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MAPPING SERVICES LIBERALISATION COMMITMENTS IN EUROPEAN UNION REGIONAL TRADE AGREEMENTS

**Bregt Natens
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ABSTRACT

In recent years, there has been a surge in the conclusion of regional trade agreements ('RTAs') by the European Union with trading partners across the world. These RTAs have gradually become more elaborate and substantive, thereby liberalising *inter alia* certain aspects of trade in services. This paper aims to map services liberalisation commitments in these RTAs in order to gain an overview of the obligations which apply to the EU and its counterparties as a result of these agreements. The RTAs are therefore divided into four categories: RTAs with (potential) EU Member State countries, agreements concluded with European neighbours, RTAs that are part of a wider development objective and trade agreements that aim primarily at opening up global markets to European services providers. An analysis of the services provisions in these agreements reveals many similarities, but also highlights subtle differences which reflect that an RTA is not a unilateral declaration but is the product of negotiations. The mapping exercise includes both RTAs that have entered into force and agreements which have been concluded but not yet signed or ratified. RTAs under negotiation are addressed briefly as well.

KEY WORDS

European Union, EU, Regional Trade Agreement, RTA, Free Trade Agreement, FTA, services, liberalisation, trade in services

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TABLE OF CONTENTS

Introduction	4
The proliferation of regional trade agreements.....	6
1. Trade agreements with (potential) Member State candidates	10
A. European Union candidate countries.....	10
B. Potential European Union candidate countries.....	15
2. Trade agreements with neighbours	19
A. The European Economic Area.....	19
B. The European Neighbourhood Policy	19
B.1. The Euro-Mediterranean Partnership	19
B.2. The Eastern Partnership.....	25
3. Trade agreements aimed at development.....	26
4. Trade agreements opening up global markets	28
Concluding remarks	48
Bibliography	49

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Bregt Natens and Prof. Dr. Jan Wouters

INTRODUCTION

Since 1994, the European Union ('EU') has concluded regional trade agreements ('RTAs') containing provisions on trade in services. In recent years, these RTAs have gained importance in the EU's external trade policy. Additionally, the depth of liberalisation of trade in services in the RTAs has increased. However, in this respect, not all recent RTAs go equally far. Therefore, an overview of the substantive provisions on services liberalisation is necessary. This contribution aims to map the services liberalisation commitments in EU RTAs concluded by the EU in order to gain an overview of the obligations with regard to services liberalisation which apply to the EU. The contribution not only includes those agreements that have entered into force, but also those which have not yet been signed or ratified. This article proposes to map the services components by building on an existing typology of RTAs, which is based on their broad purpose and policy context but also reflects, to some extent, distinctions based on geography, type of agreement and degree of integration.² Therefore, it distinguishes between RTAs with (potential) EU Member State countries, agreements concluded with European neighbours, RTAs that are part of a wider development objective and trade agreements that aim primarily at opening up global markets to European services providers. Such an approach, as opposed to a chronological one, is based on the premise that the EU's RTA trade policy has not only substantively changed throughout time, but is also dependent on geopolitical strategic concerns, in addition to economic interests. Although the focus of this contribution is on RTAs that have been concluded, free trade agreements under negotiation are addressed briefly too.

As will be shown, many RTAs make use of concepts out of the General Agreement on Trade in Services ('GATS'), such as the modes of supply, national treatment, market access or the scheduling of specific commitments. As concerns the latter, it is essential to analyse these schedules in order to grasp the substantive scope and the full extent of the commitments contained in an RTA as they determine the actual extent of liberalisation. But such an analysis would greatly exceed the scope of this contribution. Furthermore, the analysis of the EU's RTAs is limited to those issues currently regulated by GATS and thus does not cover government procurement, investment, competition, intellectual property and subsidies.³ Additionally, to keep the scope of this contribution manageable, only general provisions are mapped. Provisions regulating specific sectors, such as financial services or transport services are mentioned where they appear in an RTA, but not addressed substantively.

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² Marise Cremona, 'The European Union and Regional Trade Agreements' in Christoph Herrmann and Jörg Philipp Terhechte (eds), *European Yearbook of International Economic Law*, vol 1 (Springer Verlag 2010) 250-267.

³ If any of these issues are excluded explicitly from the scope of the provisions, this is taken up in the mapping exercise.

As this mapping exercise shows, the services chapters of EU RTAs are typically divided into sections on establishment and cross-border supply of services. For ease of comparison, and because many other GATS concepts and provisions have been copied in EU RTAs, the GATS modes of supply terminology are used.⁴ Some RTAs include explicit references to one or more modes of supply, but even when this is not the case, the text and context of the provisions usually leave little doubt as to which mode of supply is targeted. As the services provisions in many RTAs also include rules on investment, which fall outside the scope of this mapping exercise, these commitments are not addressed. First, as concerns trade in services, the sections on establishment of the RTAs regulate GATS Mode 3 on commercial presence. The WTO's Scheduling Guidelines explains Mode 3 as supply of services in which the "[s]ervice supplier [is] present within the territory of the Member" and the "[s]ervice [is] delivered within the territory of the Member, through the commercial presence of the supplier".⁵ Furthermore, "[t]his mode covers not only the presence of juridical persons in the strict legal sense, but also that of legal entities which share some of the same characteristics; it includes, *inter alia*, corporations, joint ventures, partnerships, representative offices and branches". Hence, it covers "any type of business or professional establishment within the territory of a Member for the purpose of supplying a service."⁶ Considering this, services provisions in the sections on establishment in the EU RTAs shall, where appropriate, be equated with commercial presence or Mode 3 supply of services.⁷ Second, RTA sections on cross-border supply of services typically cover Mode 1 and Mode 2 supply of services. In the former, both service supplier and consumer remain in their respective territories while the service crosses the border.⁸ The latter, on the other hand, requires the movement of the consumer.⁹ Although in GATS terminology, it is commonplace to refer to Mode 2 as "consumption abroad", in EU RTA terminology cross border supply of services appears to cover both modes. This is perhaps not surprising, as difficulties have arisen in GATS scholarship when trying to distinguish between Mode 1 and Mode 2. This has led to the suggestion that both modes are to be read as one, or redefine Mode 2 so that it requires physical movement by the consumer.¹⁰ Third, the RTA's Mode 4 provisions, which deal with movement of natural persons, are almost always included in the sections on establishment and cross-border supply of services. Where this is the case, we explicitly refer to these provisions as Mode 4 supply of services in our analysis.

A final word as to the structure of this contribution. As many provisions are recurrent throughout RTAs, and in order to enhance comparability between RTAs, the services provisions of the trade agreements are mapped in tables. These tables make a direct comparison between linked RTAs possible, but also facilitate grasping the extent of services provisions between any two

⁴ As found in Article I.2 GATS.

⁵ World Trade Organization, *MTN.GNS/W/164, Scheduling of Initial Commitments in Trade in Services: Explanatory Note (3 September 1993)* (1993) 8.

⁶ Diana Zacharias, 'Article I GATS' in Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds), *Max Planck Commentaries on World Trade Law: WTO - Trade in Services*, vol 6 (Martinus Nijhoff 2008) 51.

⁷ Additionally, in a WTO training module for the World Bank, Mode 3 was referred to as "the service supplier establishes its *commercial presence* in another country through e.g. branches or subsidiaries". See: World Trade Organization, *Measuring Trade in Services* (Training Module Produced by WTO/OMC for the World Bank, 2010) 10.

⁸ Zacharias 49.

⁹ Ibid.

¹⁰ Ibid.

agreements. Only where the table proves insufficient to properly address the commitment, do we go into more detail.

THE PROLIFERATION OF REGIONAL TRADE AGREEMENTS

Ever since the coming into force of the 1994 GATS under the World Trade Organization ('WTO') umbrella, and parallel to the multilateral trade liberalisation track at the WTO level, a wave of RTAs have been concluded.¹¹ At the moment, the only WTO member not party to an RTA is Mongolia.¹² According to the WTO, RTAs are agreements (i) to liberalise or facilitate trade on a regional basis (though parties should not necessarily belong to the same geographical region), (ii) in a reciprocal way between two or more partners, (iii) leading to preferential treatment.¹³ In the multilateral trading system, every formal relation between two or more states can thus be considered 'regional'.¹⁴ Hence, in the context of the EU foreign trade policy, all trade agreements which fulfil these conditions are RTAs, although they may have different official qualifications. Article V GATS provides WTO members with a framework for entering into preferential trade agreements, provided that such RTAs meet certain substantive conditions.¹⁵ First, the agreement must have substantial sectoral coverage. This condition should, according to footnote 1 to Article V.1 GATS, be understood in terms of the number of sectors, volume of trade affected and should not *a priori* exclude a mode of supply. Second, the agreement must provide for the absence or elimination of all substantial discriminatory measures. The explicit provision allowing RTAs was a political necessity,¹⁶ as they represent a departure from the fundamental principles of non-discrimination in the WTO by favouring signatories.¹⁷

Since 2000, there has also been a proliferation of RTAs with service components, with one hundred and five notifications of such RTAs to the WTO to the present day.¹⁸ Perhaps surprisingly, at first sight, the increase in RTAs with services provisions coincides with the Doha Round of trade negotiations or Doha Development Agenda ('DDA'), which started in 2001 and includes a mandate for negotiations on trade in services. About ninety services or mixed services and goods RTAs were notified to the WTO since the beginning of the DDA.¹⁹ The DDA's lack of concrete results after eleven years of negotiating and the frustrations of members in relation to this can most likely be linked to this rise of regional and bilateral trade

¹¹ Alejandro Jara and M. del Carmen Domínguez, 'Liberalization of Trade in Services and Trade Negotiations' (2006) 40 *Journal of World Trade* 113, 114.

¹² But it has been negotiating accession to the Asia-Pacific Trade Agreement since 2011. See UNESCAP, 'The Asia-Pacific Trade Agreement' (2012) <<http://www.unescap.org/tid/apta.asp>> accessed 23 July 2012.

¹³ Preferential Trade Agreements or PTAs on the other hand, are unilateral trade preferences, such as GSP Schemes (Generalized System of Preferences). See World Trade Organization, 'Scope of RTAs' (2012) <http://www.wto.org/english/tratop_e/region_e/scope_rta_e.htm> accessed 23 July 2012.

¹⁴ Ousseni Illy, *L'OMC et le Régionalisme - Le Régionalisme Africain* (Larcier 2012) 35 & 68.

¹⁵ See for more on these conditions: Peter Van den Bossche, *The Law and Policy of the World Trade Organization* (Cambridge University Press 2005) 662.

¹⁶ Yong-Shik Lee, 'Reconciling RTAs with the WTO Multilateral Trading System: Case for a New Sunset Requirement on RTAs and Development Facilitation' (2011) 45 *Journal of World Trade* 629, 638.

¹⁷ Rafael Leal-Arcas, 'Proliferation of Regional Trade Agreements: Complementing or Supplanting Multilateralism?' (2010-2011) 11 *Chicago Journal of International Law* 597, 602.

¹⁸ World Trade Organization, 'Regional Trade Agreements Information System' (2012) <<http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx>> accessed 22 July 2012.

¹⁹ *Ibid.*

agreements.^{20 21} Although, the surge in RTAs with services components also evidences confidence in the economic benefits of services trade liberalisation.²²

On the other hand, the increase in RTAs has increased their discriminatory impact substantively,²³ and RTAs essentially fragment and complicate the regulation of international trade law.^{24 25} Furthermore, aside from issues regarding the fairness of RTAs in relation to the position of smaller or developing countries and trade bloc dominance in RTA negotiations, the 'web' of trade agreements has also increased the cost of trade due to the multitude of sometimes overlapping rules and mutual competition.²⁶ The provisional establishment of the Transparency Mechanism for Regional Trade Agreements by a decision of the WTO General Council in 2006 illustrates the members' sense of urgency with regard to transparency rules for RTAs.^{27 28} In addition to these concerns, the 2011 WTO World Trade Report, which dealt with the relationship between the WTO and RTAs, concluded that multilateral trade regulation and RTAs should complement each other, possibly through subsidiarity in the case of deep RTA integration.²⁹ The WTO thus appears to aim to safeguard the multilateral system's minimization of possible negative effects of RTAs and protect the coherence of international trade regulation.³⁰ But the long-term impact of RTAs on multilateral liberalisation remains unclear: are they a 'building block' or a 'stumbling block' for multilateralism?³¹ The impact could be positive, for example, as illustrated by the so-called 'stepping stone theory', which claims that RTAs lead to multilateral trade liberalisation, and the increased negotiation capacity experience which follows from RTAs.³² The impact could also be negative, as a result of the pressure from those with preferential access to maintain the status quo or because of the first-mover advantage. These effects are possibly illustrated by the inequality between WTO members' offers in the GATS negotiations and those members' actual current RTA commitments.³³ Moreover, there are also doubts concerning the economic welfare effects of RTAs.³⁴ In any case, RTAs are currently a crucial part of most countries' foreign trade policy. Incentives to conclude these agreements include the continuous search for a larger market, the fact that deep integration is more easily achieved on a bi- or plurilateral rather than multilateral level, especially for countries

²⁰ Leal-Arcas 622.

²¹ Martin Roy, Juan A. Marchetti and Hoe Lim, 'Services Liberalization in the New Generation of Preferential Trade Agreements (PTAs): How Much Further than the GATS?' (2007) 6 *World Trade Review* 155, 155 & 185.

²² Pierre Sauvé, 'Lessons from the Periphery: Comparative Perspectives on Services, the WTO and Regional Trade Agreements' in Pierre Sauvé (ed), *Trade Rules Behind Borders: Essays on Services, Investment and the New Trade Agenda* (Cameron May 2003) 249.

²³ Lee 630 & 632.

²⁴ Panagiotis Delimatsis, 'The Fragmentation of International Trade Law' (2011) 45 *Journal of World Trade* 87, 88.

²⁵ Leal-Arcas 600.

²⁶ Lee 638.

²⁷ WT/L/671, Transparency Mechanism for Regional Trade Agreements (Adopted by the General Council 14 December 2006).

²⁸ Yoeri Devuyt and Asja Serdarevic, 'The World Trade Organization and Regional Trade Agreements: Bridging the Constitutional Credibility Gap' (2007-2008) 18 *Duke Journal of Comparative & International Law* 1, 2.

²⁹ World Trade Organization, *World Trade Report 2011: The WTO and preferential trade agreements: From co-existence to coherence* (2011) 198.

³⁰ Ibid.

³¹ Leal-Arcas 599.

³² Sauvé 249.

³³ Roy, Marchetti and Lim 185.

