UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

UNCTAD

MULTI-YEAR EXPERT MEETING ON TRADE, SERVICES AND DEVELOPMENT
Fourth Session
Geneva, 18–20 May 2016

Paper:

Ensuring coherence in services policy making, regulatory frameworks and trade negotiations in Africa

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UNITED NATIONS
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INTRODUCTION

If African countries are to reap the promised dividend of trade in services contributing to the attainment of their national development goals, there is need for an interconnected and seamless relationship (i.e. coherence) between and amongst, *inter alia,* three key pillars:

- *One, the overall approach taken in managing the services sector- i.e. the policy;*
- *Two, a strong foundational bedrock allowing governments to juggle the complex mix of seemingly conflicting objectives such as promoting competitiveness and protecting consumers i.e. the regulation; and,*
- *Three, the use of trade liberalizing instruments to promote the goals encapsulated in policy and regulation i.e. trade negotiations.*

So how can African governments go about this?

The challenge is as complex as it is urgent to resolve. Even more, there is no one-size-fits-all. Those countries that have succeeded would acknowledge themselves that it is a continual process of trial and error, rights and wrongs- some wins and many failures. This, owing to the fact that the best laid policy and regulatory plans may have unintended consequences. The task therefore is non-ending- requiring policy makers to remain open to righting wrongs while harnessing benefits.

While the process is challenging for all countries, it is particularly difficult for poorer ones, since they have less experience with policy formulation, crafting regulations and the intricate balances involved therein, and with strong institutional frameworks to support implementation.

Africa finds itself in the latter bracket. But there is a powerful case for why it must nonetheless invest in getting the policy- regulatory and negotiation framework nexus right. African countries have, for the last decade, and largely without exception, experienced exponential growth of the services sector- itself contributing more to Gross Domestic Product (GDP) than their traditional export cash crops. From tourism to finance; from education to health; from transport to energy- all African countries have experienced (varying levels of) growth in each of these sectors. It is now well understood that services are the growth pole of the future; that they are the glue that will hold and bring Africa's industrial and structural transformation dreams to life by greasing the agriculture/industry linkage[2] and that services will catalyze Africa's leapfrogging of some of the stages traditionally viewed as necessary in economic development

[1] A paper submitted to the Fourth Session of the UNCTAD Multi Year Expert Meeting on Trade, Services and Development. 18-20 may 2016.

[2] Think of agriculture and what it takes to transform coffee beans to what consumers are willing to buy in the supermarkets? Drying, itself dependent on efficient storage systems (a service); transporting the beans to value addition points (a service) such as crashing, roasting, packaging etc., branding (a service) to create distinct impressions of quality in consumers' minds and certification.

theory. It seems inevitable therefore that Africa invests in the right services policies- this in turn raises the bar on the imperative to get the policy choices right.

CREATING COHERENT PATHS TO POLICY FORMULATION

In order to get policy choices right, governments need to undertake sound analytical assessments and audits- both overall and in individual sectoral terms, so as to understand what their strengths are and how these can be built on, creating forward and backward linkages with other economic sectors (such as agriculture and industry). In addition, they need to decide how all of this fits together in a clear and comprehensive articulation of *where* a country wants to go and *how* it is that each of the sectoral elements can take it there.

This is no easy task- not least because the services sector is in fact an amalgamation of a series of sectors and sub-sectors- each with their own intricate dynamics and challenges- requiring specific interventions.

But therein lies the necessary starting point: That getting a proper understanding of each of these elements is inescapable for pro-sustainable development-oriented policy formulation on trade in services. The good news is that Africa is not starting from scratch. Off the efforts of African countries, supported by international institutions, many have developed sectoral policies- ranging from Uganda's Education Policy,[3] to Rwanda's Information Communication Technology (ICT) Policy,[4] to Nigeria's Energy Policy[5] to South Africa's Aviation Policy[6] to Gambia's Tourism Policy[7]. Such policies typically provide for the vision a country seeks to attain, specific policy objectives and implementation strategies including timelines (short, medium and long term) for intervention and review (monitoring and evaluating progress). However, many a time, there is hardly a reflection of how trade in these sectors, including export trade, can contribute to attaining some of the objectives sought in the policies. This raises the need to mainstream trade in national sectoral policies on services.

Moving from sectoral to national policies on trade in services

But sectoral policies are not enough. Governments need to think through how the overarching objectives of national development can be served by the culmination of these sectors. They need to know and understand how the contribution of each of these individual sectors benefits the wider economy. Put differently, African governments lose out when they do not connect the dots in ensuring that the sectors are contributors to a greater good- rather than silos in a larger market place.

This process, by definition, rides off the strength of existing sectoral policies and would be aimed, not at redefining sectoral priorities, but by ensuring that overarching considerations, including the potential for trade (national, regional and international) to make a contribution, are mainstreamed.

