

**SERVICES PROVISIONS IN REGIONAL TRADE AGREEMENTS:
DOES THE EAST AFRICAN COMMUNITY STAND TO GAIN MORE
FROM AN INTEGRATED MARKET?**

A mini thesis submitted in partial fulfilment of the requirement for the LLM
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Student name: Habu Patricia

Student number: 29723397

Degree: LLM, International Trade and Investment

Supervisor: Rafia De Gama



Declaration

I hereby certify that this is an original work done by me for submission in fulfilment of an LLM Degree in International Trade and Investment Law and it has not been printed nor submitted elsewhere or for any other purpose.

.....

Habu Patricia

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TABLE OF CONTENTS

| | |
|--|----|
| Declaration | 2 |
| Acknowledgement | 3 |
| List of abbreviations | 7 |
| List of tables | 8 |
| Chapter One | |
| 1.1 Background | 9 |
| 1.2 Problem statement | 15 |
| 1.3 Research problem and research questions | 16 |
| 1.4 Significance of research | 17 |
| 1.5 Literature review | 17 |
| 1.6 Methodology | 19 |
| 1.7 Overview of chapters | 19 |
| 1.8 Scope and delineation of study | 21 |
| Chapter Two | |
| 2.1 Introduction | 23 |
| 2.2 Pattern of Services Trade | 26 |
| 2.3 Principles | 28 |
| Chapter Three | |
| 3.1 Introduction | 34 |
| 3.2 RTAs and Trade in Services | 35 |
| 3.3 Liberalisation approaches | 42 |
| 3.3.1 NAFTA-type approach | 42 |
| 3.3.2 GATS-type approach | 45 |
| 3.3.3 Assessing the effect of NAFTA approach versus The GATS approach of liberalisation | 50 |
| 3.3.4 Trade in services in the East African region | 53 |
| 3.4 Regulation and Competition | 58 |
| 3.5 Harmonisation of policy | 52 |
| 3.6 Challenges | 55 |
| Chapter Four | |
| 4.1 Conclusions | 58 |
| Bibliography | 72 |

SUMMARY

Services are the fastest growing sector of the economy. With the advent and development of technology, trade in services has grown more rapidly than trade in goods in world production. This has also resulted from ongoing economic reforms and the development of more liberal policies. Prior to the Uruguay Round of negotiations, international trade was confined to the conventional form of trade in goods or merchandise trade. With new developments, especially with the advent of technological changes, trade not only centred on cross border exchanges of goods but was broadened to include cross border trade of services. In spite of this development in trade in services, trade negotiations on services liberalisation have made little progress under the World Trade Organisation (WTO). Because of this, countries have opted for other fora to address their needs under trade in services. One of the ways of doing this has been to enter into regional and free trade agreements providing for liberalisation of trade in services. Such has been the case of the proliferation of such agreements not only Africa but the world over, during the last decade.

Services provisions under regional trade agreements (RTAs) follow the same trend as those RTAs that provide for goods. They are largely premised on the elimination of explicit barriers to the entry of foreign service providers in the region. Notably, for services trade under RTAs, two models of liberalisation are largely used. A number of RTAs tend to duplicate the use, found in GATS, of a positive-list approach to market opening, whereas others pursue a negative-list approach. The negative-list approach is modelled along the services provisions in the North American Free Trade Agreement (NAFTA).

Much discourse has been advanced on which of the models of liberalisation is better although no conclusive research has been undertaken in support of either one. Proponents of the negative list do advance its attributes while those of the negative list do the same. However, most of them conclude that one cannot say with finality that either one is the better option because the impact of liberalisation is not automatic.

Such liberalisation, in order to benefit the regional economy, and also the domestic economies, must be accompanied by related policy reforms and proper formulation of such

reforms. Managing reforms of services markets should therefore be done in combination with the proper formulation of both competition and regulatory reforms and policies. In addition, there should be adequate regulation and supervision mechanisms to monitor the functioning of the different services sectors or else the liberalisation efforts of the countries will be undermined.

Much of such discourse on the choice of either approach to liberalisation has been undertaken based on the RTAS and free trade agreements in North America and Asia. Notably, not much of the same has been done regarding such agreements in Africa. As such, this research is undertaken focusing on assessing albeit fleetingly, the scheduling approach adopted by the East African countries under the Protocol for the establishment of the East African Community Common market. This research, while drawing from that undertaken in other regions, attempts to explore the likely consequences of the liberalisation approach adopted by the countries of the East African Community.

LIST OF ABBREVIATIONS

| | |
|--------|---|
| AFAS | ASEAN Framework Agreement on Services |
| ASEAN | Association of South East Asian Nations |
| COMESA | Common market for East and Southern Africa |
| EAC | East African Community |
| ECOWAS | Economic Community of West African States |
| EPA | Economic Partnership Agreements |
| EU | European Union |
| FDI | Foreign Direct Investment |
| FTA | Free Trade Area |
| GATS | General Agreement on Trade in Services |
| GDP | Gross Domestic Product |
| MFN | Most Favoured Nation |
| MNP | Movement of Natural Persons |
| NAFTA | North American Free Trade Agreement |
| OECD | Organisation for Economic Cooperation and Development |
| PTAs | Preferential Trade Agreements |
| RTAs | Regional Trade Agreements |
| SADC | Southern Africa Development Community |
| UNCTAD | United Nations Conference on Trade and Development |
| WTO | World Trade Organisation |

LIST OF TABLES

Table 1: Uganda's schedule of commitments under the EAC Common Market Protocol
(financial services)

SERVICES PROVISIONS IN REGIONAL TRADE AGREEMENTS: DOES THE EAST AFRICAN COMMUNITY STAND TO GAIN MORE FROM AN INTEGRATED MARKET?

1.1 BACKGROUND

Services are the fastest growing sector of the economy. With technological advances as well as policies that are more liberal and other economic reforms, trade in services has grown more rapidly than trade in goods in world production. The gains from trade in key sectors for example, communications, finance, transport, and professional services (e.g. accounting, legal services etc) are large in comparison to trade in goods.¹ Different service types account for two thirds or more of the gross domestic product (GDP) in Organisation for Economic Cooperation and Development (OECD) countries, over 50% of GDP in many middle income countries and just over 40% in the poorest countries.² Further, services now represent an important share of world trade as well as the greater share of world foreign direct investment (FDI) flows.³ Such statistics further indicate that services trade indeed contributes to the growth and development of international trade and that further development of the services sectors could foster trade gains not only for services but also for goods.⁴

Prior to the Uruguay Round of negotiations, international trade was confined to the conventional form of trade in goods or merchandise trade. With new developments, especially with the advent of technological changes, trade not only centred on cross border exchanges of goods but was broadened to include cross border trade of services. As a result, the Uruguay Round had, as one of its major feats, the General Agreement on Trade in Services (GATS). The GATS is an international framework of rules and regulations governing trade in services.⁵

¹ Gootiiz, B. and Mattoo, A. (2009) "Services in Doha: What's on the Table?" *Journal of World Trade* 43(5):1013-1030

² Vylder, S (2007) "The Least Developed Countries and World Trade-Second Edition", SIDA studies no. 19, p. 146

³ Roy, M. (2009) "Endowments, power and democracy: Political economy of multilateral commitments on trade in services", WTO Staff Working Paper ERSD, p. 2

⁴ Hoekman, B. (2009) "The General Agreement on Services: Doomed to Fail? Does it Matter" *Journal of Industry, Competition and Trade* 8:295-318

⁵ Adlung, R. And Roy, M. (2005) "Turning Hills into Mountains? Current Commitments Under the General Agreement on Trade in Services and Prospects for Change" *Journal of World Trade* 39(6):1161-1194

In spite of the development of services, trade negotiations on services liberalisation have made little progress under the World Trade Organisation (WTO). The outcome of the Doha negotiations held in November 2001 is evidence of this. The Ministerial Declaration on services only served to emphasise that negotiations on trade in services are to be conducted with the intention of promoting the economic growth of all the member countries and the development of developing and least developed countries.⁶ A further outcome of the Doha round was that it recognised the work undertaken thus far on services trade and the different country proposals made in that regard.⁷ Consequently, the Doha round did not yield much on liberalisation of trade in services because no conclusions were drawn on the said proposals. One of the reasons for this slow state is the current negotiation process which is premised on a request and offer model rather than a framework of objectives required to give direction and momentum to the negotiations.⁸ A further impediment to progress in services trade is the fact that the trade negotiations under the WTO framework are undertaken based on the principle of “single undertaking”. Under this principle, every item on the agenda must be agreed; the agenda is inseparable. In other words the principle clearly follows that “Nothing is agreed until everything is agreed”.⁹ Therefore, with the ‘failed’ Ministerial conference at Cancun, largely over an impasse on agricultural subsidies, no progress was made on services trade and the other issues on the agenda.

More effort is therefore needed to liberalise trade in services. For countries ready to commit to market opening, a bilateral or regional forum may deliver quicker results than a multilateral one. Because of this, there has been an increase in regional trade agreements (RTAs) in Africa and the world over, in the last ten years. Countries enter into regional trade agreements with the ultimate objective of establishing full economic communities. With this ultimate objective in hand, countries integrate for a variety of reasons, including inter alia, the following:

- Economic considerations: This is one of the main reasons for integration. RTAs are a means of trade creation through the removal of trade barriers within the region.

⁶ Doha Declarations, November 2001, p. 7

⁷ Ibid

⁸ Mattoo, A. (2005) “Services in a Development Round: Three Goals and Three Proposals”, *Journal of World Trade* 39(6):1223-1238

⁹ Trade Negotiations Committee “How the Negotiations are Organised”, Doha Development Agenda, 2003, also available at http://www.wto.org/english/tratop_e/dda_e/dda_e.htm

Further, widening of the regional economy would result in greater economies of scale and also improve the welfare status quo of the region.¹⁰

- Foreign policy considerations: RTAs facilitate the development of political and social unity among countries in order to strengthen ties among themselves¹¹ and also to minimise the probability of any conflict occurring in the region.
- Political unity for some RTAs: some RTAs are established with the futuristic purpose of eventually ending up as a political federation.¹²
- Some countries enter into RTAs due to the slow pace of negotiations under the multilateral trading system.

In spite of the reasons for integration, important to note is the fact that regional cooperation is not an end in itself. Instead, it is a means through which countries can enhance economic growth and development.

Many of the recently concluded RTAs have a wide coverage providing not only for liberalisation of trade in goods but also the liberalisation of trade in services. This trend in rising interest in services trade agreements or even trade agreements containing services trade provisions, is influenced by a number of developments. Firstly, policy makers have turned their attention to other barriers other than those that restrict trade in goods. Secondly, the growth of world trade in goods and the materialisation of international production networks have emphasised the importance of an efficient services infrastructure. Market openings in services therefore offer the prospect of increased efficiency in the services sectors.¹³ Thirdly, infrastructure services otherwise provided by public monopolies are increasingly being provided by the private sector.¹⁴ This has necessitated the proper regulation of these services sectors. Accordingly, the role of trade in services in facilitating economic development is vital and cannot be underestimated.

¹⁰ Economic Commission for Africa report (2008) “Assessing Regional Integration in Africa III: Towards Monetary and Financial Integration in Africa”, <http://www.uneca.org/aria3> (accessed 11/08/09)

¹¹ Fink, C and Molinuevo, M. (2008) “East Asian Preferential Trade Agreements in Services: Liberalisation, Content and WTO rules” *World Trade Review* 7:4, p. 642

¹² Article 5 (2), Treaty establishing the East African Community states “.... *Partner States undertake to establish among themselves and in accordance with the provision of this Treaty, a Customs Union, a Common Market, subsequently a Monetary Union and ultimately a Political Federation ...*”

¹³ Fink, C and Jansen, M. (2009) “Services Provisions in Regional Trade Agreements: Stumbling or Building Blocks for Multilateral Liberalisation?” in Baldwin, R. and Low, P. (eds) *Multilateralising Regionalism: Challenges for the Global Trading System*, Cambridge University Press

¹⁴ Fink, C and Molinuevo, M. (2008) “East Asian Free Trade Agreements in Services: Key Architectural Elements” *Journal of International Economic Law* 11(2): 263-311

Services differ from goods in terms of their characteristics. Services are often seen as intangible, invisible and perishable. This often requires that their production and consumption are done simultaneously. Because of this trait, trade in services often necessitates producers and consumers having to be in the same place. Despite this necessity for proximity between the producer and the consumer, they can still interact at a distance due to technological advancement. Such interaction is made possible through the use of the internet.¹⁵ Therefore, in order to accommodate these various interests, liberalisation in services trade has been advanced not only in international agreements (at the WTO) but also in regional trade agreements as the countries progress towards deeper integration.

Services provisions under RTAs follow the same trend as those RTAs that provide for goods. They are largely premised on the elimination of explicit barriers to the entry of foreign service providers in the region. Notably, for services trade under RTAs, two models of liberalisation are largely used. A number of RTAs tend to duplicate the use, found in GATS, of a positive-list approach to market opening, whereas others pursue a negative-list approach. The negative-list approach is modelled along the services provisions in the North American Free Trade Agreement (NAFTA). For example, under the Association of South East Asian Nations (ASEAN) Framework Agreement on Services (AFAS), the GATS model of a positive list approach is used.¹⁶ Under the positive-list (GATS type) approach, liberalisation is only applicable to those sectors that are listed in a country's schedule of commitments.¹⁷ On the other hand, under the negative-list (NAFTA type) model, all sectors are liberalised unless stated otherwise in the country's reservations provisions.¹⁸ While both approaches can result in similar liberalisation outcomes, there have been propositions that a negative-list approach may result in useful gains in governance and transparency terms. It may, however, deprive countries of some measure of policy flexibility since there are limitations as regards the introduction of future regulatory measures.¹⁹

¹⁵ Francois J, (1990) "Trade in Nontradables: Proximity Requirements and the Pattern of Trade in Services", *Journal of International Economic Integration* (now called *Journal of Economic Integration*) 5 (1):31-46

¹⁶ Hamanaka S, (2009) "The Building Block versus Stumbling Block Debate of Regionalism: From the Perspective of Service Trade Liberalisation in Asia" *Journal of World Trade* 43(4): 873-891

¹⁷ Roy, M. Marchetti, J. and Lim, H (2007) "Services Liberalisation in the new Generation of Preferential Trade Agreements (PTAs): How Much Further than the GATS?" *World Trade Review* 6(2):155-192

¹⁸ Ibid

¹⁹ Mattoo, A and Sauvé, P. (2008) "Regionalism in Services Trade" in Mattoo, A., Stern R.M. and Zanini, G. (eds) *A Handbook of International Trade in Services*, Oxford University Press

In spite of difference in the two model types, the GATS type has in some instances been referred to as a hybrid model. This is because it contains a combination of both positive and negative type elements.