³⁴ Sauvé, 'Canada, Free Trade and the Diminishing Returns from Regionalism' 488.

with less resources and negotiators, the relative speed of concluding RTA negotiations and the fact that the results of RTAs are more visible to a producer getting preferential treatment in comparison to competitors outside of the RTA which further may attract political will.^{35 36} Current trends show that RTAs are becoming more cross-regional, as exemplified by the EU's RTAs with Korea, Central America and Colombia and Peru, and are concluded to form mega-trade blocs, such as the ASEAN-China RTA, which covers two billion people, or the EU-India agreement under negotiation.³⁷

In the increasingly complex network of RTAs, the EU has become a hub.³⁸ Internally, the EU's common commercial policy is in essence an exclusive competence of the EU,³⁹ to be conducted in the context of the principles and objectives of the EU's external action.⁴⁰ Externally, Article 207(3) TFEU provides the EU with the legal basis to conclude international agreements on the common commercial policy. The EU has done so extensively, especially since 2000, creating RTAs with its trading partners, mainly through Association Agreements and Economic Partnership Agreements.⁴¹ Its foreign trade policy is largely based on the 2006 *Global Europe* Communication, which focused mainly on the EU's offensive interests in concluding trade agreements to gain market access, and the 2010 *Trade, Growth and World Affairs: Trade Policy as a Core Component of the EU's 2020 Strategy* Communication, which additionally appears to encompass trade agreements in the context of the neighbourhood policies and as development policy tools.⁴² These documents, and subsequent practice, make it clear that RTAs are, in the words of a member of DG Trade, "at the heart of the EU's trade policy".⁴³ However, it must be noted that the very recent examples of the EU's RTAs include Association Agreements with Serbia and Montenegro, and the EU-Korea, EU-Central America and EU-Colombia and Peru trade agreements. Additionally, RTA negotiations are being conducted with many important trading partners, such as Mercosur, India and Canada.

Perhaps, considering the quasi universal membership of the WTO,⁴⁴ RTAs could be deemed useful only if they go beyond the commitments made under GATS, as otherwise, no practical use can be attributed to them.⁴⁵ In practice, some of the EU's RTAs extend noticeably beyond the obligations flowing from the WTO agreements,⁴⁶ "exporting their own regulatory approaches

³⁵ Leal-Arcas 620.

³⁶ Roy, Marchetti and Lim 185.

³⁷ Leal-Arcas 614.

³⁸ Henrik Horn, Petros C. Mavroidis and André Sapir, 'Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements' [2010] *The World Economy* 1565, 1566.

³⁹ Article 3(1)(e) of the Treaty on the Functioning of the European Union (TFEU).

⁴⁰ Article 207(1) TFEU.

⁴¹ Piet Eeckhout, *EU External Relations Law* (2nd edn, Oxford University Press 2011) 127.

⁴² European Commission, *COM(2006) 567 final, Global Europe: Competing in the World* (2006) and European Commission, *COM(2010) 612 final, Trade, Growth and World Affairs: Trade Policy as a Core Component of the EU's 2020 Strategy* (2010).

⁴³ Colin Brown, 'The European Union and Regional Trade Agreements' in Christoph Herrmann and Jörg Philipp Terhechte (eds), *European Yearbook of International Economic Law*, vol 3 (Springer Verlag 2012) 446.

⁴⁴ Currently, the WTO has 157 members, including all large economies. World Trade Organization, 'Understanding the WTO: the Organization: Members and Observers' (2012) <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> accessed 27 November 2012.

⁴⁵ Jara and Domínguez 114.

⁴⁶ Roy, Marchetti and Lim 169.

to RTA partners” after failing to incorporate these into the WTO regulatory framework.⁴⁷ Still, research has shown that this is not always the case, even in the case of the EU: some RTAs contain so-called “GATS-minus” commitments, that fall short of GATS commitments undertaken by the member.⁴⁸ Furthermore, the extent of the EU’s exclusivity in the common commercial policy⁴⁹ in cases of national regulation concerning non-trade objectives, such as public health or consumer protection, is not clear cut: does every Member State measure that could distort or deflect international trade automatically lead to an exclusive EU competence?⁵⁰ In any case, this contribution will shed some light on how services commitments have been taken up in the extensive RTA policy of the EU.

The typology of RTAs applied in this paper reflects on its structure. The majority of earlier EU RTAs were concluded with European neighbours through the Stabilisation and Association process in the Balkans and the European Neighbourhood Policy for the EU’s neighbours in the south and the east. A second type of RTAs are Economic Partnership Agreements (‘EPAs’), which were approached as a form of development cooperation. These EPAs originated in the 2000 Cotonou Agreement, concluded between the EU and 79 countries from the African, Caribbean and Pacific (‘ACP’) Group of States.⁵¹ But, since the Global Europe Strategy, the focus of the EU’s trade negotiations has shifted towards creating agreements with parties that have a large market size and strong growth potential, and have a higher level of protection against EU export interests.⁵² This strategy is reflected in key negotiations with, for example, India and Mercosur. To highlight commonalities and differences in services provisions in these RTAs, they are divided in four categories. First, trade agreements with official and potential EU member candidates are addressed. These countries are being prepared by the RTA for their accession to the EU. Second, we map the services provisions of the agreements with neighbouring states. Here, we address the agreement on the European Economic Area, which aside from Iceland, consists of states not interested in becoming EU members but who, due to their geographical location and cultural similarities, are strongly linked to the EU as a trading partner. This is followed by an examination of RTAs with EU neighbouring countries in the east and the south as covered by the European Neighbourhood Policy. Third, RTAs with services provisions focused on the development of the trading partners are addressed. Fourth, we map agreements with a more outspoken economic rationale, which, in the services provisions of the trade chapters, aim primarily at obtaining global market access for European services and services providers.

Of course, the inclusion of extended services chapters is also very much linked to timing and chronology, which is why a timeline of the RTAs which are being applied, based on their date of entry into force, is included below. An ‘x’ behind the date signifies that the agreement has been

⁴⁷ Horn, Mavroidis and Sapir 1587.

⁴⁸ Rudolf Adlung and Peter Morrison, ‘Less than the GATS: ‘Negative Preferences’ in Regional Services Agreements’ [2010] 13 Journal of International Economic Law 1103, 1105 & 1130.

⁴⁹ Articles 3(1) and 207 TFEU.

⁵⁰ Eeckhout 23.

⁵¹ The Cotonou Agreement was revised in 2005 and 2010. A consolidated version is available at <http://ec.europa.eu/europeaid/where/acp/overview/documents/devco-cotonou-consol-europe-aid-2012_en.pdf> accessed 3 October 2012.

⁵² European Commission, *COM(2006) 567 final, Global Europe: Competing in the World* 11.

signed at that date but has not fully entered into force. In the discussion of those RTAs, their current legal position is addressed. The column category (“cat.”) refers to the RTA categories applied in this article and correspond to the chapters of this paper.

DATE	COUNTERPARTY	CAT.
1994	EEA	2
1998	Tunisia	2
2000	Israel	2
2000	Mexico	4
2000	Morocco	2
2002	Jordan	2
2004	Egypt	2
2004	Macedonia	1
2004	South Africa	3
2005	Algeria	2
2005	Chile	4

DATE	COUNTERPART Y	CAT.
2006	Lebanon	2
2008 x	Bosnia- Herzegovina	1
2008 x	CARIFORUM	4
2008 x	Serbia	1
2009	Albania	1
2010 x	Korea	4
2010	Montenegro	1
2012 x	Central America	4
2012 x	Colombia and Peru	4
2012 x	Iraq	3

Timeline of signed EU RTAs with services provisions

1. TRADE AGREEMENTS WITH (POTENTIAL) MEMBER STATE CANDIDATES

A. EUROPEAN UNION CANDIDATE COUNTRIES

After the Croatian accession in 2013, there will be four more official EU candidate countries which have concluded RTAs with the EU which include services aspects. Except for Iceland, which, as a member of the European Free Trade Association, is party to the Agreement creating the European Economic Area and will be analysed *supra*, these candidate countries are part of the former Yugoslavia, namely Macedonia, Montenegro and Serbia. In its common strategy for the region, the Stabilisation and Association Process, the EU envisages the accession of these newly independent Balkan states once the Copenhagen criteria are fulfilled.⁵³ One of the key aspects of the strategy was the drafting of Stabilisation and Association Agreements (‘SAA’), which, according to their preambles, seek to enhance the political, economic and institutional stabilisation in the region through, *inter alia*, enhanced trade and economic cooperation. The

⁵³ These criteria, named after the Copenhagen European Council meeting of 21 and 22 June 1993, sets out the criteria candidate-Member States must meet to become part of the EU. These include “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate’s ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union”. See European Council, *Presidency Conclusions of the Copenhagen European Council of 21-22 June (1993)*.

SAAs between the EU and Macedonia⁵⁴ and the EU and Montenegro⁵⁵ have entered into force. The SAA with Serbia is pending entry into force, awaiting ratification by Lithuania, but in the meantime, the Interim Agreement on Trade and Trade-Related Matters is being applied to EU-Serbia relations.⁵⁶ The text of the SAA between the EU and Serbia, although not officially published yet, has been circulated.⁵⁷

Because the SAAs with **Macedonia**, **Montenegro** and **Serbia** have a very similar structure, their services provisions are mapped side by side. In their respective Articles 1, the aims of the Associations are listed, which include the promotion of harmonious economic relations and the gradual development of a free trade area between the Community and Macedonia, Montenegro and Serbia respectively. In line with the Stabilisation and Association Process goals, Articles 4, 6 and 6 add that Macedonia, Montenegro and Serbia commit themselves to enter into cooperation and good neighbourly relations with the other countries of the region, including an appropriate level of mutual concessions concerning the movement of persons, goods, capital and services. Moreover, Articles 12, 15 and 15 include an obligation for Macedonia, Montenegro and Serbia to start negotiations with the other countries with which the EU has signed an SAA to enhance regional cooperation by establishing a free trade area consistent with relevant WTO provisions between the non-EU countries party to the SAA, and by agreeing to mutual concessions concerning the movement of workers, establishment, supply of services, current payments and movement of capital equivalent to those in the SAAs. Similar cooperation with other states in the region concerned by the Stabilisation and Association Process is also required as well as conventions on regional cooperation with other EU membership candidates in order to align their bilateral relations with those of the EU and the other EU candidate country. Furthermore, Article 17.2 of the SAAs with Montenegro and Serbia contains an explicit obligation to start negotiations with Turkey, which has established a customs union with the EU, in order to conclude an RTA on a mutually advantageous basis. These RTAs should, among other things, liberalise the establishment and supply of services at an equivalent level of the SAA in accordance with Article V GATS. It is clear from these provisions that the SAAs are focused on integrating the Balkans into the EU's trade policy framework, by attempting to create interdependent links between these newly formed states.

ESTABLISHMENT ⁵⁸	Macedonia	Montenegro	Serbia
Establishment of companies: most favoured nation ('MFN') & national treatment	Art. 48.1(i); Art. 48.3(i)	Art. 53.1(a); Art. 53.2(a)	Art. 53.1(a); Art. 53.2(a)

⁵⁴ L 84/13, 20 March 2004, Stabilisation and Association Agreement between the European Communities and the former Yugoslav Republic of Macedonia.

⁵⁵ L 108/3, 29 April 2010, Stabilisation and Association Agreement between the European Communities and the Republic of Montenegro.

⁵⁶ L 28/2, 30 January 2010, Interim Agreement on Trade and Trade-related Matters between the European Community and the Republic of Serbia.

⁵⁷ Stabilisation and Association Agreement between the European Communities and the Republic of Serbia ('EU-Serbia SAA').

⁵⁸ In all three SAAs, establishment is defined as the right to set up undertakings and the right to take up economic activities by means of the setting up of subsidiaries and branches. See, respectively, Art. 47(d), 52(d) and 52(d). But, as concerns RTAs with Montenegro and Serbia, establishment is extended to also include natural persons setting up economic activities. Still, these Mode 4 supplies of service are exempted from the scope of the provisions on establishment, see *infra*.

Operations of branches/subsidiaries: MFN & national treatment	Art. 48.1(ii); Art. 48.3(ii)	Art. 53.1(b); Art. 53.2(b)	Art. 53.1(b); Art. 53.2(b)
Establishment/operation of companies: non-discrimination	Art. 48.2; only for EU	Art. 53.3; reciprocal	Art. 53.3; reciprocal
Intra-corporate transfer of key personnel (Mode 4)	Art. 53.1-2	Art. 58.1-2	Art. 58.1-2
Entry/temporary residence of senior personnel to set up subsidiary or branch; limited: no right to direct sales/supply services (Mode 4)	Art. 53.3	Art. 58.3 + no pay from within host	Art. 58.3 + no pay from within host
Right to use and rent real property for subsidiaries and branches	Art. 48.5(a); only for EU	Art. 53.5(a); only for EU	Art. 53.5(a); only for EU
Right to acquire real property	Art. 48.5(b); only subsidiaries of EU companies	Art. 53.5(b); only branches & subsidiaries of EU companies	Art. 53.5(b); only subsidiaries of EU companies
Regulation of establishment/operation: non-discrimination	Art. 49.1	Art. 54.1	Art. 54.1
Exception: prudential reasons in financial services; limited by avoidance of obligations	Art. 49.2	Art. 54.2	Art. 54.2
Non-disclosure of affairs, accounts, confidential or proprietary information	Art. 49.3	Art. 54.3	Art. 54.3
Air transport, inland waterway transport and maritime cabotage services excluded	Art. 50	Art. 55	Art. 55
Exception for non-incorporated in host: legal or technical differences & for financial services: prudential reasons; limited by necessity	Art. 51	Art. 56	Art. 56
Temporary derogation (expired) for companies in difficulties and infant industries	Art. 54		

Table 1: Structure of EU-Macedonia, EU-Montenegro and EU-Serbia establishment provisions

Table 1 provides an oversight of the provisions on the liberalisation of establishment in all three SAAs, which are largely similar. Articles 48.4, 53.4 and 53.4 of the SAAs foresee liberalisation for the establishment of self-employed natural persons four years after the entry into force of the SAA. Only the SAA with Macedonia has been in force for four years, but the 2009 visa liberalisation decision does not extend to work. Therefore, no Macedonian natural person can establish himself as a self-employed service provider in the EU without a visa. Furthermore, although the EU-Montenegro and EU-Serbia SAAs' definition of establishment includes the right to take up economic activities as self-employed persons, the substantive provisions on

establishment are explicitly limited to companies, branches and subsidiaries.⁵⁹ An exception is made for intra-corporate transfers of employees, which is allowed for key personnel employed exclusively by the company, its branches or subsidiaries, as covered by Articles 53, 58 and 58. Additionally, according to Article 54, during the four first years of the agreement, and thus until 1 April 2008, Macedonia was allowed to temporarily derogate from the provisions on establishment for companies undergoing restructuring or in serious problems, industries facing a drastic reduction of market share in Macedonia or for newly emerging industries in Macedonia, if necessary and reasonable and applied without discrimination. This exception was not added to the SAAs with Montenegro and Serbia.

