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Title: *Will the Southern African Development Community's Protocol on Trade in Service be effective in meeting its objective of strengthening the region's services market?*

by

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ABBREVIATIONS

CARIFORUM	Caribbean Forum
EAC	East African Community
EPA	Economic Partnership Agreements
EU	European Union
FDI	Foreign Direct Investment
GATS	The General Agreement on Trade in Services
GATT	General Agreement on Trade Treaty
GDP	Gross Domestic Product
MFN	Most Favoured Nation
NT	National Treatment
Protocol on Trade in Services	SADC Protocol on Trade in Services
PTA	Preferential Trade Agreement
SADC	Southern African Development Community
SADC Treaty	The Treaty of the Southern African Development Community of 1992

TNF Services

Trade Negotiating Forum for Services

WTO

World Trade Organisation

ABSTRACT

The SADC Protocol on Trade in Services seeks to create a strengthened single integrated services market in the region. Such a Protocol could be of great benefit to SADC as the region's services sectors are not efficient nor are they competitive. The region's services sector is also characterised by comparatively high costs. The liberalisation of trade in services is seen as a way in which countries can create competitive and efficient services sectors, while boosting FDI and GDP. While the will to negotiate on the liberalisation of services is significant, it is equally important that the framework utilised for such liberalisation be well thought through and structured. An agreement that is not well thought through or does not put in place all the rules and mechanisms necessary for the efficient liberalisation of trade in services could have the result frustrate the liberalisation process. It is not sufficient to commit to the liberalisation of services, members to preferential trade agreements for the liberalisation of services must commit to negotiate on other measures that have a direct impact on the implementation of such agreements.

This paper will analyse whether or not the SADC Protocol on Trade in Services in its current form will be successful in creating an integrated services market in the region.

CHAPTER I

INTRODUCTION

1.1 Introduction

Services can be simply defined as a diverse group of economic activities that are distinct from manufacturing, mining, and agriculture.¹ Services are also often utilised as intermediary products that are important for the efficient operation of most parts of the economy.² The liberalisation of trade in services is of great significance to developing countries as there are significant gains that can be made from such liberalisation.³ This is especially true in key infrastructural services, such as transportation, telecommunications and financial services, but such gains may not be realised if liberalisation efforts are not properly designed.⁴ Like with the trade of goods, if countries keep restrictions on the trade of services, these restrictions lead to a loss of welfare as they reduce a country's Gross Domestic Product (GDP). In the case of services, the loss of welfare is compounded as many services are utilised as inputs in the production of goods therefore the inefficient production of services has a direct impact on the efficient production of goods.⁵ The Along with the effect that services have on the production of goods, the availability of essential services, such as water supply, sanitation, power supply, transportation, education, or health, is generally associated with higher productivity and earnings.⁶ It is suggested that the gains to be made from the liberalisation of trade in services could be greater than those to be made from the further liberalisation of goods.⁷

¹ J Marchetti, 'Developing Countries in the WTO Services Negotiations: Doing Enough?' in G.A Bermann and P.C Mavroidis (eds) *WTO Law and Developing Countries* (2007) 84

² M Stern, S Truen S, Y Ramkolowan, 'SADC Trade in Services: Negotiating the National Interest' (2011) Occasional Paper No 93 *South African Institutional International Affairs* 6

³ A Mattoo, 'Developing Countries in the New Round of GATS Negotiations: Towards a Pro-Active Role' in D Njinku and P English (eds) in *African Countries in the New Trade Negotiations: Interests, Options and Challenges* (2008) 27

⁴ as above

⁵ as above

⁶ Marchetti (n 1 above) 84

⁷ Stern, Truen and Ramkolowan (n 2 above) 5

At the World Trade Organisation (WTO) level the liberalisation of trade in service is regulated by the General Agreement on Trade in Services(GATS). The primary objectives of the GATS are to promote progressive liberalisation of trade in services and to ensure that all its signatories are treated equitably when exporting their services to foreign markets.⁸ In recent years trade diplomacy has tended towards the preferential liberalisation of trade, this is a result of the impasse currently experienced at the multilateral level negotiations. Prior to the year 2000, 86.4 percent of Preferential Trade Agreements (PTAs) in force dealt exclusively with the liberalisation of goods.⁹ Contrast this with the fact that in recent years half of the PTAs concluded now include provisions on the liberalisation of trade in services, this can also be attributed to the impasse currently being experienced at the multilateral level.¹⁰ One explanation offered for this ‘stalemate’ is that members have made very conservative commitments, and as a result have chosen to conclude RTAs in order to gain access to high priority services sectors in foreign markets.¹¹ It is important to note that whilst the commitment WTO members have made in PTAs are generally stronger than those made in terms of the GATS, these commitments do not always produce meaningful liberalisation.¹²