Roy, Marchetti and Lim²⁰ propose that the services rules that are included in most of the RTAs are similar to those in the GATS. They however add that many of these RTAs provide for sectoral coverage which goes beyond the commitments made by countries under the GATS.²¹ Their conclusions show that overall; countries extend more commitments under preferential agreements than they do under the GATS through the introduction of improved and new bindings. The writers do however admit that though preferential agreements have made vital advancement in the further liberalisation of services trade than has the GATS, the value that they add to certain sectors is still narrow and is still yet to be realised.

With the exception of the European Union (EU) and a small number of agreements between high income countries (e.g. Australia-New Zealand, the US-Australia Preferential Trade Agreement (PTA)), most preferential agreements have not achieved much in terms of actual additional liberalisation. Therefore in practice, achieving liberalisation through regional cooperation is neither simple nor is it automatic. It is even difficult where there is a strong political commitment from all the countries and common institutions mandated to oversee integration. The EU, in fully liberalising intra-EU services trade and creating a single market for services is evidence of such complexity.²²

North-South agreements, notably the bilateral free trade agreements of the United States (US) and of the European Union (EU), have been the important drivers for services. In broad terms, the United States, for example, offers access to its large market for goods in exchange for access to services markets in developing countries. Under the same agreements, developing countries also accept rules governing investment and intellectual property rights.²³

²⁰ Supra, n. 17

²¹ Ibid

²² Hoekman, B and Winters A L, (2009) "Multilateralising Preferential Trade Agreements: A Developing Country Perspective" in Baldwin, R Low, P. (eds) *Multilateralising Regionalism: Challenges for the liberal trading system*, Cambridge University Press

²³ Ibid

South-South agreements tend to feature services liberalization less prominently. Further, their rules governing investment, intellectual property, and even the temporary movement of workers, are usually weak or absent altogether. There is therefore much difference in the coverage of services under North and South agreements.²⁴

Although liberalisation of trade in services has its benefits, it does not occur automatically. Such liberalisation, in order to benefit the regional economy, and also the domestic economies, must be accompanied by related policy reforms and proper formulation of such reforms. Managing reforms of services markets should therefore be done in combination with the proper formulation of both competition and regulatory reforms and policies.²⁵ In addition, there should be adequate regulation and supervision mechanisms to monitor the functioning of the different services sectors or else the liberalisation efforts of the countries will be undermined.²⁶

However, the establishment of institutions competent to regulate well is a serious challenge. This is further complicated by the problem of domestic regulations which may themselves become impediments to competition and trade. The role of domestic regulation is multifaceted and includes, inter alia, proper management of service providers, protection of the consumers etc. In spite of such objectives, regulations themselves can become a barrier to trade. They become an impediment through the setting of different technical standards, prudential regulations, and qualification requirements in services in the respective jurisdictions. These need to be addressed in the context of regional integration in the drive towards liberalisation of trade in services. In this regard, it is important to note that integration often requires a certain degree of regulatory harmonisation, which, although it has its benefits, also has its costs. It will result in benefits where national regulation can be improved. However, where national regulations are optimal, the benefits of harmonisation must be weighed against the costs to be incurred²⁷ by the country seeking to bring its regulations on harmony with the agreed standards.

²⁴ Newfarmer, R. (2005) "Beyond Merchandise Trade: Services, Investment, Intellectual Property, and Labour Mobility in "Global Economic Prospects 2005: Trade, Regionalism, and Development" World Bank report

²⁵ Supra, n. 17

²⁶ Mattoo A and Stern R M., (2008) "Overview: Pattern of Trade in Services" in Mattoo, A., Stern, R.M., and Zanini, G (eds) *A Handbook of International Trade in Services*, Oxford University Press

²⁷ Ibid

Notably, RTAs in sub-Saharan Africa are currently being negotiated and most, if not all of them, contain provisions on services trade. Under the Southern Africa Development Community (SADC) for example, the regional bloc has in place a SADC Trade Protocol and negotiations are ongoing on a framework agreement for a Services Protocol. In the East African region, the East African Community (EAC) has currently signed the Protocol for the establishment of the East African Community Common Market (EAC Common Market Protocol) which contains services provisions. The countries have agreed that the East African Community will become a common market commencing 1st July 2010. In the interim, modalities for its enforcement are currently being negotiated.²⁸ With the exception of these few RTAs in Africa covering services trade, the number of RTAs covering trade in services is largely prevalent in Europe, the Americas and Asia.

This therefore, indicates that most of the literature on services trade liberalisation under RTAs has mostly been conducted with regard to north RTAs and includes the south RTAs involving countries in Asia. Where reference is made to sub-Saharan Africa, it is done in the context of general research. It is therefore necessary that an overview of the status of services trade liberalisation on intraregional trade in sub Saharan Africa is done; which this paper seeks to address.

1.2 PROBLEM STATEMENT

The proliferation of RTAs is due to the impasse that the multilateral negotiations have resulted into. The international trade negotiations under the WTO framework have more or less come to a standstill considering that up to date, no conclusions have been made to the major issues under discussion. As a result, countries wishing to guarantee commitments to market opening in a faster manner have resorted to negotiating and signing regional trade agreements. Accordingly, RTAs, which were largely premised on facilitating trade in goods, have demonstrated an increasing pattern to include provisions on trade in services. This is, mainly in part, due to the vital role that services have come to play in the development and growth of trade both within and outside the respective regions.

²⁸ <http://www.eac.int> (accessed 11/08/2009)

In their development, RTAs have adopted different approaches to the regulatory framework governing liberalisation of trade in services within their respective regions. These models of regulation are adopted with a view to attracting more investment to the region and improving the region's supply constraints in order to maximise gains from services exports. While some RTAs have adopted a GATS model (positive-list approach) others have adopted a NAFTA model (negative-list approach). The GATS model provides that only those sectors that are listed are liberalised²⁹ while the NAFTA model provides that all sectors are liberalised unless otherwise stated by reservations.³⁰ Consequently, RTAs have adopted either model, with modifications made that are best suited to the region's needs.

The research will be based on the assumption that a GATS-model of services trade liberalisation under regional trade agreements will indeed provide the adequate foundation and impetus for the development of intra regional trade. This does not however mean that the development of intra regional trade will be automatic; what is needed are the institutional and other reforms (both regionally and nationally) necessary to maximise the gains from services liberalisation. Such reforms include, most importantly, competition and regulatory reforms.

1.3 RESEARCH PROBLEM AND RESEARCH QUESTIONS

The research seeks to address the following:

- 1) What is the pattern of services trade provisions under regional trade agreements?
- 2) In view of the fact that most RTAs are GATS modelled while others are NAFTA modelled, upon which regulatory framework should an RTA be placed in order to gain the benefits of intra regional trade growth and development?
- 3) What is the role of services trade liberalisation as the likely driver of the development of intra regional trade and ultimately as the potential force for the development of trade between the region and third countries?

²⁹ Supra, n. 15

³⁰ Ibid

1.4 SIGNIFICANCE OF RESEARCH

Services are the fastest growing sector of the economy. This is due to the essential role played by different services sectors respectively. On one hand, services provide the bulk of employment and income in many countries while on the other hand; services provide input for the production of other services and also for goods. Owing to their role in the economy, it is therefore imperative that services sectors are not only given due recognition but regulated in an efficient manner in order to maximise the gains from trade. In an attempt to achieve this efficiency, RTAs have adopted regulatory models that are regional specific with a view to maximising gains from trade liberalisation within their respective regions.

It is against this background that this research is to be undertaken in order to explore the different regulatory models adopted by some RTAs in their drive to expand regional trade by liberalising trade in services. This research will largely focus on the services provisions under the EAC Common Market Protocol which will be reviewed against the two models of liberalisation adopted by RTAs. Therefore, an assessment of the services provisions of the EAC Common Market Protocol will be done in order to discuss the regulatory model best suited for the region, in the circumstances.

Most of the literature on trade in services under RTAs is largely premised on the examination of the regulatory models adopted by different RTAs and preferential trade agreements in Asia, North America and the EU with minimal research addressing RTAs in Africa, and particularly East Africa. Accordingly, research on the services provisions of the EAC Common Market Protocol is vital in order to explore the regulatory model adopted and its potential impact on the development of intra regional trade in the East African region and the reforms needed to realise this.

1.5 LITERATURE REVIEW:

Roy, Marchetti and Lim³¹ illustrate that RTAs take different approaches to liberalisation of services trade. Some adopt a GATS-like approach (e.g. the European Communities, the ASEAN Framework Agreement on Services Trade) under which liberalisation is based on a positive list. Under this approach, liberalisation obligations only extend to those sectors

³¹ Ibid

which are listed in the countries' commitment schedules. On the other hand, some RTAs adopt a NAFTA-like approach based on a negative list modality under which every sector is liberalised unless otherwise stated in the countries' reservation provisions. Their research, which was largely premised on RTAs and Preferential Trade Agreements (PTAs) involving the United States, European Communities, and some Asian countries further illustrates that though most RTAs have adopted either the GATS model or NAFTA model of regulation, it can be said that the GATS-type is actually a hybrid approach containing both positive and negative elements. No reference was made to any agreements involving African countries. They state that this combined approach is adopted with the aim of attaining greater consistency between services and investment.

Their conclusions show that overall; countries extend more commitments under preferential agreements than they do under the GATS. This they do through the introduction of improved and new bindings. The writers do however admit that though preferential agreements have made vital advancement in the further liberalisation of services trade, the value that they add to certain sectors is still narrow.

Aaditya Mattoo and Pierre Sauvé³² state that in principle, the potential gains from preferential agreements in certain services sectors can also be obtained through most favoured nation (MFN) liberalisation. They however propose that the regional context is more feasible for the convergence of regulatory regimes, which is necessary for the further market integration. In their findings, they maintain that RTAs and the GATS on the whole, have common standard provisions aimed at the progressive liberalisation of services. They illustrate that in some cases the GATS go further than the RTAs (e.g. by providing for domestic regulation). They further illustrate that those RTAs that provide for the same merely restate what the GATS provides for or even provide for narrower scope on the same. They further find that some RTAs adopt a negative list approach while most are inclined to duplicate a hybrid approach which is found in the GATS.

The writers further expound on the economic benefits of regional liberalisation which include the following: it acts as an inducement to FDI, and competition among firms within the region helps them prepare for global competition. They however acknowledge that regional

³²Supra, n. 17

liberalisation does have its shortcomings. For example, there is the risk that regional liberalisation might create a monopoly of firms that could resist further market opening. This monopoly creation raises the concern that regionalism can become a “stumbling block” to further multilateral liberalization.³³

1.6 METHODOLOGY:

Use will be made of both primary and secondary sources.

Primary sources will include the General Agreement on Trade in Services (GATS), the Protocol on the establishment of the East African Community Common Market, the Treaty establishing the East African Community, the Treaty establishing the European Union, North American Free Trade Agreement (NAFTA), and other relevant regional trade agreements or services agreements.

Secondary sources will include textbooks on international trade law, journals on the subject of international trade law, economic law and related subjects.

Other information will be obtained from the databases of government institutions e.g. the East African Community secretariat, Ministry of Tourism, Trade and Industry (Uganda), Ministry of East African Community Affairs (Uganda) etc.

Use will also be made of the internet for example the official websites of the World Trade Organisation, UNCTAD, the World Economic Forum etc.

1.7 OVERVIEW OF CHAPTERS

Chapter One

This chapter is an introductory chapter to the thesis (the research proposal). It will cover the background to the study, research problem and questions, research methodology and the significance of the research.

³³ Ibid

Chapter Two

This chapter will cover the patterns of trade in services by giving a brief overview of different modes of supply of services under the GATS. These four modes are: cross border supply (mode 1): services are supplied from the territory of one country to the territory of another; consumption abroad (mode 2): services are supplied in the territory of one country to the consumers of another country; commercial presence (mode 3): services are supplied through any business or professional establishment of one country in the territory of another; and presence of natural persons (mode 4): services are supplied by the nationals of one country in the territory of another.

The chapter will also give an overview of GATS Article V which provides for regional trade agreements. It will therefore illustrate the basic principles that should be followed under RTAs in order to ensure that they are compliant with the GATS regime.

Chapter Three

The chapter will review the different regulatory models of liberalisation adopted by different RTAs largely premised on the two models adopted by most RTAs. The regulatory models to be reviewed are: the GATS model (positive-list approach) and the NAFTA model (negative-list approach). The GATS-type is sometimes referred to as a hybrid approach.

A selection of RTAs to be reviewed includes, but is not limited to the following: the European Union, the ASEAN Framework Agreement on Services Trade, the NAFTA, the Treaty establishing the Caribbean Community and protocols thereto, the Protocol on the establishment of the EAC Common Market, and some regional trade agreements in Asia.

The chapter will also give a brief overview of the effects of either model of liberalisation while assessing which option is better.

An assessment, albeit fleeting, will be made of the Protocol for the establishment of the East African Community. This will be done in order to assess those elements of a GATS type approach that regional agreement signed last year. An overview will also be made of the likely impact of such model of liberalisation.

An overview will also be made of the effects of adopting services liberalisation in terms of the necessary reforms that the region and particularly, the countries should undertake. The

design and implementation of the reforms is vital if the countries and the region as a whole are to maximise the gains from services trade.

In relation to the above therefore, the section will also address the necessary competition and regulatory reforms that are to be adopted in order for services liberalisation to yield maximum results.

Chapter Four

This will contain the conclusion to the paper and possible recommendations necessary to guide policy makers in their drive towards further liberalisation of services trade in the East African region. This is important considering that the EAC Common Market which was signed last year is expected to come into force on 1st July 2010.

1.8 SCOPE AND DELINEATION OF STUDY

The study will cover the EAC Common Market Protocol with due regard being made to the services provisions there under. Comparison will be made with services trade under the GATS model and the NAFTA model of services liberalisation. This is because these are the two services agreements approaches along which services RTAs are modelled. As sources of information, regard will be made to the different RTAs for reference, in order to give an overview of services liberalisation under either model. These RTAs include but are not limited to the following:

- the European Union. This is because it is a full common market providing for movement of services within the internal market and has been used as a model for integration by most regions;
- agreements undertaken in the Asian region;
- the North American Free Trade Agreement etc.

An overview of the impact of the services regulatory framework adopted will then be made in light of the East African region. This will extend to the domestic reforms and mechanisms that a country within the region might have to undertake in order to maximise the gains from liberalisation, where it has not yet undertaken such reforms. In such country assessment reference will be made to Uganda owing to the limitations that undertaking reference to each

country in the region will entail. Such assessment would require much more than the research can offer in terms of resources and scope. Availability of data is another limiting factor to undertaking reference to each country in the region.

Therefore, the study will be limited to Uganda, with reference being made to selected sectors since covering even more than three sectors would require much more policy space than is permitted by this research.

