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Options for Africa's Priorities in WTO and EPA Services Negotiations

Summary

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Overview

The General Agreement on Trade in Services (GATS) entered into force on 1 January 1995, laying down rules and disciplines for multilateral services trade. GATS Article XIX contained a mandate to start a new round of negotiations in 2000. This was later incorporated into the Doha Round. In addition to services trade liberalisation, the agenda mandates the continuation of work to develop GATS disciplines covering domestic regulation, safeguards, government procurement and subsidies.

Outside multilateral services negotiations, the Cotonou Agreement (signed in June 2000) allows for regional economic partnership agreements (EPAs) on reciprocal trade arrangements between the EU and ACP countries. Beyond trade in goods, negotiations may also cover trade in services.

The objective of this paper is to inform African negotiators on the issue of services in the context of both GATS and EPAs and on which sectors to prioritise in making requests and offers to trading partners for liberalisation of services trade.

African exports of services

Between 1980 and 2000, low and middle income countries increased their production of services by 25 percent. Services account for two-thirds of global GDP, but this proportion varies greatly between developed and developing countries. For African countries (excluding Egypt and South Africa) the average share of services in GDP is about 40 percent although there are wide variations among individual countries ranging from 5 percent for Equatorial Guinea to 81 percent for Djibouti.

The increasing importance of services in national output has been accompanied by an expansion of the share of services in world trade. Since the early 1980s, trade in services has increased more rapidly than merchandise trade such that it now comprises one-fifth of global trade. African exports of services have grown, on average, 4 percent per year from US\$5.2 billion in 1980 to US\$9.4 billion in 2000. However, despite strong growth, the world share of African services exports dropped from 0.7 percent in 1980 to 0.5 percent in 2000. Among African countries there is a wide variation in the share of services in total exports ranging from over 70 percent for countries like the Seychelles (because of tourism) to under 5 percent for Niger, Burundi, Angola, Liberia, Mauritania, Guinea and Sudan.

For African countries, the largest export sector is travel and tourism, which accounts for one-third of all services exports, followed by transport, business and government services.

Constraints to Africa's services exports

Services trade is defined as occurring through four modes of supply:

- Mode 1. Cross-border supply. For example, mode 1 services trade occurs when computer software is purchased and then delivered over the internet from producers located in India to consumers in the EU. Mode 1 delivery has become more important owing to technological improvements in telecommunications and information networks.
- Mode 2. Consumption abroad. Services supplied in the territory of one country to consumers originating from another e.g. tourism.
- Mode 3. Commercial presence. Services supplied through foreign-owned companies.
- Mode 4. Temporary movement of natural persons. Services supplied by nationals of one country in the territory of another.

There remain constraints to the development of African services exports relating to issues of export capacity (e.g. limited access to technology, lack of financial resources and small domestic markets limiting the scope for economies of scale) and trade barriers faced in foreign markets. Protection in foreign markets may take the form of restrictions on market access (e.g. quantitative limits on foreign entry) or national treatment (e.g. discriminatory measures favouring domestic over foreign firms). Domestic regulation concerning qualitative requirements (e.g. qualification and licensing procedures) can also be designed and implemented in a way that is unnecessarily burdensome on foreign services suppliers.

The General Agreement on Trade in Services

At the multilateral level, the GATS governs some measures affecting trade in services and serves as a basis for WTO Members to progressively liberalise their services trade. The GATS regulates all trade in services (except for those which are supplied in the 'exercise of governmental authority'¹ and the greater part of the air transport sector), covers all modes of supply and applies to all types of domestic regulation at all levels of government.

The GATS distinguishes between general obligations which are those measures a country agrees to apply to all its services sectors and sector-specific commitments which apply only on specified sectors, as offered by each WTO Member.

¹ Defined as services which are supplied neither on a 'commercial basis nor in competition with one or more service suppliers' (Article I:3). There is a need to clarify in the GATS whether both or just one of these conditions must be met in order for the exclusion to apply.