One of the general obligations of the GATS is contained in Article II is the Most Favoured Nation (MFN) principle. The MFN rule requires members to immediately and unconditionally extend to services or services suppliers of all other members “treatment no less favourable than that accorded to like services and services suppliers of any other country”.¹³ Article V of the GATS permits members to derogate from the MFN principle, by allowing members to enter into PTAs for the purposes of liberalising Trade in services. Members of a PTA constituted in terms of Article V of the GATS do not have to extend the benefits of the PTA to another member of the WTO. All PTAs constituted under Article V must provide for substantial sectoral coverage¹⁴ and eliminate substantially all discrimination¹⁵. The elimination of substantially all discrimination should be

⁸<http://www.international.gc.ca/trade-agreements-accords-commerciaux/wto-omc/gats-agcs/back-info.aspx?lang=eng> (accessed 15 July 2017)

⁹P Sauvé and A Shingal, ‘Reflections on the Preferential Liberalisation of Services Trade’ (2011) Working Paper No 2011/05 *NCCR Trade Regulation* 3

¹⁰as above

¹¹C Arup, ‘Services and Investment in Free Trade Agreements: Liberalisation, Regulation and Law’ in R Buckley, V Lo and L Bouille (eds) *Challenges to Multilateral Trade: The Impact of Bilateral, Preferential and Regional Agreements* (2008) 166.

¹² as above

¹³ https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm (accessed 10 July 2017)

¹⁴ General Agreement in Trade in Services of 1995, Article V(I)(a)

¹⁵ GATS (n 15 above) Article V(I)(b)

through the elimination of existing discriminatory measures¹⁶ and the prohibition of new or more discriminatory measures¹⁷. The rationale for permitting member states to form such PTAs is that liberalisation at the regional level will lead to greater liberalisation at the multilateral level.

PTAs can be highly beneficial in regulatory cooperation as, preferential treatment in services trade is usually in the form of the elimination of discriminatory restrictions on the movement of capital and labour and other domestic regulations such as licensing, qualification requirements and technical standards, which requires regulatory cooperation from the members of a PTA.¹⁸ Apart from regulatory cooperation amongst the members of a PTA, liberalisation of services through PTAs can also help bring about greater transparency as members are forced to develop rules that require all the parties to be open.¹⁹

The Southern African Development Community (SADC) was established in 1992 through the conclusion of the SADC Treaty²⁰. The main objective of SADC is to achieve economic development and economic growth through regional integration. SADC is currently made up of sixteen-member states these being; Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Union of the Comoros, United Republic of Tanzania, Zambia and Zimbabwe. The Union of the Comoros is the latest country to be admitted to SADC.²¹ Article 22 of the SADC Treaty allows for the conclusion of protocols in each area of cooperation. In 1996 the SADC member states concluded a Protocol on Trade²², which entered into force in the year 2000. Article 23(1) of the Protocol on Trade, recognises the significant role of trade in services plays in the development of the economies of SADC member states. Article 23 (2) of the Protocol on Trade states that “Member states shall adopt policies and implement measures in accordance with their obligations in terms of the WTO's General Agreement on Trade in Services (GATS), with a view to liberalising their services sector within the Community.” Paragraph 3.2.2.2 of the Regional Indicative Strategic Development Plan, recalls the objectives of SADC which are the “[elimination of] obstacles to the

¹⁶ GATS (n 15 above) Article V(I)(b)(i)

¹⁷ GATS (n 15 above) Article V(I)(b)(ii)

¹⁸ A Mattoo and C Fink, ‘Regional Agreements and Trade Services: Policy Issues’ (2002) Policy Research Working Paper 2852 *The World Bank Development Research Group* 6