CHAPTER TWO

OVERVIEW OF SERVICES TRADE

2.1 Introduction

Many economists and lawyers have veered away from the conventional theory of trade that limited the scope of trade to merchandise trade. With the recent advancements in technology and infrastructure, there has emerged over time, a new dimension to trade encompassing trade in services. This is due to the fact that with the growth in services trade, services have come to be seen as having as much an important role to play as do goods trade. To date, services contribute to the Gross Domestic Product (GDP) of most countries with services production and activity not only as a means of trade on its own, but also as an intermediate input to goods trade. Transportation and storage services for example, are not only important but vital for the production and trading processes of most, if not, all goods.³⁴ Trade in goods has been supported by services in, among others, the following ways:

- The financial sector especially has facilitated trade through the availability of capital, a requirement most necessary for purchasing both the goods and the factors of production used to make the goods
- Services also aid in determining costs of transaction. Examples of such services include transport services (goods must be moved from the point of production to that of consumption. In some cases goods have to be distributed to different points of the production process) and energy services (fuel used to run the machinery for manufacture of goods and also the electricity necessary for industrial use).³⁵

Significant gains could also be obtained worldwide through services trade exports from developing countries to developed economies. The exports of software services from India, for example, cannot be ignored.³⁶ Developing countries could also become exporters of

³⁴ Supra, n .15

³⁵ Nordås, H, K “The impact of services trade liberalisation on trade in non-agricultural products” (2008) OECD Trade Policy Working paper No. 81, www.oecd.org (accessed 10/09/2009)

³⁶ Mattoo, A. (2008) “Developing Countries in the New Round of GATS Negotiations: Towards a Pro-active Role” in Njikeu, D and English P (eds) *African Countries in the New Trade Negotiations: Interests, Options and Challenges*, Africa and the World Trading System, Vol. 3, Africa World Press Inc.

health services, through attracting foreign patients; sending their health personnel abroad, temporarily; or through training of foreign medical students.³⁷

Further, services are not only vital for trade in goods but also contribute to employment with the largest number of persons being involved directly in the services industry, for example, business and professional services like accounting, legal construction services etc. Some services are also used as intermediate inputs for not only goods but other services e.g., transport, financial and energy and sectors.

On the whole, services facilitate the improvement of infrastructure; increased productivity; and increased competitiveness and demand.³⁸

A larger percentage of GDP of most countries is attributed to services trade (about 80% for the United States and the EU). This is an indication that with further developments in the liberalisation of services trade by different countries, the gains therefrom are likely to even exceed those attributed to goods trade.³⁹ Despite services trade being small in comparison to goods trade, its contribution to global exports cannot be ignored. This is due to the fact that trade in services has increased over the past decade, due to recent and still ongoing technological advancements.⁴⁰ Such has been the development in services trade that the WTO has valued its growth over the past decade as amounting to 4.2 trillion dollars.⁴¹

As a result of the broader concept of trade to include other forms of trade apart from trade in goods, international trade law has made provision for a framework of rules and principles governing different sectors. These sectors which are diverse span from goods, services, intellectual property, investment, to agriculture, textiles, safeguards and countervailing measures, among others. Though diverse, they are vital and more often, interlinked with some services forming part of the production process of goods (intermediate services). Such intermediate services include banking and telecom.

³⁷ Ibid

³⁸ Lakshmi Puri, Director, Division of International Trade in goods and services “Trade in Services and Development Implications” March 2007 session, www.wto.org (accessed 10/09/2009)

³⁹ Supra, n. 1

⁴⁰ Nadoo, V (2009) “Trade Commitments on Education Services: The Need to Move Out of the Current Impasse”, *Journal of World Trade*, 43(3): 621-640

⁴¹ WTO, International Trade Statistics, Geneva WTO 2005

One of the major results of the Uruguay Round was the GATS. It was negotiated during a period of far reaching unilateral reforms of service sector policies. These reforms were advanced as a result of the developments in technology at the time which enabled consumers to, among others, consume services without having to be in the same proximity as their production. The reforms were also as a result of the recognition that was given to the importance of services trade in the growth performance of the economy. Consequently, the cost and quality of the services sector became important thereby necessitating their regulation. An efficient competitive financial sector is critical for capital deployment where it has the highest returns. Likewise, telecommunications and transport services are important as they are means through which production and provision of other goods and services respectively can be done. Once therefore, this important role of services as inputs is duly recognised, then further development of the services sector can result in increased gains for international trade of both services and goods.⁴²

Development of some of the different sectors as part of the WTO law and process was done at the Uruguay round of negotiations held in 1994. One of its far reaching results was the adoption of the General Agreement on Trade in Services (GATS); an agreement that spelt out the regulations and principles by which trade in services would forthwith be governed. It thereby introduced a different dimension to the conventional theory of international trade which, until then, was restricted to the trade in goods. The fact that services are essentially intangible and invisible making them different from goods, usually necessitates that the producer and consumer thereof are in the same proximity.⁴³ A further characteristic of services is differentiation; meaning that services are customised to suit the customer's needs.⁴⁴

Services include activities as disparate as transport of goods and people, financial intermediation, communications, distribution, hotels and restaurants, education, health care, construction, and accounting.

⁴²Supra, n. 4

⁴³ Stern M.R, and Mattoo, A (2008) "Overview" in Mattoo, A, Stern, R and Zanini, G (eds), *A Handbook of International Trade in Services*, Oxford University Press

⁴⁴Hoekman, B and Mattoo, A. (2007) "International Trade: Trade in Services" in Guzman, A.T and Sykes, A.O. (eds) *Research Handbook in International Economic Law*, Edward Elgar Publishing, 113-150

2.2 Pattern of services trade

In contrast to merchandise trade, services are often intangible, invisible and perishable, and usually require simultaneous production and consumption. The need in many cases for proximity between the consumer and the producer implies that one of them must move to make an international transaction possible. Since the conventional definition of trade—where a product crosses the frontier—would miss out on a whole range of international transactions, the GATS took an unusually wide view of trade, (defined in Article I thereof) to include four modes of supply:

- a) Cross-border (mode 1): services are supplied from the territory of one Member into the territory of another. Under this mode of supply, the supplier does not move from one territory to another. It is only the service itself that moves from one territory to another. Such services include software services provided by a supplier in one country through mail or electronic means to consumers in another country or electronic transfers of money done through internet banking.
- b) Consumption abroad (mode 2): services supplied in the territory of one Member to the consumers of another. Examples are where the consumer moves, for example, to consume tourism or education services in another country or even medical services in another country.
- c) Commercial presence (mode 3): services supplied through any type of business or professional establishment of one Member in the territory of another. An example is an insurance company or a bank establishing a branch by means of foreign direct investment (FDI) in another country.
- d) Presence of natural persons (mode 4): services supplied by nationals of one Member in the territory of another. This mode includes both independent service suppliers and employees of the services supplier of another Member. Examples are a doctor of one country supplying, through his physical presence, services in another country. It also includes for example, the foreign employees of a foreign bank providing services on a temporary basis.⁴⁵

The four modes of supply cover all services types except for those that are neither supplied on a commercial basis nor in competition. For example, students studying under a scholarship

⁴⁵Supra, n. 3

overseas will not be covered by any of the four modes of supply because their stay is not on a commercial basis.⁴⁶ The same applies to workers employed in a foreign country but under a grant scheme regulated by a treaty of cooperation between the two countries.

Prior to the Uruguay Round, the regulation of international trade was limited to trade in goods since conventional trade theory was only synonymous with trade in goods. With time however, this theory was modified resulting from developments, in for example, technology (particularly electronic transfers), which enabled services transactions to occur without the consumer and producer thereof being in the same proximity.⁴⁷ This has indeed expanded the range of cross border services trade to include electronic banking.

Conventional economic theory prescribes free trade as the regime that maximises global economic welfare. Economics say that globalisation is a policy that is likely to produce gains for each country. The same theory applied to trade in goods should also apply to trade in services. Free movement of service suppliers across borders will maximise the gains from trade and thus promote economic welfare.⁴⁸

The importance of proximity between the consumer and producer of a service is further reflected in the definition of services as provided for under the GATS.⁴⁹

Services, as defined in the GATS, include generally all types of services. GATS Article I states that the Agreement covers “any service in any sector” meaning that no service is excluded from the agreement’s scope.⁵⁰ All levels of government “central, regional, or local governments or authorities” must comply with the GATS terms. (However, it is important to note that some services are not regulated by the GATS, for example, air services; services exercised in governmental authority.⁵¹

⁴⁶ Supra, n. 40

⁴⁷Trebilcock, M.J. and Howse, R. (2005) “The Regulation of International Trade”, Routledge,: Taylor and Francis Group

⁴⁸ Peng S (2006) “Towards Greater mobility: Movement of Service Suppliers in East Asia”, *Asian Journal of WTO & International Health Law & Policy*,105-139

⁴⁹ GATS, Article I

⁵⁰ Leal-Arcas R. (2007) “The Resumption of the Doha Round and the Future of Services Trade” Loy, *L.A. International Comparative Law Review*, Vol. 29: 339-461

⁵¹GATS, Article I(3)(b)

Regarding the scope of the GATS, it expressly provides that the GATS applies to “measures affecting trade in services”.⁵² Such measures affecting trade in services take the form of law, regulation, rule, procedure, decision and administrative action. For purposes of clarity, the term “measures affecting trade in services” has been further explained by case law in order to determine the intended scope of application of the GATS. For example, the Panel in EC-Bananas III defined the scope of application as

*“No measures are excluded a priori from the scope of the GATS as defined by its provision. The scope of the GATS encompasses any measure by a Member to the extent it affects the supply of a service regardless of whether such measure directly governs the supply of a service or whether it regulates other matters but nevertheless affects trade in services”.*⁵³

This means that countries are bound to follow some of the GATS rules even where they have not expressly agreed to do so regarding some sectors.

Unlike the GATT, the scope of the GATS is not confined to product related measures. It is wider in scope covering (a) the product related measures, (b) the process and (c) the producer related laws and regulations.⁵⁴

2.3 Principles

The principles underlying services trade regulation are similar in form to those that govern goods trade under the GATT. However, difference lies in the manner in which these similar principles are applied, owing to the different nature of trade in goods as compared to trade in services.⁵⁵

The GATS, like the GATT, does make provision for obligations and principles which apply to all Members. These are principles of general application and apply to all sectors whether a Member has committed to have it liberalised or not in its schedule of commitments.

⁵² GATS, Article I *“This Agreement applies to measures by members affecting trade in services”*

⁵³ GATS, Article 1B, Interpretation and Application of Article I

⁵⁴ Supra, n. 5

⁵⁵ Ross, B. (2003) “Regulations Confronting Trade in Services” in Simpson, G.P. and Woolcock, S. (eds) *Regionalism, Multilateralism and Economic Integration: the Recent Experience*, United Nations University Press, 253-274

Under the GATS, the core principles of general application are Most Favoured Nation principle (MFN) and that of transparency. The principles of Most Favoured Nation (MFN) ensures that members do not, in their services trade, accord unequal treatment to some members as opposed to others. The GATS provides that “with respect to any measure covered by this Agreement, each member shall accord immediately and unconditionally to services and service suppliers of any other member, treatment no less favourable than it accords to like services and service suppliers of any other country”.⁵⁶

The principle of transparency which is stipulated under Article II makes obligates Members to publish any measures which affect the operation of the GATS including international agreements pertaining to trade in services.⁵⁷ Furthermore, as a means of advocating transparency, Members are obligated to set up enquiry points⁵⁸ which will provide information regarding laws, regulations and administrative procedures affecting those services that are covered by the Agreement.

Apart from the general principles, the GATS, unlike the GATT, also provides for specific principles which apply to a country’s schedule of commitments and form the core of the GATS since they determine the outcome of the liberalisation commitments under the Agreement.⁵⁹

These sector specific principles are market access and national treatment. Because they are sector specific, both market access and national treatment are made for each of the four modes of supply under a country’s schedule of commitments.

Article XVI on ‘market access’ obligates Members not to show less favourable treatment to services and service suppliers of other Members, than what it has committed to under its schedule of commitment. Notably, under the obligation of market access, the GATS lays down six measures which countries are not permitted to undertake, namely⁶⁰:

- limitations on the number of service suppliers;

⁵⁶ GATS, Article II, 1

⁵⁷ GATS, Article III “Each Member shall publish promptly, and except in emergency situations ... all relevant measures of general application which pertain to or affect the operation of this Agreement. International agreements pertaining o or affecting trade in services shall also be published.”

⁵⁸ GATS, Article III (4)

⁵⁹ Supra, n. 47

⁶⁰ GATS, Article XVI 3

- limitations on the total value of service transactions or assets; limitations on the total number of service operations or total quantity of service output;
- limitations on the total number of employees in a particular sector or that a service supplier may employ;
- measures that restrict or require supply of the service through a particular legal entity types or joint venture; and
- limitations on the percentage participation of foreign capital or total value of foreign investment.

The national treatment principle provided for under Article XVII ensures that Members give similar treatment to measures affecting services supplied by other Members as it does to its own domestic services.

The GATS however does allow Members to depart from the MFN principle, by among others, entering into regional economic agreements. Article V thereof provides that “This Agreement shall not prevent any of its Members from being a party to or entering an agreement liberalising trade in services between or among the parties to such an agreement”. In earlier research, it was proposed that this departure was formulated so that regional integration could build on the multilateral system.⁶¹ That through deeper integration at the regional level, more liberalisation at the multilateral level would be attained.

Regional trade agreements that include provisions on services trade however, must comply with the GATS provisions on regional agreements.⁶² GATS provides for the following requirements in order for the RTA to be WTO compliant:

- The regional agreements must have “substantial sectoral coverage”. It further explains that this includes number of sectors, volume of trade affected and modes of supply.⁶³
- The regional agreements should also do away with ‘substantially all discrimination’.

Some discussion on the proper definition of the terms ‘substantial sectoral coverage’ ‘substantially all discrimination’ has been ongoing with calls for a tighter definition of the same terms.⁶⁴ The discussion has also involved proposals for redrafting of GATS Article V⁶⁵

⁶¹ Supra, n. 5

⁶² GATS, Article V

⁶³ GATS, Article V:1

Despite the fact that the GATS has attempted to define ‘substantial sectoral coverage’ in a more detailed manner, it is still uncertain what exactly it means.⁶⁶ Questions still arise as to how many sectors will actually amount to adequate number of sectors. Considering also, that the volume of services trade is difficult to quantify owing to the intrinsic nature of services, then this poses a challenge for interpretation.⁶⁷ Consequently, in order to determine whether a regional agreement satisfies the set criteria, assessment will have to be done on a case by case basis.

Marion Jansen has also stated that the GATS Article V condition of “substantial sectoral coverage” by regional trade agreements was not drafted strongly⁶⁸ and as such is subject to varying interpretation and most likely, to abuse.