General obligations

For all sectors, the most-favoured-nation (MFN) principle (Article II) obliges non-discrimination between foreign services providers. However, the GATS allows for exceptions to the MFN principle by virtue of two provisions:

- 1) Regional trade agreements (RTA) affecting services trade can be notified under Article V of the GATS. In order to be compatible with Article V provisions, an RTA must have 'substantial' coverage in terms of services sectors, volume of services trade and modes of supply and it has to provide for national treatment among services providers in the countries party to the RTA eliminating 'substantially' all discrimination. These conditions should be met after a 'reasonable' period of time.
- 2) When the GATS first entered into being in 1995, Members were allowed a single opportunity to list exemptions from the MFN principle. Most were intended to be permanent exclusions, but are subject to negotiation in the current round. These were often used to specify regional arrangements which would not meet the Article V rules.

Article III contains general obligations on transparency. Under the GATS, Members are obliged to publish all domestic regulatory measures affecting services trade and establish enquiry points to provide this information.

Finally, all WTO Members must participate in rounds of GATS negotiations with the aim of achieving higher levels of services trade liberalisation (Article XIX). There are also provisions for further negotiations on developing GATS rules relating to emergency safeguard measures (Article X), government procurement (Article XIII) and subsidies (Article XV).

Sector-specific commitments

All other GATS commitments apply to the extent that each Member has accepted them on a sector-by-sector basis. A Member can make commitments (by mode of supply) to open its market to foreign service suppliers (market access – Article XVI) and / or guarantee non-discriminatory treatment between foreign and domestic suppliers (national treatment – Article XVII). Sector-specific commitments are listed in 'schedules of specific commitments'. Members have complete flexibility to determine the sector coverage and substantive content of schedules. There is no minimum for the number of sectors to be included and while some countries have scheduled all major services sectors, others have listed only a limited number. All Members were expected to commit at least one part of a sector. Members can also make market access and national treatment commitments *across* sectors in what are known as horizontal schedules of commitments.

There are measures inconsistent with market access, listed in Article XVI, which a Member cannot maintain or adopt, unless listed as a limitation in its schedule of specific commitments:

- 1) Limits on the number of services suppliers;
- 2) Limits on the total value of services transactions or assets;
- 3) Limits on the total number of services operations or the total quantity of the services output;
- 4) Limits on the total number of natural persons that may be employed in a particular sector;
- 5) Limits on specific types of legal entity through which services can be supplied;
- 6) Limits on foreign equity participation.

Under the GATS, national treatment applies only to those services sectors inscribed in a Member's schedule of specific commitments and even then conditions and restrictions can be imposed, provided they are listed. Article XVII provides no exhaustive list of measures inconsistent with national treatment but it makes clear that all *de jure* and *de facto* measures that favour domestic services suppliers must be listed if they are to be maintained.

Within the schedules of specific commitments:

- An entry of 'none' indicates that a Member is bound to not having or introducing any measures that restrict market access or national treatment for a sector and mode of supply (but any limitations set out in the horizontal schedule still apply).
- The term 'unbound' indicates that no commitment has been made and the Member is free to introduce market access and national treatment limitations.
- 'unbound*' appears for sectors in which a particular mode of supply is not technically feasible e.g. cross-border supply of construction services.
- All other entries which include commitments with limitations are known as 'partial commitments'. A Member is bound to not introduce any additional measures that restrict market access or national treatment.

For sectors where WTO Members have made specific commitments, Articles VI and VII of the GATS deal with domestic regulation and recognition, respectively. Since negotiated commitments on market access and national treatment could be offset by restrictive domestic regulations these rules aim to ensure a predictable regulatory environment. Although disciplines on domestic regulation are still being developed in the

GATS, measures affecting services trade must be administered 'reasonably', 'objectively' and 'impartially' and should not constitute 'unnecessary' barriers to trade.

Finally, under Article XVIII Members can make additional liberalisation commitments that do not fall under market access or national treatment, such as on licensing requirements and procedures.