CROSS-BORDER SERVICES SUPPLY ⁶⁰	Macedonia	Montenegro	Serbia
Take necessary steps to allow cross-border services supply	Art. 55.1; Art. 55.3	Art. 59.1; Art. 59.3 + Mode 4 for self-employed service suppliers	Art. 59.1; Art. 59.3 + Mode 4 for self-employed service suppliers
Temporary movement for natural persons to negotiate/conclude the sale of services; limited: no right to direct sales/supply services (Mode 4)	Art. 55.2	Art. 59.2	Art. 59.2
Standstill obligation: cross-border supply of services as cannot become 'significantly more restrictive' + request for consultations	Art. 56	Art. 60 + Mode 4 for self-employed service suppliers	Art. 60 + Mode 4 for self-employed service suppliers
Land transport services	Agreement 28 November 1997	Protocol 4 SAA	Protocol 4 SAA
International maritime services: principally unrestricted access + explicit prohibitions	Art. 57.2-3; less strict	Art. 61.2-3; NT obligation	Art. 61.2-3; NT obligation
Air transport market access (ECAA = European Common Aviation Area)	ECAA Agreement	ECAA Agreement	ECAA Agreement
Harmonisation with EU legislation on air and land transport; if aids liberalisation	Art. 57.6; during transitional period of 10 years	Art. 61.6; at all times + maritime, inland waterway	Art. 61.6; at all times + maritime, inland waterway

Table 2: Structure of EU-Macedonia, EU-Montenegro and EU-Serbia services provisions

The SAAs also regulate the supply of services by companies established in the territory of the other party than that where the consumer is located, which includes both Mode 1 and Mode 2 service supplies under GATS. According to the SAAs, the supply of services by companies or

⁵⁹ Thus, all these provisions cover Mode 3 except for key and senior personnel provisions as listed in Table 1.

⁶⁰ The relevant chapters of the SAAs are titled "supply of services", but Articles 55, 59 and 59 refer to the supply of services in which the service supplier is established in the territory of a party other than that of the person for whom the services are intended. Thus, these provisions cover both Mode 1 and Mode 2. But, considering the definition of establishment in the SAAs with Montenegro and Serbia, they could, for those two RTAs, also refer to self-employed nationals who move temporary to supply a service, which would be Mode 4 supply of services.

nationals which are established in a party other than that of the person for whom the services are intended should be progressively allowed.⁶¹ According to the same provisions, the parties shall permit the temporary movement of natural persons providing the service or who are employed by the service provider as key personnel. In principle, such a Mode 4 liberalisation measure would go far, but the provisions are limited to the purpose of negotiating the sale of services or entering into agreements to sell services and cannot cover making direct sales to the general public or supplying services themselves. With regard to international maritime transport, the SAAs foresee unrestricted market access in a freely competitive environment. Inland land transport services between the EU and Macedonia are regulated by an earlier agreement.⁶² For Montenegro and Serbia, inland transport services are liberalised by unrestricting road transit traffic across the parties' territories, ensuring the effective application of the principle of non-discrimination and progressively harmonising legislation.⁶³

GENERAL PROVISIONS	Macedonia	Montenegro	Serbia
General exceptions: public policy, public security, public health, circumvention of 3 rd country market access rules	Art. 61.1; Art. 67	Art. 65.1; Art. 71	Art. 65.1; Art. 71
Exclusion of exercising public authority	Art. 61.2	Art. 65.2	Art. 65.2
Right to regulate entry and stay, employment, working conditions, establishment of natural persons and supply of services; limited: nullification of benefits	Art. 62	Art. 66; notably residence permits	Art. 66; notably residence permits
MFN obligations do not apply to tax advantages avoiding double taxation	Art. 64.1-2	Art. 68.1-2	Art. 68.1-2
Endeavour to avoid imposition of restrictive measures + asap removal; limited: investment	Art. 65.1; Art. 65.3	Art. 69.1; Art. 69.3	Art. 69.1; Art. 69.3
Balance of payments difficulties; following WTO rules	Art. 65.2	Art. 69.2	Art. 69.2
Progressive adjustment to respect Art. V GATS	Art. 66	Art. 70	Art. 70

Table 3: Structure of EU-Macedonia, EU-Montenegro and EU-Serbia general services provisions

The general provisions of the applicable title in the SAAs exclude activities in the exercise of public authority and contain the general exceptions to the liberalisation commitments, namely limitations justified on grounds of public policy, public security or public health.⁶⁴ Although parties shall attempt to refrain from applying temporary restrictive measures in the case of

⁶¹ EU-Macedonia SAA Art. 55 EU-Montenegro SAA and EU-Serbia SAA Art. 59.

⁶² The Agreement between the European Community and the former Yugoslav Republic of Macedonia in the field of transport which entered into force 28 November 1997.

⁶³ EU-Montenegro SAA and EU-Serbia SAA Art. 61. Also see Protocol 4 of both SAAs.

⁶⁴ EU-Macedonia SAA Art. 61 EU-Montenegro SAA and EU-Serbia SAA Art. 65.

balance of payments issues, such measures are allowed if they are in accordance with WTO rules, with the exception of investment transfers.⁶⁵ With regard to WTO compatibility, Articles 6, 9 and 9 provide that the SAAs shall be fully compatible with the relevant WTO provisions, in particular Article XXIV of the GATT 1994 and Article V of the GATS.⁶⁶ Article 9 of the SAAs with Montenegro and Serbia adds that they shall also be implemented in a manner consistent with WTO provisions.

As stated, the EU-Serbia SAA has not been ratified and thus has not yet entered into force. The interim agreement, currently governing relations between the parties, was deemed necessary to implement some provisions of the SAA on trade-related matters. With the exception of Article 69 on balance of payment difficulties, none of the above-mentioned provisions were taken up in the interim agreement.

B. POTENTIAL EUROPEAN UNION CANDIDATE COUNTRIES

In addition to the official EU candidate countries, two potential EU candidate members have signed RTAs with services components with the EU. The SAA between the EU and **Albania**,⁶⁷ which has applied for EU membership but is not yet recognised as an official EU candidate, has already entered into force. Although ratified by all parties, the SAA with **Bosnia-Herzegovina** is still pending as Bosnia-Herzegovina has not yet fulfilled its obligations regarding entry into force.⁶⁸ An Interim Agreement on Trade and Trade-related Matters is in force and is awaiting Bosnia-Herzegovina's compliance.⁶⁹

The EU-Albania and EU-Bosnia Herzegovina SAAs start, as the SAAs addressed under the previous heading, by laying out the aims of the association, which are identical to what is described *supra*. As could be expected, there is a high degree of comparability with the SAAs described in the previous section. The Articles 4 and 6 of the SAAs with Albania and Bosnia Herzegovina state that these countries commit themselves to enter into cooperation and good neighbourly relations with the region. Articles 12 and 15 include an obligation for Albania and Bosnia Herzegovina to start negotiations with the other countries with which the EU has signed an SAA and other states part of the Stabilisation and Association Process in the region. Again, such negotiations include the establishment of a free trade area between the non-EU countries party to the SAA, consistent with relevant WTO provisions and mutual concessions concerning the movement of workers, establishment, supply of services, current payments and movement of capital equivalent to those in the SAAs. According to Articles 15.2 and 17.2, both states are required to start negotiations with Turkey on an RTA.

⁶⁵ EU-Macedonia SAA Art. 65 EU-Montenegro SAA and EU-Serbia SAA Art. 69.

⁶⁶ Also see Articles 66, 70 and 70.

⁶⁷ L 177/166, 28 April 2009, Stabilisation and Association Agreement between the European Community and the Republic of Albania.

⁶⁸ Especially bringing the constitution into compliance with the jurisprudence of the European Court of Human Rights, namely the Sejdic-Finci ruling which condemned the constitutional ethnic limitations to candidacy for the Presidency or the House of Peoples of Bosnia and Herzegovina. See Council of the European Union, *Council Conclusions on Bosnia and Herzegovina*, 3179th Foreign Affairs Council meeting, Luxembourg, 25 June 2012 (2012).

⁶⁹ L 169/13, 30 June 2008, Interim Agreement on Trade and Trade-Related Matters between the European Community and Bosnia and Herzegovina.

ESTABLISHMENT ⁷⁰	Albania	Bosnia-Herzegovina
Establishment of companies: MFN & national treatment	Art. 50.1(i); Art. 50.3(i)	Art. 51.1(a); Art. 51.2(a)
Operations of branches/subsidiaries: MFN & national treatment	Art. 50.1(ii); Art. 50.3(ii)	Art. 51.1(b); Art. 51.2(b)
Establishment/operation of companies: non-discrimination	Art. 50.2; reciprocal	Art. 51.3; reciprocal
Intra-corporate transfer of key personnel (Mode 4)	Art. 55.1-2	Art. 56.1-2
Entry/temporary residence of senior personnel to set up subsidiary or branch; limited: no right to direct sales/supply services (Mode 4)	Art. 55.3	Art. 56.3 + no pay from within host
Right to use and rent real property for subsidiaries and branches	Art. 50.5(a); only for EU	Art. 51.5(a); only for EU
Right to acquire real property	Art. 50.5(b); only branches & subsidiaries of EU companies	Art. 51.5(b); only subsidiaries of EU companies
Regulation of establishment/operation: non-discrimination	Art. 51.1	Art. 52.1
Exception: prudential reasons in financial services; limited by avoidance of obligations	Art. 51.2	Art. 52.2
Non-disclosure of affairs, accounts, confidential or proprietary information	Art. 51.3	Art. 52.3
Air transport, inland waterway transport and maritime cabotage services excluded	Art. 52	Art. 53
Exception for non-incorporated in host: legal or technical differences & for financial services: prudential reasons; limited by necessity	Art. 53	Art. 54
Temporary derogation for companies in difficulties and infant industries; limited: reasonable, necessity, non-discrimination, MFN	Art. 56; until 28 April 2014	

Table 4: Structure of EU-Albania and EU-Bosnia Herzegovina establishment provisions

With regard to the right of establishment or Mode 3, Articles 50 EU-Albania and 51 EU-Bosnia Herzegovina contain the same substantive provisions discussed above: an MFN type approach

⁷⁰ In both SAAs, establishment is defined as the right to set up undertakings and the right to take up economic activities by means of the setting up of subsidiaries and branches. See, respectively, Art. 49(d) and 50(d).

is set up parallel to a reciprocal non-discrimination obligation for new regulations. Moreover, these provisions include an obligation to extend the right of establishment of self-employed natural persons after four years from the entry into force of the SAA. Currently, neither SAA has reached that deadline. Furthermore, as with the EU-Montenegro and EU-Serbia SAAs, the EU-Albania SAA's definition of establishment includes the right to take up economic activities for self-employed persons, but substantive provisions on establishment are limited to companies, branches and subsidiaries. However, Articles 55 and 56 respectively allow intra-corporate transfers of employees for key personnel employed exclusively by the company, its branches or subsidiaries. Identical to the EU-Macedonia SAA, where these provisions have expired, Albania was allowed temporary derogation from the establishment provisions in the SAA, if such measures conformed with the conditions set forth. This exception is not found in the EU-Bosnia Herzegovina SAA.

CROSS-BORDER SERVICES SUPPLY ⁷¹	Albania	Bosnia-Herzegovina
Take necessary steps to allow cross-border service supply	Art. 57.1; Art. 57.3 + Mode 4 for self-employed service suppliers	Art. 57.1; Art. 57.3 + Mode 4 for self-employed service suppliers
Temporary movement for natural persons to negotiate/conclude the sale of services; limited: no right to direct sales/supply services (Mode 4)	Art. 57.2	Art. 57.2
Standstill obligation: supply of services as in Art. 57 cannot become 'significantly more restrictive' + request for consultations	Art. 58 + Mode 4 for self-employed service suppliers	Art. 58 + Mode 4 for self-employed service suppliers
Land transport services	Protocol 5 SAA	Protocol 3 SAA
International maritime services: principally unrestricted access + explicit prohibitions	Art. 59.2-3; NT obligation	Art. 59.2-3; NT obligation
Air transport market access (ECAA = European Common Aviation Area)	ECAA Agreement	ECAA Agreement
Harmonisation with EU legislation on air and land transport; if aids liberalisation	Art. 61.6; at all times + maritime	Art. 61.6; at all times + maritime, inland waterway

Table 5: Structure of EU-Albania and EU-Bosnia Herzegovina services provisions

⁷¹ The relevant chapters of the SAAs are titled "supply of services", but Articles 57 and 57 refer to the supply of services in which the service supplier is established in the territory of a party other than that of the person for whom the services are intended. Thus, these provisions cover both Mode 1 and Mode 2. But, considering the definition of establishment, they could also refer to self-employed nationals who move temporary to supply a service, which would be Mode 4 supply of services.

Regulation of the supply of services by companies established in the territory of the other party is again completely parallel with the SAAs concluded with EU candidate member countries. According to Article 57 of both SAAs, key personnel or natural persons providing a service shall be permitted to temporarily move for the purpose of negotiating the sale of services or entering into agreements to sell services where those representatives will not be engaged in making direct sales to the general public or in supplying services themselves. Again, international maritime transport is subject to unrestricted market access in a freely competitive environment. As in the SAAs with Montenegro and Serbia, inland land transport services are liberalised by unrestricting road transit traffic across the parties' territories, ensuring the effective application of the principle of non-discrimination and progressively harmonising legislation.

GENERAL PROVISIONS	Albania	Bosnia-Herzegovina
General exceptions: public policy, public security, public health, circumvention of 3 rd country MA rules	Art. 63.1; Art. 69	Art. 63.1; Art. 69
Exclusion of exercising public authority	Art. 63.2	Art. 63.2
Right to regulate entry and stay, employment, working conditions, establishment of natural persons and supply of services; limited: nullification of benefits + general exceptions	Art. 64	Art. 64; notably residence permits
MFN obligations do not apply to tax advantages avoiding double taxation	Art. 66.1-2	Art. 66.1-2
Endeavour to avoid imposition of restrictive measures + asap removal; limited: investment	Art. 67.1; Art. 67.3	Art. 67.1; Art. 67.3
Balance of payments difficulties; following WTO rules	Art. 67.2	Art. 67.2
Progressive adjustment to respect Art. V GATS	Art. 68	Art. 68

Table 6: Structure of EU-Albania and EU-Bosnia Herzegovina general provisions

The general provisions are again identical to those in the other three SAAs. Because of the issues with Bosnia Herzegovina's compliance with EU preconditions for the application of the SAA, the interim agreement is still in force. As with Serbia's Interim Agreement, apparent from the provisions dealt with here, only the provisions on balance of payment difficulties are found in the interim agreement.

2. TRADE AGREEMENTS WITH NEIGHBOURS

A. THE EUROPEAN ECONOMIC AREA

The European Free Trade Association ('EFTA'), in principle composed of **Iceland, Liechtenstein, Norway** and Switzerland, signed the Agreement on the European Economic Area with the EU, thereby creating the European Economic Area ('EEA').⁷² Switzerland signed the EEA Agreement, but never ratified it after a negative domestic referendum on its application. Afterwards, agreements on several sectors were negotiated between the EU and Switzerland. However, services trade has not been addressed so far, after being withdrawn from negotiations because of Swiss issues with fundamental EU provisions.⁷³ Concerning Iceland, Liechtenstein and Norway, the aim of the EEA Agreement is the promotion of strengthened trade and economic relations between the parties, thereby creating a homogeneous EEA trade bloc. It therefore installs the four freedoms of the EU internal market, namely free movement of goods, persons, services and capital. In addition, the agreement sets up a free competition system and close cooperation in research and development, the environment, education and social policy.⁷⁴ Article 105 of the Agreement specifies that its provisions should be interpreted in conformity with the interpretation given to them within the EU, including the case law of the European Court of Justice. To provide for such homogeneous interpretation, the EFTA Surveillance Authority was established by the EEA Agreement to monitor implementation of EU law relevant to the internal market in the EEA.⁷⁵ The EFTA members party to the EEA Agreement can thus be said to benefit from the internal market, although some limited exceptions exist.⁷⁶ Considering that the internal market in effect expands to incorporate Iceland, Liechtenstein and Norway, trade liberalisation by the EEA Agreement is very wide and deep. For nationals of any of the parties, there is a high degree of removal of barriers to trade.