As noted above, the GATS explains ‘substantial sectoral coverage’ as referring to “the number of sectors, volume of trade affected, and modes of supply”. According to these provisions therefore, not all sectors must be covered under regional trade agreements.⁶⁹ Some sectors could be excluded as long as the exclusion is not substantial and all modes of supply are covered.

The GATS however is unclear as to how many sectors if excluded would amount substantial exclusion. As a way forward, it can be deduced that where the regional trade agreement includes a large number of sectors but then excludes a major sector crucial to the region, for example, agriculture in the East African region, then the RTA will probably have failed to meet the requirements provided for under the GATS. No two RTAs can be exactly the same in terms of “number of sectors, volume of trade affected and modes of supply” therefore; they must be assessed on a case by case basis in order to determine their compatibility with the GATS.

⁶⁴Supra, n. 11

⁶⁵ Feketekuty (2000) ‘Assessing and Improving the Architecture of GATS’ in Sauv , P. and Stern, R.M. (eds.), *GATS 2000: New Directions in Services Trade Liberalisation*, Washington DC: Brookings Institution.

⁶⁶ Supra, n 15

⁶⁷ Ibid

⁶⁸ Jansen, M (2007) “Services Trade Liberalisation at the Regional Level: Does Southern and Eastern Africa Stand to Gain from Economic Partnership Agreements?” *Journal of World Trade*, 41(2): 411-450

⁶⁹ Choi, W. (2007) “Legal Analysis of Korea-ASEAN Regional Trade Integration” *Journal of World Trade* 41(3): 581-603

Article V further stipulates that the regional agreement must do away with ‘substantially all discrimination’ within a set period of time, that is, ‘at the time of entry into the agreement or on the basis of a reasonable time frame’. Although the test of reasonableness is subjective, such provision is necessary since it enables the liberalisation of services to be conducted in a progressive manner. Services barriers take the form of regulations and standards and by their very nature can only be eliminated progressively through a well defined process thereby necessitating a certain time frame. This differs from goods trade whose barriers can be eliminated within a reasonable time frame.⁷⁰

Liberalisation of trade in services accompanied by the reform of complementary policies can lead both to sectoral and economy wide improvements in performance.⁷¹ Where limitations on entry exist, the question is whether there are good reasons for such limitations. Any restrictions are increasingly difficult to defend in principle in the face of technological change and the mounting evidence that competition works. There has been proof that inefficiency produced by duplication of networks may be small compared to operational inefficiencies that can result from a lack of competitive pressure.⁷² In order to attract investment without sacrificing competition, small countries need to be part of a more integrated market. Integration usually requires a certain degree of harmonization which has benefits but also costs.⁷³

As indicated the pattern of services trade is such that it differs from that of trade in goods owing to the intrinsic nature of services. Services are intangible and indivisible and because of their nature, the regulations and principles governing them tend to differ in some aspects from those governing trade in goods.

Generally trade in goods and trade in services do indeed provide for similar principles of governance, notably Most Favoured Nation, National Treatment, Market Access, Transparency, among others. The similarity of these principles only extends to their form but not their substance. They appear the same though they differ in terms of their application and operation.

⁷⁰Supra, n. 37

⁷¹Supra, n. 17

⁷²Ibid

⁷³Ibid

The GATS, like the GATT does indeed provide for departures from these principles, notable of which is the provision on regional agreements. However, these agreements must conform to the standards and requirements as set out in the GATS, in order for them to be duly recognised.

Arguments have been made for and against the formulation of RTAs in the long debate of their “stumbling” or “building” block effect on the multilateral system. Neither stand can be said to hold more sway than the other and as such, each RTA should be assessed on its merits. RTAs are recognised trading blocs and whether they are building or stumbling blocs to the multilateral trading system will continue to be debated. In as much as they do have some negative consequences, as do all other issues in international trade, the benefits that they bring cannot be ignored nor underestimated.

CHAPTER THREE

LIBERALISATION MODELS OF REGIONAL TRADE AGREEMENTS

3.1 Introduction

Services trade has, over the past few years, become the subject of interest for trade economists and legal practitioners on a multilateral, regional and national level. This goes to further support the important role that services trade has come to play both on its own, and also as a medium through which trade in goods and even trade in services can further be developed. Services exports in the East African region have seen Mode 3 evidencing the highest record, with FDI participation progressively higher than national counterparts. The region attracted investment both from foreign firms and cross border investments. Such participation increased by 77% in a number of projects.⁷⁴ It even reached as high as 348% in value in 2006 over a one year period.⁷⁵ Notably, most of the investment in the region is cross border, with most of the investment flowing from Kenya into the other countries in the region.⁷⁶ Proof of services contribution to a country's GDP can be evidenced in Uganda where, for example, the share of the services sector in real GDP increased to 51.2 percent in 2008 from 50.0 percent previously.⁷⁷ The services sector in Uganda is one of the fastest growing sectors as compared to other more traditional sectors like industry and agriculture.⁷⁸ In Uganda, the services sector has contributed to the country's economic growth through, among others, generation of more employment opportunities in the services sectors, and its linkages with other sectors.⁷⁹

Services RTAs take different approaches in their liberalisation models. The different approaches are premised on whether they are modelled along a NAFTA-type approach or GATS-type approach. With the former approach, all sectors are liberalised unless otherwise stated in the country's list of reservations (negative-list approach). On the other hand, the

⁷⁴ Tripartite working document of the First COMESA-EAC-SADC tripartite summit, October 2008 www.eac.int (accessed 03/10/2009)

⁷⁵ Ibid

⁷⁶ Ibid

⁷⁷ Uganda Budget, Financial Year 2009/10

⁷⁸ Bank Of Uganda, 2008 www.bou.or.ug (accessed 10/02/2010)

⁷⁹ UNCTAD, 2010, "National Services Policy Review of Uganda: Insurance, Legal, Accounting and Construction and Engineering Services", United Nations, New York and Geneva

GATS-type approach provides that only those sectors that are listed are liberalised (positive-list approach). It is against this background that services RTAs have taken either approach to liberalisation, the EAC Common Market Protocol being no exception. Either approach has both its strong points and shortcomings. Though much discourse has been made as to either approach being better than the other, no conclusion can be drawn as to which approach is better because liberalisation efforts undertaken do not necessarily result in automatic gains. The necessary regulatory reforms and policies must be undertaken in order for the respective region, and countries in particular, to maximise the gains from liberalisation.

3.2 Regional Trade Agreements and Trade in Services

Characteristic of all rounds of negotiations is the objective by Members, to conclude each round successfully. This same objective was manifest in the Uruguay round which successfully culminated in the development of the GATS, an international framework for the regulation of trade in services. The advent of the GATS thereby added a new component to the meaning of international trade which was hitherto limited in definition to merchandise trade strictly.

The GATS, like its predecessor the GATT, does provide for fundamental principles to govern trade in services notable of which include (a) the MFN principle and; (b) the transparency principle. These principles apply not only to services but also to service suppliers, generally.⁸⁰ In addition to the above principles, the GATS provides for the principles of market access and national treatment which specifically apply to a Member's commitments⁸¹ as provided in their schedule of commitments. The schedule of commitments is a national schedule under which a country lists those sectors that foreign suppliers are guaranteed access to. In addition, like the GATT, the GATS does provide for allowable departures from the principles provided thereunder. Inclusive of such departures, the GATS entitles Members to depart from the MFN principle through, inter alia, entering into regional agreements.⁸²

⁸⁰GATS, Article II provides for MFN, and Article III provides for transparency

⁸¹ GATS, Article XVI provides for market access and Article XVII provides for national treatment

⁸² GATS, Article V: *"This Agreement shall not prevent any of its Members from being a party to or entering into an agreement liberalising trade in services between or among the parties to such an agreement, provided that such an agreement:*

- *Has substantial coverage and*

More and more countries have, over time, opted to enter into regional trade agreements that provide for liberalisation of services for, *inter alia*, the following reasons: the slow progress that the multilateral negotiations on trade in services has taken; and also due to the fact that the multilateral process has so far, not offered more market access than was granted during the Uruguay round.

Generally, countries enter into RTAs providing not only for liberalisation of trade in services but also liberalisation of trade in goods. The reasons for such integration extend beyond those stated above which apply to trade in services. Accordingly, countries enter into RTAs for different reasons, including the following:

- Most countries enter into RTAs with the political objective as the principal motivation, especially among neighbours. The origins of the EU and the ASEAN for example, can be attributed to achieving greater cooperation among countries in the respective regions. The ultimate aim of such cooperation was to minimise the risk of confrontation between or among the countries in the region.⁸³ In the same breath, the ultimate aim of the East African Community as a regional bloc is to achieve political federation.⁸⁴
- Also, through RTAs, countries can promote development cooperation. The EU has for long used RTAs as a mechanism of promoting cooperation with its extended neighbourhood or with some of the former colonies of its members⁸⁵ through Economic Partnership Agreements (EPAs). The EPAs do provide for the European Development Fund through which the EU advances development aid to the African and Caribbean countries within the confines of the EPAs.
- RTAs are also entered into not only for one particular reason but for a combination of reasons whether political, economic or social. The East African Community was entered into for such reasons as these.⁸⁶

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- *provides for the absence or elimination of substantially all discrimination between or among the parties either at the entry into force of that agreement or within a reasonable time*

⁸³ Seshadri V.S. (2009) "Evolution in India's Regional Trading Arrangements" *Journal of World Trade*, 43(5):903-926

⁸⁴ Article 5(2) of the Treaty Establishing the EAC provides that "...the Partner States undertake to establish among themselves and in accordance with the provisions of this Treaty, a Customs Union, a Common Market, subsequently a Monetary Union and ultimately a Political Federation in order to strengthen and regulate the industrial, commercial, infrastructural, cultural, social, political and other relations of the Partner States."

⁸⁵ *Supra*, n. 68

⁸⁶ *Supra*, n. 84

- Additional reasons have also been advanced for joining RTAs such as improving competitiveness and providing greater economies of scale.⁸⁷
- Because of their size, regional establishments enable countries to better negotiate and come to consensus faster than do international establishments like the World Trade Organisation.⁸⁸ The result is that RTAs promote efficiency in terms of quicker decision making processes and actual implementation of the proposals made by the countries.
- With regional integration, a larger market is created since the individual markets of each state are integrated to form one market. The members of the region are therefore able to access this larger market on fairer terms than would third countries.⁸⁹ Through increase of the size of the markets, more competition is realised and oligopolistic and monopolistic tendencies are reduced. Also the problem of segmented markets is reduced.⁹⁰
- Cooperation among countries also allows members to leverage their collective voice in international negotiations.⁹¹
- Trade agreements can enhance commercial opportunities abroad for domestic businesses, while offering a vehicle for anchoring home-grown policy reforms. Multilateral trade negotiations have in recent years not been successful in fostering an exchange of market opening commitments. Despite more than five years of negotiations, there has been no conclusion to the WTO's Doha Development Agenda (DDA). For countries ready to commit to market opening, a bilateral or regional forum may deliver quicker results. Many of the recently concluded PTAs are comprehensive in their coverage seeking not only the dismantling of barriers to traditional trade in goods but also the liberalization of trade in services. The widening of the scope of PTAs reflects underlying economic forces.⁹²

Though all the objectives mentioned above do apply to all RTAs generally, some specifically apply to RTAs that provide for trade in services. For example, the fact that RTAs create a

⁸⁷ Supra, n. 68

⁸⁸ Brummer, C. (2008) "Regional Integration and Incomplete Club Goods: A Trade Perspective" Working paper number 08-15, 2008, Vol. 8 No. 2 http://www.ssrn.com/abstract_id (accessed 17/03/2010)

⁸⁹ Ibid

⁹⁰ Supra n. 13

⁹¹ Ibid

⁹² Supra, n. 11

larger market is beneficial to the service providers in the region. Further, service providers and other stakeholders are better able to come to a consensus within a regional context than they would at an international forum.

Notably, economic integration, as explained by the above reasons, is a means to achieving these objectives and is therefore not an end in itself. Therefore, in order for countries to get both the immediate benefits of the concentration of production and the long-term benefits of a convergence in living standards, they have to embark on economic integration. One of the ways to tell if the actions undertaken are paying dividends is by assessing whether market access improves noticeably⁹³ and whether the other complementary reforms undertaken have produced positive results.

Regional integration though it has several benefits, does have some disadvantages. These advantages have been termed “stumbling block” elements by most trade researchers, economists and practitioners. For example, it has been argued that regionalism may deter countries from participating in multilateral fora after having gained adequate market access in the region.⁹⁴ Further argument has also been advanced that countries may breed fear of likely competition from third countries among those firms that have created a niche in the regional market.⁹⁵ However, there have been varying stands, regarding such a disadvantage. Roy *et al* aver that such a concern may not apply to services trade considering that regional agreements in Asia, for example, do not have GATS-plus commitments.⁹⁶ Instead ASEAN members have made an effort to ‘multilateralise’ their regional liberalisation scheme through the multilateral negotiations.⁹⁷ A further perception is that, the advent of multiple regional blocs may trigger trade conflicts between the regions leaving the weak economies to suffer.⁹⁸

Other researchers, like Seshadri,⁹⁹ have also considered other drawbacks of RTAs as including the following: RTAs could result in trade diversion whereby trade is developed in a particular area due to the concentration of production in that area, thereby resulting in

⁹³ World Development Report, 2009, www.wto.org (accessed 6/11/2009)

⁹⁴ Melo, J. (2007) “Regionalism and developing countries: A primer” *Journal of World Trade* 41(2):351-369

⁹⁵ Ibid

⁹⁶ Supra, n. 17

⁹⁷ Supra n. 15

⁹⁸ Supra, n. 16

⁹⁹ Supra, n. 83

inefficiencies in the other parts of the region; they could also result in the creation of vested interests by firms that could later oppose further liberalisation in order to maintain their niche.

Until recently, cooperation and integration in the area of services remained marginal in regional integration arrangements among African countries. Most of the sub regional and regional agreements deal with the mere facilitation of services among countries. Cooperation among member states is limited, for the most part, to measures aimed at the coordination and harmonisation of rules and regulations affecting service activities. For example, several regional or bilateral agreements deal with the facilitation of services among various modes of road and rail transport. The Economic Community for West African States (ECOWAS) has enacted decisions concerning the facilitation of transport services within the region, such as the decision relative to the harmonisation of highway legislation, and decisions such as the creation of liability insurance for transit and transport operations. Other types of cooperation have taken the form of harmonisation of mechanisms for the exchange of information and experiences, and initiatives promoting joint research and training programs on services.¹⁰⁰

An equally significant number of these agreements facilitate the joint provision of services. This involves mostly infrastructure services. One example is the creation in 1985 within the Preferential Trade Area (PTA) for Eastern and Southern African States, of the Bank for Trade and Development. Its mission is to secure financing for multinational projects and promote trade among the 19 member states.¹⁰¹

Finally, a more limited number of agreements deal with collaboration among corporations and other professional interests from the same sector of activity in several countries. This usually results in the creation of sector-specific associations, e.g. bankers, restaurant owners, hotel keepers, journalists, lawyers etc. The creation by ECOWAS of Ecobank, a private offshore bank, is an example of transnational business collaboration. The above types of measures could be described as cooperation but not integration. Integration is oriented toward the creation of a wider economic space for service providers at the regional or sub regional level, by means of mutual market opening and preferential treatment among member states.

