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EXECUTIVE SUMMARY

**THINK-PIECE ON RECENT TRENDS IN SERVICES NEGOTIATIONS AND
ACP POLICY RESPONSES**

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The importance of services trade – for the ACP and the wider global economy – is being gradually recognized. After suffering years of neglect and under-estimation, services trade is finally emerging from the shadow of goods trade, thanks to long-overdue changes in perspective – from stronger emphases on trends such as global value chains and value addition, to improvements in measuring services trade flows.

This belated recognition of the importance of services is in part reflected in vibrant discussions in the plurilateral Trade in Services Agreement (TISA) and several “mega-RTAs” such as the Trans-Pacific Partnership (TPP) and the EU-US Trans-Atlantic Trade and Investment Partnership (TTIP). While none of these agreements currently involve any ACP Member, the ACP countries are not untouched by the wave of services liberalization, either through their own regional integration efforts, or through bilateral/bi-regional exercises such as the Economic Partnership Agreements (EPAs).

Traditional approaches to policymaking require significant changes to accommodate the new reality of services trade. In an “age of access” – which involves a fundamental shift from ownership (in goods) to access (to experience) – much of what we considered production of goods is in fact composed of a myriad of services; and much of what we thought was (local or international) trade in goods is in fact better understood as (also) trade in services. Distance and cost – often major obstacles to the development of trade in goods – today often simply do not apply to the delivery and the consumption of services. Old trade policy perspectives relying in simple categorizations and “silo” mentalities are ill-equipped to analyze this new reality.

But barriers of course still exist, from physical borders to regulatory restrictions, which need to be understood, clearly measured and (if need be) removed. However weaknesses in services trade statistics have often led to a lack of awareness, insecurity and hesitation on the part of many negotiators – particularly from developing countries, where statistics can often be weakest – resulting in trade policy that is perilously removed from reality, where what cannot be measured is considered to be “not there”.

While the Doha negotiations on services have been held hostage to progress in other areas, the LDC waiver represents a “giant in disguise”. Progress at the multilateral level on the GATS’ built-in agenda, particularly in market access, has been hampered by a lack of progress in other areas (namely agriculture and NAMA): little has been achieved in market access, and GATS rules have seen virtually no momentum; only in domestic regulation has some progress been made. The only area with actual movement over the past years is the negotiations on the LDC modalities, with the adoption of the LDC Services Waiver decision in 2011, and the subsequent decision in Bali to “operationalize” the Waiver. The LDC Waiver, barely noted by many observers, is

arguably a giant in disguise. As discussed further below, it represents a novel, perhaps unique opportunity for something the WTO has never seen: The discussion of and a push for, actual, real life services liberalization *vis-à-vis applied regimes*.

With little progress on the Doha negotiations on services, the momentum for bilateral, regional and plurilateral negotiations on services liberalization is at its peak. **TISA entered a phase of intensified, ambitious negotiations** aiming to conclude an ambitious agreement with a comprehensive scope. A negotiating draft for the main text (closely resembling the GATS) already exists, and negotiations on market access and national treatment have just begun. The TISA includes several architectural elements/innovations, including a negative list for national treatment, a standstill (including no “water” between commitments and applied regimes), a “ratchet” to lock in subsequent autonomous liberalization, and “new and enhanced disciplines” for rule-making. Important questions remain as regards the shape of the final agreement, such as whether it will be a PTA or a “critical mass agreement” or another type of plurilateral agreement, and what will be its relationship with the GATS/WTO framework. The TISA however remains a potentially game-changing exercise, particularly if China’s request to join the talks is accepted by other TISA participants.

The TPP negotiations are among the biggest exercise of its kind. The comprehensive ambition of TPP parties is to generate a “21st century agreement” which some observers expect to generate a new “gold standard” of services liberalization. While the negotiations have barely begun, highlights include a negative list on cross-border services, separate chapters on financial services and telecoms (including far-reaching disciplines in the latter), plans to include investor-state dispute settlement, and holistic treatment of cross-cutting issues (e.g. investment, IP, regulatory coherence, and E-commerce).