¹⁹ as above

²⁰ The Treaty of the Southern African Development Community of 1992

²¹ <https://www.tralac.org/resources/by-region/sadc.html> (accessed 1 September 2017)

²² SADC Protocol on Trade of 1996

free movement of capital, labour and goods and services and the improvement of the region's economic management and performance through regional cooperation with the ultimate goal of eradicating poverty.”²³In August of 2012 SADC member states concluded the Protocol on Trade in Services²⁴, which is yet to enter into force. Prior to the conclusion of the Protocol on Trade in Services, member states took the decision in November 2011 to commence with negotiations for the liberalisation of six identified priority sectors these are; communication services, construction services, energy-related services, financial services, tourism services, and transport services.²⁵ The first Round of Negotiations on liberalisation commitments in the six priority sectors commenced in April 2012. It was expected that the round would be concluded in 2015. Three years after the negotiations commenced, the negotiations on the six identified priority services sectors are yet to be completed.²⁶ These negotiations are expected to result in market access commitments that will provide a predictable legal environment for the trade and investment within the services sector within the region.²⁷ The Preamble of the Protocol on Trade in Service states that SADC;

- Recognises the importance of services trade for the growth and development and is mindful of the need to diversify SADC economies through greater services trade;
- Is convinced that an integrated regional market for services, complemented by cooperative mechanisms will create new opportunities for a dynamic business sector and strengthen the Region’s services capacity, its efficiency and competitiveness and expand the Region’s services exports.

The objectives of the SADC Protocol on Trade in services are listed in Article 2, they are inter alia, the progressive intra-regional liberalisation of services trade and the enhancement of the capacity and competitiveness of the services sectors of its member states. It has been argued that the Protocol on Trade in Services is not ambitious enough and will not take SADC members beyond their GATS commitments.²⁸

²³ <https://tis.sadc.int/> (accessed 10 July 2017)

²⁴ SADC Protocol on Trade in Services, 2012

²⁵ (n 26 above)

²⁶ as above

²⁷ as above

²⁸ Stern, Truen and Ramkolowan (n 2 above) 28

1.2 Research problem

The SADC Protocol on Trade in Services was concluded in August of 2012, it is yet to come into force. The Protocol obliges members to progressively liberalise trade in services with the view that such liberalisation will lead to the creation of a single services market in the region. It identifies six priority services sectors which will be the focus of the first round of negotiations. SADC members hold the view that an integrated regional market for services, complemented by cooperative mechanisms will create new opportunities for a dynamic business sector and strengthen the region's services capacity, its efficiency and competitiveness and expand the region's services exports.

However, it has been argued that the Protocol on Trade in Services lacks ambition and will not take SADC members beyond their GATS commitments. Not only does the Protocol not mandate the liberalisation of trade in services, it also does not provide rule making mechanisms that will support the creation of a strengthened integrated services market. It is against this backdrop that this study will interrogate whether the SADC Protocol on Trade in Services will be effective in strengthening the region's services market'.

1.3 Research questions

The key question that this study seeks to address is: Whether the SADC Protocol on Trade in Services will be effective in strengthening the region's services market? In answering the research question this mini-dissertation will also answer the following questions:

1. How important is trade in services to developing countries?
2. The current state of services liberalisation in the SADC Region?
3. What changes could be made to the Protocol on Trade in Services in order for it to be more effective in reaching its objectives?

1.4 Thesis statement

SADC member states recognise that services are imperative for the growth and development of their economies and that an integrated regional market for services in trade will strengthen the region's services capacity for development. This research will therefore argue that the SADC Protocol on Trade in Services in its current form is not ambitious enough to take SADC's member states beyond their GATS Commitments and as a result, it will not be able to meet its objective of strengthening the region's services market.

1.5 Justification

Services sectors contribute significantly to the economies of SADC countries. Despite this key services sectors in the region are expensive and very ineffective. The liberalisation of services trade if carried out in an effective manner could increase competition and improve the state of the region's services sector. A regional agreement could assist SADC member states to achieve the realisation of a more efficient and competitive regional services market. Such a services market will not only allow for trade diversification but a more efficient services market could also have a positive effect on the region's other economic sectors as certain services act as inputs in manufacturing.

