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Services negotiations under the Tripartite Agreement: Issues to consider

by Paul Kruger

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Introduction

It is envisaged that the proposed Tripartite Free Trade Area (FTA) will not only cover trade in goods, but also trade in services. One of the general objectives stated in Article 3 of the draft Tripartite Agreement is the creation of a large single market which would include the free movement of services. It is, however, expected that the services negotiations at the tripartite level will begin only once the regional processes to liberalise trade in services have been completed, and most likely after the issues relating to trade in goods have been addressed. Due to the varying pace of progress made by member states of the Southern African Development Community (SADC), the Common Market for Eastern and Southern Africa (COMESA) and the East African Community (EAC), it is difficult to provide a comprehensive analysis on the state of services liberalisation in the tripartite region. For that reason the paper starts with an analysis of the services liberalisation commitments made by the tripartite member states at the multilateral level since it is the only experience some of these countries have had with regard to services negotiations. This analysis also attempts to set a benchmark for the calculation of 'substantial sectoral coverage' which all services agreements will have to comply with.

The paper takes note of the progress, or rather lack of progress, in the SADC and COMESA configurations and provides a more in-depth analysis on the services liberalisation commitments made by the EAC member states. The EAC is the only configuration to have drafted its services schedules, so no comparison can be drawn between outcomes of the regional services negotiations. The paper therefore compares the process and liberalisation commitments of the EAC with that of the Mercosur member states to put the progress of the African countries into context. The more lessons regional member states learn from their individual services liberalisation processes, the better they can design and implement a larger tripartite strategy.

An important aspect that this new situation of supra-regional services negotiations will demand is the need for continuity; the need for the converged tripartite market to build what has already been achieved in the markets of COMESA, EAC and SADC. The paper examines the services provisions in the draft Tripartite Agreement and looks at the services negotiating guidelines that were originally published in November 2009. Although the guidelines were not revised together with the other 13 annexes in December 2010, it is still necessary to analyse the original Annex 12 as this is the only document shedding some light

on the liberalisation process the tripartite member states are likely to follow. The paper attempts to compare the proposed process under the Tripartite Agreement with the ongoing processes at the regional level and highlights some of the challenges member states may encounter. The regional negotiations are taken as the starting point for thinking around the larger tripartite integration, and on this basis the paper provides challenging suggestions on the way forward. It presents innovative ideas on the sequencing of the negotiations, the manner and degree of liberalisation, the responsibility of the more developed member states, deeper integration in a services market and the administration of regulatory information. The paper concludes by making brief recommendations on how member states can prepare for services negotiations at the tripartite level.

The multilateral framework

The General Agreement on Trade in Services (GATS) forms an important part of a comprehensive analysis on services liberalisation of countries in SADC, COMESA and the EAC. The process of negotiating and implementing services liberalisation commitments at the multilateral forum is the only experience some of these countries have had with regard to services negotiations. Negotiating services at the bilateral level with the European Union (EU), in the context of the Economic Partnership Agreement (EPA), negotiations are in a state of uncertainty at the moment while the regional processes of SADC, COMESA and the EAC are at different stages of development. Nevertheless, 20 of the 26 tripartite member states participated in the GATS negotiations and acquired some experience in dealing with services negotiations and the drafting of scheduled commitments.[1] An important part of GATS is the framework it provides in terms of which countries can make certain liberalisation commitments in specific services sectors and modes of supply. These specific commitments are legal obligations undertaken by the individual member states concerning the level of market access permitted to foreign services suppliers and the conditions under which they are allowed to operate domestically. These undertakings are recorded in the national schedules of each member state on a sector-by-sector basis and only bind the countries to the extent that they have committed themselves. These schedules from an integral part of the services liberalisation strategy of a country and a similar process

[1]Countries that are not WTO members have not had any experience in negotiating services and negotiations at the regional levels will be their first.

of scheduling will be followed at the regional or bilateral level. The schedules basically determine how far a country is prepared to liberalise its services industries.

There was no requirement on World Trade Organisation (WTO) members to schedule a minimum number of commitments during the GATS negotiations, but this will inevitably change during regional or bilateral negotiations. GATS provides its own set of criteria for integration between member states; therefore at the regional or bilateral level there will be an obligation on countries to liberalise to a certain threshold, that of 'substantial sectoral coverage'. The specific threshold has not yet been clearly been defined and is another reason for the analysis of the GATS schedules – governments must understand how to negotiate services schedules to comply with the international rules set out in the relevant GATS provisions.

Table 1: Liberalisation under GATS

Countries[2]	Sectors committed (out of 12)[3]	Subsectors committed (out of 160)[4]	Commit-ments negotiated (out of 1280)[5]	Partial commit-ments made[6]	Full commit-ments without restrictions[7]	Percentage liberalised commit-ments[8]
Angola	3	9	72	13	52	**5.08%**
Botswana	3	20	160	74	54	**10.00%**
Burundi	5	28	224	62	162	**17.5%**
DRC	6	12	96	24	72	**7.50%**
Djibouti	3	30	240	53	63	**9.06%**
Egypt	4	29	232	28	99	**9.92%**
Kenya	5	59	472	195	203	**31.09%**
Lesotho	10	78	624	165	326	**38.36%**
Madagascar	1	4	32	4	12	**1.25%**
Malawi	5	29	232	58	174	**18.13%**
Mauritius	3	28	224	113	110	**17.42%**
Mozambique	1	13	104	26	78	**8.13%**
Namibia	2	3	24	0	24	**1.88%**
Rwanda	4	10	80	4	76	**6.25%**
South Africa	9	92	736	239	345	**45.63%**
Swaziland	3	9	72	0	56	**4.38%**
Tanzania	1	1	8	2	4	**0.47%**
Uganda	2	11	88	42	46	**6.88%**
Zambia	4	16	128	32	96	**10.00%**
Zimbabwe	3	19	152	51	101	**11.88%**
AVERAGE	**3.85**	**25**	**200**	**59.25**	**107.65**	**13.04%**

Source: www.wto.org

This analysis is based on GATS Article V, specifically the requirement of 'substantial sectoral coverage' which refers to the number of sectors included and the modes of supply and volume of trade affected. In trade negotiations, parties are expected to negotiate in good faith by complying with the relevant WTO rules; for services negotiations this implies that

[2] Comoros, Ethiopia, Eritrea, Libya, Seychelles and Sudan are not WTO members and therefore have no specific commitments under GATS. Five of these countries – Comoros, Ethiopia, Libya, Seychelles and Sudan – are observer governments which are in various stages of the WTO accession process.
[3] The number of core sectors included in the GATS schedule of each country as defined in MTN.GNS/W/120.
[4] The number of subsectors included in the GATS schedule of each country as defined in MTN.GNS/W/120.
[5] The total number of commitments that can be negotiated in services negotiations, in both the market access and national treatment columns and with respect to all four modes of supply.
[6] The number of commitments with limitations. Measures inconsistent with market access and national treatment obligations can be maintained if so inscribed in the schedule. Mode 4 commitments expressed as 'unbound except as indicated in the horizontal section' are included in the calculation of partial commitments, but only if specific exclusions are made the horizontal commitments.
[7] Full commitments made without any restrictions, indicated by an inscription of 'none'.
[8] Percentage of full and partial commitments are expressed as a percentage of the total number of possible inscriptions (1280). Partial commitments are included since these will form the baseline for progressive liberalisation.

countries must observe the disciplines of GATS Article V. A detailed analysis such as this, breaking down the schedules of commitments for sector, while having regard for the modes of supply in each subsector, can help to promote the understanding and observance of these disciplines. Currently there is no agreed definition of what constitutes 'substantially all trade' in the area of services, and no acceptable way of determining that threshold, but effective communication between negotiating parties on what exactly constitutes 'substantially all trade' can alleviate some uncertainty. For example, in the Cariforum[9] EPA negotiations initial market access targets were proposed to guide the drafting of the services schedules. The more developed economies in Cariforum were expected to liberalise 75% while the lesser developed economies were expected to liberalise 65% of their subsectors.[10] Despite the thresholds that have been proposed in the Cariforum EPA, it can nevertheless be argued that simply considering the number of committed subsectors is not sufficient to determine the depth and degree of liberalisation. GATS Article V also refers to the mode supply, something which is not taken into account in the EU calculation. It the EU approach (that of counting subsector lines) is followed, it is possible that parties can be confronted with the situation as illustrated in the extract below:[11]

G. Pipeline transport	**Limitations on market access**	**Limitations on national treatment**
(a) Transportation of fuels (CPC 7131) (b) Transportation of other goods (CPC 7139)	1) Unbound 2) None 3) Unbound 4) Unbound	1) Unbound 2) None 3) Unbound 4) Unbound

In all of the newly committed sectors, Mode 1, 2 and 4 were left unbound with only Mode 2 being liberalised. Mode 2 deals exclusively with 'consumption abroad' and essentially the service is delivered outside the territory of the party making the commitment. Also, in this mode of supply, parties may only impose restrictive measures affecting its own consumers

[9] Refers to the Caribbean Forum of African, Caribbean and Pacific States consisting of 14 member states of the Caricom (Caribbean Community) plus the Dominican Republic.
[10] If considering and counting the number of subsectors committed in the Cariforum negotiations, it can be argued that the suggested thresholds were not achieved.
[11] This is an actual extract from the conditional initial offer which South Africa submitted in March 2006.

and not those of other countries on the activities taking place outside of its jurisdiction. Therefore the effects that Mode 2 commitments will have on foreign suppliers' access are negligible. In this scenario the transportation of fuels (CPC 7131) and the transportation of other goods (CPC 7139) will count towards the threshold (if using the EU calculation) despite the quality of the commitment. For that reason it is crucial that the depth of the scheduled commitment to which the modes of supply contribute is also considered. So, basically, to comply with GATS Aricle. V, a predominately large part of a country's services industry must be scheduled across all modes of supply. Consider, for example, the percentage of commitments made by South Africa, which has the highest number of commitments in the region. According to the method of including the number of sectors *and* modes of supply, South Africa only committed 45.63% of its services industry. Achieving a threshold of between 65% - 75% will not be an easy task, even for a country such as South Africa which has sufficient capacity to deal with the negotiating of trade in services and the effects of the liberalisation.