The strange saga of the EPA services negotiations continues. One of the many oddities and predicaments of the EPA process continues to apply: it is driven and somewhat dominated by the threat of the loss of preferences in goods, even though the process is about much more, including services – a matter of great importance for ACP countries. Looking across the different EPA regions, while progress remains mixed, services recently appear to feature more prominently than at earlier junctures: a concluded agreement on services in CARIFORUM; ongoing talks towards a comprehensive agreement in the EAC, COMESA and Central Africa; future negotiations (via a rendezvous clause) in West Africa despite a strong political push; divisions in Southern Africa; and stalled negotiations in the Pacific.

Among the many stumbling blocks in the EPA services negotiations, and a main concern of the EU, has been the treatment of mode 4 (temporary movement) versus labour mobility (joining the local labour market) – a division arising from the GATS, but one with questionable economic logic in the context of a “trade and development” agreement. A possible way forward for the ACP lies in smart “creative design” choices, from the definition of services and service providers to the design of special hybrid side agreements. Further complicating the EU-ACP picture is the fact that the EPA exercise is running in parallel with the ACP regions’ own efforts to create an internal services regime, with varying approaches and much still remaining to be negotiated, designed, legislated and regulated.

The LDC Waiver is arguably the secret champion of services liberalization, but the onus is now on LDCs. As noted above, the services waiver is remarkable because it has the potential to do what trade in services agreements rarely do: provoke actual liberalizing changes to the applied services regimes of a number of WTO Members, since any instance of “operationalizing” the waiver by definition implies a favourable deviation from current applied MFN practice. The Waiver allows WTO Members to grant LDC service suppliers market access (either exclusive or incrementally relaxed vis-à-vis other Members) in otherwise closed sectors or modes of supply, or apply regulatory measures discriminating in favour of LDC suppliers, subject to sufficiently flexible rules of origin.

After the Ministerial decisions in 2011 (authorizing the Waiver) and 2013 (on its operationalization), the onus is now on LDCs to identify their demands – currently the subject of a major research effort to identify market opportunities, target regulatory barriers and raise awareness.

Major changes are afoot in the EU and China. In the EU, the 2006 Services Directive clarified the parameters of the freedom of movement for persons, services and capital. This Directive sought to address a lack of clarity that had persisted with respect to the parameters of legal rights to establish and supply services, which had hindered the free flow of services within the EU. While the Directive has been hailed as an important step forward in creating a single EU market for trade in services, it also highlights the challenges of liberalizing services even in a highly integrated economic space like the EU. In China, the government’s interest in joining TISA and the opening of both capital and financial markets in Shanghai’s new free trade zone show a new willingness and seriousness towards both opening and regulating services sectors.

The major trends, seen from an ACP perspective, represent both challenges and opportunities, although much homework still remains. At a fundamental level – above and beyond the state of play of major services negotiations – there are important steps

for the ACP countries to take in order to craft solid offensive and defensive positions. ACP countries need to continue to understand their own services economies (in part through better statistics), establish consultative structures with service providers and regulators, and create a critical mass of stakeholder awareness. This internal homework is the essential precondition for reaping the benefits of market opening in services, whether at home or overseas.

The enormous post-GATS wave of unilateral liberalization and regulatory advancement has been matched by a tightening of rules: a trend likely to continue. The changing picture – from the GATS to the “mega-RTAs” – implies that ACP countries (a) should not be too shy to engage in seeking increased market access, particularly on “low-hanging fruit”, and (b) at this stage worry less about increased competition in services export markets within the Mega-RTAs in which they do not participate, but rather worry about not being at the table when new rules are negotiated that are likely to set global standard.