¹⁰⁰ Economic Development in Africa Report, 2009, "Strengthening Regional Economic integration for Africa's Development", UNCTAD www.unctad.org (accessed 06/11/2009)

¹⁰¹ Ibid

Integration thus implies progressive implementation of liberalisation principles of transactions, non-discrimination and coordination of member states' policies and legislation. The African Economic Community (AEC) Treaty, the revised Treaty of ECOWAS and COMESA, and SADC have all introduced explicit provisions relating to national treatment, right of establishment, free movement of capital or free movement of labour. These form the legal basis through which effective integration in services can be achieved. Thus far, however, there is very limited progress in terms of the implementation of these integration provisions in RTAs. At best, what is apparent is trade facilitation and sectoral cooperation in key services infrastructure.¹⁰²

Regional trade agreements have generally always focused more on trade in goods. Recently however, the trend has been such that the RTAs have sought to include services provisions. This is due to the recognition that has been duly given to the role that services play in the economic development of trade. Services greatly contribute to a country's GDP and employment. Services contribute to employment through, for example, the large number of persons employed in the different sectors e.g. the financial sector (banking and insurance), telecommunications sector and the professional services sector (e.g., lawyers, accountants etc). Services also serve as an input to the production, distribution and consumption processes of goods trade. For example, essential services like telecommunications and financial services form part of the routine of day to day life while transportation and storage services are necessary for the import and export of commodities.¹⁰³

Many countries today are concluding regional trade agreements providing for both trade in goods and trade in services regulation. This is due to the role that services have come to play in trade both internationally and regionally. The development of services trade has in part resulted from the development of technology which has enabled the provision and consumption of cross border services. With the advent of technology, developing countries must endeavour to develop their technological infrastructure in order to enjoy the benefits that flow from the development of the services sectors through information technology (IT). This should be an even greater endeavour for least developed countries whose technological infrastructure is still underdeveloped. Consequently, the costs to be borne by such

¹⁰² Ibid

¹⁰³ Hoekman, B. and Mattoo, A. (2007) "Regulatory Cooperation, Aid for Trade and the General Agreement on Trade in Services" Policy research working paper, WPS4451

progression are enormous and more often than not, developing countries and least developed countries tend to lag behind in becoming exporters of services to other countries.

In spite of the above challenges, the number of RTAs providing for services trade liberalisation has grown steadily over the years. Of the 462 RTAs having been notified to the WTO, as at February 2010, 86 of them were notified under Article V of the GATS.¹⁰⁴

Much discussion on the advantages of liberalising trade in services at the regional level has been undertaken, with several possible benefits having been highlighted. Some of such benefits include the following: More efficient bargaining may be got through an RTA, depending on the provisions of the agreement; and, regulatory cooperation may be more feasible or desirable in the regional context than at the multilateral level leading to economies of scale. Regional liberalisation of trade in services would be more feasible because countries have more geographic proximity, and also, because it is easier to come to agreement with few countries than it is to do so among many countries with varying interests and systems. Further, a sector-by-sector approach of liberalisation of trade in services could be most beneficial in order to identify key services sectors for deeper regional integration.¹⁰⁵

In addition, more and more RTAs have included provisions on services trade liberalisation due to, among other reasons, the slow pace that the international negotiations on services have taken. The Uruguay round was the first round during which countries did make commitments on services liberalisation. Being the first of its kind, the liberalisation efforts matched the enthusiasm and optimism that countries had for services trade at the time. However, since then, not much has been achieved in terms of more market access. The Doha round only served to emphasise the commitment that countries have towards liberalisation of services and generally no further commitments were made. While some countries made no offers at all, most of those that did, did not improve on their earlier commitments under the Uruguay round. For example, Ghana, Senegal and Tanzania did not make any offers, while offers made by Kenya and South Africa did not improve their Uruguay offers considerably.¹⁰⁶ Accordingly, such slow pace has prompted countries to enter into regional trade agreements,

¹⁰⁴ Available at www.wto.org accessed 10/04/2010

¹⁰⁵ Cattaneo, N. "Hotseat comment" TRALAC associate commenting on 'Services aspects of regional trade agreements' www.tralac.org (accessed 10/10/2009)

¹⁰⁶ Supra, n. 1

that will best address their concerns and through which more practicable liberalisation of services can be undertaken. In addition, some countries have even entered into bilateral agreements providing for services trade liberalisation.

3.3 Liberalisation approaches

Liberalisation of trade in services under a regional preferential setting, takes up either of two conventional approaches. They either follow a GATS-type approach or a NAFTA-type approach. The GATS-type approach is modelled along a “positive-list” (bottom up) approach while a NAFTA-type approach is modelled along a “negative-list” (top down) approach. With a GATS-type agreement, liberalisation commitments apply to only those sectors that are listed, while a NAFTA-type agreement liberalises all sectors unless otherwise provided. Important to note is the fact that most, if not all RTAs, irrespective of the liberalisation approach adopted, provide for exemption of certain sectors from the scope of the agreement. Such sectors are usually covered under bilateral treaties or they are deemed “sensitive” sectors and therefore, foreign participation is prohibited¹⁰⁷ for example, air transport services.

3.3.1 NAFTA-type approach

Under the NAFTA-type (negative-list) approach, the countries liberalise all their services sectors. The only limitation to such liberalisation will extend to what is specified in their list of reservations, which are appended to the agreement.¹⁰⁸ In other words, every sector is liberalised unless expressly stated otherwise.

The negative listing applies not only to the sectors but also to all the measures affecting trade in services. Therefore, all services activities (services and measures affecting those services) are liberalised unless the schedule of commitments shows otherwise. This approach covers three modes of supply, which are modes 1, 2 and 4. Mode 3 is covered under a separate chapter that covers investment and provides for a set of rules of discipline governing the same.¹⁰⁹

¹⁰⁷ Supra, n. 14

¹⁰⁸ Supra, n. 19

¹⁰⁹ Supra, n. 5

The Singapore–US FTA, for instance, serves as a proxy for the FTA model promoted by the US in different regions of the world. For instance, it makes separate provisions for cross border services (mode 1) and for investment (mode 3).¹¹⁰ Other NAFTA-inspired agreements in East Asia mirror the approaches adopted by many countries in the Western Hemisphere—including Canada, Chile, and Mexico.¹¹¹

As earlier mentioned, NAFTA type agreements provide for investment (largely mode 3) separately from the other modes of supply. Under the North American Free Trade Agreement, investment is provided for separately from cross border trade, telecommunication services, financial services and temporary movement of persons.¹¹² Notably, under the NAFTA-type agreements, the provisions on investment apply horizontally to both services and to goods. On the other hand, the rules governing modes 1, 2 and 4 apply to trade in services only, with separate rules applying to goods.

Under NAFTA-type agreements, trade in financial services is provided for separately. The NAFTA does specify that the disciplines affecting investment do not apply to measures covered by the provisions on financial services.¹¹³ Also, under NAFTA, certain sectors are excluded from the ambit of the Agreement. These sectors are: most air services, social services that the government provides and, the maritime industry.

Likewise, the EU services Directive expressly excludes financial services from its scope. It provides for those activities that are not covered to include, inter alia, financial services,¹¹⁴ electronic communications services and networks, and transport services.

¹¹⁰ Article 8.1 (2), Singapore-US FTA provides “*cross border trade in services or cross border supply of services means the supply of a service*

- a) *from the territory of one Party into the territory of the other Party;*
- b) *in the territory of one Party by a person of that Party to a person of the other Party; or*
- c) *by a national of a Party in the territory of the other Party*

but does not include the supply of a service in the territory of a Party by an investor of the other Party or a covered investment as defined in Article 15.1 (Definitions)” www.ustr.gov/trade (accessed 20/02/2010)

¹¹¹Supra, n. 13

¹¹² NAFTA provides for investment, services and related matters under Part 5 thereof, with separate chapters for each. E.g. Article 1213(2) defines ‘cross border provision of a service’ or ‘cross border trade in services’ as excluding ‘the provision of a service in the territory of a Party by an investment as defined in Article 1319(Investment definitions)

¹¹³ Article 1101(3), NAFTA provides thus “*This Chapter does not apply to measures adopted or applied by a Party to the extent that they are covered by Chapter Fourteen (Financial Services)*

¹¹⁴ Article 2,2 (d) EC Directive. Available at <http://www.ec.europa.eu> (accessed 20/02/2010)

Further, negative list agreements allow for the scheduling of two categories of limitations: (a) existing non-conforming measures and, (b) future measures. Existing non-conforming measures include all current laws and regulations that a country seeks to maintain, but which would be inconsistent with one or more of the obligations enshrined by the agreement. By definition, limitations scheduled in this category reflect status quo policies.

Future measures are reservations that do not necessarily relate to existing laws and regulations. They allow a country to introduce new measures in the relevant sectors at any point after an agreement enters into effect. The scope of future measures is defined through their sectoral coverage and the description outlining the reserved policy actions. Broad future measures can *de facto* exclude full sectors from an agreement's market opening obligations—equivalent to not listing a sector or indicating 'unbound' for one or more modes of supply under a positive list scheduling approach. For example, under the Korea–Singapore FTA, Korea scheduled a future measure under which the government reserves '*the right to adopt or maintain any measure with respect to (a) broadcasting services [. . .] (b) foreign investment in the broadcasting services sector*'.¹¹⁵

The NAFTA provides for a negative-list approach to reservations. Countries are permitted to list reservations with regard to regulations or other measures that do not conform to the principles of MFN, national treatment and local presence.¹¹⁶ These regulations are to be listed as they apply to each sector and sub sector. Article 1206, NAFTA provides that the provisions on local presence, MFN and national treatment "*do not apply to:*

- a) *Any existing non conforming measure maintained at the federal level, by a state or province or by a local government;*
- b) *The continuation or prompt renewal of any non-conforming measure;*
- c) *Any amendment to any non-conforming measure, to the extent that the amendment does not decrease the conformity of the measure."*

Such a measure of reservations advances the principle of transparency because countries are made aware at the onset, of any existing non conforming regulations and measures. It therefore does not, like the GATS and the European Union agreements, require parties to further notify each other of any regulations or measures that are non conforming. Under the

¹¹⁵ Supra, n. 13

¹¹⁶ Supra, n. 19

NAFTA-type therefore, countries easily trade with a clearer picture in mind without having to incur more time and costs of understanding the regulatory and other environment of the other countries, which will limit the progress of trade. This would also reduce the occurrence of trade disputes that may arise as countries seek to eliminate each other's restricting measures.

The NAFTA also introduces a ratchet clause. Under this clause, any future liberalisation of the reservations inscribed on non conforming measures are automatically locked in; in other words, once the country decides in the future, to liberalise those sectors, then there need not be a process of amendment of the RTA or FTA because they are automatically included once the agreement is signed.¹¹⁷ The clause obligates the parties to maintain and increase the liberalisation of their services sectors within specific time frames, depending on the sector. The ratchet clause can therefore enhance market access only due to the fact that no new regulation should be introduced that acts as a barrier to trade in services. Any exclusion of a sector would therefore require modification and the withdrawal of commitments would require the country to list additional regulations. Such actions are not allowed by the agreement.

3.3.2 GATS-type approach

Under the GATS-type (positive-list) model, only the listed sectors are liberalised. Members only adopt liberalisation obligations which strictly apply to those sectors listed in their schedule of commitments. These sectors that are so listed are then subject to certain conditions.¹¹⁸ However, even in those sectors listed in their schedule of commitments, members reserve the right to maintain or adopt measures inconsistent with the obligations undertaken thereunder. Such reservation is done through members indicating such conditions on their commitments provided in the schedules. Consequently, the GATS-type approach has sometimes been described as a hybrid approach because it contains elements of both positive-list and negative-list approaches.¹¹⁹ The positive list elements are evidenced in the list of sectors to be liberalised while negative elements are evidenced by the reservations attached to the same liberalised sectors.

¹¹⁷ Supra, n. 17

¹¹⁸ Supra, n. 17

¹¹⁹ Ortino, F. "Regional Trade Agreements and Trade in Services" in Lester, S. and Mercurio, B. (eds) *Bilateral and Regional Trade Agreements: Commentary, Analysis and Case Studies*, Cambridge, CUP, forthcoming

Despite the above, the GATS approach has in some instances been referred to as ‘pure’ positive list¹²⁰ type and in other instances it is referred to as a hybrid approach.

Under the ‘pure’ positive list, Fink and Molinuevo aver that it specifies the level and type and foreign participation that is allowed for those sectors that are listed in a country’s schedule of commitments.¹²¹ They find that two agreements in East Asia follow this ‘pure’ positive list approach: the Mainland–Hong Kong and the Mainland–Macao Closer Economic Partnership Agreements (CEPAs).

They also find that these ‘pure’ positive list agreements do not provide for the standard binding provisions as stated under the GATS, i.e., market access and national treatment provisions. The authors further find that unlike other services agreements, these agreements do not classify any modes of supply. They do note however, that the market access commitments granted by China do provide substantial trade preferences to the service providers from Hong Kong and Macao.

Notably, many services RTAs have indeed adopted the GATS-like approach, in effect combining elements of both a positive-list and negative-list model of services liberalisation. This is in part due to the fact that most RTAs have largely been drafted along the provisions of the existing GATS framework, with moderations made to best suit the objectives of the respective regions.¹²²

Under a GATS-style hybrid list, parties, first and foremost, list those sectors that are open to liberalisation. Parties then define the level of openness in those listed sectors either on a positive or negative list basis. In particular, agreements following this approach typically adopt the market access and national treatment provisions of the GATS some even mirroring verbatim the same provisions of the GATS. Schedules of commitments then specify the market access ‘terms, limitations and conditions’ and national treatment ‘conditions and qualifications’. In other words, countries are free to describe either how trade is restricted or what type of services transactions are allowed in a listed sector. Following the GATS jargon

¹²⁰ Supra, n. 11

¹²¹ Ibid

¹²² Delimatsis P. (2008) “Determining the Necessity of Domestic Regulation in Services: The Best is Yet to come” *European Journal of International Law*, 19(2):365-408

of liberalisation commitments, an entry in a GATS schedule that takes the form ‘*None, except . . .*’ signifies a negative list of trade-restrictive measures, whereas an entry that takes the form ‘*Unbound, except . . .*’ signifies a positive list of market-opening concessions.¹²³

Most research undertaken on trade in services refers to the GATS approach of liberalisation of services as a positive list approach. Important to note is the fact this term is based solely on the sectors subject to trade commitments; in other words the term “positive” arises because liberalisation commitments extend to only those sectors that are listed. The term ‘positive’ is not based on any other criterion or provision in the agreement.

