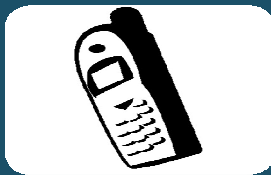
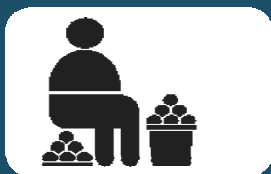


Southern Africa Customs Union: Getting ready for services negotiations



OVERVIEW

For many African states, negotiations to liberalise trade in services is a relatively new experience. Southern African Development Community (SADC), Common Market for Eastern and Southern Africa (COMESA) and East African Community (EAC) member states are set to negotiate services at several levels – regional, bilateral, multilateral and even at the supra-regional level in the context of the Tripartite agreement.

Trade in services is not a feature of the 2002 Southern African Customs Union (SACU) agreement, and although the Heads of State and Government hinted at the possibility when they undertook to develop “SACU positions on new generation issues”, it is unlikely that services will be negotiated in the context of SACU any time soon. SACU member states already have to contend with bilateral services negotiations with the

European Union (EU) (Botswana, Lesotho, Swaziland), regional negotiations as part of SADC (all five SACU member states), regional negotiations as part of COMESA (Swaziland), and even at the supra-regional level as part of the Tripartite negotiations. This is already ambitious, particularly for a country with limited capacity such as Swaziland.

These negotiations are mostly focussed on services liberalisation, which addresses regulatory barriers relating to the access and treatment of foreign services suppliers. If SACU member states feel the need to directly address the issue of services within the configuration, the basis of the discussion should be deeper integration. With deeper integration, 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.

RECOMMENDATIONS

For many countries in the region, the process of liberalising trade in services through trade negotiations is the first step in addressing fundamental behind-the-border issues. Trade in services has, in part, been addressed during the Economic Partnership Agreement (EPA) negotiating process. This has enabled some governments to strengthen their capacity and technical expertise and come to grips with the fundamental issues involved in services negotiations. Some SACU member states – those that already signed the interim EPA – are more firmly bound to services negotiations.

The signing of the interim EPA has created certain obligations for them, one of which is to go ahead with the process and negotiate a services chapter. It is difficult to predict how this process will unfold and what will be agreed, but this has arguably signaled the beginning of regional and bilateral services negotiations in Southern Africa.

The process in Eastern Africa is already underway and SADC member states are inching closer to approve the SADC Protocol on Trade in Services. It is inevitable that all countries will sooner rather than later be involved in services negotiations. Moreover, it is likely that countries will negotiate on several levels – regional, bilateral, multilateral and perhaps even supra-regional in the context of the Tripartite agreement.

Laying a solid foundation in the form of thorough preparations, accurate knowledge and improved understanding will become indispensable for countries wanting to successfully negotiate services.

Deeper integration, among other things, includes domestic issues such as transparency, competition regulation, specific sectoral disciplines, mutual recognition and the harmonisation of certain areas. Some of these issues are, however, also addressed at the regional level of SADC, so SACU member states will have to carefully define the scope of the negotiations according to their needs and expectations.

In the wider region, only EAC member states have concluded binding commitments to liberalise certain services sectors. COMESA member states still have to start negotiating rounds to agree on binding commitments, while the SADC member states are in the final stages of approving the SADC Protocol on services. According to the draft text, SADC negotiating rounds to liberalise trade in services will be concluded within three years after the adoption of the Protocol. During these negotiating rounds, countries will draft 'schedules of specific commitments' which will form an integral part of the services framework.

These specific commitments are legal obligations undertaken by the individual countries concerning the level of market access permitted to foreign services suppliers and the conditions under which they are allowed to operate domestically. Specific commitments 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. Basically these schedules set the parameters for foreign participation in a country's domestic services industries.

NEGOTIATING ISSUES FOR SACU TO CONSIDER

Each SACU member states will have to prepare a separate schedule for each level of negotiations (bilateral, regional, supra-regional, multilateral) and these have to be in line with World Trade Organisation (WTO) rules. As all five SACU countries are WTO member states, they will have to observe the disciplines of General Agreement on Trade in Services (GATS) Article V when concluding regional integration agreements on trade in services. These schedules should have "substantial sectoral coverage" on the number of sectors included, the modes of supply and the volume of trade affected.

This coverage is further qualified by a footnote to GATS Article V:1(a), which specifically states that "agreements should not provide for the a priori exclusion of any mode of supply". These requirements aim to prevent the negotiation of an agreement with a too limited scope.

There is no agreed definition at present of what constitute "substantially all trade" in the area of services, or an acceptable way of determining that threshold. In the context of the Caribbean Forum (CARIFORUM) EPA, this threshold is being interpreted by the EU as between 65 percent and 75 percent – expressed in terms of services sectors subject to scheduled commitments – depending on the country's level of development.

The flaw of this approach is that the focus is solely on the number of the sectors, while the calculation does not take account of the modes of supply or volume of trade as specified in GATS Article V. It is therefore advisable to clearly define minimum thresholds that are acceptable to all parties before the start of any negotiations.

Until now, the only time SACU member states negotiated these schedules of specific commitments was during the multilateral negotiations in the context of the GATS. All the member states of SACU are signatories to the GATS and submitted their schedules of specific commitments during the Uruguay negotiations. In contrast to the approach under GATS Article V, there was no requirement on WTO member states to schedule a minimum number of commitments. As a result these varied, ranging from very limited to fairly liberal. South Africa committed 91 sub-sectors (or 56.88 percent) of the potential 160 sub-sectors, Lesotho 78 (or 48.75 percent), Botswana 20 (or 12.5 percent), Swaziland nine (or 5.63 percent) and Namibia only three (or 1.88 percent).

