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Trade in services in the context of SADC-EU EPA: Risks and opportunities

Summary

The desire by the EU to include trade in services as part of the ongoing EPA negotiations with SADC has brought into sharp focus the question as to whether such a move would be in the best interest of SADC. The significance of this question lies in the widely held belief among developing countries that opening up their service sectors to foreign competition while the sector remains poorly developed would harm their developmental prospects. This article examines the merits and weaknesses of this viewpoint, by highlighting the risks that often accompany liberalisation of services between two regions that are at different levels of development. It also draws attention to the growing importance of services in world trade and how they have become an indispensable component of economic growth in developing countries. The article concludes that an EPA is not the most appropriate mechanism for achieving equitable trade in services from a SADC perspective, given the adversarial nature of the negotiations that precede its conclusion. Furthermore, rather than support an all-encompassing process involving liberalisation of all the services sectors at one go, the article advocates a more gradual process involving liberalisation of a few strategic sectors at a time, which would focus within the region initially and only expand globally with time.

Handel in dienste in die konteks van SAOG-EU EPA: risiko's en geleenthede

Die begeerte van die EU om handel in dienste in te sluit as deel van die EPA-onderhandelinge met die SAOG het die vraag of so 'n stap in die beste belang van die SAOG sal wees skerp onder die soeklig geplaas. Die belang van hierdie vraag lê in die algemeen aanvaarde siening onder die ontwikkelende lande dat die opening van hul diens sektore tot buitelandse mededinging, terwyl die sektor swak ontwikkel bly, hul ontwikkelings-vooruitsigte sou benadeel. Hierdie referaat ondersoek die meriete en swakhede van hierdie siening. Klem word geplaas op die risiko's wat dikwels die liberalisering van dienste tussen die twee streke wat op verskillende vlakke van ontwikkeling is, vergesel. Dit trek ook die aandag na die toenemende belangrikheid van dienste in wêreld handel en hoe hulle 'n onmisbare komponent van ekonomiese groei in die ontwikkelende lande geword het. Hierdie referaat kom tot die gevolgtrekking dat 'n EPA nie die mees geskikte meganisme is vir die bereiking van billike handel in dienste van 'n SAOG-perspektief nie, inaggenome die opponerende aard van die onderhandelinge wat die sluiting daarvan voorafgaan. Verder, eerder as om die ondersteuning van 'n alles-omvattende proses wat die

liberalisering van al die sektore van dienste op 'n slag insluit, staan hierdie referaat 'n meer geleidelike proses wat die liberalisering van 'n paar strategiese sektore op 'n tyd toe, wat aanvanklik sal fokus binne die streek, en slegs globaal sal uitbrei met verloop van tyd.

1. Introduction

The perception has long persisted that trade in services is not a domain of developing countries, but the exclusive preserve of the developed countries.¹ The prevalence of this notion is nowhere more evident than in the enduring reluctance of most developing countries to undertake commitments which would open up their domestic services markets to external competition.² However, there are contrasting opinions regarding the accuracy of this perception. This article is an in-depth examination of the various views on the issue within the context of the Economic Partnership Agreement (EPA) currently being negotiated between the Southern African Development Community (SADC) and the European Union (EU).³ This examination takes place against the background of the EU's wish to include provisions on services trade in the EPA⁴ and investigates both the implications of such a move for SADC member countries as well as the way in which these countries should respond.