It may be time for ACP members to consider pro-actively re-engaging in services negotiations in the WTO as the one forum that gives all of them a voice. The effective lifting of the “single undertaking” obligation has resulted in the reanimation of (at least partially) global services talks through the TISA, albeit explicitly outside both the WTO and the DDA. This “externalization” arguably should eventually end, with services talks re-merging into a multilateral forum where the ACP countries are more likely to be active participants. ACP and other developing countries should consider the possibility of joining TISA as a way of bringing it back to the WTO, possibly as a “critical mass” agreement. The more countries engage, the stronger the case for reintegrating TISA into the GATS, and the stronger the support for ensuring WTO compatibility of TISA.

For the TISA, fundamental opposition is futile, but pro-active critical engagement should be an option. The sheer size and ambition of the TISA, TTIP and TPP “mega-RTAs” may provide as much discomfort as comfort to the ACP and others outside the movements, who would again be rule “takers” rather than rule “makers”. The emerging rules however are likely to be well-vetted and of high quality, and the ACP (like others) – who would have the comfort of looking at the rules in action – will probably benefit as the “mega-RTA” participants will likely apply them on a de facto MFN basis, providing a basis for consideration of whether to support their eventual reflection in the WTO.

For the TPP and TTIP, there are number of benefits to be derived, and interfaces to be explored, from engagement with the respective parties and/or from close observation. Whether or not the advance praise as the “new gold standard” in services liberalization will be adequate once the ink is dry, both agreements will likely set new

standards. These should be studied closely by services regulators, negotiators and stakeholders in other countries. The negotiations should also be mined for a better understanding of both services regulation on the sub-federal/state level in the United States and EU-US regulatory cooperation – information that is notoriously difficult to come by, and, if made available, will benefit operators and negotiators elsewhere, including in ACP countries. ACP countries can also benefit from regulatory harmonization and possibly recognition/equivalence between the TPP and TTIP parties.

In the EPAs, an MFN Clause may hold unexpected surprises: as the EU embarks on ambitious negotiations with third parties under TISA and TTIP, CARIFORUM members can look forward to the automatic extension of any market access in those three modes which the EU may grant to its TISA and TTIP partners.

The LDC Waiver holds the potential for positive surprises. For the LDC Services Waiver, the focus on *what LDCs can and do export and what trade liberalization can do for those LDCs services exports* is in many ways new and holds the promise of inspiration. The benefits of this process, while directed at LDCs, will likely spill over to other developing country services exporters. Moreover the Waiver could flank or transcend regional agreements (particularly within Africa) and thereby help foster regional integration.

ACP countries are well advised to pay detailed attention to specific disciplines and mechanisms for regulatory cooperation being explored in services agreements. Several sectors appear to be in need of, and benefit, from sectoral disciplines, ranging from “network” industries (e.g. telecoms, energy and rail) and IT/IT-enabled services to financial services and industries (e.g. tourism) prone to anti-competitive behaviour. Moreover, research has shown that regulatory cooperation is likely to be the single most important factor in fostering effective trade in services. In this context the TISA, TPP and TTIP negotiations promise to offer insights beyond experiences in recent FTAs around the globe, as the parties are looking for the “new gold standard”: ACP negotiators, regulators and stakeholders are encouraged to watch closely.

ACP countries are encouraged to pro-actively fine-tune the application of “special and differential” (S&D) treatment for their maximum benefit. Many of the classical S&D provisions have been subjected to criticism, often for good reasons. Rather than simply exchanging mantras or seeing S&D as charitable accommodation for the weak in the form of friendly exceptions, ACP countries should explore creative but feasible solutions, from the use of development indices to the design of flexible procedural solutions – the recently adopted Agreement on Trade Facilitation and the CARIFORUM EPA are troves of good ideas. There is, for example, no *a priori* reason why elements of S&D cannot be integrated into the TISA: whether by generating or enhancing regulatory structures/capacities, and/or through enhanced regulatory cooperation.

Perhaps the most glaring missing element of the S&D agenda is Aid-for-Trade (AfT). A host of areas that require serious attention and support is underserved by AfT, ranging from developing export strategies for services sectors (outside of tourism and ICT) and improving services policy-making and regulation to enhancing the self-organization of service suppliers and assisting developing countries in addressing barriers to services trade in export markets.