1.6 Literature review

This study sets out analyse whether or not the SADC Protocol on Trade in Services will be successful in creating a strengthened integrated services market in the region. As part of this analysis this study will consider the benefits that can be derived from the liberalisation of services. It will also look at the rules pertaining to the creation of PTAs for the liberalisation of services trade and the interpretation of these conditions. This mini-dissertation will then analyse the SADC Protocol on Trade in Services looking at its individual provisions, in order to determine whether or not it will meet its objectives.

Mattoo²⁹ argues that services liberalisation is of great significance to developing countries as there are significant gains to be made from the liberalisation of trade in services.³⁰ This is especially

²⁹ (n 3 above) 27

³⁰ as above

true in key infrastructural services such as transport, communication and transport, but such gains may not be realised if liberalisation efforts are not properly designed and implemented.³¹ He further argues that if countries keep restrictions on trade in services, as with the trade of goods, such restrictions will lead to a loss of welfare as it reduces GDP. In the case of services trade the loss of welfare is compounded as many services are utilised as inputs in the production of goods.³² In essence an inefficient services sector has a direct impact on the efficient production of goods.

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Sauvé and Shingal³⁴ put forward the argument that in the past decade trade diplomacy has tended towards the preferential liberalisation of trade mostly because of the impasse at the multilateral level. They also argue that this trend of preferential liberalisation has extended to trade in services. They argue that barriers to services trade are often more prohibitive, as they are usually in the form of quantitative restrictions rather than being overtly discriminatory.³⁵ Trade in services differs from trade in goods as a broad range of services require physical proximity of both the producer and the consumer, resulting in the stringent restrictions placed on trade in services.³⁶

Marchetti, argues that liberalisation of services requires that states not only reduce or eliminate barriers that affect the services sectors but that they also reduce and eliminate those barriers that affect services firms, “such as restrictions on entry, legally established monopolies or oligopolistic market structures, discriminatory taxation, and limits on foreign investment.”³⁷ Like Mattoo, Marchetti also argues that substantial gains may be made from liberalising access for foreign firms to provide intermediate services that increase the productivity of the final goods sector that utilise these firms’ services as input³⁸ According to Marchetti the costs of barriers to trade in services are difficult to estimate but there is substantial evidence that suggests that protectionist measures reduce competition in services sectors, especially those services that are used in the production of goods are very costly.³⁹ He further argues that policies regarding important services sectors such

³¹as above

³²as above

³³as above

³⁴(n 10 above) 3

³⁵as above

³⁶as above

³⁷ Marchetti (n 1 above) 85

³⁸ Marchetti (n 1 above) 86

³⁹ Marchetti (n 1 above) 87

as transportation, finance, telecommunications, which are services that are used as inputs in production of goods and trade are often very restrictive in developing countries⁴⁰

It is argued that the liberalisation of trade in services will increase FDI flows as a large percentage of trade in services takes place through foreign service providers establishing themselves in a particular country. Catteneo argues that there is very little evidence that shows that the GATS has actually led to increased FDI in developing countries.⁴¹ She further argues that while services are needed for economic development ‘generalised services liberalisation’ is not the appropriate method for liberalising services sector in developing countries, and that liberalisation through the GATS is also not the best way to improve the efficiency of services sectors.⁴²

Cronje also finds that the GATS framework is not ideal for the promotion of the liberalisation of trade in services, this is due to the fact that the agreement does not take into account technological advancements that affect the way in which services transactions are concluded.⁴³ He also argues that using the GATS framework for the formation of an integrated regional services market is not idea, due to its inadequate and outdated classification method.⁴⁴

Article V of the GATS permits members to enter into PTAs for the liberalisation of trade in services. Mattoo and Fink argue that preferential liberalisation of services maybe beneficial in regulatory cooperation as “Deeper regulatory cooperation, in the form of harmonization and mutual recognition, naturally takes place among a subset of similar countries”⁴⁵ They argue that such regulatory cooperation is necessary as barriers to trade in services are generally in the form of domestic regulations such as technical standards, licensing and requirements regarding qualifications.⁴⁶

Such agreements must meet certain requirements set out in Article V(I) of the GATS, it would seem that there has been great difficulty in interpreting the requirements. Cronje argues that the

⁴⁰ as above

⁴¹ N Catteneo ‘Services Trade Liberalisation and the Role of the Services Sector in South African Development’ (2011) Occasional paper 94 *South African Institutional International Affairs* 14

⁴² as above

⁴³ JB Cronje, ‘The SADC Protocol on Trade in Services: What is necessary to support the establishment of an integrated market?’ (2014) Tralac Working Paper No. S14WP05/2014 *Trade Law Centre* 25

⁴⁴ as above

⁴⁵ Mattoo and Fink (n 20 above) 27.