Before proceeding to address the core issues dealt with in this article in detail, it is important first to explain the meanings of the concepts of "services" and "trade in services", as well as their significance to world trade. Services cover a broad spectrum of activities including the provision of clean water, energy supply, education, health care, telecommunications and business services such as banking, lawyers and accountants.⁵ On the other hand, trade in services was initially associated with those services that could be transported between borders and which were characterised by the producer and the consumer being in different countries. It was only later that the notion encompassed the movement of the consumer to the country of the service provider and *vice versa*.⁶

In the developed world, in particular, many countries have come to view the services sector as a source of new opportunities for export-oriented growth and this, in turn, has led them to seek to promote global trade expansion in the sector through numerous free trade agreements.⁷ As in the case of goods, the main reason offered in support of the drive to liberalise trade in services may be traced back to Ricardo's theory of comparative advantage. Aniket aptly articulates this theory in the following terms: "the ability of each nation to prosper simultaneously by exploiting their

1 Kuznar 2007:2.

2 Kuznar 2007:2.

3 The agreement is otherwise known as the SADC-EU EPA.

4 Lazzeri 2010.

5 Lazzeri 2010.

6 Burange *et al.* 2009: 2-3.

7 Daima Associates Limited 2007:viii.

respective comparative advantages in the field of trade. ... [T]he relative abundance of natural or evolved resources or, in other words, factors of production would directly reflect on the comparative advantage.”⁸

The unwillingness on the part of many developing countries to liberalise their services markets has been attributed to the poor development of the sector in these countries and their fear that established foreign firms would stifle budding local industries even before these industries took root.⁹ The exclusion of broad public policy issues from the World Trade Organization (WTO) services negotiations agenda has also been a source of concern for the developing countries. These countries are particularly concerned about the likely impact of liberalisation on their domestic markets where there are inadequate regulatory frameworks in place, as well as about possible adverse effects of liberalisation on the imperative of universal access to essential services, especially as regards the poor.¹⁰ However, as will be shown later in this article, there are certain commentators who dismiss these concerns as stemming from lack of awareness and understanding of the situation of services exporters and what they stand to gain from greater participation in international trade in services.¹¹

2. The origins of SACU-EU EPA and the parties' positions on services

The idea behind the creation of EPAs between the EU and the African, Caribbean and Pacific (ACP) group of countries followed in the wake of certain changes in the political and economic policies of the EU towards the ACP countries in the late 1980s and 1990s.¹² During this period, the focus of EU policies shifted away from the ACP countries to other parts of the world. With these changes, the historically cooperative relationship between the EU and ACP countries, which had culminated in the Lomé Convention and the Cotonou Partnership Agreement, lost much of its significance. Moreover, the fact that the latter two agreements had extended preferential treatment to the ACP countries had attracted criticism from WTO members, who had argued that these agreements were in breach of Article XXIV of the *General Agreement on Tariffs and Trade (GATT)* (1947).¹³ It was against this background that the EU is said to have decided to initiate the EPA negotiations.

The objectives of the SADC-EU EPA are stated as follows:

Based on the Cotonou Agreement and the outcome of the first phase negotiations, both sides agree that the overall objectives

8 Aniket 1995:.

9 Kuznar 2007:2.

10 Aniket 1995.

11 Kuznar 2007:2.

12 Tralac 2008.

13 Tralac 2008.

of the SADC-EC EPA will be sustainable development of SADC countries, their smooth and gradual integration into the global economy, and to contribute to the eradication of poverty. More specifically, the SADC-EC EPA will promote sustained growth, contribute to enhancing the production and supply capacity of the SADC countries, foster the structural transformation of the SADC economies and their diversification and support regional integration initiatives in the SADC region.¹⁴

Despite the fact that these objectives contain no specific reference to the liberalisation of services, it is, as mentioned earlier, no secret that the EU wishes to incorporate an agreement covering this aspect in the final SADC-EU EPA.¹⁵ The EU has argued that it would not be possible for an EPA that excludes services to achieve much, as the competitiveness of exported goods is contingent on ready access to competitive services in the financial, transport and telecommunications sectors.¹⁶ Thus, the position adopted by the EU is not surprising. In addition, the EU's position is in line with its past policy and that of the other developed countries. According to Daima Associates, “[b]y and large, major services providers in the US and Europe acted as *demandeurs* for services rules and for a process that would lead to global trade expansion in the sector”.¹⁷