It can be argued that the countries making fewer commitments will have more policy space and options available to them in subsequent services negotiations. These countries may also have greater leverage when making requests to other negotiating parties to open up new markets. The ongoing negotiations at the multilateral level were intended to gradually level the playing field, but the current imbalance in the commitments made by negotiating parties may render bilateral and regional services negotiations more challenging. Not only are African countries at different level of development, they are also at different stages in their respective liberalisation processes. This can lead to tension between negotiating parties if the precise parameters or guidelines for the services negotiations are not clearly defined.

Flexibility for lesser developed countries is built into the services negotiations, but what exactly does this mean? What is expected of each negotiating party with respect to the degree of the liberalisation must be determined before the start of the negotiations.



SELLING SERVICES: Different levels of development are causing tensions among SACU member states on how to proceed with the services part of the SADC Economic Partnership Agreement negotiations

Tensions are already apparent in the bilateral services negotiations with the EU. SACU member states, despite the existence of a proposed common negotiating mechanism in SACU, are not in agreement on how to proceed with the services part of the SADC EPA negotiations. The objectives of the SACU member states are contradictory; where the developed partner already exports a wide range of services to its neighbours, the lesser developed partners do not have many noteworthy firms to protect against foreign competition.

In this instance, in which other developed countries (EU) are involved in the negotiations, the developed partner (SA) has a defensive interest to protect its services industries in the region, in contrast to the lesser developed partners (Botswana, Lesotho, Namibia, Swaziland), which want to open their markets to stimulate further competition.

These objectives will again be different when countries are negotiating at the regional levels of SADC and will most likely also be different at the supra-regional negotiations under the Tripartite configuration. The question SACU member states face is not whether their services industries are going to be liberalised or not, but rather how they are going to structure and sequence their negotiations across the different levels.

PREPARING FOR SERVICES NEGOTIATIONS

Despite the challenges created by the EPA negotiating process, it has brought governments certain benefits in the form of capacity strengthening and technical expertise, particularly in the area of trade in services. This can serve as the basis for formulating a services strategy, but each country still has go through a

process of domestic introspection to prepare for future services negotiations. Certain aspects of the negotiations are unique to each country and a customised services strategy should be formulated to fit the strengths and nature of the countries' markets. Preparations at this stage of the negotiations revolve around the detailed knowledge of a country's services sectors; to submit an *offer* to another negotiating party the government must understand what is going on behind its own borders, while *requests* to other negotiating parties rest on the ability of a government to identify the suppliers which have an offensive interest in exporting services.

The GATS commitments made at the multilateral level will be used as baseline for other services negotiations and can serve as a good starting point for a regulatory assessment. SACU member states must first ensure that current domestic legislation is in line with their international commitments made under the GATS. This is a particular important exercise for a country such as Lesotho which negotiated a GATS schedule that in some instances does not accurately reflect government policy. Even South Africa might have to scrutinise Black Economic Empowerment (BEE) policy and regulations to determine conformity with its GATS commitments.

Current realities and the conditions applicable in each of the sectors are, however, not accurately reflected in the GATS and its schedules. Unlike trade in goods, tariffs or duties are not applicable when services or suppliers enter a country. Protection of a country's domestic services industry is therefore mostly achieved through national laws and regulations. It is necessary to undertake a complete regulatory audit of the domestic regulatory framework to provide a clear picture of what is happening behind the borders of each country.

An important first step to determine the specific barriers applicable in a specific sector is to examine each piece of local legislation affecting trade in services, to establish whether it discriminates against foreign suppliers or denies market access in any way. Preparation of this full inventory of measures affecting all trade in services is necessary to cultivate a greater understanding and appreciation of the regulatory regime. This information will feed into the *negotiating offer* that is presented to the other negotiating parties.

It is also advisable that all the identified restrictions are stored where it is easily accessible by officials dealing with trade in services. Maintaining such a database can enhance the institutional memory of the government and facilitate the administration of regulatory information. This ability to accurately store and administer large amounts of regulatory information will become increasingly important over time, particularly if countries are involved in multiple services agreements.

Preparing the *negotiating requests* will consist of two parts: 1) determining the export capacity of domestic industries and 2) identifying regulatory and other barriers in the markets of the negotiating parties. Some SACU member states may regard this offensive analysis as less important because of their inability to supply services competitively.

This analysis is, however, necessary to secure market access and more favourable conditions for a country's services suppliers, including the supply of cross-border services and the movement of natural persons. A crucial element for the successful preparation of an offensive analysis is establishing and maintaining proper channels of communication with relevant stakeholders, and ensuring that there are avenues for constructive engagement

between these stakeholders and the government ministry responsible for the negotiating of trade in services.

In the area of trade negotiations, the responsibility of governments is to negotiate favourable market access and conditions for the companies that do the actual trading. Activities are, however, so diverse and specialised that it will be difficult for the responsible ministry to keep up to date with all the developments.

The input of the private sector is particularly crucial in drafting a services request due to the unique nature of each services sector. It is a good idea to identify the most prolific, innovative and successful services suppliers in each of the sectors already exporting services, or which would likely have the potential and interest to expand beyond the borders of its host country. These suppliers can be approached to articulate an offensive sector-specific strategy that can feed into the overall strategy of the government. However, for the engagement to be constructive and continuous, it is necessary that consultations with the private sector are a collaborative process, meaning the government must be more transparent by sharing the significance and progress of the negotiations with the participants.

This collaborative process would likely entail information seminars to inform the private sector participants of the reasons behind the negotiations, the objectives government wishes to achieve, the consequences of liberalisation, and the kind of support required from the private sector. The interaction could also include regular updates on the negotiating progress and any planned activities. If a concerted effort is made to consistently involve the private sector in the process, the support given would be more valuable and arguably more targeted towards the pertinent issues.

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