B. THE EUROPEAN NEIGHBOURHOOD POLICY

B.1. The Euro-Mediterranean Partnership

The EU sought to strengthen its ties with non-EU Mediterranean countries through several initiatives, including the Euro-Mediterranean Partnership and the Union for the Mediterranean. According to the EU, the key objective in this regard is creating a deep EU-Mediterranean free trade area.⁷⁷ In the context of these relations, the EU has entered into Euro-Mediterranean

⁷² L 1/3, 3 January 1994, Agreement on the European Economic Area. The EEA Agreement was amended multiple times to account for EU enlargement, ratification of Liechtenstein and an EEA financial mechanism for 2009-2014. Article references refer to the 2011 updated version, available through <http://www.efta.int/~media/Documents/legal-texts/eea/the-eea-agreement/Main%20Text%20of%20the%20Agreement/EEAAgreement.pdf>.

⁷³ European Commission, 'Switzerland' (2009) <<http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/switzerland/>> accessed 27 August 2012.

⁷⁴ EEA Agreement Art. 1.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ European Commission, 'Euromed - Euro-Mediterranean Trade Relations are Healthy and Growing' (2012) <<http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/regions/euromed/>> accessed 29 October 2012

Agreements ('EMA') with seven Mediterranean states. Chronologically, the EMAs including services components were concluded with Tunisia,⁷⁸ Morocco,⁷⁹ Israel,⁸⁰ Jordan,⁸¹ Egypt,⁸² Algeria⁸³ and Lebanon.⁸⁴ In 2011, negotiations on a Deep and Comprehensive Free Trade Area with Egypt, Jordan, Morocco and Tunisia were initialled.⁸⁵ Additionally, there have been bilateral services negotiations with Egypt, Israel and Morocco.⁸⁶ The seven EMA partner countries are, compared to their economic size,⁸⁷ trading large volumes of services. In 2011, Israeli, the largest trader among these states, services exports totalled 0.8% of world total services exports, while its services imports made up 0.7% of total world volumes excluding intra-EU services trade.⁸⁸ Services trade volumes of major emerging economies such as Brazil, Russia and South Africa show the relative importance of countries targeted by the European Neighbourhood Policy.⁸⁹ Their part in global services trade is mirrored in their participation in EU services trade: compared to larger economies, these states account for a proportionately large percentage of the EU's services trade.⁹⁰ Again, the example of Israel shows that in 2010 the EU both imported and exported 0.7% of its total services with this country. In comparison, trade with Brazil accounted for 1.3% of EU imports and 1.8% of exports, with Russia 3.1% of imports and 4.3% of exports, with South Africa 1.0% of imports and 1.2% of exports. Aside from geostrategic and

⁷⁸ L 97/2, 30 March 1998, Euro-Mediterranean Agreement Establishing an Association between the European Communities and the Republic of Tunisia.

⁷⁹ L 70/2, 18 March 2000, Euro-Mediterranean Agreement Establishing an Association between the European Communities and the Kingdom of Morocco.

⁸⁰ L 147/3, 21 June 2000, Euro-Mediterranean Agreement Establishing an Association between the European Communities and the State of Israel.

⁸¹ L 129/3, 15 May 2002, Euro-Mediterranean Agreement Establishing an Association between the European Communities and the Hashemite Kingdom of Jordan.

⁸² L 304/39, 30 September 2004, Euro-Mediterranean Agreement Establishing an Association between the European Communities and the Arab Republic of Egypt.

⁸³ L 265/2, 10 October 2005, Euro-Mediterranean Agreement Establishing an Association between the European Community and the People's Democratic Republic of Algeria.

⁸⁴ L 143/2, 30 May 2006, Euro-Mediterranean Agreement Establishing an Association between the European Community and the Republic of Lebanon.

⁸⁵ European Commission, *Overview of FTA and Other Trade Negotiations* (Updated 8 October 2012, 2012).

⁸⁶ Ibid.

⁸⁷ According to the United Nations 2011 International Trade Statistics Yearbook, total import trade volumes are for: Israel 75 billion US dollar, Egypt 59 billion, Algeria 46 billion, Morocco 44 billion, Tunisia 24 billion, Jordan 18 billion and Lebanon (2010) 18 billion. The total world imports from these countries is thus about 286 billion US dollar. In comparison, Brazil imports totalled 214 billion US dollar, Russian 305 billion, Indian 447 billion, China 1742 billion and South African 99 billion.

⁸⁸ In the WTO top 30 export and import states excluding intra-EU trade, aside from Israel, also Lebanon is featured. Egypt and Morocco only fall within this group with regard to their services exports. Egyptian export is worth 19 billion and 0.6%, Lebanese export 18 billion and 0.6% and import 15 billion and 0.5%, Moroccan export 14 billion and 0.4%. See World Trade Organization, 'PRESS/658, 12 April 2012 World Trade 2011, Prospects for 2012: Trade growth to Slow in 2012 after strong deceleration in 2011' (2012) <http://www.wto.org/english/news_e/pres12_e/pr658_e.htm> accessed 30 August 2012.

⁸⁹ The BRICS countries share of services trade is: Brazil: 37 billion and 1.2% for export, 73 billion and 2.4% for import; Russia: 54 billion and 1.7% for export, 90 billion and 3.0% for import; India: 148 billion and 4.7% for export, 130 billion and 4.3% for import; China: 182 billion and 5.7% for export, 236 billion and 7.8% for import; and South Africa: 15 billion and 0.5% for export, 20 billion and 0.7% for import. See *ibid*.

⁹⁰ When looking at services trade with the EU, trade with these countries was, respectively for EU imports and exports in total % of extra-EU trade: with Israel 0.7% and 0.7%, with Egypt 1.5% and 0.6%, with Algeria data not available for EU but 0.4% and 0.1% in world trade, with Morocco 0.9% and 0.5%, with Tunisia data not available for EU but 0.1% and 0.2% in world trade, with Jordan data not available for EU but 0.2% and 0.2% in world trade, with Lebanon data not available for EU but 0.5% and 0.5% in world trade. See European Commission, 'Bilateral Relations: Statistics' (2011) <<http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/statistics/>> accessed 30 August 2012.

political reasons, there appear to have been clear economic incentives to engage in trade liberalisation in services. The EMAs currently in force have a similar structure. Except for the EMA with Israel, Article 1 of all EMAs aims, amongst other objectives, to establish the conditions for gradual liberalisation of trade in services. The wording of the same aim in the EU-Israel trade agreement is very different, clearly indicating that a higher level of liberalisation is already in place between the parties: the provision is focused on the expansion of, rather than establishing conditions for, amongst others, trade in services, establishment and public procurement.

OVERVIEW	Tunisia	Morocco	Israel	Jordan	Egypt	Algeria	Lebanon
Agreement to cover services & establishment in EMA	Art. 31	Art. 31 + §4	Art. 29		Art. 30' 'consider'		
Reaffirm GATS MFN obligations	Art. 32	Art. 32	Art. 30		Art. 29'		
Commitments will be based on GATS							Art. 30
Substantive provisions				Art. 30-47		Art. 30-37	

Table 7: Structure of EMA services provisions

As Table 7 illustrates, looking at the substantive provisions of the EMAs on services liberalisation reveals some remarkable differences. While there is a large degree of homogeneity between the EMAs with **Tunisia**, **Morocco**, **Israel** and **Egypt**, the agreements with Jordan, Algeria, and to a lesser extent Lebanon, differ. The four former EMAs contain very little services liberalisation. Respectively, Articles 31, 31 and 29 of the EMAs with Tunisia, Morocco and Israel state that parties agree that the agreement covers the right of establishment and the liberalisation of services, and add that a first assessment of the achievement of this objective will have to be made five years after entry into force. Article 30 of the EU-Egypt EMA is similar, but here the parties shall only consider extending the scope of the EMA. In the EU-Morocco EMA, a fourth paragraph is added to article 31 to have the Association Council propose recommendations on the liberalisation of the international maritime transport sector. Articles 32, 32, 30 and 29 of the agreements with Tunisia, Morocco, Israel and, in a slightly different wording, Egypt foresee that any services provisions violating GATS MFN rules will be authorised exceptions under either Article V GATS or listed MFN exemptions by the parties. Although it has been negotiating accession since 1999, **Lebanon** is not a WTO member. Article 30, the only provisions on services in the EU-Lebanon EMA, states that services and establishment treatment of the other party will be based on GATS commitments, from the accession of Lebanon to the WTO onwards. Lebanon is to provide a schedule of specific commitments to the EU in accordance with Article XX GATS as soon as it is finished, which is not yet the case at the time of writing. Furthermore, the parties undertake to consider the development of provisions to establish an economic integration agreement under Article V GATS. Lastly, a standstill obligation until Lebanon accedes to the WTO adds that neither the EU nor Lebanon shall take measures more discriminatory for the supply of services than at the entry into force of the EMA.

As concerns Jordan and Algeria, there are substantive provisions on services liberalisation.

ESTABLISHMENT ⁹¹	Jordan	Algeria
Establishment of companies: MFN & national treatment	Art. 30.2(a); Art. 30.1(a); For the EU: MFN only; for Jordan, reservations: Annex VI	Art. 30; Art. 32.1(a); For both: MFN only
Operations of branches/subsidiaries: MFN & national treatment	Art. 30.2(b); Art. 30.1(b)-(c); For the EU: subsidiaries: NT only + reservations: Annex V; branches: MFN only. Art. 30.3; MFN obligations cannot be used to circumvent legislation & regulation.	Art. 30; Art. 32.1(b); For the EU: MFN only
Intra-corporate transfer of key personnel (Mode 4)	Art. 34.1-2	Art. 33.1-2
Entry/temporary residence of senior personnel to set up subsidiary or branch; limited: no right to direct sales/supply services (Mode 4)	Art. 34.3; not required that principal place of business is outside other party	Art. 33.3; not required that principal place of business is outside other party
Exception: prudential reasons in financial services; limited by avoidance of obligations	Art. 46; not explicitly limited to financial services	Art. 35.4; not explicitly limited to financial services
Non-disclosure of affairs, accounts, confidential or proprietary information	Art. 46.2	Art. 35.5
Air transport, inland waterway transport and maritime cabotage services excluded	Art. 31; but see text	Art. 34.1; but see text
Exception for non-incorporated in host: legal or technical differences & for financial services: prudential reasons; limited by necessity	Art. 36	Art. 35.3

Table 8: Structure of EU-Jordan and EU-Algeria establishment provisions

⁹¹ There is no definition of establishment in the EU-Jordan EMA, but the language of the provisions clearly indicates that they cover classical Mode 3 supply of services. The relevant article of the EU-Algeria EMA is entitled “commercial presence” and thus also refers to Mode 3.

Like Lebanon, **Algeria** is not a WTO member, but its provisions on services liberalisation are much more elaborate than in the previously discussed EMAs. The chapter on services and establishment of the EMA with **Jordan** is also more developed. Both EMAs show quite some parallels with the SAAs covered *supra* as concerns Mode 3 services supply. Table 8 reveals that there are some asymmetrical obligations on MFN and national treatment between the EU and Jordan. These have attracted the criticism that Jordanian companies have been disadvantaged, partly because Jordanian negotiators were focused on obtaining EU market access commitments.⁹² Additionally, some exceptions have been submitted to Annexes. Annex VI of the EMA contains Jordanian reservations to MFN and national treatment obligations as regards the establishment of companies, which limit shareholding for non-Jordanian investors to fifty per cent in construction contracting, trade and trade services and mining. The same applies to public shareholding companies unless a foreign majority existed at the time of subscription. Additionally, there is a minimum investment for foreigners of 100,000 Jordanian dinar in any project. Lastly, the purchase, sale or rental of immovable assets by a foreigner is subject to prior consent. With regard to subsidiaries, the EU's national treatment obligations are subject to reservations listed in Annex V. This Annex lists limitations in mining, real estate purchase, telecommunications, agriculture and news agency services, which may exist in some member states. It is not a closed list, and thus allows EU Member States to introduce regulatory measures, within the limits of these exceptions. The Annex also lists two restrictions at EU level: fishing access is restricted to vessels with EU flags and to production and distribution, including broadcasting and other forms of transmission to the public of audio-visual services may be limited to works meeting rules of origin criteria.

Aside from these differences, some provisions of the EU-Jordan and EU-Algeria EMAs do not fit the SAA scheme. Notably, in relation to establishment, Article 31.1 of the EU-Jordan EMA not only excludes air transport and inland waterways transport but in principle also maritime transport from the scope of Article 30. This does not mean that the establishment of maritime services companies is not covered by the agreement, as this exclusion is followed by Article 31.2, which sets out an MFN and national treatment obligation. Article 34.2 EU-Algeria is identical. Both articles permit the establishment and operation of subsidiaries and branches of shipping agencies supplying international maritime transport services. Thus, certain maritime services are subject to strict liberalisation obligations. Additionally, a provision similar to the standstill obligation in the services chapters of the SAAs is added to the EU-Jordan and EU-Algeria establishment provisions. But where Article 33 EU-Jordan states that the parties shall use their best endeavours to avoid more restrictive rules on establishment and operation than prior to conclusion of the EMA,⁹³ Article 37.1 EU-Algeria is compulsory: parties shall avoid taking such measures.

⁹² Walid Abu-Dalbouh, 'Jordan and the Euro-Mediterranean Partnership' in Haizam Amirah Fernández and Richard Youngs (eds), *The Euro-Mediterranean Partnership: Assessing the First Decade* (Fundación para las Relaciones Internacionales y el Diálogo Exterior (FRIDE) and the Real Instituto Elcano de Estudios Internacionales y Estratégicos 2005) 141.

⁹³ This is limited as these provisions cannot be more favourable than GATS commitments. See EU-Jordan Euro-Mediterranean Agreement art. 44.

CROSS-BORDER SERVICES SUPPLY ⁹⁴	Jordan	Algeria
Take necessary steps to allow cross-border service supply	Art. 37.1; not obligation but “best endeavour”	Art. 30; Art. 31; full MFN obligation
Land transport services	Art. 38; “may be dealt with by specific agreement” + inland waterways	Art. 34.6; “may be dealt with by specific agreement” + inland waterways
International maritime services: principally unrestricted access + explicit prohibitions	Art. 39; NT obligation for listed aspects of service supply	Art. 34.3-5; extra exceptions, NT obligation for listed aspects of service supply
Air transport market access (ECAA = European Common Aviation Area)	Art. 38; “may be dealt with by specific agreement”	Art. 34.6; “may be dealt with by specific agreement”

Table 9: Structure of EU-Jordan and EU-Algeria services provisions

It is clear that, as concerns enforceable provisions on cross-border services supply, the EU-Jordan EMA is very limited, with the exception of maritime transport services. There, together with the provisions on establishment, a quite liberal regime is established. The EU-Algeria EMA goes much further in cross-border services supply liberalisation, as Algeria committed to full, unconditional MFN treatment. Article 44 of the EU-Jordan EMA states that in any case, treatment cannot be more beneficial than granted under GATS.⁹⁵

GENERAL PROVISIONS	Jordan	Algeria
General exceptions: public policy, public security, public health, circumvention of 3 rd country market access rules	Art. 41.1; Art. 47 + Art. 46.1 = prudential reasons	Art. 35.1-2 + Art. 35.3 = prudential reasons in financial services
Exclusion of exercising public authority	Art. 41.2	Art. 35.2
Right to regulate entry and stay, employment, working conditions, establishment of natural persons and supply of services; limited: nullification of benefits + general exceptions	Art. 42	Art. 35.6; explicitly limited to Mode 4 services supply
Progressive adjustment to respect Art. V GATS	Art. 40; “consider development”	Art. 37.2; “consider development”

Table 10: Structure of EU-Jordan and EU-Algeria general provisions

⁹⁴ The EU-Jordan EMA speaks of the supply of services by a company established in the territory of a party other than that of the service consumer. Thus, Mode 1 and Mode 2 are covered. In the case of Algeria, cross-border supply of services is defined as supply by EU service suppliers into the territory of Algeria, other than through a commercial presence or the presence of natural persons. Thus, Algeria has taken up commitments in Mode 1 and Mode 2. As concerns the EU, Article 30.1 states that GATS MFN commitments apply fully.