On average, the COMESA-EAC-SADC countries have scheduled only 13.04% of their services industries – a far cry from the expected threshold. Despite these low levels of liberalisation, it seems as if the process in the Tripartite aims even higher than the EU proposal. Already in the proposed services negotiations under the Tripartite Agreement certain thresholds been mentioned. The original Annex 12 (November 2009 version)[12] to the Tripartite Agreement refers to mandatory commitments that 'shall' be undertaken in the priority sectors of Business, Communication, Transport, Financial, Tourism, Energy and Construction Services. The threshold for these priority sectors referred to in the Annex is 'a credible level and amount of liberalisation',[13] but the text also makes provision for the possibility of no limitations or restrictions in the priority sectors, with some minimal time-bound exceptions.[14] The idea of limiting restrictions is more in line with the negative list approach, something which will discussed at length in the paper.[15]

The main document is the draft Agreement establishing the COMESA, EAC and SADC Tripartite Free Trade Area, together with its 14 annexes covering a number of areas that are deemed important for the effective operation of the regional market. Annex 12 of the

[12] The annex has not been revised together with the main text and the other annexes. See discussion in the paragraph directly below.
[13] Art. 17 of Annex 12 (original text).
[14] Art 18 of Annex 12 (original text).
[15] See the section on Services under the Tripartite Agreement below

draft Tripartite Agreement (November 2009 version) exclusively dealt with trade in services and set out the guidelines countries can use during the first round of services negotiations. However, after the revision of the draft agreement and its annexes in December 2010, this Annex 12 providing guidelines on services negotiations was left out. This approach proposed in the Tripartite Agreement annex, together with the suggested depth of liberalisation, can be put forward as reasons why Annex 12 has not been revised. Instead Annex 12 – which has the objective to guide member states in the tripartite services negotiations – were omitted after the main agreement and remaining annexes had been revised in December 2010. Another reason that can be offered is the fact that the process of services negotiations in the region is still somewhat unclear. COMESA has not started the first round of services negotiations while the relevant SADC Protocol on Trade in Services is still in the process of being approved. It is only the EAC member states that have made marked progress in regional services negotiations. This uncertainty around the progress of regional negotiations and the sentiment of member states regarding services liberalisation may have caused the Tripartite Council to postpone publishing the guidelines until such a time when there is more clarity on the regional processes. The Tripartite text nevertheless gives the Tripartite Council the mandate to adopt guidelines on each successive round of services negotiations.[16] In any event, the guidelines were at best rudimentary focusing on how to schedule commitments and conduct negotiations rather than 0n considering the more important issues. These are basic issues that countries will have to be familiar with when it comes to the eventual negotiation of the services under the Tripartite Agreement. The guidelines will have to be reworked based on the outcomes and progress of the regional negotiations in the EAC, COMESA and SADC,. It can also be assumed that services negotiations will only proceed once other issues relating to the goods agenda have been addressed.

Provision is also made in the original Annex 12 for the six tripartite countries that are not WTO members. According to the text, 'Member States shall extend their commitments under the General Agreement on Trade in Services to all other Member States that are not Members of the World Trade Organisation'. This is not only an expression of how non-WTO members are to be treated but also a clear indication that commitments made under GATS will be used as the baseline for further services negotiations. It can be seen from the

[16] Art. 30(5) of the Tripartite Agreement.

table above that countries made varying commitments ranging from fairly liberal to very limited.[17] In terms of GATS, there was no requirement on WTO member states to schedule a minimum number of commitments;[18] however, they are obliged to enter into successive rounds of negotiation to liberalise trade in services.[19] For example, a country like Tanzania only made commitments in one subsector (out of a possible 160 subsectors) while South Africa at the other end of the spectrum made commitments in 92 subsectors. Another reason why the multilateral dimension is important is the fact that the process under GATS is the only experience many tripartite member states have had with regard to the liberalisation of trade in services. This is likely to change as countries in SADC and COMESA also take on additional regional commitments, but only time will tell how these processes will unfold. If regional services' liberalisation is concluded in all three configurations (COMESA, EAC and SADC) before services negotiations under the Tripartite Agreement start, then it may be possible to take the outcomes of these regional processes as baseline for tripartite negotiations. However, such modalities including the interpretation of 'substantially all trade' are issues that will have to be clearly and unambiguously defined at the onset of the negotiations.

Ongoing negotiations at the multilateral level

Least developed countries (LDCs) are formally exempt from participating in the ongoing GATS negotiations, due to their special status. The WTO Ministerial Decision adopted on 18 December 2005[20] recognised the particular economic situation of LDCs and the difficulties they face, thereby acknowledging that these countries were not expected to undertake new commitments in the context of the progressive liberalisation under GATS. All other WTO member states, however, were urged to participate actively in the negotiations in order to achieve higher levels of liberalisation of trade in services. Few

[17] Roy (2009) suggests that four key determinants (democracy, relative power, relative endowments and the negotiating process) explain why governments undertook varying commitments. One can add to this argument that many of the African member states liberalised offensive sectors, particularly tourism, with the hope of attracting more foreign investment.

[18] This was the case in the Uruguay Round regardless of whether a member state was a developed, developing or least developed country. It was long after the Uruguay round, only in 2003, that the WTO Council for Trade in Services adopted the 'Modalities for the special treatment for least developed country members in the negotiation on trade in services (TN/S/13)'. Flexibility is provided for LDCs by requiring them to liberalise fewer sectors and fewer types of transactions, and by progressively extending market access in line with their development situation.

[19] See GATS Art. XIX: 1.

[20] See WT/MIN(05)/DEC.

tripartite member states participated, however, with only Egypt, Kenya, Mauritius and South Africa tabling initial offers in the context of the ongoing GATS negotiations. Participation in general has been poor with only 71 initial offers and 31 revised offers having been submitted in these ongoing rounds of services negotiations. It is unlikely that the countries participating in the ongoing negotiations will undertake bold commitments; instead countries can be expected to publish and commit reforms already undertaken at the domestic level. It can be assumed that countries will rather leave the more ambitious and far-reaching commitments for the regional or bilateral levels. Firstly, it is expected of countries involved in regional or bilateral negotiations to comply with the requirements of GATS Article V and therefore will have to negotiate 'substantial' liberalisation commitments in line with certain thresholds; and secondly, all countries have to participate in these negotiations, something which increases the negotiating leverage.

Countries are aware that the approach taken at the multilateral level will have a regional and bilateral impact because commitments made under GATS are for the benefit of all WTO members. The areas liberalised at the multilateral level will not be the subject of regional negotiations since these already apply to all negotiating parties that are WTO members. Tripartite member states that are not WTO members will not automatically receive market access and national treatment benefits undertaken at the WTO; however, tripartite member states are obliged to extend their commitments made under GATS to all other member states that are not WTO members. Therefore, the further the degree of liberalisation at the multilateral level, the less leverage or negotiating power a party might have in regional and bilateral negotiations. This fact has been recognised by some countries and is arguably a reason for the cautious approach taken in the ongoing multilateral negotiations.

Progress at the SADC level

The importance of developing trade in services is recognizsd in Article 23 of the SADC Protocol on Trade, where member states are urged to adopt policies and implement measures in accordance with their GATS obligations in order to liberalise trade in services. Discussions to address trade in services in line with Article 23 of the SADC trade Protocol commenced in September 1999 when the SADC Committee of Trade and Industry decided that priority should be given to elaborate a regional strategy to liberalise trade in services. A SADC Trade Negotiations Forum meeting to implement the mandate was held shortly afterwards in June 2000 in Lesotho where the Maseru action plan was adopted. Six core

services sectors were identified which would be the subject of the initial SADC focus. The priority services sectors are transport, communications, finance, construction, tourism and energy. Incidentally, these are also the priority sectors identified by the Tripartite Agreement, together with the sector of business (including professional) services. These are considered as the key services sectors to support general economic development in SADC, while the first three (transport, communications and finance) are also regarded as essential to facilitate the physical trading of goods. According to the draft Protocol on Trade in Services, the SADC Trade Negotiating Forum for Services will adopt negotiating guidelines for each consecutive round of services negotiations. The guidelines for the first round provide that the starting point for negotiations shall be the existing GATS commitments in these sectors and horizontal sections of each of the member states.

Although the process was initiated more than 10 years ago, there is still no signed protocol on trade in services. According to the preamble of the draft Protocol on Trade in Services, the contracting parties seek to achieve coherence in the region's intraregional, interregional and multilateral commitments and negotiations on trade in services. The objective is to follow an incremental liberalisation process to eliminate substantially all discriminatory measures in order to enhance competitiveness and to ensure consistency between the implementation of this and various other SADC protocols on specific services sectors. The development of a coherent regional approach to services trade liberalisation carries significant potential payoffs. A regional vision can help achieve greater transparency through the development of rules that require mutual openness from all the parties. A regional approach can also increase the credibility of domestic policy choices through the adoption of legally binding commitments, and the creation of efficient regulation through rules that favour the adoption of international best practices.

The Draft Protocol is being circulated amongst member states for approval after cosmetic changes were made to the Most Favoured Nation (MFN) clause. The purpose of the MFN clause is to ensure that a member state's service providers are never disadvantaged in relation to those of a non-member if another member decides to negotiate a better regime for services trade with a third party. Nothing prevents a member state from entering into new preferential agreements with third parties provided such agreements do not impede or frustrate the objectives of the regional protocol. The protocol does not, however, prescribe measures to prevent a member from negotiating preferential agreements with third parties.

The protocol only obliges a member to inform other member states of its intention to negotiate such an agreement and to afford them an opportunity to negotiate the preferences granted therein on a reciprocal basis. If, however, some member states conclude a preferential agreement in, for example, the SADC-EPA context prior to the adoption of this protocol those member states must afford reasonable opportunity to the other member states to negotiate the preferences granted therein on a reciprocal basis. Despite this obligation, member states may maintain measures which are inconsistent with the MFN obligation provided those measures are listed in the MFN exemption list. The agreed list of MFN exemptions that must be annexed to the protocol must be reviewed by the Trade Negotiating Forum for Services on a regular basis with a view to ultimately eliminate them.

Even after the protocol is signed, major work still lies ahead for the member states. Negotiating a services protocol has additional complexities that have to be dealt with, the most important one being the schedule or list of commitments. After all, preferences are not granted through tariff concessions, but through discriminatory restrictions on the movement of labour and capital and a variety of domestic regulations such as technical standards, licensing requirements and procedures as well as professional qualification requirements. Judging from the length of time it took other configurations to complete the whole process, a long road lies ahead.[21] However, it is necessary for the members to find ways of fast-tracking this process, particularly if the supra-regional negotiations at the tripartite level lies ahead.