The following features are characteristic of a GATS-style hybrid list approach.

First, commitments in each listed sector are made with respect to the four different modes of supply: cross-border trade (mode 1), consumption abroad (mode 2), commercial presence (mode 3), and movement of natural persons (MNP) (mode 4). Therefore, they follow the same pattern of liberalisation commitments for each mode of supply as is defined under the GATS. Market access and national treatment commitments are indicated for each mode of supply. In actual GATS schedules, most entries for modes 1, 2, and 3 set the level of openness on a negative list basis, whereas the great majority of entries for mode 4 are made on a positive list basis. Fink and Molinuevo¹²⁴ find that eleven of the twelve East Asian FTAs that follow the GATS hybrid list do follow the GATS structure of liberalisation commitments. They provide for the four modes of supply and also provide for market access and national treatment provisions in the substantive provisions of the agreements and in the countries’ schedule of commitments.

The only GATS-hybrid style agreement that does not follow this same pattern is the Australia– Thailand FTA. The agreement’s schedule does not make any distinction between the four modes of supply nor does it differentiate between market access and national treatment measures. The nature of the scheduled entry determines which mode and which measure a particular commitment applies. This scheduling approach differs from the GATS

¹²³ Supra, n. 11

¹²⁴ Supra, n. 14

because it appears to reduce difficulties in scheduling measures that may be inconsistent with both market access and national treatment obligations.¹²⁵

A second feature of most of the GATS-style hybrid list agreements is that they provide for a most-favoured nation (MFN) obligation. This MFN obligation is subject to the scheduling of reservations. However, MFN reservations are always provided for on a negative list basis in relation to both service activities and trade restrictive measures. Important to note is that some hybrid list agreements do not have obligatory MFN disciplines as part of their substantive provisions. Important to note also is the fact that MFN obligations in an FTA context have a different meaning than the multilateral MFN principle under the GATS. These MFN obligations are largely differentiated in the following forms. On the one hand, MFN obligations under regional trade agreements comprising of more than two countries provide for non-discriminatory treatment between service providers from countries within the region. Such is the MFN obligation provided for in the ASEAN Framework Agreement on Services. It obligates the member countries to provide for preferential treatment to be accorded on an MFN basis, to service providers originating within the south east Asian region. Accordingly, the ASEAN Framework Agreement provides thus: *“Pursuant to Article 1 (c), Member States shall liberalise trade in services in a substantial number of sectors within a reasonable time frame by: (a) eliminating substantially all existing discriminatory measures and market access limitations among member states...”*¹²⁶ On the other hand, MFN obligations under some FTAs require non-discrimination between parties and non-parties. In other words, a non-party MFN clause guarantees FTA parties the best current and future treatment that the other party grants to services suppliers from any country that is not a signatory to the FTA.¹²⁷

Third, GATS-style schedules allow for horizontal commitments. These horizontal commitments are the specific commitments on market access and national treatment that a country specifies in its schedule. The measures spelt out in these horizontal commitments apply to all listed service sectors, unless the wording of a sectoral commitment explicitly indicates otherwise. The commitments on market access and national treatment each apply to each of the four modes of supply of services. In assessing the level of openness of specific service sectors, it is therefore critical to take these horizontal commitments into account.

¹²⁵ Ibid

¹²⁶ Article III, ASEAN Framework Agreement on Services

¹²⁷ Supra, n. 14

Such assessment is vital because the impact of the liberalisation efforts undertaken in the agreement greatly depend on these horizontal commitments undertaken by the countries. Sometimes such commitments can lower the level of openness across certain sectors. For example, use will be made of Kenya's schedule of commitments under the GATS as a proxy to illustrate how horizontal commitments can indeed lower the level of openness in for example, the telecommunications sector. For some telecommunications services (e.g., satellite based mobile services, cellular or mobile telephone services, mobile data services etc), Kenya's market access limitations under mode 3 permits foreign investment of not more than 30 percent.¹²⁸

Fink and Molinuevo further provide that the fourth trait of GATS-style hybrid list agreements is that signatories are not usually mandated to make bindings that match the actual level of openness in their domestic jurisdictions. Most of the existing GATS commitments are often characterised as such and this as a result of the nature of negotiations undertaken under the WTO. Once countries expressly liberalised certain sectors, as provided for in their schedules, this is not usually a reflection of their domestic policies and even laws and regulations on the same. What is on paper is at times different from what is in practice. In determining the actual level of a country's openness regard must be made to its domestic policies, regulations and practices. The variance between the bound and the actual policies are disadvantageous to service providers because of the element of uncertainty which it brings. Such policy space enables governments to undertake measures that are discriminatory and can restrict foreign participation as long as they do not go beyond their bound level of commitment. The authors found that most of the hybrid list agreements in East Asia do not require countries to make commitments similar to their actual level of openness. They however noted that the Economic Partnership Agreements (EPAs) between Japan and Malaysia and Japan and the Philippines contain a provision which aims at reducing the uncertainty associated with the binding variance between actual and bound commitments. The two EPAs permit the countries to the service sectors in which a party agrees to bind its actual policies. In addition, the identified service sectors automatically lock in liberalisation: that is, once a party unilaterally eliminates a trade-restrictive measure, policy will automatically be bound at the more liberal level.¹²⁹

¹²⁸ www.wto.org (accessed 20/02/2010)

¹²⁹ *Supra*, n. 14

Regarding the fourth trait mentioned before hand, Roy, Marchetti and Lim maintain that actual liberalisation could actually be provided for under a regional or free trade agreement. Such liberalisation is evident where countries expressly provide under their schedule of commitments that they shall phase out applied restrictions over a period of time.¹³⁰

In addition to the East Asian FTAs, a number of other regional agreements have adopted a hybrid-list approach to liberalisation. The agreements contain elements of different models of liberalisation. Such agreements include the Trans-Pacific EPA, and the Australia–Singapore FTA. Such a combined approach will therefore act as an example for other regional agreements intending to adopt the same.¹³¹

Other countries that have adopted a GATS-type approach are the AFAS members. The classification of services under the AFAS has followed that of GATS whereby the services are classified into twelve categories using the W/120 classification.¹³²

In Africa, the East African Community has also adopted a GATS-type approach of liberalisation. Under the Common Market protocol, only those sectors that are listed in a country’s schedule of commitments are subject to liberalisation.¹³³

3.3.3 Assessing the effect of the NAFTA approach versus the GATS approach of liberalisation

Some discussion has been made as to which approach would grant more benefits than the other and whether the two approaches are in fact different in the outcomes that result from either one.

Roy, Marchetti and Lim¹³⁴ conclude that services RTAs do not go beyond much of what is provided for in the GATS. Both the RTAs and the GATS have more or less similar rules and

¹³⁰ Supra, n. 17

¹³¹ Supra, n. 14

¹³² Supra, n. 16

¹³³ Article 23, EAC Common Market Protocol provides thus “*The implementation of Article 16 of this Protocol shall be progressive and in accordance with the Schedule on the Progressive Elimination of Services, specified in Annex V to this Protocol*”

¹³⁴ Supra, n. 17

disciplines on services trade. They do however note that under RTAs, countries tend to have wider sectoral coverage than what they commit to under the GATS. Stephenson¹³⁵ also maintains that RTAs go beyond what the GATS provides for by granting wider market access to countries within the region. Further, Mattoo and Sauv ,¹³⁶ advance that although the two approaches have fundamental differences, they both can result in generally similar outcomes.

Fink and Molinuevo note that the negative list approach does result in improved or new commitments (60%) than those provided for under the positive list type (30%).¹³⁷ They propose that countries will more probably adopt a negative list approach in their quest for greater openness.¹³⁸ They however stress that the composition of negative-list agreements may not always favour liberalisation of sensitive sectors. In that case, countries are prompted to opt for positive-list agreements.¹³⁹

Fink and Molinuevo further state that on the face of it, negative lists do offer incentives for scheduling of more liberalisation commitments as is evidenced by some of the East Asian FTAs. However, they also argue that agreements using the positive list can also result in more liberalisation outcomes than negative list agreements as evidenced by the Lao PDR-US bilateral trade agreement.¹⁴⁰ They further state that negative list agreements do not always result in wider and deeper liberalisation although they assert that negative lists appear to induce wider but not deeper commitments than do they their positive list counterparts. This was evident in their research, which involved assessment of a number of East Asian trade agreements, some of which were entered into by the same country with different other partners. The research showed that Singapore's schedule for example, under the Japan-Singapore Economic Partnership Agreement (EPA), which is a positive list type, showed wider and deeper commitments compared to Singapore's schedule under the Australia-Singapore FTA which is a negative list type agreement.¹⁴¹

¹³⁵ Stephenson, S.M, (2002) "Regional versus Multilateral Liberalisation of services" *World Trade Review* 1 (2):187-209

¹³⁶ *Supra*, n. 19

¹³⁷ *Supra*, n. 11

¹³⁸ *Ibid*

¹³⁹ *Supra*, n. 13

¹⁴⁰ *Supra*, n. 11

¹⁴¹ *Ibid*

In other related research, Fink and Molinuevo, maintain that some modifications in some of the PTAs adopted by East Asian countries have resulted in minimal differences between the two scheduling approaches.¹⁴² In their research, they concluded that the GATS-type agreements are classified as either ‘pure’ positive lists or GATS hybrid lists. Under the GATS hybrid lists the agreements contain both negative and positive elements thereby resulting in no difference between the positive and negative lists. Consequently, the effects of using either liberalisation model are more or less the same. Once a country properly drafts the reservations under its schedule of commitments, it can have far reaching limitations with either approach of liberalisation adopted.¹⁴³

Arguments against the GATS-type approach have also included the fact that although the GATS provides for transparency as one of its core general obligations, implementation and enforcement of this principle, has proven to be difficult. The problem with enquiry points is that they are rarely used by countries added to the fact that they are rarely updated. They also include contact numbers (fax, telephone and email contacts) that are no longer applicable.¹⁴⁴ Owing to this problem, the principle of transparency has turned out to be more of a principle that promises a lot but cannot be fully made use of. The problem is more so for least developed countries which rarely update their websites as they do not have the adequate resources to do so. Further, for developing and least developed countries even if they do have the resources, there is limited or no monitoring of these same enquiry points. Most times the enquiry points are officers stationed within a department in a line ministry, who are usually required to attend to so many other issues thereby prioritising those issues over that of updating the information as required. Notably, the EAC Common Market Protocol does indeed provide for notification by obliging parties to notify the others of measures affecting trade in services and also to respond to any requests made in the same regard.¹⁴⁵

Marconini’s research concludes that there are indeed misconceptions about the differences in the two scheduling approaches.¹⁴⁶ They state that the differences can be deceiving. Though

¹⁴² Supra, n. 14

¹⁴³ Ibid

¹⁴⁴ Supra, n. 49

¹⁴⁵ EAC Common Market Protocol, Article 19

¹⁴⁶ Marconini, M. (2006) “Services in Regional Agreements between Latin American and Developing Countries” CEPAL-SERIE Comercia Internacional no. 71, Santiago, Chile, United Nations www.wto.org (accessed 20/02/2010)

the NAFTA approach is considered to be more ambitious than the GATS, the results do not necessarily reflect this. When a detailed comparison is made the results differ from the stand taken. They further conclude that the GATS approach is more flexible than the NAFTA approach in general terms. However, it has more comprehensive coverage and provisions. Further research has indicated that ultimately, the advantages of either approach of liberalisation are largely dependent on the schedules on market opening that the countries adopt.¹⁴⁷ Therefore, neither approach can be conclusively said to be better than the other.

3.3.4 Trade in services in the East African region

In the East African region, member countries have signed a regional trade agreement regulating not only trade in goods but also trade in services as well as other aspects like intellectual property, establishment, movement of workers, among others. The objective of such agreement is to develop intraregional trade in the East African region in the drive towards turning the region into an economic hub. The Treaty for the Establishment of the East African Community specifically directed that the countries in their drive towards deeper integration are to integrate their markets and to provide for a framework of cooperation on the area of goods and services trade. Article 76(1) thereof provides that: *“There shall be established a Common Market among the Partner States. Within the Common Market, and subject to the Protocol provided for in paragraph 4 of this Article, there shall be free movement of labour, goods, services, capital, and the right of establishment”*. Further, Article 76(4) provides as follows: *“For the purpose of this Article, the Partner States shall conclude a Protocol on a Common Market”*.

Pursuant to the above, the countries negotiated and signed the Protocol for the establishment of the East African Community Common Market. The Protocol for the establishment of the East African Community Common Market was signed in October 2009. It is set to enter into force by 2010, subject to its ratification by all the member states of the East African Community. To date, the Protocol has been ratified by all the countries, the recent ones being Kenya and Burundi.¹⁴⁸ The process of ratification is in tandem with the process of each country enacting relevant enabling legislation to bring the provisions of the EAC Common

¹⁴⁷Fink, C. and Molinuevo, M. (2007) “East Asian Free Trade Agreements in Services: Roaring Tigers or Timid Pandas?” East Asia and Pacific Region Poverty Reduction and Economic Management, World Bank, www.worldbank.org (accessed 05/10/2009)

¹⁴⁸ <http://www.eac.int> (accessed 05/10/2009)

Market Protocol into domestic law. The processes also involve countries bringing their domestic law in consonance with the EAC law.¹⁴⁹

The EAC Common Market Protocol, expectedly, offers reciprocity in terms of benefits available to the member countries, in the services trade within the region. To this end, the EAC Common Market protocol lays down principles that are to apply to services and services suppliers within the region. Notable among such principles are the national treatment and MFN principles which are meant to apply to all services and services suppliers of member states, giving them preferential treatment over third parties. In particular, Article 17 thereof provides that each country is to accord similar treatment to domestic services and service suppliers and to the other services and service suppliers originating within the region. Further, Article 18 thereof provides for Most Favoured Nation principle which is phrased in similar fashion to the MFN principle under the GATS.

The EAC Common Market protocol adopted a GATS style of liberalisation whereby countries only adopted liberalisation commitments for those sectors that are listed in the schedule of commitments. These schedules are appended to the EAC Common Market Protocol as annexes.¹⁵⁰ Broadly, the EAC Common Market protocol can be described as a hybrid list agreement because it contains both positive and negative elements of liberalisation.

Some research has indicated the cons of positive list agreements. One of such cons is that positive lists because they only list those sectors that are liberalised, do not in effect provide a lot of information for foreign service providers wishing to operate within the region.¹⁵¹ Consequently, the burden is on the foreign service provider to carry out further investigations on the status quo of existing measures not provided or in the agreement. Such a burden could also be borne by service providers within the region and as such, increase their costs of operation.

