



Report on Workshop on Trade in Services Modalities for CFTA Negotiations

The African Union Commission (AUC) hosted a workshop on modalities for trade in services negotiations for the Continental Free Trade Area (CFTA) at the Newlands Sun Hotel in Cape Town, South Africa on 24 November 2015. The workshop was organised in collaboration with the Trade Law Centre (tralac). In attendance were representatives from the Department of Trade and Industry of the AUC and other departments of the Commission, tralac, the United Nations Conference on Trade and Development (UNCTAD), and the Southern African Development Community (SADC).

Ms. Treasure Maphanga, Director of Trade at the AUC welcomed participants to the meeting. She highlighted the importance of the services agenda for Africa's trade and development prospects in the 21st century and hence the importance of the meeting in exploring different modalities and approaches that could be adopted in the CFTA services negotiations. This is to ensure that challenges currently facing trade in services, such as weak regulatory frameworks, are addressed and opportunities for increased competitiveness of African economies are harnessed.

Discussions during the workshop centred on presentations delivered by respective resource persons as follows:

1. Options for services liberalisation in the CFTA – Ms. Carolyn Tumuhimbise, Trade Adviser in the Department of Trade and Industry, AUC

Ms. Tumuhimbise discussed modalities, advantages and challenges for negotiations on four possible approaches namely:

- (a) The negative list approach of the North American Free Trade Agreement (NAFTA);
- (b) The sector specific approach provided for in the Abuja Treaty establishing the African Economic Community covering transport, communication and tourism;
- (c) A hub and spokes approach, which includes core disciplines applicable across the board and regulatory disciplines specific to individual service sectors;
- (d) A transparency list approach, which includes market access and domestic regulations applicable horizontally across sectors, and modalities for harmonisation and recognition of regulatory disciplines specific to individual service sectors

2. Options and considerations for draft modalities for the CFTA services negotiations: Lessons from the frontline and back office – Dr. Joy Kategekwa, Head of UNCTAD Regional Office for Africa

Dr. Kategekwa discussed some considerations for draft modalities on CFTA services negotiations including the sequencing of preparation and negotiations; developing guidelines and procedures for the negotiations; issues for the Framework Agreement; approaches to scheduling commitments; regulatory disciplines and cooperation issues; and institutional issues to support implementation. She also presented a typology of issues which could be adopted from the GATS, and adapted to the CFTA services agenda.

3. ICT infrastructure development in the context of African regional integration – Ms. Amazouz Souhila, Senior Radio Transmission and Broadcasting Officer, Department of Infrastructure and Energy, AUC

Ms. Souhila provided an overview of the Programme for Infrastructure Development in Africa (PIDA) and reported some notable progress on infrastructure projects being implemented in the information and communication technology (ICT) sector, as well as those still in the preparation phase. It was noted how ICT infrastructure and services are cross-cutting and indispensable backbones to increased productivity in other sectors, hence the need for appropriate legal frameworks at national and regional levels to ensure the effective development of the sector on the continent.

4. Legal and procedural framework for negotiation of trade in services as part of the CFTA – Prof. Gerhard Erasmus, tralac Associate

Prof. Erasmus noted how a non-conventional approach to services negotiations is vital given the high level of ambition in the CFTA, the needs for effective governance of 21st century trade, as well as constraints posed by ideological choices and the Abuja Treaty. He noted some important legal and institutional issues that would need to be anchored by the CFTA including a comprehensive rules-based trade agreement with an effective dispute settlement arrangement; domestic reforms; monitoring of compliance; uniformity in remedies; interaction with regional bodies on competition; and distinction between institutions for political, technical and implementation tasks. He proposed a model CFTA Agreement establishing an AU CFTA organisation or institution, with the founding text covering goods and services, and other new generation issues such as investment, intellectual property and competition in associated annexes.

5. Terms of reference for the technical working group and institutional arrangements for services negotiations – Mr. Babajide Sodipo, Regional Trade Adviser in the Department of Trade and Industry, AUC

Mr. Sodipo informed the meeting of the institutional framework for the CFTA negotiations as well as the composition, functions and responsibilities of the Technical Working Group on Trade in Services. He posed some key questions to the meeting including whether the Terms of Reference are fit for purpose, how sectoral negotiations could be handled, and how other sector players and regulators can be brought into existing frameworks.