⁹⁵ EU-Jordan Euro-Mediterranean Agreement art. 44. Treatment accorded to other states under economic integration agreements is of course not taken into account: Art. 45. This provision can also be found in e.g. Art. 32.2 of the EU-Morocco EMA.

B.2. The Eastern Partnership

In order to reinforce the ties between the EU and countries in Eastern Europe or the Southern Caucasus, the Eastern Partnership was created. Within the Eastern Partnership, the EU is conducting negotiations on services trade liberalisation with Armenia, Georgia, Moldova and the Ukraine. **Armenia** and **Georgia** started negotiating a Deep and Comprehensive Free Trade Area ('DCFTA') with the EU in early 2012. The aim for the Armenian DCFTA is an ambitious agreement with a wide scope and regulatory approximation with the EU.⁹⁶ Since 2010, **Moldova** has been negotiating an Association Agreement with the EU, but negotiations on a DCFTA as part of an Association Agreement only were initialled in 2012. According to the EU, negotiations are moving along quite rapidly.⁹⁷ Negotiations with the **Ukraine**, as part of an Association Agreement, have been finalised and technical steps towards signing the agreement are being taken, in accordance with internal EU law.⁹⁸ According to the European Commission, the RTA with the Ukraine will be the "first of a new generation" of DCFTAs and it will not only cover goods, services, intellectual property rights, customs, public procurement, energy-related issues, competition and more but also deep regulatory approximation with the EU.⁹⁹ Such an approach was also used in the EU-Chile and EU-Korea RTAs, but EU *acquis* adoption was only necessary insofar it concerns trade with the EU as Chile nor Korea aspire EU membership,¹⁰⁰ while Ukraine does.¹⁰¹ Still, the Ukrainian level of compliance with the EU *acquis* was initially considered to be of Ukrainian volition, as the country is not an official EU candidate, however the EU had a non-negotiable list of demands in this respect, leaving little flexibility for Ukrainian negotiators.¹⁰²

It seems that the approximation of regulatory measures of its eastern neighbours is of concern to the European Union. Concluding DCFTAs including such approximation effectively makes an enlarged European market more attractive for other economies, limiting the economic costs of administrative burdens and the like. After conclusion of the Association Agreements, it is interesting to evaluate to what extent such considerations might or might not have played a role in European priorities or concessions. The limited importance of the Armenian economy, which on a global level was worth only 0.7 billion euro in services imports and 2.8 billion in goods imports, the Georgian economy, importing 0.8 billion euro worth of services and 3.9 billion of goods and the Moldovan economy, totalling 0.5 billion euro in services imports and 2.9 billion euro in goods import in 2011 might put the European Union in a comfortable decision when negotiating the RTA, leaving less room for the demands of their counterparties. Ukraine, as the

⁹⁶ European Commission, *Overview of FTA and Other Trade Negotiations* (Updated 26 June, 2012).

⁹⁷ Ibid.

⁹⁸ European Commission, *Overview of FTA and Other Trade Negotiations*.

⁹⁹ European Commission, 'Ukraine' (2012) <<http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/ukraine/>> accessed 7 September 2012.

¹⁰⁰ Olga Shumylo-Tapiola, *Ukraine at the Crossroads: Between the EU DCFTA & Customs Union* (Russia/NIS Center Ifri, Russie Nei Reports, N°11, 2012) 7.

¹⁰¹ According to its foreign minister Gryshchenko on 31 August 2012, the Ukraine has an "ambitious goal of eventual EU membership". European Dialogue, 'Kostyantyn Gryshchenko: We Are Ready to Explore New Spheres of Bilateral Interaction within the Framework of Ukraine-NATO Constructive Partnership' (2012) <<http://eurodialogue.org/europe-east/Kostyantyn-Gryshchenko-Ukraine-NATO>> accessed 3 October 2012.

¹⁰² Shumylo-Tapiola 7.

economic giant of the neighbourhood, importing 8.8 billion euro of services and 46.2 billion euro worth of goods in 2011, might have proven slightly harder to convince, especially considering its importance in the energy market. Moreover, the relation with Russia plays an important role in Ukraine's position. A think tank report on the EU-Ukraine trade relations examines the possibilities for Ukrainian trade policy, as the finalised EU-Ukraine agreement is not yet signed or ratified.¹⁰³ According to the report, recent political turmoil in the Ukraine and the Russian offer to join the 2010 Russia-Belarus-Kazakhstan Customs Union, which only deals with goods, might mean the EU-Ukraine RTA will not enter into force soon.¹⁰⁴

3. TRADE AGREEMENTS AIMED AT DEVELOPMENT

Some EU RTAs have focused primarily on the development of the trading partner. The main target of development-oriented RTAs has been the African, Caribbean, and Pacific Group of States ('ACP'). The trade policy picture is complex. At the end of the WTO waiver in 2007 under which ACP countries were allowed non-reciprocal preferential access to the EU market, and as an extension of the waiver was politically infeasible at the WTO, a solution for trade regulation that complied with WTO law was to be found.¹⁰⁵ Article 37 of the Cotonou Agreement required WTO-compliant trade agreements between the EU and different ACP groups to be completed by the end of 2007. These RTAs would have to take the form of Economic Partnership Agreements ('EPA'), which combine trade with technical assistance.¹⁰⁶ But, the 2007 deadline was not met and no EPA has yet entered into force, although some EPAs are being applied provisionally. The controversy on both the link between development and regional integration and whether the EPAs are in effect development-friendly appears to have played a substantial role in the lack of concluded agreements.¹⁰⁷

Nonetheless, the EU is still striving to conclude comprehensive regional agreements with the different configurations of ACP countries.¹⁰⁸ An interim EPA between the EU and the **Southern African Development Community** ('SADC') was signed by Botswana, Lesotho, Swaziland and Mozambique, but not by Namibia. The agreement is not being applied provisionally by the five signatories. The EU also concluded an interim agreement with the **Eastern and Southern Africa** ('ESA') group of countries. Of its twenty-one members,¹⁰⁹ only Mauritius, the Seychelles, Zimbabwe and Madagascar signed and ratified the interim EPA, which now applies provisionally with regard to these states. Moreover, Comoros and Zambia have not yet signed. Furthermore,

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Pierre Sauvé and Natasha Ward, *The EC-CARIFORUM Economic Partnership Agreement: Assessing the Outcome on Services and Investment* (European Centre for International Political Economy Paper, 2009) 2.

¹⁰⁶ See, on the difficulties and controversy surrounding the conclusion of EPAs with African countries, Getahun Seifu, 'The Interplay of the ACP-EU Economic Partnership Agreements and the Rules of the World Trade Organization: Double Jeopardy for Africa' (2006) 6 *Irish Yearbook of International Law* 191, where the conundrum between WTO-compatibility and previous non-reciprocal trade measures that focus on development aspects is examined.

¹⁰⁷ Cremona 262.

¹⁰⁸ Brown 454.

¹⁰⁹ These are Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Somalia, South Sudan, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

the EU is negotiating an EU-**Central Africa** EPA with eight states.¹¹⁰ Awaiting the conclusion of this EPA, only Cameroon has signed an interim EPA with the EU, which is not yet ratified. Negotiations with the **Eastern African Community** ('EAC') on an encompassing EPA are ongoing too.¹¹¹ In the west of Africa, an EPA with Mauritania and fifteen members of the **Economic Community of Western African States** ('ECOWAS') is being negotiated under the moniker of an EU-West Africa EPA.¹¹² In the meantime, Côte d'Ivoire and Ghana have initialled interim EPAs. Côte d'Ivoire signed its so-called stepping stone EPA, which has not been ratified. Ghana has not signed the agreement. Negotiations with fourteen island states¹¹³ on an EU-**Pacific** EPA have so far only led to signed interim EPAs with Fiji and Papua New Guinea on trade in goods. As these agreements are being applied on an interim basis and with so few ACP parties, their few services provisions are not included in this mapping exercise. A notable exception to the lack of concluded trade agreements with ACP parties is the EPA between the EU and some CARIFORUM members, which is discussed in the following chapter.

Currently, two RTAs in this category include provisions on trade in services. First is the 1999 Trade, Development and Cooperation Agreement with **South Africa**, which entered into force in 2004.¹¹⁴ The objectives of the agreement include promoting the expansion and reciprocal liberalisation of trade in services.¹¹⁵ But, the RTA contains few provisions liberalising trade in services. Article 29 reconfirms GATS obligations, referring in particular to MFN obligations. Article 30 states that the parties shall endeavour to extend the scope of the RTA to further liberalise trade in services. In the case of such an extension, and as required by Article V GATS, substantially all discrimination should be eliminated and all modes of supply should be covered. Lastly, according to Article 31.1, the parties shall endeavour to apply unrestricted access to the international maritime market and traffic. Paragraph 2 of the same article does contain an enforceable provision, namely an MFN obligation for certain listed maritime services. There have not been any decisions implementing these provisions. Furthermore, the agreement establishes cooperation between the EU and South Africa on matters such as information society, transport, tourism and services.¹¹⁶

Second, in 2012, an EU-**Iraq** Partnership and Cooperation Agreement, a framework agreement with a services component, was signed. The agreement has provisionally entered into force. Although formally not part of the EU's Mediterranean policy,¹¹⁷ the agreement can be seen in the light of the EU's EMAs. Substantively, and even though it principally covers trade in services through in all four modes of supply and in all sectors,¹¹⁸ the scope of the EU-Iraq RTA is limited

¹¹⁰ Cameroon, Central African Republic, Chad, Congo, Democratic Republic of Congo, Equatorial Guinea, Gabon, Sao Tome and Principe.

¹¹¹ EAC members are Kenya, Uganda, Tanzania, Burundi and Rwanda.

¹¹² ECOWAS is comprised out of Benin, Burkina Faso, Cape Verde, Ivory Coast, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo.

¹¹³ These are Cook Islands, East Timor, Fiji, Kiribati, Marshall Islands, Micronesia, Nauru, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu.

¹¹⁴ L 311/3, 4 December 1999, Agreement on Trade, Development and Cooperation between the European Community and the Republic of South Africa.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ See, *supra*, the EMAs with non-EU Mediterranean countries.

¹¹⁸ Art. 23.2 *juncto* 24(i) EU-Iraq.

by a list of exceptions, which include, aside from the typical exclusions documented above, education, health and social, space transport, and production or trade in arms.¹¹⁹ Furthermore, the following services sectors are excluded from the scope of the RTA: governmental authority and social security systems; measures relating to natural persons seeking access to the employment market, citizenship, residence or employment on a permanent basis; measures regulating the entry into or temporary stay in the territory of a party which do not nullify the commitments in the section; and measures necessary to prevent third-party market access through circumvention. Measures applying to the activities conducted by a central bank, monetary authority or a public entity in pursuit of monetary or exchange rate policies are excluded by Article 29 also. The main EU commitment is found in Article 25.1 EU-Iraq, which extends the EU's GATS commitments on national treatment and market access to non-WTO member Iraq.¹²⁰ Iraqi commitments, as featured in Article 25.2 EU-Iraq, entail a national treatment or MFN obligation, whichever is better, across the trade in services and establishment board. The wide scope of these obligations is not unlimited. First, the national treatment obligation is mitigated by paragraph 3, which states that Iraq may introduce conditions and qualifications which render treatment of EU services, service suppliers and establishments less favourable than Iraqi counterparts, if these modifications respect MFN obligations, are notified in advance and justified, and examined and approved by the joint Cooperation Committee at the request of a party. Furthermore, according to paragraph 4, and without prejudice to the MFN and national treatment benefits for the EU, Iraq is to extend its scheduled commitments under GATS to the EU after Iraqi accession to the WTO. Second, the MFN obligation is limited by Article 26.1 EU-Iraq, which contains exceptions concerning taxes. Articles 26.2, 26.3, 29.1(d) and 29.1(e) add fiscal and tax exceptions to the whole agreement. The EU-Iraq RTA contains a transparency obligation similar to what is found in the RTAs which will be discussed in the following chapter. Additionally, as in all EU RTAs with services components, general and security exceptions apply. The general exception provision, Article 29.1, has a typical structure that will be discussed *infra*. The grounds of justification are, subject to a necessity test, public security, public morals, public order; human, animal or plant life or health; and securing compliance with laws or regulations not inconsistent with the RTA. Lastly, the security exceptions, too, mirror those typically found in the RTAs opening up global markets.

4. TRADE AGREEMENTS OPENING UP GLOBAL MARKETS

The last and largest category of RTAs are those concluded to open up global markets to European businesses. Negotiations on these agreements have been guided by the 2006 Global Europe Strategy, which stated that the EU's prior trade policy, largely focusing on either geographically close neighbours or developing countries, had left its main trade interests "less well served".¹²¹ Under this heading we first examine the EU-Mexico and EU-Chile RTAs.¹²² These agreements may be seen as setting the template for post-Global Europe Strategy RTAs

¹¹⁹ Art. 23.2 EU-Iraq.

¹²⁰ Iraq is not yet a member of the WTO but has been negotiating accession since 2004.

¹²¹ European Commission, *COM(2006) 567 final, Global Europe: Competing in the World* 11.

¹²² Cremona considers these RTAs to be developmental in nature. However, as concerns services liberalization and as will become clear through the analysis of the services provisions in these RTAs, it is more appropriate to discuss them here.

with regard to services. Subsequently, four very similar and elaborate RTAs, i.e. with CARIFORUM, Korea, Colombia and Peru, and Central America are addressed.