⁴⁶ Mattoo and Fink (n 20 above) 9

substantial sectoral coverage condition requires that coverage of not all the sectors but requires coverage of more than some the sectors.⁴⁷

It has been argued that inquiry on if an agreement meets the substantial sectoral coverage condition must be a quantitative, qualitative or a hybrid one.⁴⁸ A quantitative test is problematic as it only considers the number of sectors covered by an agreement rather than considering whether or not it covers crucial sectors.⁴⁹ While a qualitative test would consider whether or not an agreement covers crucial sectors, it may cover a limited number of sectors.⁵⁰

Cronje argues that the integration of services sectors of different countries is reliant on the convergence of national regulatory frameworks of each member state while still allowing each member state to regulate its domestic services sectors in a manner that will allow them to achieve their legitimate national policy objectives.⁵¹ He argues that for countries to be able to create integrated services markets there has to be an agreement with clearly legal binding guarantees in place.⁵² In order for such agreements to be operational member states are required to simplify administrative requirements and procedures; set minimum standards; develop codes of good conduct to ensure quality and recognise each other's systems, practices and requirements"⁵³

Stern, Truen and Ramkolowan argue that the size of SADC economies is not the only reason for the underperformance and underdevelopment of the region's service sector rather the weak competition and inappropriate regulation also contribute to the current state of the region's services sector.⁵⁴ They put forward that a regional agreement on trade in services , such as Protocol on Trade in Services would be beneficial to the region as it would provide SADC regulators with a binding framework, that would bring about the changes needed to create a more competitive

⁴⁷ JB Cronje 'Is the liberalisation of trade in services in the EAC complaint with WTO Law?' Trade Law Brief, No. S11TB07/201, April 2011, 5

⁴⁸ H Wang, 'The Interpretation of GATS Disciplines on Economic Integration: GATS Commitments as a Threshold?' (2012) 46 *Journal of World Trade* 407

⁴⁹ Wang (n 52 above) 409

⁵⁰ as above

⁵¹ Cronje (n 47 above) 3

⁵² Cronje (n 47 above) 4

⁵³ as above

⁵⁴ Stern (n 2 above) 22

services sector.⁵⁵ They find that the Protocol on Trade in Services is not ambitious and is unlikely to take SADC countries beyond their already existing commitments under the GATS.⁵⁶

1.7 Research methodology

This research for this paper will be desktop and library based. The approaches adopted will be descriptive, analytical and prescriptive.

The descriptive approach will be adopted in examining the state of services liberalisation in the SADC region. The analytical approach will be adopted in examining whether or not the Protocol on Trade in Services will be able to assist SADC in strengthening its services market. Finally, the prescriptive approach will be adopted in making recommendations to SADC policy makers

1.8 Overview of chapters

Chapter 1:

This chapter will introduce the research paper and outline the research problems and questions to be answered. It will also outline the significance of the study, the research methodology and end off with an overview of the chapters contained in the paper.

Chapter 2:

The importance of trade in services will be outlined in this chapter, along with the history of developing countries in services negotiations in the multilateral arena, finally this chapter will look at Article V of the GATS.

Chapter 3:

This chapter will analyse the SADC Protocol on Trade in Services, focusing on whether it meets the requirements set out in Article V of the GATS.

⁵⁵ as above

⁵⁶ Stern (n 2 above) 28

Chapter 4:

Recommendations for policy makers

Chapter 5:

Conclusion

CHAPTER 2

TRADE IN SERVICES UNDER THE GATS

2.1 Introduction

This chapter will provide a conceptual understanding of trade in services. It will begin by defining what is meant by services in terms of the GATS. The importance of trade in services will be outlined in this chapter. It will then go on to look at trade in services as regulated by GATS in the multilateral arena, and the importance of services liberalisation. It will go on to examine the GATS provisions relating to economic integration and the interpretation and implementation of these provisions. Finally, this chapter will look at the history of developing countries in services negotiations in the multilateral arena.