6. Fundamental principles and sectoral coverage for services negotiations – Mr. JB Cronjé, tralac Researcher

Mr. Cronjé firstly noted that the services negotiations will be facilitated by clarification of the principles that are to guide the overall negotiations process. He highlighted the need for a trade in services framework agreement that provides architectural elements such as most-favoured nation, market access with liberalisation commitments determined under sector specific annexes, national treatment as a general obligation but with provision for reservations under the sector specific annexes, rules of origin, approaches to domestic regulation for facilitation of trade, enhanced transparency obligations, standstill, ratchet, electronic commerce, and good governance practices.

He emphasised the need for sector specific annexes to such an agreement, which do not necessarily dwell on scheduling techniques, but are rather designed to achieve particular outcomes. These annexes should ideally include professional services, finance, communication and ICT, transport, distribution and express delivery, and energy, and should be negotiated by continental, regional and national sector regulators, competition regulators, private sector and governments. He also suggested a basic structure for the sector-specific annexes which could, for example, include sector-specific regulatory and pro-competitive disciplines, classification that reflects services trade, phased-in regulatory reform obligations, harmonisation of domestic regulation around international standards, applied market access regime and time-frames for phase out of existing restrictions, and lists of non-conforming measures. Examples of sector-specific issues were provided for the communications services and financial services sectors.

7. Pro-competitive regulation of services sectors and movement of persons – Mr. Malcolm McKinnon, Senior Trade Advisor on Trade in Services, SADC Secretariat

Mr. McKinnon noted that most regional economic communities in Africa have adopted the GATS approach to liberalisation of trade in services, and that there may not be significant additionality from extending preferences within respective RECs to the CFTA level. He also noted that although the CFTA would have to conform to the conditions of GATS Article V, it is worth noting that most FTAs around the world have moved on from strict adherence to the conventional GATS approach towards more GATS plus agreements. The challenge for Member States negotiating the CFTA will be on the extent to which they are willing to make commitments that go beyond those made at REC level. He presented the experience of SADC where services negotiations are still ongoing long after the Services Annex to the SADC Trade Protocol was adopted in 2000, and a separate Protocol on Trade in Services was consequently adopted. He also highlighted the challenges that exist for the Tripartite FTA process, given the differences in frameworks and coverage between COMESA and SADC. In the particular case of the SADC services negotiations, he highlighted how most market access and national treatment commitments were generally bound at or less than the regulatory status quo. This has value in providing legal certainty for investment, but would change very little if not accompanied by regulatory reform. Hence, the negotiations have included pro-competitive regulatory principles provided for in sectoral annexes in the areas of construction and energy-related services, finance, postal and courier, telecommunication,

tourism, and transport and logistics. Challenges encountered in this process – such as non-implementation of commitments even after reference sectoral papers were drafted – as well as lessons drawn from other arrangements such as the EU/Korea FTA and the WTO TISA negotiations were also reported.

Discussions

The following substantive issues arose out of the discussions on the presentations:

- It was agreed that the respective options discussed – including pros and cons of each – should be synthesised into a few options to be considered by Member States, based on similarities that run across the different options and aspects specific to each.
- It was noted that the DTI of the AUC has commissioned some case studies on services sectors in select African countries. These can translate into benchmarks for moving the CFTA services negotiations forward. Further work on capacity building will be required to ensure adequate knowledge and capacity ahead of the negotiations.
- The importance of streamlining the services agenda with the trade facilitation agenda was highlighted, for example through inter-connectivity of customs administrations.
- The increase in disputes in services sectors such as telecommunication makes clear the need for an effective institutional frameworks governing trade in services, including dispute settlement. A Continental Court and ad hoc panels will be important in this regard.
- It was noted that the question of creating new institutions or strengthening existing ones needs to be further interrogated.
- There was emphasis on the need to engage the Pan-African Parliament and national parliaments in the early stages of the CFTA process, as part of a broader communication and institutional collaboration process that starts from within the AUC.
- It is important to draw lessons from the T-FTA process, as challenges encountered and questions raised there will possibly also come up in the CFTA process.

In closing, Ms. Maphanga thanked participants for the fruitful deliberations during the meeting. She urged the need for further engagement to ensure that all stakeholders are well versed with the complexities of the area. She reiterated her department's commitment to engage in the process in collaboration with other AUC departments.

Prof. Erasmus thanked participants for their active engagement and wished the AUC the best in managing the daunting but exciting task ahead.