First, in 2000, the Economic Partnership, Political Coordination and Cooperation Agreement between the EU and **Mexico** entered into force.¹²³ Article 4 of the agreement explains that the RTA's trade chapter aims to establish a framework to encourage the development of trade in goods and services. Article 6 states that in order to do so, appropriate arrangements are to be adopted. These provisions were implemented by Decision 2/2001 of the EU-Mexico Joint Council,¹²⁴ which contains substantive commitments in the liberalisation of services. Further references to the EU-Mexico trade agreement refer to this decision, unless noted otherwise. Article 7.3 stipulates that within three years after the entry into force of the decision, a list of commitments is to be adopted in a decision. These commitments were to apply at the end of a transitional period of ten years. It was held in the Joint Communiqué after the sixth Joint Council EU-Mexico in 2009, that the parties would reiterate their interest in moving forward in negotiations on deepening services trade,¹²⁵ but no schedules of commitments have yet been agreed.¹²⁶

Second, the EU and **Chile** signed an Association Agreement in 2002, which entered into force in 2005.¹²⁷ The RTA contains a chapter on services liberalisation which is structured in a similar way to the EU-Mexico implementation of services liberalisation. The Association Agreement was considered the most comprehensive and ambitious EU RTA by former EU Trade Commissioner Pascal Lamy at the time of conclusion, and was the first fully fledged services agreement.¹²⁸ This was, although perhaps contrary to the EU's trade policy at the time, made possible because of Chile's openness, the structure of EU-Chile economic relations and less sensitive agricultural issues.¹²⁹

GENERAL PROVISIONS ¹³⁰	Mexico	Chile
Government procurement excluded	Art. 2.4	Art. 95.3
Subsidies excluded	Art. 2.5	Art. 95.4
Audio-visual services, certain air services and maritime cabotage excluded	Art. 2.2	Art. 95.2
Social security systems excluded	Art. 27.3	Art. 135.2
Governmental authority excluded	Art. 27.3	Art. 135.2

¹²³ L 276/45, 28 October 2000, Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and the United Mexican States.

¹²⁴ L 70/7, 12 March 2001, Decision No 2/2001 of the EU-Mexico Joint Council of 27 February 2001 implementing Articles 6, 9, 12(2)(b) and 50 of the Economic Partnership, Political Coordination and Cooperation Agreement.

¹²⁵ Council of the European Union, *VI Joint Council EU - Mexico, May 14th 2009, Joint Communiqué* (8436/09 (Presse 79), 2009) 26.

¹²⁶ The last Joint Council, in 2012, did not refer to services trade at all.

¹²⁷ L 352/3, 30 December 2002, Agreement Establishing an Association between the European Community and the Republic of Chile.

¹²⁸ See footnote 1 in Maria Garcia, 'Incidents along the Path: Understanding the Rationale behind the EU-Chile Association Agreement' (2011) 49 *Journal of Common Market Studies* 501, 502.

¹²⁹ *Ibid.*

¹³⁰ These provisions apply to all modes of supply of EU-Mexico and EU-Chile, see *infra*.

Domestic regulation		Art. 102; see text
Standstill obligation	Art. 7.2	
Right to regulate entry or temporary stay of natural persons; limited: nullify specific commitments	Art. 27.4 + work, labour and establishment of natural persons; limited: nullify benefits of Decision	Art. 135.3 + work, labour and establishment of natural persons; limited: nullify benefits of RTA
General right to regulate	Art. 8; if non-discriminatory	
Obligation to further negotiate services liberalisation	Art. 7.3	Art. 100; Art. 101 for Mode 4
Mutual recognition	Art. 9; in principle necessary steps within 3 years	Art. 103.2-5; encourage development, turn into binding agreement
Transparency: obligation to respond to information requests		Art. 105
Procedures: if authorisation is necessary to benefit from liberalisation, obligation to inform of decision and provide independent procedures or tribunals to appeal to such decisions		Art. 103.1
Sector-specific regulatory framework	Art. 10-26; international maritime transport and financial services	Art. 106-129; international maritime transport, telecommunications and financial services
Electronic commerce: parties agree to promote it and maintain dialogue on regulatory issues		Art. 104
General exceptions: see text	Art. 27.2	Art. 135.1
Security exceptions: see text	Art. 52 EU-Mexico RTA	Art. 194
Balance of payments exception		Art. 195
Taxation exception		Art. 196

Table 11: Structure of EU-Mexico and EU-Chile general provisions

It is important to note that the general structure of the EU-Mexico and EU-Chile RTAs is very similar. Both RTAs do not include separate chapters on establishment, cross-border services supply and Mode 4. The EU-Mexico Decision contains a title on trade in services, of which Article 2 defines the scope explicitly as encompassing all four modes of supply.¹³¹ Furthermore,

¹³¹ Article 3(c) clarifies that “commercial presence” only refers to setting up and managing undertakings, subsidiaries, branches or other forms of secondary establishment. Thus, it covers Mode 3 supply of services only.

it applies in principle to all services, although some services are exempted as shown *supra*. Title III of the EU-Chile RTA is applicable to services and, according to Article 95, also applies in principle to all four modes of supply, which are named explicitly, and all sectors, except those listed.¹³²

An interesting aspect of the RTA with Chile is the inclusion of a provision on domestic regulation. Although other agreements contain a provision with the same name, substantively these are not related to the GATS concept of domestic regulation. Article 102.1 EU-Chile on the other hand, is similar to Article VI.4 GATS, which obliges WTO members to establish disciplines on domestic regulation within the framework of Article VI.4 GATS. To date, this has not been the case at WTO level. Nevertheless, Article 102 EU-Chile does contain such disciplines and requires that the EU and Chile endeavour to ensure that a domestic measure relating to the requirements and procedures of licensing and certification of service suppliers of the other party is consistent with three rules. First, the domestic measure should be based on objective and transparent criteria. Second, it should not be more trade restrictive than necessary to ensure the achievement of a legitimate policy objective. Third, it is not a disguised restriction on the supply of a service.

The scope of the general exceptions contained in Article 27.2 EU-Mexico Decision and Article 135.1 EU-Chile is limited as the chapeau of the provisions states that they may not constitute arbitrary or unjustifiable discrimination or a disguised restriction on trade in services. The grounds of exception are summed up exhaustively, including measures which protect public morals or maintain public order and public security; protect human, animal or plant life or health; and secure compliance with laws or regulations that are consistent with the provisions of the Decision. The EU-Chile RTA also contains an exception for the protection of national treasures of artistic, historic or archaeological value. All these grounds are subject to a necessity test in order to qualify as an exception. In Article 27(d) of EU-Mexico, an exception to national treatment obligations for the effective or equitable imposition or collection of direct taxes was also added. Furthermore, in the EU-Chile RTA, an exception is permissible if it relates to the conservation of exhaustive natural resources if such measures are applied in conjunction with restrictions on domestic or consumption of services supply. The security exceptions of the EU-Mexico RTA are found in the RTA agreement itself, and not in Decision 2/2001. Article 52 of the EU-Mexico RTA contains, aside from an exception on the disclosure of information of essential interest to national security, exceptions for measures relating to the production of, or trade in, arms, munitions or war material or to research, development or production necessary to guarantee national defence, and measures which it considers essential to its security in the event of serious domestic disturbances liable to jeopardise public order; war or serious international tensions, which might erupt into armed conflict or to fulfil obligations it has entered into for the maintenance of peace and international security. Article 194 EU-Chile lists security exceptions for the disclosure of information, but also for measures that relate to fissionable or fusionable materials; the traffic in arms and supply or provisioning of military establishment; and government procurement that is essential to national security. Furthermore, in the EU-Chile

¹³² The title also applies to establishment, but the scope of the chapter on establishment is defined in Article 130 as “all sectors with the exception of all services sectors”.

RTA, obligations under the UN Charter must be respected. However, measures taken in war time or other emergencies in international relations can benefit from an exception. Moreover, the EU-Chile RTA contains exceptions in the case of balance of payments difficulties, according to which measures can be taken that are inconsistent with the obligations that arise out of the RTA, although they must be necessary, temporary, non-discriminatory and in accordance with WTO and IMF rules. Lastly, an exception for measures relating to taxation was added to the latter agreement. The RTA cannot prevent parties distinguishing between taxpayers who are not in the same situation, or prevent the adoption of measures against tax evasion or avoidance.

ESTABLISHMENT & CROSS-BORDER SERVICES SUPPLY	Mexico	Chile
Any service in any services sector for cross-border services supply	Art. 2.2; “all services sectors”	Art. 95.2; “all services sectors”
Market access	Art. 4; no schedule of commitments	Art. 97.1; Annex VII commitments
Forbidden market access measures are like XVI.2 GATS	Art. 4	Art. 97.2
National treatment	Art. 6; no schedule of commitments	Art. 98; limited: inherent competitive disadvantages
MFN	Art. 5; limited: possible mutual recognition as in Article VII GATS for establishment; not in force for cross-border services supply	

Table 12: Structure of EU-Mexico and EU-Chile establishment and cross-border services supply provisions

The EU-Mexico and EU-Chile agreements only contain obligations that are in principle applicable to all modes of supply. Article 4 EU-Mexico Decision and Article 97 EU-Chile contain such a cross-mode of supply market access commitment. The list of prohibited measures contained in both articles is identical to that in Article XVI.2 GATS.¹³³ According to Article 7.3(b) EU-Mexico, the MFN obligation contained in Article 5 does not enter into force until a liberalisation calendar, part of the decision which should also contain schedules of commitments for national treatment and market access, decides it will. As stated, this decision has not been adopted, thus rendering the provision unenforceable. When entered into force, it shall, in the case of a new RTA between the EU or Mexico and a third party, be made subject to negotiations to obtain the benefits contained in that new RTA. The services provisions of the EU-Chile RTA does not include an MFN obligation.

¹³³ Although measures (e) and (f) are swapped in the case of Mexico.

Third, as stated, the EU concluded an EPA with some **CARIFORUM** members,¹³⁴ the Caribbean group of the ACP.¹³⁵ CARIFORUM's dependence on the EU for its exports combined with the outlook of higher barriers to trade if the Cotonou waiver, discussed under the previous chapter, ended, left the region with little choice but to conclude negotiations.¹³⁶ Although not yet entered into force, the comprehensive agreement has been provisionally applied since 2008. Its importance is not to be underestimated, as it may impact upon further ACP EPA negotiations and sets out a new stage for so-called North-South cooperation based on reciprocal commitments.¹³⁷ Although officially an EPA, from the point of view of services liberalisation, this agreement fits within the category of RTAs aimed at opening up global markets as Title II of the EU-CARIFORUM EPA contains quite extensive provisions on services which are very similar to those in the other agreements discussed under this heading. As services are crucial to CARICOM exports, allowing much needed economic diversification, and exports to the EU amount to 60% of all exports,¹³⁸ the inclusion of such provisions makes economic sense. The services provisions in the EU-CARIFORUM agreement will be analysed next.

Fourth, **Korea** and the EU came to an agreement, signing an ambitious so-called "new generation" RTA in 2010, which preliminarily entered into force in 2011.¹³⁹ It is the first major RTA to be concluded after the entry into force of the Lisbon Treaty, which provided the European Parliament with a larger role in EU trade policy and created an explicit competence for investment protection – since interpreted as an exclusive EU competence by the European Commission.¹⁴⁰ According to a DG Trade lawyer, it is the most significant EU trade agreement since the establishment of the WTO.¹⁴¹

Fifth and sixth, the EU has concluded two interregional agreements in the Americas. First, an RTA with **Colombia and Peru** was signed in June 2012. Originally, this agreement was meant to include Bolivia and Ecuador as an EU-Andean Community RTA. But the latter two states did not wish to conclude negotiations, although they could possibly accede to the agreement at a later stage.¹⁴² The Council of the European Union has given its consent to sign and apply the agreement provisionally, but neither signature nor provisional application has yet been completed. A few days later, the EU reached an agreement with six Central American states, namely Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama. These parties

¹³⁴ Namely Antigua and Barbuda, the Commonwealth of the Bahamas, Barbados, Belize, the Commonwealth of Dominica, the Dominican Republic, Grenada, the Republic of Guyana, the Republic of Haiti, Jamaica, Saint Christopher and Nevis, Saint Lucia, Saint Vincent and the Grenadines, the Republic of Suriname, and the Republic of Trinidad and Tobago.

¹³⁵ L 289/I/3, 30 October 2008, Economic Partnership Agreement between the CARIFORUM States and the European Community.

¹³⁶ Sauvé and Ward, *The EC-CARIFORUM Economic Partnership Agreement: Assessing the Outcome on Services and Investment* 2.

¹³⁷ Claude Chase, 'MFN in the CARIFORUM-EC Economic Partnership Agreement: Policy Blunder or Legal Inconsistency?' (2011) 38 *Legal Issues of Economic Integration* 189, 190.

¹³⁸ Sauvé and Ward, *The EC-CARIFORUM Economic Partnership Agreement: Assessing the Outcome on Services and Investment* 5.

¹³⁹ L 127/6, 14 May 2011, Free trade Agreement between the European Union and the Republic of Korea. Ratification by all 27 EU Member States is necessary for the entry into force as the RTA is considered a mixed agreement.

¹⁴⁰ Brown 447.

¹⁴¹ Ibid.

¹⁴² Ibid Colombia and Peru are referred to in the text of the RTA as the "signatory Andean Countries".

signed the **EU-Central America** Association Agreement, which has not yet been ratified although the trade provisions can apply provisionally.¹⁴³ As with the EU-CARIFORUM EPA, the broader approach to this Association Agreement might be development orientated. However, with regard to the liberalisation of trade in services, this RTA appears to fit best in this category as it includes an extensive services component in Title III which is similar to those in the other agreements in this category.

¹⁴³ Article 353.4 of the Agreement Establishing an Association between Central America and the European Union and its Member States (not yet published). The provisional application is conditional to a Council Decision authorising it. A proposal for such a decision was put forth on 25 October 2011: European Commission, *COM(2011) 678 final, Proposal for a Council Decision authorising the signature and provisional application of the trade part (Part IV) of the Agreement establishing an Association between the European Union and its Member States, on the one hand, and Central America on the other* (2011).