Progress at the COMESA level

The theoretical premise of a common market is to ensure the free movement of goods, services, capital and labour. The COMESA Treaty (Art. 6(e)) states as one of its objectives the removal of 'obstacles to the free movement of persons, labour and services, right of establishment for investors and right of residence within the Common Market'. More specifically, COMESA member states agree to adopt the necessary measures to progressively achieve the free movement of persons, labour and services as well as the right

[21] For example, the ASEAN and Mercosur configurations, both consisting of mainly developing countries took many years to negotiate trade in services. In the ASEAN configuration, the ASEAN Framework Agreement on Trade in Services was signed in 1995. Five negotiating rounds have been held since with subsequent rounds planned until the end of 2015. For more information on the Mercosur process, see the section on Comparing the services obligations of the regional agreements below.

of establishment and residence of COMESA citizens (Art. 164). In the area of trade in services (Part IV of the Protocol on the Freed Movement of Persons, Labour, Services, Right of Establishment and Residence), states agree to remove restrictions on services trade in accordance with a programme to be adopted by the council. (Ibid: Art. 10(1)). The target date was set for 2004 but it was only in 2009 that the programme actually started gaining momentum. On that basis a set of trade in services regulations was prepared by legal and trade experts and adopted by the COMESA Council in June 2009. The COMESA Regulations on Trade in Services provide a framework for the liberalisation of trade in services and a set of rules to guide the process of domestic reform. According to Article 12(1) of the COMESA Treaty, regulations must be published in the official COMESA Gazette and will enter into force on the date of publication unless otherwise specified. The regulations were published in June 2009 and adopted by the council.

A Committee on Trade in Services was also established under the regulations in order to oversee the liberalisation and negotiating process. The first meeting of this committee was held in September 2009 where the rules of procedures[22] and a set of guidelines on the negotiating of services and the preparation of the related services schedules were adopted. A roadmap was also adopted in terms of which member states would submit their offers and requests by February 2010 and start negotiations on the initial offers and requests in May 2010. This included an indicative list of priority sectors which would be confirmed once member states completed their internal consultation processes. Based on the submission of the member states, four priority sectors (communications, finance, transport, and tourism services) were eventually identified to be the focus of the first round of negotiations. Despite this initial focus, nothing would prevent member states from liberalising and taking commitments in additional sectors. Although, as mentioned, this could possibly impact on the negotiating leverage of the countries further in the negotiations. Similarly to the original Annex 12 ({November 2009 version) on the guidelines of the tripartite services negotiations, the negotiating guidelines adopted by COMESA provides that the priority sector shall to the extent possible not have any limitations. Apparently this is to ensure deeper and broader liberalisation than undertaken at the multilateral level and additionally

[22] The rules provides for the composition of the committee, the conduct of meetings and other incidental matters.

to comply with the 'substantial sectoral coverage' requirement of GATS Artcle V. in order to attain a credible amount of liberalisation.[23]

At the second meeting of the Committee on Trade in Services held in May 2010 the negotiating of the services schedules was postponed to November 2010 since not all participating member states had submitted their initial offers and requests. No meeting was held in November 2010 and it is expected that negotiations will commence at the third meeting of the Committee on Trade in Services.

Progress at the EAC level

Of the three configurations, the EAC is furthest ahead in terms of progress and is the only one to have drafted a comprehensive schedule of services commitments. It is simpler to negotiate services chapters if fewer countries are involved, a challenge which might constrain the negotiations at the tripartite level. The larger the configuration the better the coordination and political persuasion must be to successfully conduct services negotiations. One unwilling or slack government has the potential to obstruct the process and delay the entire negotiations. This we have seen from the COMESA process where countries are taking more than a year to identify priority sectors, something which should be a simple task considering the complexity of what is to follow. Also the SADC process has slowed due to the demand of a country to change one word in the text, which meant that the amended text had to be resubmitted to the member states for approval. The complication that may arise from the large number of countries involved in the negotiations is an eventuality that must be taken in account.

In accordance with Artcles 76 and 104 of the EAC Treaty, the EAC Common Market Protocol was concluded to give effect to the establishment of a common market which would have as its objectives the free movement of labour, goods, services, capital and the right of establishment. This protocol was ratified by member states at the end of April 2010, and amongst other things makes provision for the progressive implementation of the free movement of services. Member states agreed that this had be phased in gradually in line with the Schedule on Progressive Liberalisation, which would be annexed to the protocol to form an integral part of the agreement. In support of this progressive approach, member states addressed the seven priority sectors of business, communication, distribution,

[23] See Report CS/CM/XXIX/2 of the 29th Meeting of the COMESA Council of Ministers.

educational, finance, tourism and transport services in the first round of the services negotiations. As provided for in Article 23 (2) of the protocol, the idea is to address the remaining sectors in subsequent negotiations. It is the responsibility of the EAC Council to issues directives on the modalities for further rounds of negotiation.

In line with Article 23(1) of the EAC Common Market Protocol, member states have agreed to certain liberalisation commitments in the seven priority sectors of business, communication, distribution, educational, finance, tourism and transport services and attached these to the protocol as Annex V. Based on the positive list approach and the W/120 classification systems utilised in GATS, each of the EAC member states undertook liberalisation commitments, some which are linked to an 'elimination date'. Commitments made by each member state will take effect on the preferred date specified by them, which varies between 2010 and 2015. It can be assumed that measures indicating an elimination date of 2010 would take immediate effect and be already phased in. It is the responsibility of the member states to ensure that their domestic laws and regulations conform to what has been agreed at the regional level. This will be an ongoing process and countries that have indicated future elimination dates must also ensure that the commitments are met and complied with in the domestic sphere.

If the same analysis is used as in Table 1 to determine the progress made at the multilateral level, the picture presented in terms of the GATS commitments changes quite significantly:

Countries	Sectors committed (out of 7)[24]	Subsectors committed (out of 140)[25]	Commit-ments negotiated (out of 1120)[26]	Partial commit-ments made[27]	Full commit-ments without restrictions[28]	Percentage liberalised commit-ments[29]
Burundi	7	89	712	143	514	**58.66%**
Kenya	7	67	536	159	311	**41.96%**
Rwanda	7	105	840	241	585	**73.75%**
Tanzania	7	56	448	130	289	**37.41%**
Uganda	7	102	816	244	558	**71.61%**
AVERAGE	7	83.8	670.4	183.4	451.4	**56.68%**

Rwanda and Uganda which made modest commitments at the multilateral level, actually undertook extensive liberalisation commitments during the regional negotiations. Both countries made deep and sweeping commitments in all of the seven sectors and across all four modes of supply. This is a sign that smaller economies are realising how important a change the contribution services liberalisation can make to their development. In a sense these countries are testing the water to see the effect such substantial liberalisation can have on their economies. It also shows that these countries are willing to take more risks and liberalise further in the regional context when more equal negotiating partners are involved, as opposed to the bilateral or multilateral negotiations with more developed negotiating partners. The more powerful economies of Kenya and Tanzania instead opted for a more cautious approach in offering fewer subsectors (67 and 56 subsectors respectively) for liberalisation. This will likely give them more policy space and options in later negotiations, including the tripartite negotiations. It can be argued that the outcome of

[24] The number of core sectors included in the first round of services negotiations as per the guidelines including business, communication, distribution, educational, finance, tourism and transport services.

[25] The number of subsectors considered by the member states in the seven priority sectors. According to the W/120 classification system used in the GATS negotiations, the total number of subsectors is 140 if only the above seven core sectors are considered.

[26] The total number of commitments that can be negotiated in services negotiations, in both the market access and national treatment columns and with respect to all four modes of supply.

[27] The number of commitments with limitations.

[28] Full commitments made without any restrictions, indicated by an inscription of 'none'.

[29] Percentage of ful and partial commitments are expressed as a percentage of the total number of possible inscriptions (1120).

the regional negotiations of COMESA, the EAC and SADC will play an important part in the tripartite negotiations. An economy with greater offensive interests such as Kenya will be careful to liberalise areas in which it might have a competitive advantage in the greater region. Kenya liberalised 41.96% in the regional negotiations in contrast to the 31.09% liberalised at the multilateral level. It can be assumed that South Africa will take a similar kind of approach in the SADC services negotiations.

Countries such as Rwanda, Uganda and even Burundi have instead liberalised key sectors, arguably with the hope of stimulating investment, activity and competition in these areas. These three countries fully liberalised the telecommunications sector, including the audio-visual sector, which traditionally proved to be a very sensitive area. They also fully liberalised the education sector and large parts of the professional, financial and transport services sectors. Burundi, Rwanda, and Kenya fully liberalised their tourism sectors, but these are similar to what has been committed during the GATS negotiations. Countries cannot retract on these commitments and undertake more protective measures in subsequent regional or bilateral negotiations since the GATS commitments are assumed as the baseline for these negotiations.[30]

Schedules of services commitments typically include a horizontal section where governments address issues of a cross-cutting nature that apply to all schedules sectors, such as the movement of persons. The EAC intentionally omitted the horizontal section and instead decided to deal with these issues elsewhere. In addition to Annex V (schedule of commitments on the liberalisation of services), the protocol also includes annexes on the Movement of Persons (Annex I), the Movement of Workers (Annex II), the Right of Establishment (Annex III), the Right of Residence (Annex IV) and the Movement of Capital (Annex VI). As stated in Article 52 of the protocol, these 'annexes from an integral part of

[30] It is possible for countries to change scheduled commitments already made at the multilateral level by following the procedures set out in GATS Art. XXI. According to the provision, a country wishing to modify or withdraw any commitments in its schedules can do so three years after the commitment entered into force. The country must notify its intention to change the commitment at least three months before implementing the change. This will give any WTO member affected by the change an opportunity to be identified as an affected member, and to notify their claim of interest for compensation. Countries will then enter into a consultation process to determine the necessary compensatory adjustments due to the affected country. Reaching an agreement on compensation is undoubtedly a critical aspect of the process but no explanation is provided on the nature of compensation or the manner in which it should be determined. The compensatory calculation is further complicated by a lack of historical precedents on the use of GATS Art. XXI. To date only two WTO members have invoked the procedures of GATS Art. XXI. The EU submitted notifications to accommodate the harmonisation of the additional country schedules upon enlargement of the community, while the United States withdrew its GATS commitments made on gambling and betting services after a WTO dispute ruling in favour of Antigua.

the Protocol'. For the purposes of services liberalisation, Annex II on the Free Movement of Workers is the most relevant, since Mode 4 (movement of natural persons) inscriptions frequently refer back to this annex. Under GATS, Mode 4 inscriptions typically read 'Unbound, except as indicated in the horizontal section' implying that measures regulating the movement of natural persons are set out under the horizontal section. In the case of the EAC a separate set of regulations was devised to deal exclusively with the movement of workers, their spouses and children.