Some of the tools that have been developed to support countries in this process are the Services Policy Review (SPR). This is an UNCTAD creation that provides a comprehensive overview of the services economy of a country and in-depth analysis of the impacts of regulatory, institutional and trade reforms

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[3] For more, see http://www.education.go.ug/data/dcat/1/Policies-and-Regulations.html.
[4] For more see http://www.myict.gov.rw/ict/policies-and-regulations/policies/approved-policies/national-ict-policy/.
[5] For more see http://www.energy.gov.ng/.
[6] For more see http://www.transport.gov.za/Portals/0/Aviation/NewFolder/NCAP%20draft%20final%203%20Sept_2015.pdf.
[7] http://www.accessgambia.com/information/responsible-travel-policy.html.

undertaken. It also supports identification and analysis of the development and trade-related opportunities and challenges in each of the priority service sectors chosen for review. It is a participatory process led by relevant Ministries (Trade), working closely with sectoral line ministries, regulators and all other relevant stakeholders. In some cases, the UNCTAD supported SPR process has led to the development of national services trade policies- such as in the case of Uganda- whose policy sets out specific priorities that the country will pursue in ensuring the services sector contributes to national development as well as a targeted implementation plan to keep the policy alive from the perspective of prioritizing national resources.[8]

Deeper regional integration, including in services, is critical to achieving the goals countries seek in their national services trade policies. It is critical therefore that as governments develop national services trade policies, destination countries are kept in view and that this can be scaled to the regional level- requiring that they be part of the conversation. Increasingly, UNCTAD is requested to adapt its national SPR methodology to regional blocks- again evidence of the reality that several African countries have embraced the regional approach to attaining their policy objectives.

COHERENCE IN REGULATORY ISSUES

Regulation is a critical must-have in supporting attainment of a country's objectives. It puts in motion- through law, rule or administrative requirement- the nuts and bolts of how a country intends to ensure that its policy objectives are fulfilled through the day to day interactions in various services sectors. In the case of health for example, national regulations will seek to channel government funding to the establishment and maintenance of facilities that have sufficient reach for all within country. The same would be said for education and other services in which government remains a large provider.

Trade can play an important role in creating opportunities both for employment and wealth creation as well as promoting service delivery. In such cases, regulation takes on a different role- with governments seeking to ensure that profit making is balanced with a contribution to national development goals such as those on access to basic services. In the case of education and health for example, regulations in this case would seek to include conditions that promote national coverage and access in the award of licenses. In financial services, issues of inclusion would be at the heart of regulation, including through requirements to meet universal service obligations.

There is also the international and regional trade dimension, where countries agree to open their markets to foreign services and service suppliers to compete with *like* domestic producers. In this context, the calculation on regulation would be balancing the interests of domestic service suppliers in terms of keeping them in the market, while ensuring that foreign ones are not discriminated against. In such instances, it would be common for some countries to provide conditional market access subject to minimum capital requirements, potential limitations on number of service suppliers, requirements for

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[8] The priorities identified are the following: to identify and promote strategic services sectors to drive economic growth; establish and enforce appropriate laws and regulations in the identified services sectors; build the human and institutional capacity of the regulatory agencies; develop capacity of domestic services providers to enhance standards; secure and maintain market access to regional and international markets; strengthen mechanisms for generating services trade statistics; develop measures and incentives for service providers to exploit market opportunities; promote national synergies and complementarities in the services sectors, and develop accreditation and certification regimes for the services sector. Copy available with Ministry of Trade, Industry and Cooperatives.

certain types of legal entities, limitations on numbers of transactions etc.[9] On the side of ensuring no discrimination, countries may commit to treat foreign service suppliers like domestic ones in sectors in which they have committed to market access.[10]

Regulation is therefore always a balancing act. And here below is the coherence challenge:

How can countries use regulation to ensure that as they open markets for foreign service suppliers, such participation contributes to the attainment of the objectives in their sectoral and national policies on trade in services?

One of the approaches that African countries have used in these instances is to seek regulatory cooperation, harmonization and even convergence in liberalized sectors. For it is well understood by negotiators that regulations, of not streamlined, can act as effective barriers to accessing markets.

In the case of the EAC Common Market Protocol (EAC CMP), the overarching objective is to work towards an eventual political federation of the Community. Therefore, citizens of the region have *rights and freedoms* including to move, establish, and reside in the territory of other Community members. The regulations in various areas therefore take on a different shape than what we know in the GATS, and go deeper into creating that environment where services, people and capital can move freely. Because of this over-riding objective, the regulatory ambition in the EAC tends to be very high- aiming for approximation and harmonization of policies, laws and systems, including as elucidated through deep regulatory disciplines in the various annexes on Free Movement of Persons, Free Movement of Workers, Right of Establishment, Right of Residence, Schedule of Commitments on the Progressive Liberalization of Services and Schedule on the Removal of Restrictions on the Free Movement of Capital.