GENERAL PROVISIONS	CARIFORUM	Korea	Colombia and Peru	Central America
Government procurement excluded	Art. 60.2 + privatisation of public undertakings	Art. 7.1.2	Art. 107.2 + privatisation of public undertakings	Art. 159.2; + public utilities services supply in exercise of governmental authority
Subsidies excluded	Art. 60.3	Art. 7.1.3	Art. 107.3	Art. 159.3
Social security systems excluded	Art. 224.2	7.44.1; exception: domestic regulation allows competition	Art. 159.1	Art. 203.2
Governmental authority excluded	Art. 224.2	Art. 7.4.3(b), Art. 7.9(c)	Art. 107.4	Art. 203.2
Natural persons seeking access to employment market excluded	Art. 60.5	Art. 7.1.5	Art. 107.6	Art. 159.5
Citizenship, residence, permanent employment excluded	Art. 60.5	Art. 7.1.5	Art. 107.6	Art. 159.5
Right to regulate entry or temporary stay of natural persons; limited: nullify specific commitments	Art. 60.5	Art. 7.1.6	Art. 107.7	Art. 159.5
Right to regulate and introduce regulation to meet legitimate national policy objectives	Art. 60.4	Art. 7.1.4	Art. 107.5	Art. 159.4
Standstill obligation for discrimination level of specific commitments	Annex IV F paragraph 9	Art. 7.7.2, Art. 7.13.2		
Obligation to further negotiate services liberalisation	Art. 62			
Mutual recognition	Art. 85.2-3; encourage development of	Art. 7.21; encourage development of + Working Group on mutual recognition	Art. 129.2-3; encourage development of	Art. 177.2-3; encourage development of
Transparency: obligation to respond to information requests	Art. 86	Art. 7.22; exception: confidential information	Art. 130; exception: confidential information	Art. 178; exception: confidential information

Procedures: if authorisation is necessary to benefit from liberalisation, obligation to inform of decision and provide independent procedures or tribunals to appeal to such decisions	Art. 87	Art. 7.23.1-2	Art. 131.2-3	Art. 179
Domestic regulation		Art. 7.23.3; see text	Art. 131.4-6; see text	
Sector-specific regulatory framework	Art. 88-118; computer, courier, telecommunications, financial, international maritime transport, and tourism services	Art. 7.25-7.47; computer, postal and courier, telecommunications, financial, and international maritime transport services	Art. 132-161 ; computer, postal and courier, telecommunications, financial, and international maritime transport services	Art. 180-200; computer, courier, telecommunications, financial, and international maritime transport services
Electronic commerce: parties agree to promote it and maintain dialogue on regulatory issues	Art. 119-120; electronic commerce is services supply	Art. 7.48; no customs duties, WTO Agreement applies	Art. 162-166; electronic commerce is Mode 3 + no customs duties + paperless trading + protection of data + consumer protection	Art. 201-202; no customs duties
General exceptions: see text	Art. 224	Art. 7.50	Art. 167	Art. 203
Balance of payments exception	Art. 240	Art. 15.8	Art. 297	Art. 349
Security exceptions	Art. 225	Art. 15.9	Art. 295	Art. 357 + budgetary independence

Table 13: Structure of EU-CARIFORUM, EU-Korea, EU-Colombia and Peru and EU-Central America general provisions

The preceding table shows that the scope and general provisions of these services titles are quite similar. It is important to note that natural persons seeking access to the employment market of the other party are excluded from the scope of the provisions. Furthermore, there is an explicit recognition of the right to regulate the entry or temporary stay of natural persons in the territory of a party, including measures necessary to protect the integrity of the borders and the orderly movement of natural persons across borders. This right is limited: such measures may not nullify or impair the benefits flowing from specific commitments. Although many RTAs exclude subsidies from the scope of the agreement, such provisions may raise questions as to the compatibility of such an RTA with the conditions set out in Article V GATS. According to some authors, excluding a powerful policy measure such as subsidies from the scope of the RTA, is “almost tantamount” to excluding in particular Mode 1 and Mode 2, in which the role of subsidies can be the strongest, from the agreement completely.¹⁴⁴

Annex IV F, which contains CARIFORUM commitments on Modes 1, 2 and 3 contains an important Paragraph 9 which requires the CARIFORUM signatories to bind at the existing regulatory level, where GATS allows binding below such a *status quo*.¹⁴⁵ Similar provisions are included in the chapters on establishment and cross-border services supply of EU-Korea.

An interesting aspect of the RTAs with Korea is the inclusion of a provision on domestic regulation. Although other agreements contain a provision with the same name, substantively these are not related to the GATS concept of domestic regulation. The provision on domestic regulation in EU-Korea is similar to the one described in EU-Chile. However, Article 7.23.3 EU-Korea also requires the parties to endeavour ensuring that a domestic measure relating to qualification requirements and procedures, technical standards and licensing requirements is not an unnecessary barrier to trade. Therefore, such measures are based on objective and transparent criteria, such as competence and the ability to supply the service, and in the case of licensing procedures, and not in themselves a restriction to trade.¹⁴⁶ Article 131.4-6 EU-Colombia and Peru links the RTA with the possible outcome of GATS negotiations on domestic regulation. In the meantime, it mirrors the obligation of Article VI:5 GATS, which contains a standstill obligation.

With regard to electronic commerce, it is interesting to note that in Article 119.3 EU-CARIFORUM, the parties have opted for some clarity by explicitly adding that deliveries by electronic means constitute the provision of services. Although WTO case law and legal doctrine appear to have concluded that GATS applies to electronic commerce at least partly,¹⁴⁷

¹⁴⁴ Adlung and Morrison 1115.

¹⁴⁵ Sauvé and Ward, *The EC-CARIFORUM Economic Partnership Agreement: Assessing the Outcome on Services and Investment* 13.

¹⁴⁶ In the EU-Chile RTA, the provision states “objective and transparent criteria, such as, *inter alia*, competence and the ability to provide the service” (emphasis added). In EU-Korea, “*inter alia*” was dropped. This is interesting when taking into account the discussion on the exact requirements for domestic regulation disciplines of Article VI.4 GATS. See, for example, Panagiotis Delimatsis, ‘Determining the Necessity of Domestic Regulations in Services: The Best is Yet to Come’ (2008) 19 *European Journal of International Law* 365 and Jan Wouters and Dominic Coppens, ‘GATS and Domestic Regulation: Balancing the Right to Regulate and Trade Liberalization’ in Kern Alexander and Mads Andenas (eds), *The World Trade Organization and Trade in Services* (Martinus Nijhoff 2008) on this issue.

¹⁴⁷ The Appellate Body of the WTO applied GATS to electronic commerce in *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services* WT/DS285/AB/R, AB report adopted 7 April 2005. As

this provision in the RTAs foregoes any discussion on the matter.¹⁴⁸ The EU-Colombia and Peru RTA goes further and qualifies electronic commerce as Mode 3 supply of services. Furthermore, this agreement and the EU-Central America RTA exempt electronic commerce from customs duties.

The general exceptions included in the three agreements are largely similar. The general exceptions provisions are structured in the same way as Article XIV GATS: a chapeau is followed by a closed list of exceptions. First, the scope of the exceptions is limited as the chapeau of the provisions, substantially identical in all RTAs,¹⁴⁹ states that the exceptions may not constitute arbitrary or unjustifiable discrimination or a disguised restriction on establishment or cross-border supply of services. Second, the exception grounds are summed up exhaustively. All four agreements include measures that protect public security, public morals or maintain public order;¹⁵⁰ protect human, animal or plant life or health;¹⁵¹ secure compliance with laws or regulations that are consistent with the RTA;¹⁵² and protect national treasures of artistic, historic or archaeological value. These grounds are all subject to a necessity test in order to qualify as an exception. Additionally, an exception is possible for measures relating to the conservation of exhaustible natural resources if they are applied in conjunction with restrictions on domestic or consumption of services supply. The EU RTA with Colombia and Peru adds that this applies to living and non-living natural resources. Furthermore, the EU-CARIFORUM EPA contains two more grounds for exception, namely measures relating to the importation of gold or silver and to the products of prison labour. The security exceptions in the EU-CARIFORUM, EU-Korea, EU-Colombia and Peru and EU-Central America RTAs are almost identical to Article XIV bis GATS, with the exception of Article 357.1(d) EU-Central America, which adds that parties must be able to decide independently on budgetary priorities and that the RTA cannot require any party to increase budgetary resources.

concerns legal doctrine, see for example Sacha Wunsch-Vincent, 'The Internet, Cross-Border Trade in Services, and the GATS: Lessons from *US-Gambling*' (2006) 5 World Trade Review 319.

¹⁴⁸ Within the WTO's Working Party on Electronic Commerce, this solution had been proposed by some members but rejected by others. See S/L/74, Work Programme on Electronic Commerce Progress (Report by the Council for Trade in Services 19 July 1999) 6 & 25.

¹⁴⁹ Although because of the structure of the RTA, Article 224 of the EU-CARIFORUM EPA also applies to trade in goods and establishment.

¹⁵⁰ In the EU-Korea RTA, the aim is the protection of public security and not maintaining it.

¹⁵¹ Article 167.1(b) EU-Colombia and Peru explicitly adds that "those environmental measures necessary to this effect" are included as an exception.

¹⁵² This provision contains a non-exhaustive listing of the issues which such laws or regulations should relate to. That list is largely similar in the three RTAs, but the EU-CARIFORUM EPA adds two: customs enforcement and the protection of intellectual property rights in Article 224.1 (c)(iv)-(v).

ESTABLISHMENT ¹⁵³	CARIFORUM	Korea	Colombia and Peru	Central America
Economic activity excludes activities under governmental authority	Art. 65(d)	Art. 7.9(c)	Art. 110	Art. 162(b); positive list of “economic activities” (Annex X)
Excluded: audio-visual services, national cabotage transport, air transport services (exceptions apply)	Art. 66	Art. 7.10; some exceptions for air services	Art. 111	Art. 163 + inland waterways
Market access	Art. 67	Art. 7.11.1	Art. 112	Art. 164
Forbidden market access measures are like XVI.2 GATS	Art. 67.2	Art. 7.11.2	Art. 112.2	Art. 164.2
National treatment	Art. 68; limited: inherent competitive disadvantages	Art. 7.12; limited: inherent competitive disadvantages	Art. 113; limited: inherent competitive disadvantages	Art. 165; limited: inherent competitive disadvantages
Exception to national treatment for taxes imposition or collection	Art. 224.1(h)	Art. 15.7 = more general tax exception	Art. 296 = more general tax exception	Art. 203.1(f)
MFN	Art. 70; limited: see text	Art. 7.14; applies to all later economic integration agreements; limited: see text		

Table 14: Structure of EU-CARIFORUM, EU-Korea, EU-Colombia and Peru and EU-Central America establishment provisions

¹⁵³ The relevant chapter of the EU-CARIFORUM EPA refers to commercial presence, which is defined in Article 65(a) as any type of business or professional establishment through the constitution, acquisition or maintenance of a juridical person or the creation or maintenance of a branch or representative office. Thus, the chapter covers Mode 3 supply of services. Article 7.9(a) and (c) of the EU-Korea RTA refer to establishment as the constitution, acquisition or maintenance of a juridical person or the creation or maintenance of a branch or representative office within the territory of a party for the purpose of performing an economic activity, which is defined as any economic activity (exceptions apply). These provisions thus apply to the supply of services as in Mode 3, but also to any other economic activity. In the case of Colombia and Peru and Central America, the chapter is entitled “Establishment” but the definition of establishment in Article 110 and Article 162(c) respectively is identical to that of the EU-CARIFORUM EPA.

The chapter on Mode 3 supply of services in GATS, or commercial presence,¹⁵⁴ is titled “Commercial Presence” in the EU-CARIFORUM EPA, which reflects GATS terminology. In the EU-Korea, EU-Colombia and Peru and the EU-Central America RTAs, these provisions fall under the chapter “Establishment”. The scope of the RTA with Central America is in general limited to those economic activities committed in Annex X. As national treatment obligations are in any case limited to the scheduled sectors and that there is no generally applicable MFN obligation, this limitation does not appear very important. Another noteworthy provision is the listing of forbidden market access measures in Articles 7.11.2 EU-Korea and 112.2 EU-Colombia and Peru, which are substantively identical to the six types of measures listed in Article XVI.2 GATS. The five listed types of measures in Articles 67.2 EU-CARIFORUM and 164.2 EU-Central America are very similar to those in the GATS but the type of measure that restricts the total number of natural persons employed in a services sector or that a service supplier may employ, as prohibited by Article XVI.2(d) GATS, are not barred.

The major difference between these three chapters is the inclusion of a general MFN-obligation in the EU-CARIFORUM and EU-Korea agreements, a provision absent in the other two agreements. In principle, the provision applies to all measures affecting commercial presence covered by the agreement. At first sight, it thus seems to be quite a far-reaching liberalisation measure. However, concerning the former, Article 70 EU-CARIFORUM limits the scope of the obligation considerably. First, as concerns the EU, the MFN obligation only applies to treatment accorded to third countries in economic integration agreements concluded after the signature of the EU-CARIFORUM EPA. With regard to CARIFORUM States, this limitation goes even further: the most favoured treatment is to be determined only in comparison to economic integration agreements with major trading economies signed after the signature of the EPA.¹⁵⁵ Additionally, the parties may decide through consultations that in such a case the MFN treatment should not be extended to the EU.¹⁵⁶ Second, treatment following out of regional economic integration agreements which create an internal market or require significant approximation of relevant commercial presence legislation, cannot be extended to the other signatories under the MFN obligation.¹⁵⁷ Lastly, the MFN exemptions listed in accordance with Article II.2 GATS also apply. With regard to EU-Korea, the obligation is a classic reciprocal MFN-obligation applying to all treatment granted through RTAs, limited by a regional integration exception. However, if such regional integration is not granted under sectoral or horizontal commitments for which the regional integration agreement provides for a ‘significantly higher level of obligations’ than that undertaken under EU-Korea. Thus, only sufficiently ambitious new RTAs fall within the ambit of the MFN exemption. Moreover, both RTAs’ MFN obligations do not apply to treatment granted under measures which recognise qualifications or licences, or which are prudential measures in accordance with Article VII GATS. Similarly, they do not apply to treatment granted under an international agreement relating mainly to taxation.

¹⁵⁴ Sauvé and Ward, *The EC-CARIFORUM Economic Partnership Agreement: Assessing the Outcome on Services and Investment* 7.

¹⁵⁵ Article 70.4 defines major trading economies as (i) any developed country, (ii) any country with a share in world trade surpassing 1%, (iii) any group of countries with a collective share in world trade bigger than 1,5%.

¹⁵⁶ See Article 70.5 of the EU-CARIFORUM EPA.

¹⁵⁷ A footnote to Article 70.2 indicates that the EEA-Agreement, pre-accession agreements to the EU, the CARICOM Single Market and Economy, and the CARICOM-Dominican Republic FTA are “deemed to fall in their entirety under this exception”.

CROSS-BORDER SERVICES SUPPLY ¹⁵⁸	CARIFORUM	Korea	Colombia and Peru	Central America
Any service in any services sector	Art. 75.2(b)	Art. 7.4.3(b)	Art. 118 “all services sectors”	Art. 169.2(b)
Excluded: governmental authority	Art. 75.2(b)-(c)	Art. 7.5.3(b)	Art. 110	Art. 169.2(b)
Excluded: audio-visual services, national cabotage transport, air transport services (exceptions apply)	Art. 75.1	Art. 7.4.1; some exceptions for air services	Art. 118 + computer reservation system and airport ground handling and operation services	Art. 169.1 + inland waterways
Market access	Art. 76	Art. 7.5.1	Art. 119	Art. 170
Forbidden market access measures are like XVI.2 GATS	Art. 76.2	Art. 7.5.2	Art. 119.2	Art. 170.2
National treatment	Art. 77; limited: inherent competitive disadvantages	Art. 7.6; limited: inherent competitive disadvantages	Art. 120; limited: inherent competitive disadvantages	Art. 171; limited: inherent competitive disadvantages
Exception to national treatment for taxes imposition or collection	Art. 224.1(h)	Art. 15.7 = more general tax exception	Art. 296 = more general tax exception	Art. 203.1(f)
MFN	Art. 79; limited: see text	Art. 7.8; applies to all later economic integration agreements; limited: see text		

Table 15: Structure of EU-CARIFORUM, EU-Korea, EU-Colombia and Peru and EU-Central America cross-border services provisions

¹⁵⁸ Articles 75.2(a) EU-CARIFORUM, 7.5.3(a) EU-Korea, 117 EU-Colombia and Peru and 169.2(a) EU-Central America explicitly state that Mode 1 and Mode 2 fall within the scope of their chapters on cross-border supply of services.