Progressive liberalisation

Article XIX of the GATS sets out objectives for future negotiations on services trade. As a result of the Uruguay Round, WTO Members agreed to resume negotiations on all services by 1 January 2000. On the basis of this, and reiterated by the Doha Declaration, all WTO Members were committed to start a new round of negotiations – the GATS 2000 negotiations – with a view to 'achieving a progressively higher level of liberalisation'.

Annexes

The GATS has eight annexes which deal with one-time MFN exemptions, address the temporary movement of natural persons, exclude air transport services, define commitments for financial services (2 annexes) and telecommunications (2 annexes) and clarify the potential coverage of maritime transport services commitments.

Although the Uruguay Round negotiations were concluded in December 1993, negotiations on basic telecommunications, financial services and maritime transport were extended by 18 months in the hope of achieving deeper commitments in these sectors. India proposed successfully that the extended negotiations include temporary movement of natural persons. Negotiations on mode 4 were extended until 30 June 1995 but produced very little: only Australia, Canada, the EU, India, Norway and Switzerland made deeper commitments to those agreed during the Uruguay Round which were included in the Annex. These commitments mainly concern market access for additional categories of service suppliers (professionals in various business sectors) and extension of permitted durations of stay.

The current pattern of sector-specific commitments

In terms of the number of sectors each Member has included in its specific schedule of commitments, about one-third of Members have scheduled fewer than 20 of the 160 sub-sectors specified in the GATS classification list, one-third have committed between 21 and 60 sub-sectors and the remaining Members have included between 61 and 130 sub-sectors. The last group includes virtually all developed countries but also some developing and Least Developed Countries (Gambia, Lesotho and Sierra Leone). By sector, developed countries have made commitments in nearly all sectors except for

health and education. Maritime services have also been excluded by the US and EU and audiovisual services by Canada. The services most frequently included in schedules of commitments are those sectors traditionally considered to carry low levels of restrictions (tourism) but also core 'productive infrastructure' services such as business, financial and telecommunications services which benefit the wider economy. The fewest commitments have been made in social sectors like education, health, sewage and sanitation. This reflects the wish of many governments to retain policy discretion in areas which are often considered to be core public sector responsibilities.

By mode of supply, commitments are most liberal for mode 2 where close to 50 percent of all commitments are full commitments with no limitations attached, followed by mode 1. They are most restrictive for mode 4 where the fewest commitments have been made and where there are no full horizontal commitments. Most mode 4 commitments relate to skilled personnel such as executives, managers and specialist workers and over half are limited to intra-corporate transferees (related to commercial presence).

Negotiations under GATS 2000 and the Doha Round

Although the basic rules for the liberalisation of services trade were agreed in the GATS during the Uruguay Round, a number of issues remained unresolved and were left for the GATS 2000 negotiations. First, while GATS in principle covers all sectors, the number of commitments remains limited both in terms of the number and depth across sectors and modes of supply. Second, GATS disciplines for domestic regulation, safeguards, subsidies and government procurement have yet to be developed. African negotiators should first concentrate on the sectoral negotiations since negotiating stances for the rulemaking exercise will be strongly influenced by the nature of both the sectors (and foreign markets) in which they wish to promote exports and those domestic services they wish to protect.

Under the GATS negotiating process, individual countries make requests to other countries for them to make market access and national treatment commitments in specified sectors. Countries then make offers for liberalisation based on the requests that they have received.

The request process is bilateral and Members normally submit requests in the form of a letter asking a country to make commitments for a sector or to remove certain market access or national treatment limitations from a sector which has already been scheduled.

Offers can be used to respond to requests or are made in sectors where a country would like to volunteer multilateral liberalisation. Offers take the form of a draft schedule of specific commitments. Unlike requests, offers are distributed to all Members, via the WTO Secretariat, and are subject to multilateral negotiation. Offers can generate more requests as part of the negotiation process although not all countries may make requests or submit offers.