Annex II basically sets out the requirements workers must comply with when entering the territory of another member state and the procedure for acquiring a work permit. In accordance with Article 10 of the EAC Common Market Protocol the purpose of the annex is to enable workers of the member states to move around freely in the EAC to apply and take up employment without discrimination. To this effect, the annex (Art. 13 of Annex II on the Free Movement of Workers) guarantees equal treatment for the nationals of member states with regard to the a) terms and conditions of employment, b) access to employment, c) occupational health and safety, d) contribution to a social security scheme, e) access to vocational training, f) freedom of association and the right to collective bargaining, and g) access to dispute resolution. It clearly covers access to employment opportunities (market access) as well as equal treatment after the employment has been taken up (national treatment). Provision is also made for the gradual implementation in line with the schedule for the free movement of workers. The schedule lists the various categories of workers together with the preferred date of implementation as indicated by the member states. The implementation date varies between 2010 and 2015 but is not necessarily linked to the elimination date indicated in the schedule for the liberalisation of services (Annex V).

The approach to comprehensively address issues of a cross-cutting nature in the annexes is a notable improvement on the horizontal section generally used in the GATS schedules. In the horizontal section countries typically undertake that foreign employment be agreed on by the contracting parties and approved by government (Kenya), or lists the permitted occupations and requirements for entry (Burundi). Other member states (Rwanda, Tanzania and Uganda) chose to omit the horizontal section and instead dealt with such exceptions in the schedules themselves. The improved annexes are far more comprehensive and avoid ambiguity and uncertainty by providing greater details and more information. Closely related

is the annex on the Free Movement of Persons (Annex I) which applies to visitors, medical tourists, persons in transit and students. Measures dealing with self-employed persons, companies or firms which seek to undertake economic activities in other member states are contained in Annex III on the right of establishment.

Progress at the EPA level

Apart from trade negotiations at the regional level, many of the COMESA, EAC and SADC member states are also in the process of negotiating bilateral EPAs with the EU. The process which started in 2002 has been fraught with difficulties and it is uncertain when the negotiations will be concluded. Although the inclusion of new generation trade issues such as services is not a requisite for the EPAs to be WTO compatible, the EU is insisting on negotiating binding obligations as part of the broader development component. Nevertheless, member states that initialled the interim EPA agreed in principle to continue negotiations on trade in services through the inclusion of a 'rendezvous' clause. All five EAC member states initialled the interim EPA which included a chapter entitled 'Areas for future negotiation'. In Article 37(d) parties agree to continue negotiations on trade in services. The EAC was the only configuration in Africa which negotiated the agreement as a coherent configuration.[31] The member states of SADC split into the SADC EPA and Eastern and Southern Africa (ESA) EPA while the COMESA member states were split between the SADC EPA, ESA EPA and EAC EPA.

Of the 11 ESA EPA members, only six countries (Comoros, Madagascar, Mauritius, Seychelles, Zambia and Zimbabwe) initialled ESA interim EPAs. The ESA EPA also contained a similar rendezvous clause for future negotiations which included trade in services.[32] As for the SADC EPA it is currently only Botswana, Lesotho and Swaziland that have agreed to the continue negotiating trade in services with the EU. What makes the situation in the SADC EPA unique, however, is the fact that Namibia is the only initialling African Caribbean and Pacific (ACP) country that opted out of the services part of the negotiations. Strangely enough, despite the opposition to include a new generation trade agenda in the EPAs, none

[31] The EAC only started to negotiate as a coherent group in 2007. Before that Tanzania was negotiating as part of the SADC EPA, while the other EAC member states were negotiating as part of the ESA EPA configuration.
[32] See Art. 53 (d) of the interim ESA EPA.

of the other ACP countries took that route.[33] It can of course be argued that Namibia went further than any other ACP country by also managing to attach a list of concerns (also known as the contentious issues) to the interim EPA. New generation trade issues (including services) was, however, not part of these concerns because Namibia only initialled the goods chapter of the interim EPA. Namibia's name was deleted from Article 67 of the interim EPA which dealt with the ongoing negotiations on trade in services, investment, competition and government procurement. This really serves as confirmation that the inclusion of trade in services is not a requirement for the WTO compatibility of bilateral agreements.

The rendezvous clause in the interim SADC EPA is the most comprehensive of all three EPAs and includes detailed guidelines on the manner in which services are to be negotiated. This is in contrast to the requirements in the ESA EPA and EAC EPA which is simply an undertaking to continue with efforts to negotiate trade in services. This framework for the second phase of negotiation is contained in Article 67 of the SADC interim EPA and requires the initialling countries to start work towards the liberalising one services sector. The deadline for concluding the 'liberalisation schedule for one services sector' was agreed to happen 'no later than 31 December 2008'. It was further agreed to 'to negotiate progressive liberalisation with substantial sectoral coverage within a period of three years following the conclusion of the full EPA' (Art. 67 I(a)(2) of the SADC IEPA). The current focus of the EPAs is on finalising the goods agenda and addressing the list of concerns, and therefore services negotiations in the context of the EPA have not started. This suspension can prove valuable to the region as this gives countries the opportunity to negotiate services at the regional level first before engaging the EU. Services negotiations at the regional level will also allow countries to become familiar with the regulatory frameworks, establish meaningful communication channels with the relevant stakeholders and give them room to devise an effective liberalisation strategy.

It is possible for a country to have more than one services liberalisation agreement in place; there are no rules placing a maximum threshold on services agreements. The only obligation countries have is to comply with the requirements as set out in GATS Article V. A case in point is Chile which currently has 15 services agreements in place. It will,

[33] If South Africa ends up signing the EPA, it would be the only country that also opted out of the services part of the negotiations.

however, become more complicated to administer multiple services agreements, especially if countries are employing the positive list approach.

Comparing the services obligations of the regional agreements

	WTO	SADC	COMESA	EAC
Scope and application	X	X	X	X
Most Favoured Nation	X	X	X	X
Transparency	X	X	X	X
Market access	X	X	X	
National treatment	X	X	X	X
Domestic regulation	X	X	X	X
Specific commitments	X	X	X	X
Additional commitments	X		X	
Mutual recognition	X	X	X	X
Subsidies	X	X		X
Standstill clause		X		X
Special and Differential treatment / flexibility	X	X	X	
Anti-competitive business practices	X	X	X	X
Monopolies and exclusive suppliers	X	X	X	
General and security exceptions	X	X	X	X
Emergency safeguard measures	X	X	X	
Denial of benefits	X	X		
Promotion of trade in services		X	X	
Negotiations with third parties (MFN clause)		X	X	X
Modification of schedules	X		X	
Excluding government procurement	X	X	X	
Establishment of enquiry points	X	X	X	
Institutional provisions	X	X	X	X
Dispute settlement mechanism	X	X	X	X
Development of Annexes	X	X	X	X

As seen from the comparison, both the SADC Protocol and the COMESA regulations on trade in services are largely based on the GATS rules and provisions. One expects this inclusive approach was taken for the benefit of non-WTO members to provide them with a

comprehensive framework for the liberalisation of services. This is in contrast to the leaner approach taken by the EAC where all member states are already parties to GATS. The EAC does not have a separate set of regulations dealing with trade in services, but a services chapter is included in the main Protocol on the Establishment of the EAC Common Market. It deals with some basic issues such as the scope and application, mutual recognition, domestic regulation, national treatment and certain exceptions. However, by taking such a concise approach, important issues may be neglected. For example, the EAC services chapter does not mention market access to deal with the entry of foreign suppliers, even though a provision on national treatment is included. These two issues usually go hand in hand, and judging from the schedule[34] as attached to the EAC Protocol as Annex V, this seems like a glaring omission. Other important services issues such as subsidies, anti-competitive behaviour and negotiations with third parties are not specifically dealt with in the services chapter, but are elsewhere included in the main protocol. Where nothing in the SADC Protocol regulations prevents member states from using subsidies in the area of trade in services, EAC member states are prohibited from using subsidies which distort or threaten to distort competition.[35] As the EAC Protocol deal with goods and services trade, it can be questioned whether this undertaking refers to both or only to trade in goods. This ambiguity points to the dangers of integrating a concise services chapter into a wide-ranging protocol. The COMESA regulations are silent on subsidies – so it can also be questioned which agreement will take preference for countries that are signatories of both the EAC and COMESA agreements. Under the tripartite agreement, potential conflict is clarified in Article 38(4): 'In the event of inconsistency or a conflict between this Agreement and the treaties and instruments of COMESA, EAC and SADC, this Agreement shall prevail to the extent of the inconsistency or conflict'.

The SADC Protocol and COMESA regulations confirm adherence to the GATS disciplines and explicitly undertake to progressively liberalise in conformity with GATS Article V. The EAC Protocol does not mention GATS, most likely because all five EAC member states are WTO members – which is not the case with the SADC and COMESA member states. No specific threshold has been agreed by the EAC member states, except that implementation

[34] The schedules contain both market access and national treatment limitations.

[35] Even if prohibited subsidies apply to trade in services, it can still be argued that member states can exclude subsidies from the operation of the article if so specified in the services schedules.

must be progressive in accordance with the schedules on the progressive liberalisation of services as annexed to the protocol.

Perhaps more far-reaching are the undertakings referring to a 'standstill' of the services sectors. SADC member states are not allowed to introduce new or more discriminatory measures during the negotiations. EAC member states also agree to refrain from introducing new restrictions on the provision of services. The COMESA regulations avoid reference to a standstill clause and state that member states must strive to achieve progressively higher levels of liberalisation in each successive negotiating round. Barriers to services are created and maintained by domestic legislation and regulations; therefore the reference to the prohibition of new or more discriminatory measures is included to control the loading of additional discriminatory legislation. However, the standstill clause emerged as a contentious issue in the SADC EPA negotiations as countries argued that the prohibition on new or more discriminatory measures 'in all sectors' effectively amounts to the immediate liberalisation of country's services industry (Art. 67(I)(a) (2) of the SADC Interim EPA). This is in contrast to GATS where it is at the discretion of the parties which sectors are offered for liberalisation. The crucial difference here is the scope – the GATS 'standstill' only encompasses the specific sectors that have been committed, while, in contrast, the commitment in the SADC Interim EPA spans all services sectors. On a literal reading of this provision, parties to the SADC interim EPA will not be able to introduce any additional or new domestic legislation or regulations that deny market access for foreign suppliers or discriminate against them in any way in any of the services sectors, whether committed or not. It can be argued that the approach taken in SADC and the EAC is more in line with the provision in the SADC Interim EPA by limiting the policy space of member states to take protectionist measures. Both the provisions of SADC and COMESA are rather vague on the effect or operation of the standstill clause. It is nevertheless an important issue to highlight, as the approach taken to curb new protectionist measures can have significant consequences.