¹⁴⁹ Ibid

¹⁵⁰ Annex V, “The Schedule of Commitments on the Progressive Liberalisation of Services”

¹⁵¹ Supra, n. 14

On the other hand, however, the EAC Common Market protocol does provide for transparency as a substantive provision. The protocol provides as follows: “*each Partner State shall, promptly and at least annually, inform the Council of the introduction of any new national laws or administrative guidelines, or any changes to national laws or administrative guidelines which affect trade in services provided for in this Protocol*”.¹⁵²

With such a provision therefore, the costs of undertaking research to identify any new measures or changes to any measures are reduced. However, this does not automatically provide service providers with all the necessary information required before they can undertake operations in the region.

Related to the above provision on transparency, the fact that Article 19 of the EAC Common Market protocol provides for notification does not itself solve the problem of the shortcomings that arise with such a provision. Considering that all the East African countries are least developed countries (Kenya on the other hand is sometimes referred to as a developing country), the resources available to ensure that such information as stipulated under Article 19 is at hand and regularly updated, are mostly inadequate. Consequently, though the principle is in place, implementing it may not be automatic.

Article 18 of the EAC Common Market Protocol provides for the MFN obligation which applies to all services and service providers and all service related measures within the region.¹⁵³ Notably, the MFN provision provided hereunder is broader than that provided under regional trade agreements as opposed to free trade agreements, explained beforehand. The MFN under the EAC Common Market Protocol is broad as it obliges member countries to accord the same treatment to service providers within the region and that it should not be less favourable than extended to third parties. This is advantageous to the region as it will boost trade in services within the region by giving its providers priority. This will in turn enable the region develop its services and consequently develop trade the economic development in the region considering the vital and multifaceted role that trade in services

¹⁵² Article 19 (4), EAC Common Market Protocol

¹⁵³ Article 18 provides thus “*Each Partner State shall upon coming into force of this Protocol, accord unconditionally, to services and service providers of the other Partner States, treatment no less favourable than it accords to like services and service suppliers of other Partner States or any third party or a customs territory*”

plays. In turn it will foster intra regional trade and will act as contributor towards deeper integration in the region.

Further, under the EAC Common Market protocol, commitment provisions apply to each of the four modes of supply. This further contributes to transparency in the sense that the extent of the liberalisation per mode of supply is indicated and is therefore known. The schedule of commitments under the EAC Common Market protocol is framed as such. By way of example, below is an excerpt of Uganda’s schedule of commitments on banking and other financial services.

Table 1: Uganda’s schedule of commitments under the EAC Common Market protocol (financial services)¹⁵⁴

| (Sub)sector CPC code | Market access | Elimination date | National treatment | Elimination date |
|--|--|-------------------------|---|-------------------------|
| All banking and other Financial Services excluding Insurance (a- 1) with their Relevant CPCs | (1) None (2) None (3) None (4)In accordance with the Schedule on the Free Movement of Workers | 2010 | (1) None (2) None (3) None, (4)In accordance with the Schedule on the Free Movement of Workers | 2010 |

The schedule indicates the liberalisation commitment, if any, for each mode of supply thereby equipping service providers with the requisite information needed to do business in the region.

The EAC Common Market Protocol, like the GATS hybrid list, provides for horizontal commitments specifically the market access and national treatment provisions. This is necessary because it indicates the extent of liberalisation for the different sectors listed and the level of openness per mode of supply. (See table 1 above)

At the time of writing this paper, negotiations on the modalities for the framework within which the Protocol will be implemented were still underway. Notably, some sectors have

¹⁵⁴ The East African Community Common Market, Schedule of commitments on the progressive liberalisation of services, Annex V

indeed been liberalised, as provided for in each country's schedule of commitments while for those sectors that have not been liberalised, provision has been made to cater for them in the event of liberalisation in the future.. In effect, the EAC Common Market Protocol provides that *“the Council shall from time to time make regulations, issue directives and make decisions as may be necessary for the effective implementation of the provisions of this Protocol”*.¹⁵⁵ To date, negotiations are being undertaken by the different sectoral committees on the different aspects of the Common Market Protocol so as to have it fully in force during the course of this year. Such modalities will in essence substantiate the substantive provisions of the Protocol thereby providing the complete framework for its implementation. The protocol can therefore safely be described as work in progress.

Important to note is the fact that the East African Community, unlike the EU is an intergovernmental regional bloc. Consequently, all decisions have to be agreed upon by the countries first, and once agreed, then the Council of Ministers gives the necessary directives, regulations and decisions that the Partner States are to undertake. These directives, regulations and decisions are binding on the Partner States.¹⁵⁶ Therefore, before the services directives and regulations are agreed upon among the Partner States they cannot be binding upon them. In their absence therefore, the EAC Common Market protocol would stand as an “agreement to agree” until such a time as the countries agree on the directives and regulations. However, despite this, the protocol is the framework providing for, among others, the liberalisation model adopted by the East African region for trade in services, and implicitly, the necessary reforms that need to be undertaken to achieve such implementation.

The services trade in the East African region, though it seems to be growing, remains largely unexploited. In tourism for example, where most of the East African countries have a comparative advantage, the sector has developed slowly because of a number of factors. These factors include the following: security issue, financial constraints, low skilled labour, inadequacies in infrastructure, and inadequacies in marketing or promotion.¹⁵⁷ This is however likely to change, with the adoption of the EAC Common Market protocol, which

¹⁵⁵ Article 51, EAC Common Market Protocol

¹⁵⁶ EAC Treaty Article 16 provides that the regulations, directives and decisions of the Council are binding on all Partner States, organs and institutions of the Community other than the Summit, the Court and the Assembly

¹⁵⁷ East African Community Trade Report, 2006, <http://www.eac.int> (accessed 05/10/2009)

provides for areas of cooperation that the countries must enter into in order to develop the intra regional trade and also to move towards deeper integration.

The countries in the East African region have similar services sectors with similar objectives.¹⁵⁸ An integrated market in the sense of liberalisation of the services sectors with more or less uniform rules and standards would result in a large market that would most likely attract foreign investment into the region.

3.4 Regulation and Competition

The importance of services trade in international and regional trade cannot be understated and as such liberalisation attempts in services sectors must be undertaken not only progressively but carefully, with a well articulated framework and process in place. Research on trade in services has supported the notion that countries stand to gain considerably from liberalising their services sectors. Suggestions have been made to the extent that reducing protection of services trade by even half would result in gains that are five times higher than similar liberalisation of goods trade.¹⁵⁹ Another study by Mattoo et al¹⁶⁰ suggests that countries that successfully liberalised their financial and telecommunications sectors grew on average 1.0% point faster than other countries.

Therefore, the role of regulation, competition and other related disciplines is vital in the reform processes undertaken by countries. Much research has concluded that policy reforms that increase competition and improve regulatory oversight result in improved performance of the industries concerned. In turn, the productivity of the services sector is important for the long term growth prospects of countries.¹⁶¹

¹⁵⁸ Ajumbo, G. (2009) "Trade in Services in EPA, WTO and EAC Common Market Agenda" 26th-28th February 2009, Principal Trade Officer/International Trade, Directorate of Trade, EAC Secretariat, <http://www.eac.int> accessed 5/11/2009

¹⁵⁹ Robinson S, Wang Z and Martin W (1999), "Capturing the Implications of Services Trade Liberalisation" Paper presented at the Second Annual Conference on Global Economic Analysis, GL Avernoes conference centre, Ebberup Denmark, June 20-22, as quoted in Mattoo, A. (2005) "Services in a Development Round: Three Goals Three Proposals" *Journal of World Trade* 39(6):1223-1238

¹⁶⁰ Mattoo A, Rathindran R, Subramanian A,(2005) "Measuring services trade liberalisation and its impact on economic growth" *Journal of Economic Integration*, as quoted in Mattoo, A. (2005) "Services in a Development Round: Three Goals Three Proposals" *Journal of World Trade* 39(6):1223-1238

¹⁶¹ Hoekman B (2006) "Liberalising trade in services: a survey" World Bank policy research working paper, 4030

Despite this fact, these gains cannot be obtained by the automatic liberalisation of the services sectors. The reform programmes undertaken for liberalisation must be carefully crafted in order to fully maximise the gains. In effect, countries would have to combine elements of competition and a suitable domestic regulation framework in the said reforms.¹⁶² This process however, does not come without challenges. One of these challenges is that the reforms must reflect the country's commitment to its liberalisation obligations without seeking to advance the country's domestic political and economic agenda.¹⁶³ Ultimately, therefore, countries must ensure that any reforms they undertake should meet the balance between developing the country's trade and not raising any barriers to trade for other countries. To this end, Article 20(1), EAC Common Market Protocol provides that "*Partner States may regulate their services sectors in accordance with their national policy objectives provided that the measures are consistent with the provisions of this Protocol and do not constitute barriers to trade in services*".

The role of regulation however is not limited to managing imperfect competition but also extends to protecting the interests of the consumer of services. Owing to the nature of services trade (intangible), there is inequality of information between consumers of services on the one hand and producers thereof on the other hand. Consumers have difficulty securing the full quality of the quality of service being purchased. They cannot easily access the competence of professionals such as doctors and lawyers. They also cannot assess the safety of transport services nor the soundness of banks or insurance firms. They rely entirely on what the provider of the service relays to them. This therefore makes it essential for services trade to be well regulated so as to ensure the protection of consumers.¹⁶⁴

Competition also has roles when coupled with adequate regulation. It improves the economic efficiency and capacity of developing countries and facilitates trade in goods. Taking into consideration the fact that goods exports are the larger premise of exports of developing countries, then proper and well regulated competition is highly essential for these countries.¹⁶⁵

¹⁶² Supra, n. 36

¹⁶³ Supra, n. 8

¹⁶⁴ Supra, n. 38

¹⁶⁵ McGuire, G. (2002) "Trade in Services-Market Access Opportunities and the Benefits of Liberalisation for Developing Economies" Policy Issues in International Trade and Commodities Studies Series No. 19, United Nations, www.unctad.org (accessed 05/10/2009)

Services, because they differ from goods, require regulation to address market concerns and achieve economic and social objectives. Goods on the hand are regulated through use of quotas, tariffs and related restrictions thereby making them easier to monitor especially at the points of entry and exit of countries. In order therefore to achieve set objectives, countries must carefully formulate the necessary rules and standards, especially those that are to be incorporated in trade agreements.¹⁶⁶

Such regulation is vital for all sectors but more so for the intermediate services which are critical for the production, distribution and consumption processes of both goods and services.¹⁶⁷ Such sectors include, but are not limited to, financial services, telecommunication services, transport and storage services, and professional services. The financial sector for example, is very critical for all other sectors since it is necessary that capital is available in order to purchase other factors of production or to invest in a sector or industry. On their own however, these same services sectors contribute immensely to the economic growth of a country and it's GDP. In the finance and telecommunications sectors, (like in all other sectors), the share of employment of persons in banks and telecommunications companies cannot be ignored.

In a competitive market, the words “market access” is not synonymous with “competitive market”.¹⁶⁸ A market could be “open” in that it does not limit entry of foreign firms and persons unless as is reasonably necessary. The same market however, may not be a favourite destination for the foreign firms and persons due to the high costs therefore making profits negligible. In order to avoid this, the domestic policies of countries should in effect promote entry of new firms in the market by eliminating the unnecessary barriers, for example, high costs of entry.¹⁶⁹

¹⁶⁶ Supra, n. 132

¹⁶⁷ Chanda R and Gupta P “Trade Liberalisation in Producer Services: Case Study of India” Asia-Pacific Trade Economists’ Conference, ‘Trade led growth in times of crisis’ United Nations Economic and Social Commission for Asia and the Pacific, www.... accessed 13/11/2009

¹⁶⁸ Peng, S. (2007) “Trade in Telecommunications Services: Doha and Beyond” *Journal of World Trade* 41(2):293-317

¹⁶⁹ Ibid

For example, opening the financial sector to foreign participation could result in efficiency of the domestic banks and allocation of capital as well as dynamism. However, in order to achieve this, with minimal risk, countries must adopt proper policies and have in place the necessary institutional infrastructure.¹⁷⁰

The negative consequences of liberalisation cannot be ignored. In the financial sector for example, the entry of foreign banks could result in the reduction of profits of local banks.¹⁷¹ This is due to increased competition between the domestic and the foreign banks and the fact that foreign banks in their quest to create a niche in the domestic market provide better services than do their local counterparts.

Even with the telecommunications sector, if liberalisation is well managed, it will result in efficiency and transparency in the sector. Having an effective regulator in place will instil confidence and transparency which will in turn encourage investment (foreign or otherwise) and technology transfers.¹⁷²

Market access commitments in the communications sector, cannot on their own warrant liberalisation. Rather, competition safeguards must be enshrined in the reform process so as to enable the regulator to effectively regulate the main telecom service providers and ensure an even playing field for all stakeholders.¹⁷³

Such gains have been evidenced in Uganda. The contribution of the communications sector to GDP for the financial year 2008/2009 rose from 3.2% to 3.4% in the previous year. The growth of the sector is the result of an increase in infrastructure investment by both government and private sector and uptake of services. New infrastructure investments by e.g. Orange Uganda Ltd, the government fibre optic backbone project, 3G network roll out by UTL and major network expansion by MTN and Warid Telecom. Important to note is that the

¹⁷⁰Cali M, Ellis K and Willem te Velde D, "The Financial Sector" briefing Note 3, January 2008, www.oecd.org/investment/gfi-7 (accessed 13/11/2009)

¹⁷¹ Herfindahl, E. and Brown, R.W. (2007) "WTO Negotiations in Financial Services: Standing Offers Disappoint" *Journal of World Trade* 41(6): 1259-1273

¹⁷² Bodammer I, Forbes M and Addy-Nayo C, (2005) "Telecoms Regulation in Developing Countries: Attracting Investment into the sector: Ghana – A Case study" *Journal of World Trade* 39(3): 527-558

¹⁷³ *Supra*, n. 168

number of mobile commercial telephone operators was 5 by the end of the financial year. There have also been some key regulatory developments as follows:

- Development of key regulatory remedies for identified or potential market failures including guidelines and regulations.
- The Uganda Communications Commission (national regulator) presented the following draft regulations to the industry for consultation and shall be issued shortly: Interconnection regulation, 2009; Fair Competition regulations, 2009; Tariff and accounting regulations 2009; SMP determinations from time to time.¹⁷⁴

Further still, sequences liberalisation and regulatory reform are important. This is due to the implied changes that will arise in the regulatory environment. In one case, the incumbent is a relatively inefficient public operator and the regulator is well informed about the cost structure, in the other case, the incumbent is a relatively efficient private operator and the regulator is less well informed. It could be argued that new entry is easier to accomplish where the incumbent is an inefficient operator. This therefore necessitates the regulation of services. Regulation in services, as in goods, arises essentially from market failure attributable to three kinds of problems: natural monopoly; inadequate consumer information; and considerations of equity and protecting the poor.¹⁷⁵

3.5 Harmonisation of policy

Where liberalisation is undertaken at the regional level, the reforms undertaken by countries will have to consider the legal systems in the region, especially where the systems vary. Where systems are similar then it will facilitate the liberalisation process. However, where they are at variance, it could act as a barrier to the liberalisation process. Therefore, harmonisation or approximation of laws should be undertaken in order to bridge the gap.