2.2 Defining services

A number of social and economic activities fall under the definition of services. The GATS identifies 12 services sectors, these being; business, communication, construction and engineering, distribution, education, environment, financial, health, tourism and travel, recreational, cultural and sporting, transport, and other services.⁵⁷ Services exercised in governmental authority are excluded from the purview of the GATS.⁵⁸

Unlike the trade of goods, “services are often intangible, invisible, and perishable, and usually require simultaneous production and consumption.”⁵⁹ As a result of this, restrictions around the trade of services are generally more stringent than those applicable to the trade of goods.

⁵⁷ GATS (n 15 above) Article 2

⁵⁸ GATS (n 15 above) Article 1

⁵⁹Trade in services using openness to grow, http://documents.worldbank.org/curated/en/285571468337817024/310436360_20050012013700/additional/multi0page.pdf (accessed 20 June 2017) 70

2.3 Importance of services and benefits of liberalisation

2.3.1 Direct and indirect benefits of services

The benefits of services can be divided into direct and indirect benefits. The direct benefits of a high quality and efficient services sector is that it contributes to the generation of revenue and job creation especially since many services are labour intensive.⁶⁰

The indirect benefits of services generally stem from intermediate services that are utilised as inputs in the production of goods or other services.⁶¹ These intermediate or “producer services” bring about greater domestic competition; transfer of know-how and technology through investment⁶²

2.3.2 Benefits of the liberalisation of services

Services are generally restricted through policy instruments that restrict access of foreign services into domestic markets of sovereign markets, these include measures such as entry fees and market share restrictions.⁶³ The intangible nature of trade in services makes it difficult to impose the same restrictions that are placed on the trade of goods. So liberalising trade in services entails putting measures into place that will expand market access to foreign service providers or diminish any discrimination that services providers may face.⁶⁴

A competitive and efficient services sector is a precondition for economic success, with services such as telecommunications, financial, and transportation being important inputs for all sectors, goods and services, and a liberalised services market allows for competition amongst service providers which is essential for the growth of these services.⁶⁵ While the protectionist measures of services markets increase the price of inputs which in turn translate into a tax on the production of exportable and import-competing goods and services.⁶⁶

⁶⁰ N Balchin, ‘Why Services are Important for Industrialisation and Economic Transformation’ in B Hoekom and DW te Velde (eds) (2017) *Trade in Services and Economic Transformation 3*

⁶¹ Marchetti (n 1 above) 86

⁶² as above

⁶³ N Khumalo, “Services Trade in Southern Africa: A Literature Survey and Overview” (2006) Trade Policy Report No 10 *South African Institute of International Affairs 12*

⁶⁴ above

⁶⁵ Marchetti (n 1 above) 86

⁶⁶ as above

The liberalisation of services sectors such as the telecommunications sector benefits consumers in that such it generally leads to the lower prices, better quality and wider choice for consumers.⁶⁷ These benefits of liberalisation will “...in turn, work their way through the economic system and help to improve supply conditions for many other products.”⁶⁸

Countries with liberalized services markets tend to experience faster innovation, especially in the financial and telecommunications sectors.⁶⁹ Foreign Direct Investment that goes hand in hand with a liberalised services sectors brings with it new skills and technologies that spill over into the wider economy in various ways, “Domestic employees learn the new skills [while] domestic firms adopt the new techniques, and firms in other sectors that use services-sector inputs such as telecoms and finance benefit too.”⁷⁰

The income gains from the reduction of protectionist measures in trade in services are estimated to be higher than those realised from the liberalisation of trade in goods.⁷¹ Developing countries, in particular, are likely to benefit from further domestic liberalisation and the elimination of barriers to their exports.⁷² While it is clear that there are several benefits of liberalisation of trade in services in practice many countries are very reluctant to open their services sectors to international service providers.⁷³

It should be noted though that in order to access the gains from liberalisation of services reform programs, have to be carefully carried out.⁷⁴ Developing countries must see the advantages of multilateral agreements to increase competition, enhance credibility of potential domestic reform, and strengthen domestic regulation.