The GATS 2000 negotiations failed to progress substantially by the Cancún Ministerial meeting. Subsequently, it was agreed in Geneva (on 31 July 2004) to set a revised deadline for receipt of services offers of May 2005. By March 2005, only 30 developing countries had submitted offers.

Services provisions in the Cotonou Agreement

The EU is a significant market for African services exports. Services now account for a third of Africa's total exports to the EU. Regional trade arrangements between African countries and the EU which include provisions for services trade are, therefore, potentially important.

The Cotonou Agreement (2000) replaced the Lomé Convention and marked a shift from non-reciprocal tariff preferences to establishing reciprocal trade arrangements for all ACP countries. During a preparatory period (2000-08), the Cotonou Agreement maintains Lomé IV non-reciprocal preferences while the EU and ACP regional groups negotiate Economic Partnership Agreements (EPAs) that will establish timelines for progressively liberalising trade. The new trading arrangements will enter into force by 1 January 2008, after which liberalisation will be phased in over a period of at least 12 years. In addition to merchandise trade, EPAs could also cover trade in services.

The first phase of EPA negotiations started in September 2002. Regarding trade in services, the EU agreed that the ACP will not be obliged to liberalise services trade under EPAs and that any services liberalisation should be: progressive and based on a positive list approach (see Box 1); underpinned by special and differential for developing countries; and, based on sound domestic regulatory frameworks and the right to regulate. The EU also agreed that within the context of EPAs support will be provided for the development of ACP services sectors and there should be adequate sequencing between this and services trade liberalisation. The EU also showed willingness to discuss improved market access under mode 4 for ACP suppliers, although this issue remains sensitive.

Box 1: Approaches to liberalisation of services trade

Two approaches to services trade liberalisation are common in the international trading system: the 'positive list', or 'bottom-up' approach and the 'negative list' or 'top-down' approach.

Under a positive list approach, countries make national treatment and market access commitments specifying the type of access or treatment offered to services suppliers in scheduled sectors.

The negative list approach to services trade liberalisation is based on a top-down listing, whereby all sectors and measures are to be liberalised unless otherwise specified in annexes containing exceptions. Exceptions in the annexes are then usually liberalised through future negotiations.

The negative list approach is useful in providing information in a transparent form on the existing barriers facing services exports to foreign markets. In positive list agreements, the sectoral coverage of commitments and the type of information provided on these may vary significantly among countries. Moreover, the type of limitations on market access and national treatment in countries' schedules are often listed as minimum levels of treatment that do not necessarily reflect the *status quo*. This can result in less transparency for services providers and less certainty regarding market access.

The second phase of EPA negotiations was launched in 2003. The first decision concerned which ACP regional groups were prepared to negotiate EPAs with the EU. The following have emerged so far: ECOWAS (plus Mauritania), CEMAC (plus São Tomé and Príncipe), Eastern and Southern Africa (ESA), SADC (with South Africa as an observer), Pacific Forum and CARIFORUM. Each region now needs to decide whether to negotiate a services agreement as part of an EPA. Initial indications are that all regions will include a services component in EPAs. There is also, therefore, a need to discuss the liberalising principles that will be adopted in each EPA, requests and offers and whether the ACP will go further than commitments they are likely to undertake in the GATS 2000 negotiations. In particular, countries will need to decide what requests and offers they are likely to make to the EU under EPAs than to all WTO Members under the GATS.

Services where African countries may want to make requests

A number of activities should be undertaken to inform a country preparing a request for services trade liberalisation:

- Identification of specific services sectors where the country has existing or potential export capacity.
- Analysis of information on the size of the market in the country to which the request will be made for liberalisation in these sectors. This will provide an estimate of the possible gains to the country if the request is successful.
- Consultation with services suppliers to determine where they export to and in which markets they face barriers to market access and national treatment. The request should be for commitments to remove these constraints. If there are no constraints, then the country should request a binding commitment to maintain the degree of openness.
- Identification of other horizontal issues. A request need not always be for liberalisation commitments in a particular sector. It can also be made applicable to all services sectors e.g. barriers to mode 4 exports.