For their part, the majority of SADC members are opposed to the inclusion of services in the EPA. Led by South Africa and Namibia, which are keen to preserve their policy space in the services sector, these countries have insisted that it is not essential that services form part of the EPA for the EPA to be WTO compliant.¹⁸ In addition, it is argued that rushing into liberalising trade in services runs the risk of placing poor countries in such a position that they would be forced to remain net exporters of raw materials at the cheapest cost.¹⁹

Nevertheless, certain SADC members, such as Botswana, would prefer an EPA that is inclusive of services.²⁰ Furthermore, other members, including Lesotho, Mozambique and Swaziland, have already signed an interim EPA with the EU in terms of which they have committed to negotiating on trade in services.²¹ However, the catch in this interim arrangement is that, in terms of the agreement, the inclusion of services in the final EPA becomes

14 SACU and the EU 2004. <http://www.fes.de/cotonou/downloads/official/ACPEU/SADC-EU-JOINTROADMAPEPA.PDF> (accessed on 18 April 2012).

15 Lazzeri 2010.

16 Tralac 2011.

17 Daima Associates Limited 2009:viii.

18 Tralac 2011. Non-compliance with WTO rules is often cited as the explanation for the Lomé Convention being discarded in favour of EPAs by the EU. See footnote 13.

19 Tralac 2011.

20 Tralac 2011.

21 The decision to sign the interim agreement has been explained as a strategy to ensure continued aid from the EU. See European Centre for Development Policy Management 2011.

a more realistic possibility. Moreover, should the inclusion eventually come into effect, it is essential that it happen in accordance with WTO rules. This, in turn, would be to the advantage of the EU and in accordance with its wishes, since Article V of the *General Agreement on Trade in Services (GATS)* requires that an agreement liberalising trade in services include a substantial sectoral coverage.

However, an unfortunate consequence of the apparent lack of a cohesive negotiating strategy between the SADC members has been that sharp divisions have arisen between them and, in fact, at one point it seemed as if these divisions would result in the disbanding of the Southern African Customs Union (SACU).²²

3. A complex relationship between developing countries and services

The reality about the relationship between developing countries and the services sector is that this relationship is complex and also fraught with contradictions. On the one hand, the economies of developing countries are increasingly dependent on services for their growth and also to sustain themselves. As stated in a publication by Tralac, “[e]ven in least developing countries, services contribute an increasing share of economic activity in terms of employment [and] ... are also very important for the manufacturing sector”.²³ In addition, the liberalisation of the sector is conceived as having the potential to free developing countries from their disproportionate dependence on the export of primary products.²⁴ In particular, services offer a viable alternative for landlocked countries such as most of the SADC members, whose opportunities for exporting goods are constrained by transportation costs.

On the other hand, however, there are undeniable risks that require caution regarding the way in which the issue of liberalising the services sector is addressed by developing countries. For example, services are more intricate than goods, with the result that their liberalisation would not automatically yield the desired outcomes and must, in fact, be accompanied by regulatory reforms and other policy measures.²⁵ Such measures include, for example, guaranteeing the provision and

22 SACU members include South Africa, Botswana, Lesotho, Namibia and Swaziland, all of which are also members of SADC. Unilateral action on the part of various SACU members regarding services is made possible by the SACU Agreement, which covers trade in goods only and imposes no restrictions on individual members wishing to hold negotiations on services with third parties. See *SACU Agreement:Part 5*.

23 Tralac 2010.

24 Commodities such as unprocessed fish, timber, minerals and fuels comprise 73% of the exports by African countries, as opposed to 14% of the EU's exports. See Tralac 2010.