None of the regional configurations prohibits subsequent services negotiations with third parties. The SADC Protocol and COMESA regulations have similar provisions allowing for the conclusion of preferential agreements in accordance with GATS Article V which include the possibility of extending such preferences to member states on a reciprocal basis. The EAC Protocol does not contain a specific reference to the negotiating of services

agreements with third parties but refers in general to Article 37 of the Protocol on the Establishment of the EAC Customs Union. However, the Customs Union Protocol only deals with trade in goods. A process is stipulated in Article 37 on how to deal with subsequent trade agreements but it is not clear whether this also refers to the negotiating of trade in services.

Services negotiations are not only about liberalisation but also about increasing the transparency of rules and regulations affecting trade in services. GATS Article III, dealing exclusively with transparency issues, places three main obligations on the member countries: 1) publish all relevant laws and regulations of general application; 2) notify any new, or any changes to these laws and regulations to the Council for Trade in Services; and 3) duly administer and update such measures. To assist with the administration of the laws and regulations, each WTO member is required to establish an enquiry point and notify it to the Council for Trade in Services. However, by March 2011, only 13 countries in COMESA, EAC and SADC had notified their enquiry points. Angola, Burundi, Egypt, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, South Africa, Uganda, Zambia and Zimbabwe were the only countries that had made the notification under GATS Article III:4. Both the SADC Protocol and the COMESA regulations obliged the establishment of national enquiry points to facilitate communication and the provision of information between member states. The COMESA regulations go one step further by also enabling services providers with direct access to these enquiry points. Under the SADC Protocol, requests for information would have to be channelled through the providers' own government. The EAC Protocol provides for the right of partner states to request information on measures of general application, but does not specifically mention the creation of enquiry points. Looking ahead, effective enquiry points to organise the increasing amount of regulatory information will become indispensible, especially in the larger tripartite configuration.

All three sets of regulations provide for dispute settlement procedures. The EAC and COMESA utilises the dispute settlement mechanisms already in place under the EAC Treaty and the COMESA Treaty. The SADC Protocol on Services proposes a sui generis set of dispute settlement procedures specifically aimed at settling trade in services disputes. An annex is attached to the SADC Protocol specifically dealing with issues such as consultations, the establishment of the panel of judges, and other procedural and institutional issues. A ban is placed on forum shopping within SADC by preventing member

states to invoke another dispute settlement mechanism if the mechanism provided for in the services protocol is elected (Art. 2 of Annex 1 on the SADC Protocol on Trade in Services). When dealing with domestic regulation, countries typically undertake that measures affecting trade in services will be administered in a reasonable, objective and impartial manner. In line with GATS Article VI this is a guarantee also given in all regional and bilateral agreements. Member states in all three regional configurations give the same standards of reasonability, objectivity and impartiality. SADC and COMESA member states, however, go one step further by reiterating the obligations in GATS Article VI: 2(a) mandating the establishment of special tribunals to review administrative decisions affecting trade in services.

All three regional agreements are closely based on GATS and many provisions are similar to those included in GATS. One can argue that this approach has been followed for the benefit of the non-WTO members in SADC and COMESA. There is one area, however, where SADC and COMESA member states venture beyond the disciplines of GATS Article 18 of the SADC Protocol on Trade in Services concerns the 'promotion of trade and investment in services' and Article 13 of the COMESA Regulations refers to 'cooperation and development', both of which have no basis in GATS. These provisions make an effort to promote an attractive and stable environment for the supply of services through a number of measures. These include mechanisms to identify and disseminate information on business opportunities, the development of model laws and regulations, the introduction of simplified administrative procedures, as well as the development of mechanisms for joint investment. The SADC Trade Negotiating Forum on trade in services must establish the necessary infrastructure for such steps within three years while the COMESA Committee on trade in services is given five years to complete its proposal. Additionally, the COMESA regulations include a unique provision specifically dealing with the administrative simplification of procedures. COMESA member states are obliged to examine the procedures and formalities applicable to services and simplify those that are overly complicated. The provision is not clear on when administrative procedures are regarded as 'sufficiently simple', but it points to the intention of the member states to simplify and reform onerous domestic regulation.

Comparison to the Mercosur process

In 1991 Argentina, Brazil, Paraguay and Uruguay signed the Treaty of Asunción with the objective of establishing a common market to allow for the free movement of goods, services and factors of production Art. 1). Trade between members of the bloc known as Mercosur, consisted mainly of goods while the liberalisation of trade in services raised complex and sensitive issues at a time when there was not sufficient expertise or political will to address them (Gari 2006). Issues such as tariff elimination, the common external tariff and the institutional structure to establish a customs union enjoyed preference and it was only in 1997 that the framework document to liberalise trade in services was signed.[36] Although the Montevideo Protocol on Services was signed by the Mercosur members in 1997 it was decided that the protocol would not be sent for legislative approval until the texts of the sectoral annexes and the lists of specific commitments had been completed. One assumes that this decision was taken in order to comply with the requirements of GATS Article V. The ratification process was fraught with severe delays before it finally entered into force in December 2005. Argentina, Brazil and Uruguay deposited their instruments of ratification to fulfil the procedural obligations while Paraguay is still required to ratify the protocol.[37]

The ultimate goal of the Montevideo Protocol is to phase out restrictions on trade in services over a ten-year period, beginning from the date of entry into force.[38] Further liberalisation is to be progressive with annual negotiating rounds being incorporated in the schedule of specific commitments. In line with the multilateral process conducted under GATS, Mercosur members opted for a positive list approach whereby the liberalisation commitments only apply to the listed subsectors and modes. All the Mercosur member states included GATS plus commitments in their initial offers. However, these initial regional commitments made in terms of the Montevideo Protocol were modest with only slight improvements mostly in the professional and transport services sectors. It has to be kept in mind that only the initial commitments as agreed in 1998 by the Mercosur member states

[36] Another explanation for the delay in reaching an agreement put forward by Mercosur officials was the novelty of the issues and lack of experience on how to deal with them. See Gari (2006: 9).
[37] The Montevideo Protocol required only three member states to deposit their instruments of ratification for the protocol to enter into force.
[38] See Art. XIX of the Montevideo Protocol. Pursuant to GATS Article V:7, the Montevideo Protocol on Trade in Services was notified to the Council for Trade in Services on 5 December 2006.

have entered into force which explains the lack of enhanced liberalisation.[39] Since then there have been six negotiating rounds to expand the scope of liberalisation, but these additional commitments are not yet binding. The commitments made in the first six rounds have been consolidated and approved by the Council of the Common Market (CMC)[40], but must be domestically incorporated before they can enter into force and become effective. Article XXVII of the Montevideo Protocol states that the schedules of specific commitments must be incorporated into the national legal system in accordance with the procedures laid down in each country. It remains to be seen how long the Mercosur member states will take to domestically incorporate the improved undertakings. Shortly after consolidation the Montevideo Protocol was notified to the WTO in December 2006.

The results of the first six negotiating rounds were inspiring, with the Mercosur countries making liberal and comprehensive strides beyond their initial GATS commitments. Member states undertook liberalisation commitments in all of the core services sectors (except for the last category 'Services not included elsewhere'), the scope and depth of which clearly show the commitment of Mercosur to build a common market for services trade.[41] Their efforts are in line with GATS Article V which requires substantial sectoral coverage regarding the number of sectors, the modes of supply and volume of trade affected. Mercosur member states have included many of the 160 subsectors and have in some instances gone further than the W120 classification list by specifically referencing the United Nations Product Classification (CPC) List. They have also expanded the horizontal section by including additional categories of professionals which will be exempted from the strict Mode 4 restrictions.[42]

Mercosur is making good progress to complete its liberalisation process by the deadline of 2015. The Montevideo Protocol entered into force in December 2005 and it was agreed to complete the liberalisation process within 10 years of that date. In order to maintain the momentum, the regional bloc recently adopted a roadmap with directives to guide the

[39] Brazil has also domestically adopted the first round of negotiations in terms of Decreto Legislativo 926/2005 which expanded its offer in the sector of telecommunications.

[40] See Mercosur/CMC/Dec. N° 01/06.

[41] Besides the specific commitments, the protocol is also supplemented by four annexes specifically addressing the movement of natural persons, financial services, land and water transport and air transport.

[42] As a rule, no commitments are made in Mode 4 (the inscription frequently reads 'unbound except as indicated in the horizontal section') but certain types of professionals are allowed to supply their services if there is compliance with the requirements inscribed in the horizontal section.

countries through the final stages of liberalisation.[43] The work plan ahead consisted of a diagnosis of the current situation, defining the areas where no major difficulties exist, identifying those sectors more sensitive to liberalisation, and determining the regulatory frameworks to be harmonised. These directives are regularly reviewed and monitored to ensure member states stay on track. The latest reaffirmation of their commitment to the liberalisation process and target deadline was made in December 2010.[44]

Using the same approach as in the preceding analyses, this is the threshold to which the Mercosur member states liberalised their services industries:

Countries	Sectors committed (out of 7)[45]	Sub-sectors committed[46]	Commit-ments negotiated[47]	Partial commit-ments made[48]	Full commit-ments without restrictions[49]	Percentage liberalised commit-ments[50]
Argentina	11	191	1528	573	735	**85.60%**
Brazil	11	161	1288	444	623	**82.84%**
Paraguay	11	160	1312	210	249	**34.98%**
Uruguay	11	186	1488	441	468	**61.09%**
AVERAGE	**11**	**175.5**	**1404**	**417**	**518.75**	**66.13%**

Member states closely followed the W/120 Classification system, but in many instances went beyond the traditional classification and included additional subsectors of interest.[51] New categories were created in the sectors of communication, financial (particularly insurance), transport and cultural services. At the time of the services negotiation in the Uruguay Round, it was unclear to most of the developing world exactly what services

[43] See Mercosur/CMC/Dec. N° 49/08.
[44] See Mercosur/CMC/Dec. N° 54/10.
[45] The number of core sectors included all rounds of services negotiations.
[46] The number of subsectors considered by the member states. However, Mercosur member states went beyond the classification of the W/120 classification system and included additional subsectors. This explains why member states were able to commit more than the standard 160 subsectors traditionally used.
[47] The total number of commitments that can be negotiated in services negotiations, in both the market access and national treatment columns and with respect to all four modes of supply.
[48] The number of commitments with limitations.
[49] Full commitments made without any restrictions, indicated by an inscription of 'none'.
[50] Percentage of fully and partially commitments are expressed as a percentage of the total number of commitments negotiated.
[51] There is no obligation on negotiating partners to use a specific classification when negotiating trade in services; parties only need to be in agreement regarding the description of the supplied services which must be expressed in clear and unambiguous language. Parties are therefore free to include any services, regardless of whether these are contained in the W/120 of CPC lists.

liberalisation entailed and how it should be implemented. Few countries included additional subsectors under the W/120 system, despite the cardinal importance of those unstated activities. Things have also changed in the fifteen years that have passed since the GATS negotiations, with modern services such as mobile communications playing an increasingly important role. As countries grow more aware of the significance of regulating specific services activities, new headings will be included.