A priori, countries with low labour costs should have a comparative advantage in services exports, and as services remain some of the most restricted areas of trade within the WTO, it should not be difficult to find trade barriers which countries could request to be

removed in the expectation of making large export gains. In practice, many services require non-labour inputs or complementary products including technical inputs, quality controls and suitable infrastructure in the form of communications and transport, and government regulations. These supply-side constraints may mean that African services providers are not yet ready to compete in world markets, but it may still be prudent to identify future opportunities now, and to ensure that the trading environment will be open when African countries can export these services.

African countries may want to make requests to open services markets where they currently face barriers. The barriers which are most stringent are against mode 4 access. These are applied by all countries, developed and developing (including African), so countries need to identify where they are most likely to want access. African countries should also make efforts to ensure permanent access to markets in which they are already operating but where the importing country has not yet 'bound' access under the GATS. African and Middle Eastern countries have bound relatively few services.

Africa's principal services export is tourism. This does not face serious applied barriers in most developed countries, but there are potential barriers from regulations on security (both financial and health) so countries might want to ensure that access is bound. They may face barriers in other African countries through restrictions on non-national business or transport. Other regions, notably Central America and the Caribbean, have active groups looking at tourism trade and African countries also need to identify their interests here.

Most African exports of non-tourism services are to other African countries. Insurance firms and banks in some African countries are starting to supply services to neighbouring countries. In many cases there may not be trade barriers now, but as long as countries have not bound their openness, restrictions could be imposed in the future. This suggests that it may be less easy to have an 'African' position on services, with Africa united in making requests to the rest of the world, than in some other aspects of the negotiations. It is notable that Mauritius and Egypt were among the first countries to make requests to African countries, along with the EU, the US, and Japan.

A few African countries also have the possibility of supplying education and health services to developed countries, because they have infrastructure for a quality domestic market, and much lower costs than developed countries. For these services, the question of whether publicly-provided services should be included in GATS requests is important. Although African countries may want to have access to developed country publicly-funded markets (for example, providing medical services under national insurance schemes), it would be difficult for these countries to argue for the inclusion of some 'social services' in their requests if they were arguing that other sectors, like water, should be excluded in principle from their offers.

Services where African countries may want to make offers

Each country that receives a request needs to examine it in order to prepare an offer. An offer may be either in the form of increased sectoral commitments or reduced limitations with respect to market access and national treatment. In addition, an offer could consist of a refusal to liberalise a sector included in the request.

A country is not required under the GATS to offer any liberalisation but to make no offer would reduce its bargaining power vis-à-vis any requests it has made, including in other areas of the Doha agenda (e.g. agriculture). Although countries may only make offers in response to requests from other Members, they can also bind services trade liberalisation even if a request has not been made. Developing countries may also link liberalisation in their sector-specific schedules subject to improved access to other markets outlined in their requests.

Which services a country should actually offer depends, therefore, on what it thinks different offers would be 'worth' in terms of securing those concessions which they want in the negotiations (not necessarily in services, of course).

Following the Uruguay Round, most countries bound fewer sectors and with less extensive opening than their domestic regulatory regimes actually offered (the equivalent, for goods trade, of binding tariffs at above applied rates). Some have since liberalised trade barriers on services autonomously so that there is an increased amount of 'water in the tariff' for services. It follows that finding possible offers which would not have any real effect on the economy would not be difficult, and the first step that African countries should take is probably to identify a range of such possible 'easy' offers. Financial services and construction are examples of already open services in most countries.

In addition, there has also been some services trade liberalisation at the regional level, for example the intra-regional freeing of air transport and discussions of financial services within COMESA. Countries could consider whether they can extend any arrangements beyond their region and bind them at the multilateral level. Transport services have already been opened within some regions, and are essential inputs into all other trade, so countries could consider including these in their offers.