25 Lazzeri 2010.

maintenance of essential services such as health care and education to the poor, in particular. However, sadly, most developing countries lack the capacity to implement these essential measures.²⁶

In addition, with perhaps the exception of South Africa, at this point there are not many services regarding which SADC member countries have a realistic chance of exporting successfully to the EU. For example, it is difficult to imagine a firm of architects from either Lesotho or Swaziland running a successful practice in Europe as a result of the discrepancies between the two regions in terms of capacity, expertise and experience. This problem is exacerbated by the unwillingness of the EU to make concessions, even in the few areas in which SADC members are actually able to compete, such as the supply of low and semiskilled services.²⁷

The concern raised by several SADC members that the existing policy space available to them to implement essential regulatory reforms would be eroded should the EU have its way in terms of the proposed EPA is also not without foundation. The EU's insistence on including subjects such as the "Singapore issues", which encompass government procurement, investment, competition and trade facilitation, in the negotiations underscores this point.²⁸ Making concessions in respect of these issues would result in SADC losing significant control over who would provide some of the most important services in its members' domestic markets, as well as the terms under which those services are provided. For example, as far as "government procurement" is concerned, the EU is demanding that SADC members give European firms access to the same opportunities they give to local firms while, in respect of "investment", the EU wants SADC members to exempt European firms from special requirements when they invest in the region.²⁹

In addition, the EU is also demanding the inclusion of the most favoured nation (MFN) clause in the EPA, which would effectively extend to the EU whatever trade preferences SADC members have accorded to other countries.³⁰ Should the SADC members accede to these demands, which are not necessary to render the agreement WTO compliant, they would be surrendering their right under WTO rules to conclude preferential trade agreements with other developing countries. More significantly, such a step would render SADC's ability to alter its existing trade relationship with the EU, which is currently skewed in favour of the latter, far more difficult.

Notwithstanding the reservations voiced against the liberalisation of the services sector within SADC, there are some who still believe

26 Lazzeri 2010.

27 Lazzeri 2010.

28 These are issues that were first brought up for discussion during a WTO ministerial meeting in Singapore in 1996. The first three are closely linked with services. Developing countries have, from the beginning, consistently opposed the inclusion of the Singapore issues in the WTO negotiations. See Tralac 2011.

29 Tralac 2011.

30 Tralac 2011.

that such a step would benefit the region. According to Hartzenberg, a failure to liberalise the sector would only serve to prolong the burdening of consumers with the costly services rendered by inefficient businesses and state-owned enterprises.³¹ In addition, she maintains that the ongoing deliberations concerning this topic are providing a momentum for domestic regulatory reforms within SADC. She further argues that the dangers of liberalisation are exaggerated, particularly in view of the fact that services firms from South Africa have been operating unaided by liberalisation in most SADC countries for some time.³²

4. Why EPAs are not the best option

As a type of agreement, EPAs may not be quite suitable for application in developing countries. Their main shortcoming, especially from a services perspective, is that they are, on the whole, incapable of facilitating the use of the sector to achieve the objective of development desired by developing countries. The reason for this is that EPAs are a product of reciprocal negotiations in which the parties aim to maximise their own gains while, simultaneously, also trying to minimise their losses.³³ This is exemplified by the sharp contrast in the demands made by the two sides in the SADC-EU EPA negotiations. For instance, Namibia strongly objects to the restrictions on export taxes proposed by the EU, mainly because of concerns that these restrictions would curtail its revenue from the uranium boom it is currently experiencing.³⁴ On the other hand, the EU, for its part, would like to employ tariff escalations which, in turn, tend to discourage the local processing of primary products and would, thus, effectively deny SADC countries an opportunity to add value to these products.³⁵

Ultimately, the commitments achieved through this kind of bargaining are unlikely to take into account the impact that market access concessions made by the countries concerned would have on domestic regulations and market outcomes.³⁶ Furthermore, as cautioned by Woolfrey, such an approach "... can lead to tit-for-tat trade policies that, in the end, are not always conducive".³⁷ Instead of the give-and-take arrangement represented by EPAs, the SADC region needs a cooperative relationship with the EU that is geared towards reforming the services sector in a way that would be beneficial to both sides.