The more developed economies in the Mercosur region made substantial liberalisation commitments with the lesser developed economies of Uruguay and Paraguay making fewer commitments. When developing countries are parties to a services agreement, GATS Article V:3(a) states that flexibility must be provided when considering the degree of substantial sectoral coverage, particularly regarding the elimination and prohibition of discriminatory measures. It does not specify how much flexibility must be provided, but such flexibility should be extended in accordance with the level of development of the countries concerned, both overall and in individual sectors and subsectors. In the case of Mercosur, flexibility is clearly provided for the lesser developed economies by allowing them to schedule fewer commitments and in fewer subsectors. It can be argued that the Montevideo Protocol complies with the requirements because, on the whole, the configuration has liberalised to an average degree of 66.13%. The significant liberalisation efforts of Brazil and Argentina have helped the member states achieve a more acceptable threshold, highlighting the responsibility that the more developed countries have when negotiating services agreements. The opposite situation exists in the EAC, where the lesser developed countries have liberalised most, with the more developed economies of Kenya and Tanzania making more limited commitments.

Although Paraguay scheduled 160 subsectors, many subsectors and modes of supply were left ‘unbound’, meaning no commitments were made in those areas. It is also interesting to note that Mercosur countries in general made a far larger percentage of partial commitments than the EAC member states. On average, Mercosur countries made four partial commitments for every five full commitments, while the EAC countries made two partial commitments for every five full commitments. This is an indication that the Mercosur member states were more cautious in scheduling their commitments, although the

operation of the standstill clause has to be considered.[52] Depending on the wording of the standstill clause, countries may not be allowed to introduce new restrictions beyond the status quo. EAC member states undertake in the EAC Protocol to progressively remove existing restrictions and not to introduce any new restrictions on the provision of services in the partner states. This is in contrast to the right provided for in the Montevideo Protocol to introduce new restrictions, even covering market access and national treatment obligations, as long as these do not nullify or impair the obligations arising from the schedules of specific commitments.

Mercosur member states also made comprehensive horizontal restrictions applying to all services sectors. In addition, they specified general conditions applicable to each of the core sectors. So, although the Mercosur configuration has a higher average percentage of liberalisation commitments, it seems as if the services industries in South America are more restricted that those in East Africa. They have comprehensively and in great detail set out the current and foreseeable restrictions, clearly describing each measure. In effect, the Mercosur member states followed a negative list approach because they have addressed all of the services sectors.[53]

The way forward

This new situation of supraregional services negotiations will demand continuity and coherence; the converged tripartite market will have to build on what has already been achieved in the other markets of COMESA, the EAC and SADC. However, developments in the area of trade in services are still novel experiences for the regions and it is difficult to predict how these regional negotiations are going to turn out. Apart from the progress made by the EAC, the outcomes and effect of regional services liberalisation is still unclear. If it were a question of simply extending the liberalisation commitments to the other configurations, the process would be more straightforward, but it can be expected that unique components from each of the configurations will be included in the tripartite services negotiations.

[52] For more information, see the section on Comparing the services obligations of the regional agreements above.
[53] For a complete discussion on the negative list approach, see The manner of liberalisation under the Tripartite Agreement below.

When services negotiations at the tripartite level eventually commence, most countries will have acquired substantial experience in dealing with services liberalisation. For example, if a country like Kenya chooses to negotiate services at the EPA level, it could have negotiated services at the EPA level, the EAC level and the COMESA level before the start of the tripartite services liberalisation process. The same holds true for a country like Swaziland which could possibly negotiate services at the EPA level, the SADC level and the COMESA level before starting the tripartite process. Therefore some countries will likely have to negotiate at a number of levels before finally negotiating at the tripartite level. For a country with relatively little experience and capacity in negotiating services, this will probably be a daunting task. But the upside is that lessons can be taken from those countries with experience, on how they have sequenced, harmonised and dealt with these layers of services negotiations. It can be argued that, when the time comes to negotiate services at the tripartite level, countries would already have acquired the necessary experience and capacity to effectively negotiate a services chapter.

If one considers Annex 12 ('Guidelines on the negotiation of trade in services') large parts of the annex deal with basic issues such as the process of services liberalisation, compatibility with WTO rules and how to negotiate and complete schedules. The guidelines seem to apply to countries that have no experience negotiating trade in services. This may very well be true today, but this will inevitably change in the near future. It can be argued that these basic guidelines will be unnecessary after countries have participated in services negotiations. This might also be one of the reasons why this annex setting out the guidelines was not revised or updated in December 2010 along with the other annexes. It makes more sense to publish the guidelines after taking stock of the progress made at the various regional levels. It is advisable to wait and evaluate the outcomes from the regional negotiations before guidelines are issued.

Hypothetically speaking, the guidelines may instruct countries to extend liberalisation commitments made under COMESA, the EAC and SADC to other configurations. It seems as if the guidelines contained in the original Annex 12 (Art. 3) oblige member states to do just that in : 'Member States shall exchange offers and requests on the basis of which schedules of specific commitments shall be agreed. The commitments shall include sectors and sub-sectors that Member States have liberalised under the programs of the regional economic communities'. A measure such as this can simplify the regulatory framework

dealing with trade in services and is something that deserves consideration. This will keep the regulatory framework simple and will ease the transition towards the convergence of the services markets. Otherwise the possibility exists that a country will have one or more sets of rules for COMESA, EAC and SADC countries, another set of rules for tripartite members, in addition to the set of rules for EU countries and other WTO members. Furthermore, all of these rules will have to be incorporated into domestic laws – which will complicate the process.

Judging from the services schedules of the EAC, the kind of commitments made in the member states are deep without many restrictions. Guidelines adopted at the COMESA level also encourage member states to make deep commitments, if possible without restrictions. Although the SADC guidelines are still to be adopted, the Draft Protocol on Trade in Services hints at the same kind of deep liberalisation in line with GATS Article V.[54] The tripartite text takes a similar approach by aiming for a 'credible amount of liberalisation', which is more closely described in the original Annex 12 as follows: 'Commitments in the priority sectors shall to the extent possible not have limitations or restrictions;.[55] The Tripartite services liberalisation process is clearly aimed at substantial liberalisation, preferably without any restrictions. But from the intentions and progress at the regional levels of COMESA, the EAC and SADC it is difficult to imagine that countries will be able to make more extensive (or deeper) commitments at the tripartite level. Countries will be able to undertake lesser commitments at the tripartite negotiations, but this will be difficult for two reasons. Firstly, it is clearly not the intention of the tripartite negotiations that member states maintain more restrictive measures at the supraregional level. The operation and effect of the standstill clause contained in the COMESA, EAC and SADC text will also become an issue, especially for countries that have dual membership of the regional organisations. Secondly, more restrictive schedules may not comply with the 'substantial sectoral coverage' as set out in GATS. Article V. So, depending on the approach of the tripartite member states, the process can either be simple (by automatically extending liberalisation commitments/preferences) or more complicated (by renegotiating the liberalisation commitments). It will require careful consideration on the part of the tripartite member states on how they want to merge the regional services negotiations.

[54] See Art. 16 (1) of the SADC Protocol on Trade in Services.
[55] See Art. 18 of the original Annex 12 (Guidelines on the negotiation of trade in services).

Services liberalisation under the Tripartite Agreement

The main document is the draft Agreement establishing the COMESA, EAC and SADC Tripartite Free Trade Area, together with its 14 annexes covering a number of areas that are deemed important for the effective operation of the regional market. Annex 12 of the draft Tripartite Agreement (November 2009 version) exclusively dealt with trade in services and set out the guidelines countries can use during the first round of services negotiations. However, after the revision of the draft agreement and its annexes in December 2010, this Annex 12 providing guidelines on services negotiations was left out. This paper has already touched on some of the reasons for this omission, but it can basically be argued that drafters are waiting to evaluate the processes happening at the three regional levels. All the tripartite members have relatively little experience in negotiating services, so it can be assumed that more sophisticated guidelines will be published closer to the time of the first negotiating round and only after countries have acquired more experience at the regional level. It is also a possibility that the drafters want to assess the outcomes of the regional level before deciding on the most suitable way forward. Despite the fact that the services annex was omitted, it is still necessary to analyse the original Annex 12 (November 2009 version) as this is the only available document shedding some light on the liberalisation process the tripartite member states are likely follow. Furthermore, the guidelines contained in the annex are quite similar to what is expected from the member states at the regional levels of COMESA, EAC and SADC; so in that sense the analysis can contribute to the regional debate.

In Article 30(1) of the revised draft Tripartite Agreement (December 2010 version), member states undertake to liberalise trade in the priority sectors, subject to such flexibilities as the Tripartite Council may approve. This hints at the special and differential treatment for the lesser developed countries in the configuration, most likely in the form of levels of commitments and delayed implementation. Both the SADC and COMESA services texts take into account the different levels of development for the purpose of granting special and differential treatment.[56] The EAC Protocol does not mention special and differential treatment, probably due to the size of their market, and the more equal development of their economies. However, it is interesting to note that – judging from their

[56] See Art. 16 (5) of the SADC Protocol on Trade in Services and Art. 12 of the COMESA Services regulations.

services schedules – the smaller economies are in fact prepared to liberalise further than their more developed counterparts.[57]

Article 30(2) of the Tripartite Agreement sets out the objectives of the services negotiations which are to attain 'a credible level and amount of services liberalisation, support the strengthening of infrastructure, promote competitiveness, build the capacity of micro, small and medium scale enterprises, and contribute to the deepening of integration in the Tripartite Member States'. This is similar to Paragraph 17 of the COMESA services guidelines which states that 'commitments in the priority service sectors will assist to attain a credible level and amount of liberalisation, support the strengthening of infrastructure, promote competitiveness, build the capacity of micro and small and medium enterprises, and contribute to the COMESA-EAC-SADC Tripartite process of merging the three regional economic communities'. The 'credible level and amount of liberalisation' allude to the requirements of GATS Article V to substantially liberalise services in economic integration agreements. The COMESA Regulations on Services also refer to a credible level while the EAC Protocol is silent on the required threshold. The SADC Protocol explicitly mentions the WTO requirements indicating that negotiations must be conform with GATS Article V.[58]

The references to the 'strengthening of infrastructure' likely refers to the infrastructure and network services of business, construction, telecommunications, finance, transport and energy which are the foundations upon which an economy is built.[59] These services are embedded in all parts and sectors of the economy and make a crucial contribution to competiveness and productivity in general. They provide the backbone for other sectors, not only for other services sectors, but also for the traditional industries such as agriculture, mining and manufacturing. It seems that member states realise that it is essential to 'promote competition' by not inhibiting market access to the more efficient suppliers of these services as this can have a detrimental effect on growth and development prospects of a country over the longer term. In this regard, the transfer of knowledge and technology will play a key role in fulfilling the purpose of increased competition and the development of micro, small and medium enterprises.