Offers can also be made if countries are planning to open some sectors for domestic development reasons. Offers under the GATS increase the credibility of liberalisation and can be used to promote foreign direct investment and improve efficiency in infrastructure services whose benefits may spill over to the wider economy.

But there are constraints on what countries should offer. Services are not as amenable to examination before purchase as goods and therefore require either greater knowledge and experience on the part of the user or some form of technical standards. Many services require either strong government direction and control or well designed and well implemented regulation. Markets should not, therefore, be opened until regulation is in place and effective. Financial services require prudential regulation and construction

services need safety rules if these sectors were to be opened. If some domestic services are to be encouraged through measures, such as subsidies, then it would be desirable to exclude these.

One of the problems that the private sector in developed countries identify in services trade negotiations is that negotiators know and understand less about services, and the various types of barriers that affect them, than they do about goods. This is likely to be a problem for African countries as well and is another reason for the need to take a cautious approach in making offers.

Liberalising EU services trade under GATS versus liberalisation under EPAs

African countries will need to first determine possible outcomes under the GATS 2000 negotiations before considering post-Cotonou services liberalisation with the EU. It may be more desirable to secure liberalisation of EU barriers to services imports multilaterally rather than on a regional basis in the context of EPAs because liberalisation under the GATS is more credible: EPAs lack a dispute settlement mechanism, but this is well-established under the GATS.

Another potential problem concerns 'regulatory asymmetries' at the regional level. The EU's Single Market has led to some harmonisation of national regulations affecting services across Member States but African regional groups that will be negotiating EPAs are at a much earlier stage of services market integration. This will complicate the negotiating process since regulatory regimes could vary between countries in the regional group.

Different members of a region may also have different services interests in the EU market. Although joint action, where possible, is more powerful in negotiations it would not be inconceivable for EPAs to differentiate provisions between members of the same regional group (as they will be signed between the EU and each African member).

However, where requests to the EU for multilateral liberalisation have been, or are being, unsuccessful it may be more politically feasible to liberalise some services with a limited set of countries within the context of an EPA than with all WTO Members, as under the GATS. Mode 4 is a possible example, since this is a particularly sensitive issue for the EU vis-à-vis large developing countries like India.

Conclusion

Services exports, most notably tourism, are an important source of foreign exchange earnings for African countries. Although Africa's exports of services are growing, they are losing world market share because of domestic supply-side constraints and trade barriers in both developed and developing country export markets. Multilateral and regional trade negotiations affecting services are therefore important for Africa if its trading partners are to progressively liberalise their services trade.

The Uruguay Round made only limited progress in terms of both the depth and sectoral coverage of market access and national treatment commitments made by WTO Members under the GATS. In addition, a number of key GATS disciplines were left for future negotiation. WTO Members were obliged to start a new round of services negotiations in 2000, due to finish by the end of the Doha Round. Since then, progress in the GATS 2000 discussions has been uneven owing to problems in other areas of the negotiations such as agriculture. Nevertheless, the request and offer process has started.

Regional trade agreements are also potentially important for African economies. The EU, in particular, is a significant market for Africa's services exports and reciprocal trade arrangements (for ACP countries) in the form of EPAs could contain provisions for services trade.

In making requests for services trade liberalisation, African countries may want to seek from trading partners commitments on market access and national treatment for export sectors or modes of supply in which they currently face barriers. Where there are no constraints, but commitments have yet to be made, they may also consider requesting bound access to markets in which they operate (e.g. tourism).

In responding to requests from other countries, African countries could consider making offers which bind access to sectors in which they have already liberalised outside of negotiations (e.g. financial services) or make commitments in sectors which promote the competitiveness of other exports (e.g. transport).

In determining whether to negotiate services trade liberalisation vis-à-vis the EU under GATS or EPAs, African countries should initially prioritise the former before considering the latter. However, where requests for services trade liberalisation are made to the EU in sensitive sectors, these may be more achievable within the context of EPAs than under the GATS.

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