The case of ECOWAS is somewhat similar to the EAC in terms of depth of regulatory disciplines. Article 3 of the 1993 Revised ECOWAS Treaty establishes, as one of the aims of the regional integration process, the evolution into a common market including through removal of obstacles to the free movement of persons, goods, *services* and capital, and the right of residence and establishment. Some of the protocols detailing ECOWAS policy objectives of deeper integration include the 1979 Protocol on Free Movement of Persons [11] and its supplementary Protocols.[12] The 2003 ECOWAS Energy Protocol[13] established a legal framework promoting long-term co-operation in the sector, with a view to, *inter alia*, achieving increased trade in energy in the ECOWAS region.[14] Other areas of regulatory cooperation include Information and

[9] See Article XVI GATS.

[10] See Article XVII GATS.

[11] A/P.1/5/79.

[12] The 1985 Supplementary Protocol on the Code of Conduct for the implementation of the Protocol on Free Movement of Persons; the Right of Residence and Establishment; the 1986 Supplementary Protocol on the Second Phase (Right of Residence); the 1989 Supplementary Protocol amending and complementing the provisions of Article 7 of the Protocol on Free Movement, Right of Residence and Establishment.

[13] A/P4/1/03.

[14] Article 31(n) thereof calls for the establishment of regulatory bodies for energy systems, programmes and projects within the framework of implementation of the Protocol. Following hereon, the West African Gas Pipeline Authority (WAGPA) was established in 2004 to regulate the trans-border gas pipeline project between Nigeria, Benin, Togo and Ghana. The ECOWAS Regional Electricity Regulatory Authority (ERERA) was established in 2008 to regulate cross-border electricity interconnections among all ECOWAS Member States. For more see Peter Joy Sewornoo

Communication Technology[15] and Recognition of equivalence of diplomas, certificates and other qualifications in education within ECOWAS.[16]

And so, if the question is how countries can use regulation, including at the regional and international level, to support their efforts to meet their national policy objectives- the answer is, *it depends on the specific objectives sought*. In the case of EAC and ECOWAS above, we have seen that while the traditional parameters of ensuring quality of service, supporting competition, protecting consumers, ensuring access for vulnerable groups, are all important, they can be crafted in a manner that keeps the overall objective of creating a single community (in EAC case) in view. This is the ***best-fit*** approach to regulation in this context.

This approach will be important to build on in the context of the African Union Continental Free Trade Area (CFTA) negotiations. This is so because the objectives of the Abuja Treaty establishing the African Economic Community (the Abuja Treaty) have similar aspirations as the EAC. It is therefore important to use the CFTA process to build on what African countries have committed to as regulatory approaches in various sectors under the GATS and in their RECs. Contradiction would not be appropriate- neither would failing to use the opportunity to unlearn what has not worked. In all, it seems the appropriate recipe for success is a dose of sustenance with the best, pragmatism with shifts where needed and a steady hand at implementation.

Approaching a discussion on Regulation

African leaders have taken political and legal decisions on where it is they want African integration to go (i.e. aspirations in the Abuja Treaty). In a sense therefore, and as mandated in the Abuja Treaty, it will be a series of protocols (regulations) that will allow the dream to yield.

So how should they go about it?

It is critical that this conversation takes place in an environment conducive to understanding not only the regulatory approaches of each country and regional block, but also the challenges of implementation. Such a conversation may not be best served by an initial consideration of issues in negotiation mode. This is so because the very essence of regulation is an encapsulation of how a country has chosen to implement the attainment of its policy objectives. Moving away from chosen approaches can be difficult.

Ensuring coherence in regulations supporting policies- including at the scale of the African continent, will therefore require discussions focused on understanding the state of play, why agreed decisions prove difficult to implement, seeking to accumulate best practices and unlearn failed approaches- and skillfully convincing participants towards a certain direction. These are not things a negotiation alone can achieve.

It is important to recall that the name of the game has to be regulation and not de-regulation. It has to be more and better regulation. It is now indisputable, after the global economic and financial crisis, that regulation supports and cushions countries in their efforts to deal with market failures. Liberalization, our

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online available: http://unctad.org/meetings/en/Presentation/ditc-ted-Nairobi-24082015-ECOWAS-sewornoo-v2.pdf.

[15] Supplementary Act A/SA 1/01/07.

[16] Convention 2003 A/C.1/1/03.

next focus in this paper, should not be understood as deregulation. Africa needs more smart regulations that are people-centered and business friendly.