[57] See the section on Progress at the EAC levelabove.

[58] See Art. 16(1) of the SADC Protocol on Trade in Services.

[59] The six sectors mentioned here together with tourism services were identified in the original Annex 12 as the seven priority sectors.

Similar to the process in the regional negotiations, liberalisation at the tripartite level will be progressive, which means that successive rounds of negotiations are foreseen to achieve an increasingly higher level of services liberalisation. Typically, the priority sectors will be addressed first after which subsequent negotiations will cover the remainder of the services sectors. However, tripartite member states only undertake to liberalise trade in the priority sectors which according to the annex are identified as: a) Business; b) Communication; c) Transport; d) Financial; e) Tourism and travel related; f) Energy, and g) Construction and Related Engineering. The main text is silent on the liberalisation of rest of the services sectors while the annex only 'encourages' member states to undertake commitments in the remaining sectors. These sectors may be of a sensitive nature to some of the countries providing a possible explanation for the omission. According to Article 30(5) the Tripartite Council will adopt guidelines on each successive round of negotiation, so it is expected that such guidelines will address the remaining sector when the time is right.

The manner of liberalisation under the Tripartite Agreement

As mentioned, the Tripartite Agreement and the original draft Annex 12 focus largely on basic issues such as process of services liberalisation, compatibility with WTO rules and how to negotiate and complete schedules. The emphasis is clearly on services liberalisation and how to achieve compatibility with WTO rules logically follows. In line with the approach used in the WTO, the draft Tripartite Annex (November 2009 version) explicitly provides for the use of the positive list approach. According to this approach members only list the commitments they are willing to undertake; therefore if they omit a sector or subsector, that area is not liberalised or committed. But at the same time the annex also makes provision for the possibility of no limitations or restrictions in the priority sectors, with some minimal time-bound exceptions.[60] This proposal, however, clearly points to a negative list approach. The seven priority sectors of business, communication, transport, finance, tourism, energy and construction services comprise about 85% of the services sector with the remaining five sectors taking up only 15%. A positive list approach in a situation like this can be questioned, where member states clearly want as few restrictions as possible.

[60] See Paragraph 18 of the original Annex 12 ('Guidelines on the negotiation of trade in services').

In the WTO the 'positive list' approach was adopted specifically on request of the developing countries since they felt that they did not have the administrative resources and capacity required to examine all the services sectors and to determine all the measures applying to each sector. Since many of the subsequent regional and bilateral negotiations have been conducted in line with the agreed WTO principles, the same positive list approach was adopted. It can nevertheless be argued that the negative list approach is a more comprehensive one, and also a more suitable approach for regional services negotiations where countries want to establish a common market that provides for substantial liberalisation in all sectors.

The negative list approach requires that all sectors be liberalised unless a specific reservation is made to exclude certain measures. The main advantage – something which is already envisaged in the tripartite process – is the obligations placed on countries to consider all services sectors which imply negotiations on all areas. It is true that the negative list approach places greater responsibility on the negotiating countries and forces them to have in-depth knowledge on all areas, but, at the time, when the tripartite negotiations start countries would hopefully have gathered the necessary experience to consider and negotiate all sectors. Most importantly, a negative list would provide for a more transparent and visible regulatory framework for two reasons. Firstly, the negative list approach typically contains two parts: reservations for current nonconforming measures and reservations for future measures. This is a very important distinction because it shows which areas are currently restricted in terms of legislation and which areas are marked for possible restrictions in the future. This can provide a clearer and more predicable indication for investors of what government is planning or thinking in each area. Of course in the positive list approach there is no such indication – it is difficult to tell why a sector or subsector has been omitted.

The second reason why the negative list is more transparent is due to the scope and detail of the measure or reservation. Typically an annex on nonconforming measures includes the following: i) the sector, subsector and classification; ii) obligations concerned; iii) level of government maintaining the measure; iv) a description of the nonconforming measure; and v) the existing measures in force. The example in the box below is an extract from an actual Chilean services schedule as agreed between Chile and Australia:

Sector: Professional Services

Subsector: Legal Services

Industry classification: CPC 861 Legal services

Obligations concerned: National Treatment (Article 9.3)
Most-Favoured-Nation Treatment (Article 9.4)
Local Presence (Article 9.6)

Level of government: Central

Measures:

Tribunals Organic Code, Title XV (*Código Orgánico de Tribunales, Título XV*)

Decree 110 of the Ministry of Justice, Official Gazette, March 20, 1979 (*Decreto 110 del Ministerio de Justicia, Diario Oficial, marzo 20, 1979*)

Law 18.120, Official Gazette, May 18, 1982 (*Ley 18.120, Diario Oficial, mayo 18, 1982*)

Agreement on Mutual Recognition of Examinations and Professional Degrees between Chile and Ecuador, Official Gazette, July 16, 1937 (*Convenio sobre mutuo reconocimiento de exámenes y de títulos profesionales entre Chile y Ecuador*)

Description: Cross-Border Trade in Services

Only Chilean and foreign nationals with residence in Chile, who have completed the totality of their legal studies in the country, shall be authorised to practice as lawyers (*abogados*). This paragraph shall be understood in accordance with Chile's obligations under any other international treaty.

Only lawyers (*abogados*) duly qualified to practise law shall be authorised to plead a case in Chilean courts and to file the first legal action or claim of each party.

The following documents, among others, shall be drawn up solely by lawyers (*abogados*): drafting of articles of incorporation and amendments thereto; mutual termination of obligations or liquidation of corporations; liquidation of community property between spouses (*sociedad conyugal*); distribution of property; articles of incorporation of juridical persons, associations, water canal members (*asociaciones de canalistas*), and cooperative associations (*cooperativas*); agreements governing financial transactions; corporate bond issuance agreements; and sponsoring applications for legal representation made by corporations and foundations.

Chile has a bilateral agreement with Ecuador, whereby Ecuadorian citizens holding a lawyer's degree granted by a University in Ecuador are admitted to practise as lawyers (*abogados*) in Chile.

None of these measures apply to foreign legal consultants who practise or advise on international law or Australian law.

The big advantage here, and what makes this approach more transparent and user friendly, is the detailed description and explanation on exactly what every reservation entails. Additionally, where the measure can be found in the domestic legislation it is included in the schedule. So it provides greater clarity and complete transparency, and sets out a more detailed framework for domestic regulation and services liberalisation. In the positive list approach one will be aware of the restrictions, but would have no idea of where to find them. Moreover a more complete approach will improve the institutional memory of government because the ability to accurately store and administer large amounts of regulatory information will become increasingly important over time, especially if negotiations are taking place on more than one front. An accurate recording of restrictions will also help the government to provide clear information on the measures affecting trade in services, an obligation which is an important element of all services agreements.

Chile has concluded a large number of Regional Trading Agreements (RTAs) of which 14 contain extensive undertakings and obligations on trade in services. It is typically countries with more experience in services negotiations that prefer the negative list approach, but this kind of approach enabled these countries to be more effective than other countries in negotiating multiple agreements. As countries take on more services agreements, it becomes increasingly difficult to administer the applicable restrictions to each negotiating partner. This is a fact tripartite member states will have to deal with, especially the countries with multiple memberships in COMESA, the EAC and SADC. A negative list approach would not only be able to solve the administrative nightmare waiting for these countries, but it would also provide countries with a more comprehensive knowledge of all its services industries. Furthermore, it would also facilitate and simplify subsequent services negotiations with third countries.

Creating a more integrated market

Meaningful services liberalisation can only be achieved by focusing on the regulatory environment that would determine the access for foreign suppliers (market access) and conditions for their local operations (national treatment). The suppliers would accordingly know what is allowed and how to conduct their operations in a given services market. But in the steps towards a more integrated services market, other issues besides liberalisation become crucial. It is expected that services liberalisation will be less of an issue when the tripartite negotiations start since this will already have been comprehensively addressed at

the regional levels of COMESA, the EAC and SADC. At that time, hopefully the domestic regulatory frameworks will be strong enough to allow for substantial liberalisation and to welcome any foreign competition. Or on the other hand, perhaps countries would have realised that services liberalisation alone did not bring the desired benefits they were hoping for. Tripartite member states will have to find ways to build on the substantial liberalisation already achieved in the regional negotiations.

It can be argued that one way to build on the substantial liberalisation already achieved in the regional negotiations will be serious efforts aimed towards deeper integration by addressing issues such as transparency, competition regulation, specific sectoral disciplines, mutual recognition agreements and the harmonisation of certain areas by going through a process of domestic reform. With deeper integration agreements, the focus should be shifted from liberalising the barriers that exist at the borders, towards addressing the 'behind-the-border' issues, which exist within the jurisdiction of the member states. All three regional sets of regulations deal to varying degrees with these 'deeper integration' issues, with some also scattered in related protocols and regulations. For example, the SADC Protocol on Tourism, and Chapter 19 of the COMESA Treaty include aspirations to standardise the registration, classification, accreditation and grading of tourism providers. Those obligations relating to harmonisation and standardisation will have the biggest practical impact, but are also more challenging since they have to be addressed at the regional level with the input and approval of all member states. Other commitments focus largely on cooperation and in broad terms cover the following areas: promote the involvement of local rural and cultural groups, increase the participation of the private sector in tourism development, facilitate travel within the region, and promote tourism and investment in general. In the EAC Treaty member states have also agreed to establish a common code of conduct for private and public tour and travel operators, standardise hotel classification and harmonise professional standards of tourism and travel agents. The draft EAC Protocol on Tourism and Wildlife management deals with these and other issues of deeper integration. However, these obligations have not yet been incorporated into domestic legislation, something which could impact on the regional development of the tourism industry. There have been reports that tour operators and tour guides from certain countries have been denied entry due to onerous qualification standards (Kruger 2010). This is a serious barrier to trade that can only be addressed with regional standards on

training and qualifications of certain categories of tourism providers. Apparently, discussion on such regional standards will only commence at the end of 2011.