31 Quoted in Van den Bosch 2010.

32 Van den Bosch 2010.

33 Brenton *et al.* 2010:5.

34 Van den Bosch 2010.

35 Van den Bosch 2010.

36 Brenton *et al.* 2010:5.

37 Quoted in Van den Bosch 2010.

5. What next for SADC?

In light of the complex nature of services and the uncertainties associated with the aftermath of their liberalisation, there is little doubt that careful consideration ought to be given to any decision to remove trade restrictions in the sector. SADC should, perhaps, consider undertaking liberalisation regionally before venturing out into the wider world. The fact that this approach enjoys considerable support emerged from a recent World Bank study. The study found that the interests of African countries would be best served by initially confining liberalisation to the region.³⁸ According to the study, this “would allow regional service providers to emerge and give the governments the possibility to gain regulatory experience before fully opening the service sector”.³⁹ Moreover, such an approach would make sense from the perspective that most SADC members are, at present, hardly able to export any services to Europe.

In addition, rather than adopting an all-encompassing approach to liberalisation involving all service sectors, SADC members should rather consider adopting a sector-by-sector approach. Such an approach would allow these countries to focus their attention on those services that are most essential in terms of realising their developmental goals – something which is fairly important in view of the capacity constraints prevalent within the region.⁴⁰ Thus, the sequencing and timing of liberalisation in the different service sectors are extremely important.

In order to maintain unity within SADC it is also important that the group address the prevailing perception that the beneficiaries of the ongoing liberalisation efforts in terms of the EPA would, in the main, be South African industries and multinationals.⁴¹ As long as this perception persists, it is doubtful that South Africa’s partners in SADC would support its vision of an acceptable EPA. On the contrary, they are more likely to pursue other strategies that they believe would better serve their interests. This explains why, despite concerns raised by South Africa about certain fundamental aspects of the proposed EPA, including the issue of services, fellow SADC members Botswana, Lesotho and Swaziland (BLS) bound themselves to an elaborate interim EPA with the EU that covers services, while acknowledging that this approach may put the SACU arrangement in jeopardy.⁴²

SADC could learn something from the Bolivarian Alliance for the Peoples of Our America (ALBA) in South America which has strived for

38 Lazzeri 2010.

39 Lazzeri 2010.

40 Brenton *et al.* 2010. The sectors in question include transportation, telecommunications and finance. See Hinkle & Schiff 2004:5.

41 Tralac 2011.

42 The wisdom of defying South Africa in this way is, however, questionable considering that the BLS countries depend fairly heavily for their income on the proceeds from the SACU customs revenue pool, which South Africa indirectly “subsidises”. See Grant & Chapman 2011.

solidarity among its members. This group, which has the reputation of espousing democratic principles, has focused attention on achieving regional economic integration and the provision of services geared towards and informed by the needs of its members' citizens.⁴³ Rather than blindly implementing the neoliberal policies of free market and free trade, ALBA insists on taking into account factors such as food security and regional unity in formulating its policies.⁴⁴ Most importantly, inputs from all its members and their citizens are taken into account in pursuing all of the above objectives.

Owing to the improbability of the traditional key factors of labour and capital providing impetus to the desired rapid growth and development within SADC,⁴⁵ it is recommended that the region seek practical ways of using the existing services agreements to enhance the realisation of its developmental goals. The GATS includes a number of provisions that permit exemptions in respect of services such as telecommunications, air transport, financial services and the movement of persons.⁴⁶ These provisions offer developing countries such as SADC members the necessary degree of flexibility to liberalise their services sectors based on their state of readiness and development strategies. Exploiting the concessions provided by GATS provisions would also allow SADC to overcome obstacles such as inaccessibility to visas and double taxation, which developing countries seeking to export services abroad have encountered in the past.⁴⁷

Lastly, the reality about the poorest countries, which include some SADC members, is that they have a strong comparative advantage in the supply of low and semiskilled services.⁴⁸ Indeed, these countries have made it clear that, from their perspective, providing services through the temporary movement of persons is "one of the most important means of supplying services internationally".⁴⁹ At the same time, there is a growing demand for low and semiskilled services in developed countries.⁵⁰ In these circumstances, there is no doubt that it would be to the mutual benefit of both sides for SADC members to supply the EU with low and semiskilled workers.