HOW CAN TRADE LIBERALISING INSTRUMENTS COHERENTLY SUPPORT THE IMPLEMENTATION OF POLICY AND REGULATORY GOALS

The *chronology* that leads countries to the negotiation table, when it works well, must begin from policy formulation. It is here, as we have seen, that countries define their priorities and how to attain them be it in terms of government interventions, reliant on domestic private sector or regional/international trade. The chronology would then move on to regulation, as a support tool for day to day rules of the game that support meeting policy objectives. Trade liberalizing instruments come in third, as a logical and critical part of the development process; allowing for countries to utilize their sectoral strengths in other markets through their exports, bringing home much needed foreign exchange, while also opening access for other countries- in a reciprocal fashion.

But in order for trade liberalizing instruments to make their meaningful contribution, several factors need to be in place. This is especially so in the preparatory stages- wherein countries must connect the dots between their policy and regulatory goals, and define how foreign players can complement the process through their presence on domestic markets.

For trade negotiations in the area of services, countries want to be sure that the approach they take to scheduling for example, or any other format in which the results of negotiations are to be reflected, is *insync* with their overall objectives and principles. This is critical to avoid both under and over-reaching.

In the case of the EAC CMP for example, on the matter of movement of natural persons, the attempt to schedule GATS-type commitments while linking them to the schedule on the Free Movement of Workers has been critiqued as taking the Community's ambitions backwards, albeit without intent. It seems in this case that the format of a schedule of specific commitments as we know it, was not a good–fit.

And this is the threshold question that African Union Member States will have to deal with in negotiating the services component of their CFTA negotiations: *how to ensure that the Agreement they craft is truly transformational and a best-fit, rooted in African realities?* That it supports Africa's structural transformation, that it delivers for vulnerable groups, micro, small and medium enterprises, the largely informal sector and that it builds on what African countries have achieved in the GATS and in their RECs. More so, that the legal shape and form of the Agreement, including its content, walks in direction and spirit of the Abuja Treaty- to bring to fruition the African Economic Community.

Some of the sticky issues they will have to consider, from a negotiation perspective, are whether the modes of supply as we know them are necessary? Whether there are others? Whether and how to introduce recent advancements in International Investment Agreement reform, including some of those currently contained in the Draft Pan African Investment Code? How to cater for services provision through presence of natural persons in a trade agreement situated in a context wherein participants may have *rights and freedoms* including to look for and accept work, etc.[17] And finally, how to ensure that the

[17] It is noteworthy that in January 2016, the African Union Heads of State and Government agreed to work towards a visa free Africa with initial steps focused on visa on arrival possibilities for those engaging in official business. Indeed, some countries, like Rwanda and Ghana have advanced in visa-free policies for Africans.

different capacities of African countries are factored into the decision on the pace and their overall contribution to the CFTA.

And so the African Union trade in services agreement will need to be creative and daring- getting into previously unchartered territory- unaccustomed to- even by its own Members- but one that starts a journey in the direction of the eventual objective of a common internal market in line with the objective of an African Economic Community.

THE IMPORTANT WORK OF SECTOR DEVELOPMENT

Policies, regulations and opportunities created by trade liberalization are all well and good but may come to naught if there are no services suppliers to take advantage of them. While there is evidence of African countries, including LDCs, exporting services- such as ICT enabled services from Rwanda, Education from Uganda, Business Processing Outsourcing from Senegal, Tourism from the Gambia and others, a lot still remains to be done in increasing scale- including in value terms.

But what will it take?

Targeted skills and knowledge training is critical to strengthen already existing capacities and to build new ones. Linked to this is the growing phenomenon of incubator laboratories wherein the youth with ideas are given space and tools to let their ideas grow. Some of the innovations coming out such initiatives have changed how Africa does business- notably in the case of the Kenyan innovation: Mobile Money (MPESA). Continued government investment in such initiatives coupled with creating an overall enabling environment including through a sound base of running infrastructure services (finance, energy, transport) are some of the approaches that should be seriously considered.

CONCLUSION

In conclusion, we come back to our title: that in order for African countries to reap the promised dividend of services trade, they need coherence between and amongst three pillars: policies, regulations and trade negotiations. On policy development, the UNCTAD Services Policy Reviews are a proven tool in supporting African countries to develop sustainable development-oriented national services trade policies. The policies need regulations which, if they are to support the objectives of the policies, must be crafted ***in context.*** Trade liberalizing instruments are a useful complementary tool to create additional opportunities for income and wealth creation. For Africa, the AU CFTA- for which negotiations are currently underway- can be an instrument to bring to fruition Africa's development objectives-including the SDGs. In order for this to happen, it has to be crafted in a manner that speaks to African realities. And for all of this to be sustained, there is need for strong institutions- at continental, regional and national level.

UNCTAD is supporting the African Union Commission and its Member States to better prepare for these negotiations including through training and capacity building workshops to increase the knowledge base overall and through advisory services tapping from its global expertise in these areas.