Such were the sentiments during the World Economic Forum on Africa held in June 2009. There was general consensus, that African countries must reduce their protectionist policies and properly implement those regional agreements to which they are parties. It was further

¹⁷⁴ A Review of the Post and Telecommunications Market 2008/09, Annual Review www.ucc.co.ug (accessed 10/08/2009)

¹⁷⁵Mattoo A (2005) "Economics and Law of Trade in Services" www.siteresources.worldbank.org/INTRANETTRADE/Resourc-2005-05-19 (accessed 10/08/2009)

agreed that African countries must ensure greater harmonisation of cross border policies and reduce the bureaucracy existent in most domestic policies and regulations because they contribute considerably to the costs of trade.¹⁷⁶ To achieve such cohesion, Kandeh Yumkella, Director-General, United Nations Industrial Development Organisation, further reiterated that governments should deviate from their nationalistic behaviour by cooperating with each other, the private sector and multilateral institutions.¹⁷⁷

Harmonisation of laws may be defined as the process of making different domestic laws, regulations, and systems substantially the same or similar. Such a process entails the creation of a meta-system of systems of law, a new, complex form in which diverse features of different legal systems are reconciled.¹⁷⁸ This is especially important in the Euro-Med Association Agreements¹⁷⁹ and also for The East African Community Common Market Protocol. Kenya, Tanzania and Uganda have a common law system while Rwanda and Burundi follow the civil law system. Steps are currently being undertaken by Rwanda and later by Burundi to change the system of law to a common law system in order to effectively eliminate the divergence in the systems. The Protocol does also provide that the countries are to harmonise standards and approximate laws in the different services sectors as required.¹⁸⁰

One of the underlying paradigms of international and regional trade is that proximity between the provisions of different legal systems may facilitate reciprocal trade relations while differences between legal norms may constitute a barrier to trade. The Euro-Med Association Agreements are therefore concerned with the harmonisation or approximation of laws. Harmonisation of laws may be defined as the process of making different domestic laws, regulations, principles and government policies substantially the same or similar. Such a process entails the creation of a meta-system of systems of law, a new, complex form in which diverse features of different legal systems are reconciled.¹⁸¹

¹⁷⁶ World Economic Forum on Africa, 2009, report, available at <http://www.weforum.org> accessed 10/01/2010

¹⁷⁷ Ibid

¹⁷⁸ Harpaz, G. (2006) "When East meets West: Approximation of Laws in the EU-Mediterranean context" *Common Market Law Review* 43:993-1022

¹⁷⁹ Ibid

¹⁸⁰ Article 47 Common Market Protocol provides that "The Partner States undertake to approximate their national laws and to harmonise their policies and systems, for purposes of implementing this Protocol"

¹⁸¹ *Supra*, n. 161

Most RTAs have on their agenda some form of policy integration going through least demanding coordination (on an *ad hoc* basis) to harmonisation of national regulations and standards up to recognition of foreign regulatory regimes and assessment procedures by Mutual Recognition Agreements (MRAs). So far, only the EU has used MRAs and the process has taken 30 years to reach this relatively advanced stage of policy integration and delegation of authority to supranational institutions. Again much of the benefits from policy integration such as reduction in red tape, harmonisation of standards to international norms could be carried out on a non-discriminatory basis.¹⁸²

Harmonisation can take different forms. A hegemonic economic power, for example, could impose a model on its partners due to the fact that it has the largest market size. Such has been the case for bilateral investment treaties (BITs) between the US and other trading countries. The US usually requires partners to conform to an identical template used throughout its BITs.¹⁸³ Through these templates, the US imposes its national intellectual property right protection provisions. A further example of this hegemonic model is where the EU, through its PTAs, extends its system of geographical indications.

Harmonisation could also take the form of convergence. Convergence is especially operational in regional agreements because the elimination of barriers necessitates harmonisation of regulations and standards.¹⁸⁴ Because these standards and regulations affect competitiveness and profitability, harmonisation of the same would result in the development of patterns of fair trade within the region.

Harmonisation, because it is a more complex process than is presented, does result in countries incurring adjustment costs. The average adjustment costs to be borne by countries depends on the gap between the policy-related standards of the countries in the region. The costs are likely to be small where foreign regulatory preferences are similar. They are also likely to be smaller where the regulatory institutions are comparable thereby requiring less adjustment. The costs of harmonisation are also dependant on the extent of integration that

¹⁸²Supra, n. 94

¹⁸³ Supra, n. 22

¹⁸⁴ Ibid

the countries seek to attain. This process will further be driven by factors such as natural ties between the countries, geographic proximity, legal systems, language etc.¹⁸⁵

The costs however are to be weighed against the benefits that harmonisation will bring about, on a country by country basis. Therefore, the standard is set will determine whether a country will benefit from such harmonisation. In this regard, smaller countries have more to gain from an integrated market and so they are more willing to harmonise than do their larger counterparts.¹⁸⁶

This has been evidenced in the East African integration process involving the countries of Burundi, Kenya, Rwanda, Tanzania and Uganda. Kenya is by certain standards the strongest of all the economies, having a more developed industrial and manufacturing sector than do the other countries. Rwanda and Burundi being the smallest economies are willing, and are indeed, undertaking reforms in their legal systems, in order to bring them in consonance with the systems of the other countries. Rwanda and Burundi are the only countries that have a French system of law (civil law) while the other countries follow a common law system.

The costs of harmonisation therefore in the East African region may be aggregately lower than assumed owing to the fact that most of the countries have similar legal systems, the geographic proximity of countries is minimal (each country shares a border with at least two others), the culture and language of the countries is more or less similar with similarities across different parts of the countries. Added to this is the fact that the countries had always enjoyed close historical, commercial, industrial, cultural and other ties for many years.¹⁸⁷

3.6 Challenges

Different legal cultures and their repercussions on transatlantic integration: Beyond specific barriers to trade, divergences in legal cultures affect transatlantic integration. Notwithstanding the repercussions of these divergences, the EU with its high degree of economic integration proves that not all differences in legal culture must seriously hamper

¹⁸⁵ Mattoo, A. and Fink, C. (2002) "Regional Agreements and Trade in Services: Policy Issues" World Bank Policy Research Working Paper 2582

¹⁸⁶ Ibid

¹⁸⁷ EAC Treaty , "*WHEREAS the Republic of Uganda, the Republic of Kenya and the United Republic of Tanzania have enjoyed close historical, commercial, industrial, cultural and other ties for many years...*"

economic integration: Despite a high level of harmonisation in certain fields of law, the Member states by and large, still maintain their distinctive legal cultures. However, the thrust for a European “area of liberty, security and justice” (Art. 2 Treaty of the EU) with a cascade of instruments on civil litigation, criminal procedure and legal assistance, demonstrates a high sensitivity for overcoming different standards of law enforcement. The free movement of goods, persons, services and capital is thus supplemented by a free movement of judicial decisions.¹⁸⁸

Regulatory cooperation can also serve as a challenge. The urgency of regulatory cooperation is not only due to divergences between regulatory standards in the US and the EU but also to the pluralism of standards amongst the individual US states on the one hand and the EU member states on the other hand. Differences in regulatory philosophies also include a different degree of willingness to adopt international standards and to consider the extraterritorial effects of domestic legislation. Efficient regulatory cooperation requires an intensive dialogue which has to cover the phase prior to regulating. Regulators on both sides of the Atlantic must recognise that they are not only acting on behalf of their domestic constituencies, but also as custodians, “as joint stewards and regulators of a transatlantic market”. If the harmonisation of standards and certifications cannot be attained, greater effort will have to be directed at the mutual recognition of equivalent standards and regulations.¹⁸⁹

Baier and Bergstrand¹⁹⁰ find that bilateral trade between members of the same RTA doubles, on average, after a 10 year period from RTA creation. This finding, in itself, has little to say about the impact of RTAs on trade between members and non members and trade among non members. The new question is whether larger internal markets resulting from expanding RTAs may make it easier to implement beyond-the-border liberalisation programs, as did the EU in the 1980s with its internal market initiative. Trade creation rises, but trade diversion may rise as well. Since larger RTAs tend to have a higher ratio of internal trade to GDP than smaller RTAs, the pressure to liberalise trade with non members may decline.¹⁹¹

¹⁸⁸Herdegen, M. (2008) “Legal Challenges for Transatlantic Economic Integration” *Common Market Law Review* 45:1581-1609

¹⁸⁹ Ibid

¹⁹⁰ (2007) as quoted in Herdegen, M. (2008) “Legal Challenges for Transatlantic Economic Integration” *Common Market Law Review* 45:1581-1609

¹⁹¹Fратиани, M. and Marchionne, F. (2009) “The Limits of Integration” <http://www.ssrn.com/abstract=1358442> (accessed 17/03/2010)

However, experience has shown that services trade liberalisation also carries risks and potential costs e.g. that foreign providers might cherry-pick the most profitable customers and refuse to serve others; may leave the country at the first sign of financial difficulty exacerbating instability; may replace domestic providers, or may contribute to brain drain. Government intervention to regulate the market and to ensure there is sufficient competition is therefore crucial if the benefits of services liberalisation are to be realised.

The services sector is by far the most dynamic of any other sector. However, the true value of trade in services is understated because a good deal of it is conducted by expressly-created corporate establishments in their export markets. This means that this trade in services is not recorded in the balance of payments statistics. Furthermore, given the invisibility and intangibility of many services when they are delivered to a trade partner, their passage is often not recorded by the customs department. Statistics on trade in services are therefore not entirely reliable.¹⁹²

A further challenge to analysing services data is that it is so aggregated and sub-sectors are often combined making it difficult to effectively assess the performance of sectors. (Uganda National Chamber of Commerce and Industry position on the urgent need for trade in services policy in Uganda, 1st February 2010)

¹⁹² Supra, n. 50

CHAPTER FOUR

4.1 CONCLUSIONS

As indicated, the pattern of services trade is such that it differs from that of trade in goods owing to the intrinsic nature of services. Services are intangible and indivisible and because of their nature, the regulations and principles governing them tend to differ in some aspects from those governing trade in goods.

Generally trade in goods and trade in services do indeed provide for similar principles of governance, notably Most Favoured Nation, National Treatment, Market Access, Transparency, among others. The similarity of these principles only extends to their form but not their substance. They appear the same though they differ in terms of their application and operation.

The GATS, like the GATT does indeed provide for departures from these principles, notable of which is the provision on regional agreements. However, these agreements must conform to the standards and requirements as set out in the GATS, in order for them to be duly recognised.

The service sector accounts for a significant proportion of GDP in most countries, including low income countries, where it frequently generates over 50% of GDP. The process of development usually coincides with a growing role of services in the economy (alongside a reduced role for agriculture). Thus services constitute an increasing percentage of GDP in nearly all developing countries. Services contributed 47% of growth in Sub-Saharan Africa over the period 2000-2005, while industry contributed 37% and agriculture only 16%. Recent growth in Africa is due to services as much as natural resources or textiles (even in countries benefiting from trade preferences in these products). The question is not whether to move into services, but how and at what speed to move into services. Many services are key inputs to all or most other business e.g. infrastructure services such as energy, telecommunications and transportation; financial services which facilitate transactions and provide access to finance for investment; health and education services which contribute to a healthy, well-trained workforce; and legal and accountancy services which are part of the institutional

framework required to underpin a healthy market economy. These service sectors are thus a key part of the investment climate, and can have a much wider impact on overall business performance and the level of investment, and hence growth and productivity in the economy.

Arguments have been made for and against the formulation of RTAs in the long debate of their “stumbling” or “building” block effect on the multilateral system. Neither stand can be said to hold more sway than the other and as such, each RTA should be assessed on its merits. RTAs are recognised trading blocs and whether they are building or stumbling blocs to the multilateral trading system will continue to be debated. In as much as they do have some negative consequences, as do all other issues in international trade, the benefits that they bring cannot be ignored nor underestimated.

One of the big questions is whether services trade is vital for regional trade. The answer to this is by all means in the affirmative. This is due to the role that services trade has come to play in international and regional trade.

Many arguments have fronted the notion that the negative-list approach of liberalisation overrides that of the positive-list largely because it is a much more transparent instrument for service providers. Because sectors are listed with reservations and conforming and non-conforming measures provided for separately, service providers are aware at the onset of existing restrictions to trade thereby aiding them make the proper economic decisions in the circumstances.

Overall, research has indicated that neither approach to liberalisation of trade in services can be said to be better than the other. This is further compounded by the fact that some research has illustrated that the blatant differences between the two are not as glaring considering that GATS model of liberalisation is sometimes referred to as a hybrid model. What is therefore necessary is the necessary reforms undertaken to implement the liberalisation model adopted.

However, further research has indicated that ultimately, the advantages of either approach of liberalisation are largely dependent on the schedules on market opening that the countries adopt. To argue that the positive-list is better than the negative-list in terms of maximising

gains from services liberalisation, would not result in much since liberalisation itself does not automatically result in profits.

What is more important is the implementation mechanism of the said liberalisation commitments through the reform processes that the reforms that individual countries will have to undertake in their drive towards deeper integration. The framework of reform and the core issue pertaining to regulation and especially competition will need to be carefully crafted. If a negative-list approach is adopted and then the regulatory reform is lacking or if a positive-list is adopted with a faulty reform process, either way the region will stand to lose from the liberalisation efforts undertaken.

The better option of the two would therefore be a mix or hybrid of the two approaches with countries negotiating a well designed framework for implementation and enforcement.

The EAC Common Market Protocol is modelled along a GATS-type approach. It encompasses elements of a positive-list model and a negative-list model. It would be self defeatist to conclude that this approach is the best in the circumstances for the region. What matters is the reforms that the countries in the region will have to undertake in order to realise the maximum benefits from the liberalisation of services trade in the region.

The arguments in support of either approach are theoretical. A clear conclusion can only be drawn where both approaches are adopted by different regions with exactly similar circumstances in term of level of development, legal systems and geographic proximity. This in itself is impossible since no two regions can have the same circumstances. Therefore to rely on one approach as being better than the other even for the East African Community is moot.

Most regional agreements in Africa, have also began including services provisions. This in part is due to the role that services trade has come to play in trade and also due to the impasse that the trade round of negotiations have encountered. Most countries therefore view regional agreements as a better means through which they can address their concerns. Such advantages can only be tested over time, when the impact of liberalisation has been realised.

More research is however needed as an in depth study on the impact of liberalisation of trade in services especially within the African region since this is a new area of cooperation for most regional agreements in the area.

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