As discussed previously in relation to Mode 3 commitments, the listing of precluded market access measures in Articles 76.2 EU-CARIFORUM, 7.5.2 EU-Korea, 119.2 EU-Colombia and Peru and 170.2 EU-Central America is very alike Article XVI.2 GATS. But, as concerns cross-border supply of services, only three types of measures are listed. The measures meant in Article XVI.2(d)-(f) are not copied to the RTAs. In relation to the type of measure (d), the redundancy argument used *supra* remains valid. The types of measures (e) and (f) are not related to Mode 1 or Mode 2 service supply either, as they deal with measures regulating establishment. As with establishment, the main difference between the four agreements is the inclusion of an MFN obligation in the EU-CARIFORUM and EU-Korea agreements. These provisions are identical to those on establishment discussed *supra*, including the various limitations of the obligations.

TEMPORARY PRESENCE OF NATURAL PERSONS FOR BUSINESS PURPOSE ¹⁵⁹	CARIFORUM	Korea	Colombia and Peru	Central America
For key personnel, graduate trainees, business services sellers, contractual services suppliers, independent professionals	Art. 80 + short term visitors for business purposes	Art. 7.17	Art. 122 + short term visitors for business purposes	Art. 173
Excluded: natural persons seeking access to employment market	Art. 60.5	Art. 7.1.5 + citizenship, residence or employment on a permanent basis	Art. 107.6	Art. 159.5
Key personnel & graduate trainees: sectoral scope	Liberalised in establishment chapter, reservations: Annex IV	Liberalised in establishment section, reservations: Annex 7-A	Liberalised in establishment chapter, reservations: Annex VII and Appendix I to Annex IX	EU: liberalised in establishment chapter, reservations: Annexes X and XII Central America: listed in Annex XIII
Key personnel & graduate trainees: personal scope	Art. 81.1; max. 3 years for intra-corporate, max. 90 days/year for business visitors, max. 1 year for graduate trainees	Art. 7.18; max. 3 years for intra-corporate, max. 90 days/year for business visitors, max. 1 year for graduate trainees	Art. 124.1; max. 3 years for intra-corporate, max. 90 days/year for business visitors, max. 1 year for graduate trainees	Art. 174.1-2; EU: max. 3 years for intra-corporate, max. 90 days/year for business visitors, max. 1 year for graduate trainees; Central America: max. 1 year for key personnel & graduate trainees (renewable), max. 90 days/year for business visitors

¹⁵⁹ Both RTAs contain a separate chapter on these Mode 4 commitments.

Key personnel & graduate trainees: prohibited measures, see text	Art. 81.2; some market access measures	Art. 7.18.2; some market access measures	Art. 124.2; some market access measures	Art. 174.1-2; some market access measures
Business services sellers: sectoral scope	Liberalised in establishment or cross-border services supply chapters, reservations: Annex IV	Liberalised in establishment or cross-border services supply sections, reservations: Annex 7-A	Liberalised in establishment or cross-border services supply chapters, reservations: Annexes VII and VIII	EU: liberalised in establishment or cross-border services supply chapters, reservations: Annexes X and XI Central America: listed in Annex XIV
Business services sellers: personal scope	Art. 82; max. 90 days/year	Art. 7.19; max. 90 days/year	Art. 125; max. 90 days/year	Art. 175; max. 90 days/year
Contractual services suppliers and independent professionals	Art. 83; reaffirmation of GATS commitments + sectoral commitments (see text)	Art. 7.20; reaffirmation of GATS commitments	Art. 126; reaffirmation of GATS commitments + sectoral commitments (see text)	Art. 176; reaffirmation of GATS commitments
Contractual services suppliers and independent professionals: personal scope	Art. 83.2(e), Art.83.3(d); max. 6 months/year or duration of contract (shortest)		Art. 126.4(e), 127.4(d); max. 6 months/year or duration of contract (shortest)	
Short term visitors for business purposes	Art. 84.1; “shall endeavour to facilitate” + limited to listed activities + conditions		Art. 128.1; “shall endeavour to facilitate” + limited to listed activities + conditions	
Short term visitors for business purposes: personal scope	Art. 84.2; max. 90 days/year for business visitors		Art. 128.2; max. 90 days/year for business visitors	

Table 16: Structure of EU-CARIFORUM, EU-Korea, EU-Colombia and Peru and EU-Central America temporary presence provisions

Additionally, all four agreements include a chapter on the supply of services through temporary presence of natural persons for business purpose, which refers to Mode 4 supply of services in GATS.¹⁶⁰ This politically sensitive mode of supply is limited through strict conditions and extensive definitions. First, it is reiterated that the agreements do not cover natural persons seeking access to the employment market in the other party. second, there are definitions of the allowable types of temporary presence covered by the provisions, of the sectors in which such presence can occur, and third, time restrictions to which the natural persons must adhere. Articles 81.2 EU-CARIFORUM, 7.18.2 EU-Korea, 124.2 EU-Colombia and Peru and 174.1-2 EU-Central America on the temporary presence of key personnel and graduate trainees prohibit maintaining or adopting measures that either limit the total number of natural persons that may be employed as key personnel or graduate trainees in a specific sector, either in the form of numerical quotas, or through an economic needs test, or through discriminatory limitations. Such type of measure is like the type described in Article XVI(d) GATS, but goes further. Where the GATS provision requires the personnel to be necessary for, and directly related to, the supply of a specific service, the provisions in these RTAs do not pose such restrictions.

The temporary presence of contractual services suppliers and independent professionals is regulated beyond GATS commitments in Article 83 EU-CARIFORUM and Article 126 EU-Colombia and Peru. Paragraph 2 of Article 83 EU-CARIFORUM sets out the sectoral scope of obligations regarding contractual services suppliers. Paragraph 3 does the same for independent professionals. In the EU-Colombia and Peru RTA, Articles 126 and 127 respectively regulate these matters. In relation to the signatory CARIFORUM states, there are no sectoral limitations outside the scheduled reservations. The EU, on the other hand, has listed the sectors and sub-sectors to which the obligations apply through a positive list of twenty-nine sectors for contractual services supply and eleven for independent professionals. With regard to the EU RTA with Colombia and Peru, Article 126.2 on contractual service suppliers only applies to the EU and Colombia, and not to Peru. Paragraph 3 applies to Peru and not Colombia. There are twenty-one sectors for contractual services supply listed between the EU and Colombia, and fourteen between the EU and Peru. Article 127 has a similar structure. Paragraph 2, which relates to the EU and Colombia, contains ten sectors. Paragraph 3, on EU-Peru relations, lists eight. In the EU-CARIFORUM RTA, both paragraphs *in fine* consist of a list of conditions attached to the commitments. A similar list is taken up in paragraph 4 of Articles 126 and 127 EU-Colombia and Peru. These requirements are similar in both agreements, and include having obtained a service contract for maximum one year to which the supply of services is substantively limited; having one year seniority and three years professional experience, or six years professional experience in the relevant sector; a university degree and professional qualifications where necessary; and specific reservations scheduled in respectively Annex IV and Appendix 2 of Annex IX.

Furthermore, the EU-CARIFORUM EPA and EU-Colombia and Peru RTA contain a provision on temporary presence for short term visitors for business purposes. The

¹⁶⁰ Sauvé and Ward, *The EC-CARIFORUM Economic Partnership Agreement: Assessing the Outcome on Services and Investment* 7.

language of that provision, respectively Article 84 and Article 128, is clearly less strict than the other provisions on Mode 4. It requires that the parties shall endeavour to facilitate, in conformity with national legislation, such temporary presence. The articles only apply to listed activities. Furthermore, they add that natural persons entering into the territory of a party on the basis of this provision are not engaged in selling their services to the general public or in supplying their services themselves; do not receive on their own half any remuneration from a source within the territory where they are temporary present; and are not supplying services to a consumer through a contract with a juridical person which has no commercial presence in the territory where the service supplier is temporarily present.

In addition to these trade agreements, the EU is also conducting negotiations with **Canada** on a Comprehensive Economic and Trade Agreement, which should be the most ambitious talks since Canada's signing of the North American Free Trade Agreement ('NAFTA').¹⁶¹ It is noted that both parties might have agreed on a negative list approach as concerns services liberalisation commitments,¹⁶² which could signal that the ambitions are indeed high as the EU has not even adopted such an approach in the EU-Korea RTA. Still, the services provisions could prove to be very similar to those in that agreement.¹⁶³ According to EU Trade Commissioner Karel de Gucht, there is "the momentum needed to spur on the negotiations into the home strait."¹⁶⁴

Negotiations with **India** on an RTA have been going on since 2006, and the goal of concluding talks in early 2012 was not met. Although deemed a priority in the EU's already cited Global Europe Strategy, and despite fundamentally complementary interests between both parties in output, capital stock, human resources and trade in goods and services,¹⁶⁵ there still appear to be some contentious issues to be resolved before conclusion is possible.¹⁶⁶ According to the European Commission's latest negotiations update, an intense work plan is currently being followed and "both sides are aiming to find solutions which are mutually acceptable, so as to achieve an ambitious outcome".¹⁶⁷

In the Americas, aside from the EU-Central America RTA, an interregional agreement has been sought with **Mercosur**,¹⁶⁸ which is comprised of Argentina, Brazil, Paraguay, Uruguay and Venezuela. Negotiations on an RTA between Mercosur and the EU, its largest trading partner, were started up in 1999 but

¹⁶¹ Daniel Schwanen, *Go Big or Go Home: Priorities for the Canada-EU Economic And Trade Agreement* (CD Howe Institute Backgrounder on International Economic Policy, N°143, 2011) 1.

¹⁶² Ibid.

¹⁶³ Daniel Drache and Stuart Trew, 'The Politics and Pitfalls of the Canada – EU Comprehensive Economic and Trade Agreement' in Kurt Hübner (ed), *Europe, Canada and the Comprehensive Economic and Trade Agreement* (Routledge 2011) 79.

¹⁶⁴ European Commission, 'EU and Canada Move Towards Conclusion of Trade Negotiations' (2012) <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=844>> accessed 23 November 2012.

¹⁶⁵ High Level Trade Group, *Report of the EU-India High Level Trade Group to The EU-India Summit* (2006) 3

¹⁶⁶ See, on these matters, Rafael Leal-Arcas, 'The European Union vis-à-vis Brazil and India: Future Avenues in Selected Trade Policy Areas' (2009) 2 *International Journal of Private Law* 109, 121.

¹⁶⁷ European Commission, *Overview of FTA and Other Trade Negotiations* 1.

¹⁶⁸ See, on the parallels between RTA negotiations with Mercosur and Chile, García.

suspended in 2004.¹⁶⁹ Despite that blockage, the European Commission named Mercosur as a top priority in its external trade policy, because Mercosur combines large market potential with high levels of protection against EU export interests.¹⁷⁰ Still, the EU's agricultural policy and a very asymmetric power balance within Mercosur, where Brazil is very dominant in terms of economic power, have put halt to progress.¹⁷¹ In 2010, negotiations were officially re-launched, with the objective to negotiate a comprehensive RTA.¹⁷² The negotiations have proved very difficult, but current economic and political events in Europe and the threat of a Mercosur-China RTA may spark sufficient political will to conclude the agreement.¹⁷³ It is clear that a political window of opportunity, created by societal factors such as shifting political economy incentives, is necessary to move forward.¹⁷⁴

Furthermore, there have been negotiations with the **Gulf Cooperation Council** ('GCC').¹⁷⁵ Negotiations have been on-going since 1990. Talks are currently suspended, but the European Commission claims that they are very advanced on all elements.¹⁷⁶ Remaining issues might include the GCC's hesitance to open up its domestic services and investments market and the addition of social, environmental and human rights clauses.¹⁷⁷

Lastly, and although originally deemed a priority in the EU's external trade policy,¹⁷⁸ negotiations with the **Association of Southeast Asian Nations** ('ASEAN')¹⁷⁹ have collapsed after five years of talks. This was possibly caused by the openness of ASEAN trade policy, which could have reduced the EU's economic policy interest, although liberalisation of services would have increased possible benefits for the EU substantively.¹⁸⁰ More importantly and convincingly, the relative openness of ASEAN economies would require the EU to open its markets, too, in order to find a compromise.¹⁸¹ Lastly, the impact of an EU-ASEAN RTA on EU relations with Korea and China could have influenced the stalemate.¹⁸² Talks have now been refocused on bilateral relations, and negotiations have been initialled and are on-going with Thailand, Malaysia, Vietnam and the recently concluded negotiations with Singapore. An interregional agreement between the EU and ASEAN does not seem likely at this point.

¹⁶⁹ European Commission, 'Mercosur' (2010) <<http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/regions/mercotur/>> accessed 5 November 2012.

¹⁷⁰ European Commission, *COM(2006) 567 final, Global Europe: Competing in the World* 11.

¹⁷¹ Leal-Arcas, 'The European Union vis-à-vis Brazil and India: Future Avenues in Selected Trade Policy Areas' 120.

¹⁷² European Commission, *Overview of FTA and Other Trade Negotiations* 5.

¹⁷³ See for this argument and an overview of both parties' incentives in this RTA: Jamie Hancock, 'The Future of the Mercosur-EU Free Trade Agreement' (2012) 5 *Journal of Political Inquiry*.

¹⁷⁴ Mahrukh Doctor, 'Why Bother With Inter-Regionalism? Negotiations for a European Union-Mercosur Agreement' (2007) 45 *Journal of Common Market Studies* 281, 307.

¹⁷⁵ The members of the Gulf Cooperation Council are Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates.

¹⁷⁶ European Commission, *Overview of FTA and Other Trade Negotiations* 10.

¹⁷⁷ Jim Rollo, *Prospects for an EU-Gulf Cooperation Council Free Trade Area: The World's First Region-to-Region FTA?* (Chatham House Briefing Paper, 2008) 5.

¹⁷⁸ European Commission, *COM(2006) 567 final, Global Europe: Competing in the World* 11.

¹⁷⁹ ASEAN consists of Brunei Darussalam, Burma, Cambodia, Indonesia, Laos, Malaysia, Philippines, Singapore, Thailand and Vietnam.

¹⁸⁰ Willem van der Geest, 'Sharing Benefits of Globalisation through an EU-ASEAN FTA?' (2004) 2 *Asia Europe Journal* 201, 205.

¹⁸¹ Ibid.

¹⁸² Ibid.

In early 2013, it was announced that the EU would take up negotiations with two of its largest trading partners, the **United States** and **Japan**.

CONCLUDING REMARKS

This contribution sought to map out the services provisions in the EU's RTAs by dividing the trade agreements in four categories: RTAs with (potential) future EU Member States, RTAs with European neighbours, RTAs with a development focus and RTAs aiming at global market access. Additionally, RTAs under negotiation and some key issues with respect to these were addressed. This approach has allowed to taking into account of geostrategic and geopolitical aspects, in addition to differences which are as a result of changing times, in which RTAs cover ever more subjects while providing ever deeper integration. This mapping exercise showed that the most extensive services liberalisation is found in the more recent RTAs which aim at providing market access for European services and services providers. Although many provisions are copied from agreement to agreement, each trade agreement is unique. It is the result of negotiations between two or more parties, and thus, to some extent, takes into account the particularities of the signatories. Through side by side comparison, this contribution showcases the most important services provisions of each agreement in a way that allows a firm grasp of similarities and differences. Still, in order to fully grasp the extent of liberalisation in the case of national treatment, market access and MFN obligations, the schedules of specific commitments and reservations must of course be consulted. But the comparative tables and the accompanying text in this contribution should prove to be a good starting point for further examination of the obligations to which the EU and its partners have committed themselves.

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