However, the problem is that, owing to political considerations, the developed countries have refrained from making commitments in respect

43 Pressend, quoted in Tralac 2011.

44 Pressend, quoted in Tralac 2011.

45 As a result of the fact that they possess a large unskilled workforce as well as modest capital intensity in the production process, developing countries such as SADC members, generally have low levels of productivity, making the prospects of a rapid growth relatively slim. See Aniket 1995.

46 GATS:Article XIX(2).

47 Aniket 1995.

48 Crosby 2009:1.

49 WTO, quoted in Crosby 2009:1.

50 Crosby 2009:1.

of the supply of low and semiskilled services in the past,⁵¹ and it is unlikely that the EU would want to undertake such a commitment in terms of the SADC-EU EPA. In the CARIFORUM EPA between a group of Caribbean countries and the EU, no provision is made for the temporary movement of unskilled persons, despite the fact that the agreement includes provisions dealing with the expansion of temporary employment for skilled professionals.⁵² In view of the latter agreement, it is likely that the EU may want the SADC-EU EPA to go the same route. The onus is, thus, on SADC to demand concessions from the EU in respect of the supply of low and semiskilled services. Without such concessions, the benefits of the EPA will be greatly diminished from a SADC perspective.

6. Conclusion and summary

There is no doubt about the increasing importance of services for the economies of developing countries in today's world and, thus, the SADC countries simply cannot afford to ignore them. At the same time, the services markets of developing countries remain, to a large extent, underdeveloped and uncompetitive relative to those in their developed counterparts. As a result, unchecked liberalisation in developing countries may have unintended adverse consequences. Motivated by the proposed inclusion of provisions on services in the SADC-EU EPA, this article seeks to highlight practical ways of implementing the liberalisation of the sector in the SADC region with minimal harm to the interests of the SADC members.

An important component of the preparatory work leading up to the liberalisation of the services sector in any country is putting in place a regulatory framework that is capable of dealing effectively with the challenges that would accompany the process as it moves forward. It is, thus, essential that SADC members should avoid rushing into the wholesale liberalisation of the sector motivated only by short-sighted and transitory objectives.

A sector-by-sector approach to liberalisation, initially implemented within the region, would be the most appropriate for SADC. Such an approach would enable the members, especially the poorer members, to focus on improving their priority services and to adjust to the existing capacity shortfalls within the region. SADC members could then consider opening up their services markets to the wider world only later when the local industries are better equipped to deal with foreign competition.

Furthermore, in the negotiations involving the services sector, whether at the regional or multilateral level, SADC should insist on greater, temporary access for unskilled workers as part of the final agreement. This

51 Within the WTO framework, rather than make commitments regarding the supply of low and semiskilled services, developed countries have, instead, sought to meet the need for these services through unilateral or bilateral arrangements with preferred countries or through illegal immigration. See Crosby 2009:1.

52 Brenton *et al.* 2010:5.

mode of supply is, after all, of the greatest importance to SADC members. The concern raised by developed countries that unskilled developing country workers would not return to their countries of origin if they were to be allowed to work in developed countries can be addressed “through carefully crafted and managed sub-contracting schemes”.⁵³

In addition, it is essential that SADC take advantage of the concessions incorporated into the existing trade agreements concluded by its members in order to maximise the benefits from trade in services. At the same time, SADC should constantly seek areas of potential improvement in its priority sectors and effect such changes as are necessary in order to boost the region’s competitiveness in the services trade.

Finally, it is not possible to overemphasise the importance of an effective and well-coordinated trade negotiating machinery that would represent the interests of all SADC members. Divisions of the kind witnessed between SADC members early on in the EPA negotiations, which emanated from the members adopting conflicting negotiating strategies, can serve only to diminish the ability of SADC to reach a favourable agreement.

53 Brenton *et al.* 2010:6.

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