The transport sector which plays an important role in facilitating the physical trading of goods can be highlighted as another example of how deeper integration is envisioned. Member states to the SADC Protocol on Transport, Communications and Meteorology, the COMESA Treaty and the EAC Treaty agree to harmonise a substantial number of standards, procedures and regulations covering all the subsectors of the transport industry. For instance, in the area of road transport, very broadly these subsectors include measures on the following: vehicle safety and equipment, driving licences, documentation, and procedures, carrier obligations, transport law enforcement, technical standards, road infrastructure, transit charges, safety requirements for dangerous loads, and regional trunk road projects. These are areas that are addressed in both configurations. In COMESA and EAC, member states also agree to undertake measures to ratify or accede to the international conventions on road traffic and road signs and signals, and to take such steps as may be necessary to implement these conventions. It is important, however, to note that these measures are not concerned with the liberalisation of tourism services: liberalisation, in particular market access, and national treatment considerations will be addressed in the regional services negotiations and schedules.

So too are there specific obligations dealing with cooperation and harmonisation in other areas such as communications, financial, education, health, transport and energy services, with additional issues to be agreed in the future. Tourism is one of simpler examples with far more being expected of member states in areas such as transport and financial services. If countries want to address issues apart from services liberalisation, it is here where they should start. Their intentions for deeper integration have clearly been stated by focusing on cooperation, harmonisation and standardisation in some of the priority sectors. These kinds of measures have the potential to make a great impact on the regional development of the services industries, but only if these are effectively implemented.

The achievement of an integrated market is about more than liberalisation; it will also require a deeper integration of regulatory aspects to create benefits for the regional market. Implementation is unfortunately still lacking, the main challenge being the pace of adjustment at the regional level. Anticipated change at the regional level happens faster than what can be adopted and implemented at the national level. At the regional level, a plan of action is

adopted, but lobbying, review, legal drafting and parliamentary approval at the national level takes time. This is the main reason why not all of the regional obligations have been implemented domestically. The process of implementation becomes more complicated for countries that are part of more than one regional configuration. Furthermore, if the tripartite process runs parallel to the COMESA-EAC-SADC processes, it creates the risk of unnecessary duplication. It is important to carefully define how the tripartite negotiations will overlap and complement the regional negotiations and sequence the process accordingly.

Developing a domestic services agenda

The effectiveness of the services liberalisation strategy and process will largely be driven by the responsible institutions. Assigning responsibility for the process is sometimes complicated, mainly because there are many different government departments involved in the formulation, negotiating and implementation of the services strategy. In many countries the negotiating of trade in services is the responsibility of the Trade and Industry Department, while implementation coordination rests with the relevant line department. Developing a clear strategy for services therefore poses, for most governments, genuine institutional challenges to the extent that no single agency takes a holistic view of services and their interlinked contribution to the development and growth process (World Bank, 2009).

Accordingly, any attempt to devise a services liberalisation strategy must begin by setting up a cross-sectoral, multi-issue steering committee and designating the coordinating function to a specific ministry or agency. This institution will ultimately then be empowered to develop a services road map and strategy and oversee the implementation (Ibid). This is particularly important for countries where different departments are responsible for the negotiating of the obligations and implementation thereof.

Other institutions that are crucial for the functioning of a regional services market is the establishment or strengthening of the national enquiry points and the creation of administrative tribunals. These institutions will become increasingly relevant to facilitate and improve the administration of regulatory aspects. Although the establishment of these institutions are specific requirements under GATS, some countries have still not implemented them. Fully functional institutions can also assist with the promotion of trade

in services (which clearly is the intention of the SADC and COMESA texts), the dissemination of business opportunities, and improving the predictability and certainty for prospective investors. It will be of little help if the regional obligations agreed at the COMESA, EAC and SADC levels are simply reiterated at tripartite level. In the end it will come down to the implementation of the agreed obligations. The frameworks in each regional configuration have been drafted to include various obligations relating to the highlighted areas, but now it is up to the countries to manage the implementation phase.

Member states are now in the preparatory phase and should use the opportunity at the regional and national level to organise, coordinate and improve their national negotiating forums by increasing stakeholder participation; in other words, an effective forum where a services strategy and responses can be formulated and discussed must be established. The services sectors are different with the activities being so diverse and specialised that it would be difficult for a central agency to make informed decisions. Every sector is dynamic and has its own rules, standards, procedures, conditions and even associations to facilitate the regulation of that specific industry. A simple review of even one subsector will expose the differentiation and specialisation when compared to other subsectors; each of 160 plus subsectors is indeed a niche area with its own characteristics. A central agency cannot keep abreast of the developments and therefore the advice and support of a wide range of stakeholders are needed in the liberalisation process.

The idea is that the engagement between the government and stakeholders is collaborative, constructive, and continuous. It must be a two-way process in which governments share the significance and progress of the negotiations and inform stakeholders how the process of liberalisation can affect their business. Governments should also be clear on the kind of support expected from the stakeholders. On the other hand, stakeholders such as government departments, government agencies, national bodies, regulators, labour and academia are also well placed to make meaningful contributions to the negotiating process due to their specific technical knowledge in their respective areas. In particular, the private sector has practical experience and is best placed to inform government of challenges and possible opportunities. Most importantly, the private sector will also be able to evaluate the impact of the liberalisation policies and reform, since the liberalisation process will ultimately yield winners and losers. It is therefore important to manage the reform process to deter interest groups from derailing the process. In order to maintain the momentum of

reform it is important to make common cause with the winners to counter pressures from the losers (Hodge 2001). The fact remains: it is not only about the process of liberalisation by removing barriers to services trade, it is also about the continuous management of the process to understand how the decisions made affect the everyday traders. This knowledge will enable governments to make more effective and informed decisions when supraregional negotiations are conducted.

Particularly in the developing countries, most of the services trade occur in Mode 3 through the establishment of a local established branch, subsidiary, joint venture and representative office by a foreign supplier. It is therefore important that the regulatory framework is considered fair, credible and predictable by prospective foreign investors (Hodge 2001). However a more effective regulatory framework and competition rules also have the potential to protect domestic industries and enhance market conditions for all players. On the other hand, ineffective regulation and competition will result not in lower prices but in higher profits, thereby benefitting the owners of capital rather than labour or the consumers (Ibid).

The first step in analysing the regulatory framework is to complete a full regulatory audit to get a clear impression of what the applicable rules in each of the services sectors are. Preparing of a full inventory of measures affecting all trade in services is necessary to cultivate a greater understanding and appreciation of the regulatory regime. All measures, whether in the form of a law, regulation, rule, procedure, decision, administrative action or any other forms taken by central, regional or local governments and authorities, and non-governmental bodies, in the exercise of delegated powers must be reviewed in order to be aware of the relevant rules. The analysis of the regulatory framework can include regulatory impact assessments to determine the benefits and costs of services liberalisation. Many of the tripartite member states undertook full liberalisation in some sectors (mostly tourism), so an impact assessment for understanding the effect such liberalisation had on the local economy can be useful for the formulation of an overall services strategy. Such audits and regulatory assessment can provide governments with insights on which sectors to open up and which barriers to remove. It can also highlight the sensitive areas where government intervention of some kind is necessary. There has been recent interest from developing country government to modify commitments made under GATS in order to restrict foreign investment or to favour domestic suppliers, a process which is set out in GATS Article XXI.

To date only two countries have invoked this process[61], but it can be argued that there are less invasive measures to promote domestic participation without modifying earlier liberalisation commitments.

Conclusion

At the moment it is difficult to predict the outcome of the regional negotiations, something which will have an impact on the tripartite process. It is only the EAC member states that have made notable progress with regard to liberalising their services industries, while SADC and COMESA still have to start negotiations on their services liberalisation commitments. This lack of progress creates a certain degree of uncertainty which will only be resolved once all configurations have completed their liberalisation schedules. It is after the finalisation of the schedules that the Tripartite Committee on Trade in Services can evaluate the regional outcomes and decide on the most suitable way forward. For that reason, it is advisable that the services negotiating guidelines are only published once this had been determined. There is no rush to do this, as it is expected that services negotiations at the tripartite level will only proceed after the issues relating to the trade in goods agenda have already been addressed.

The published guidelines will have go beyond the basic issues and also clarify some of the more challenging areas. Some of the most pertinent issues relate to the WTO compatibility of the eventual tripartite services chapter. What will be the responsibility of the more developed countries in the configuration? The analysis done in paper shows that Kenya has been cautious in making liberalisation commitments beyond what was scheduled under GATS. Although the more developed countries will have a greater interest in protecting their services industries, clear thresholds will have to be set. The original guidelines call for the 'possibility of no restrictions' in priority sectors; member states, however, need to be more realistic and precise when stating such objectives. The degree of flexibility for the lesser developed states must also be stated clearly. It is understandable that tripartite member states long for the absolute free movement of services, but countries must be able to retain some kind of policy space when negotiating services. In this regard the operation

[61] The EU submitted notifications in 2004 (S/SECRET/8) and 2005 S/SECRET/9) in order to accommodate the harmonisation of the additional country schedules upon enlargement of the community. The only other country to invoke the modification procedures of GATS Art. XXI was the United States to modify restrictions on cross-border gambling.

and effect of a possible standstill clause must be carefully weighed as it has the potential to liberalise all services sectors with almost immediate effect.

The current services chapter in the Tripartite Agreement consists of only five provisions, of which the one to establish the Tripartite Committee on Trade in Services is the most important. This services committee must oversee and drive the liberalisation process at the tripartite level based on what happened at the regional levels. The committee has the responsibility to adopt guidelines on each round of services negotiations and will play an important role in the success of the negotiations. It must have the necessary technical capacity and expertise to effectively guide the negotiations and make optimal proposals on the way forward. The negotiating guidelines for the first round of negotiations on the priority sectors are crucial and will set the tone for the rest of the process. It will require meticulous thinking and contemplation on how the regional processes can be merged into the larger tripartite negotiations.

It may take a long time before the tripartite services negotiations actually start; meanwhile countries must use the opportunities at the regional level to prepare the ground for effective liberalisation and essential domestic reform. Governments must ensure that all relevant obligations under the WTO and regional agreements are fully implemented and that all necessary institutions are established and functioning properly. All measures affecting trade in services must be identified, indexed and stored to facilitate the administration and dissemination of the regulatory information. Meaningful communication channels must also be established between government and stakeholders to appreciate the differentiation and developments in the various services sectors. This constructive engagement is also crucial to monitor the progress and effect services liberalisation has on the wider economy. This is the time to use the opportunities presented by the regional negotiations in order to acquire the necessary experience and capacity to effectively negotiate a more complicated services chapter at the tripartite level.

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