⁶⁷ https://www.wto.org/english/tratop_e/serv_e/gats_factfiction3_e.htm (accessed 10 June 2017))

⁶⁸ as above

⁶⁹ as above

⁷⁰ as above

⁷¹ http://documents.worldbank.org/curated/en/285571468337817024/310436360_20050012013700/additional/multi0page.pdf (accessed 17 July 2017)

⁷² as above

⁷³ Stern, Truen and Ramkolowan (n 2 above) 5

⁷⁴ as above

2.4 Liberalisation of trade in services in the multilateral arena

2.4.1 The General Agreement on Trade in Services (GATS)

Services are generally restricted through policy instruments that restrict access of foreign services into domestic markets of sovereign markets, these include measures such as entry fees and market share restrictions.⁷⁵ The intangible nature of trade in services makes it difficult to impose the same restrictions that are placed on the trade of goods. So liberalising trade in services entails putting into place measure that will expand market access to foreign service providers or diminish any discrimination that services providers may face.⁷⁶

During the Uruguay Round of negotiation, the WTO contracting parties saw the need to come up with a multilateral framework for the liberalisation of services. These negotiations resulted in the General Agreement on Trade in Services which came into force 1 Jan 1995. The latest round of services negotiations began in the year 2000.

The GATS have a number of objectives, inter alia it aims to establish a “...multilateral framework of principles and rules for trade in services” in order to expand services trade in a manner that is transparent and ensures progressive liberalization.⁷⁷ This framework of principles and rules is also a means of promoting the economic growth of all members and the development of developing countries.⁷⁸

Apart from the principles and rules governing the multilateral trade of in services, it also provides the schedule of commitments made by the contracting parties that show which domestic markets they will allow external service providers into. It should be noted that the schedules of commitments made by the contracting parties do not necessarily involve liberalisation, rather in most cases they mostly just bind members states to the status quo.⁷⁹

The trade of services generally requires proximity between consumers and producers, in the case of international transactions this would imply that one of the parties to the transaction must move

⁷⁵ Khumalo (n 75 above) 12

⁷⁶ as above

⁷⁷ GATS (n 15 above) Preamble

⁷⁸ GATS (n 15 above) Preamble

⁷⁹ Marchetti (n 1 above) 90

to make the transaction possible⁸⁰. As a result, the definition of services trade under the GATS includes the four modes through which services are traded, these four modes are dependent on the territorial presence of the supplier and the consumer at the time of the transaction. Article I:2 of the GATS covers the modes of supply, they are as follows:⁸¹

1. Mode 1 Cross Border Supply: these are services that can be supplied across borders
2. Mode 2 Consumption Abroad: such services are supplied in the territory of one member into the territory of any other member.
3. Mode 3 Commercial Presence: these are services supplied by a service supplier of one member through commercial presence in the territory of any other member.
4. Mode 4 Presence of Natural Persons: this mode involves the movement of natural persons from a member to the territory of another member to supply services.

Mode 1 (cross-border supply) and Mode 3 (commercial presence) are generally considered to be the most important modes of supply, as they account for more than 80 percent of world trade in services⁸²

2.4.2 Obligations of the GATS

The obligations contained in the GATS can be categorised in two broad groups, the first being general obligations that apply directly and automatically to all members and the second category being specific commitments that are laid down in individual country schedules, the scope of these commitments may vary widely between members.

General obligations of the GATS

The first general obligation is found in Article II of the GATS, this is the Most Favoured Nation (MFN) rule which requires members to extend immediately and unconditionally to services or services suppliers of all other members “treatment no less favourable than that accorded to like services and services suppliers of any other country”.⁸³ While the MFN rule is a general obligation of the GATS that all members are bound by, there are exceptions to this rule. Prior to the

⁸⁰http://documents.worldbank.org/curated/en/285571468337817024/310436360_20050012013700/additional/multi0page.pdf (accessed 9 June 2017)

⁸¹ https://www.wto.org/english/tratop_e/serv_e/cbt_course_e/cls3pl_e.htm (accessed 20 June 2017)

⁸² Marchetti (n 1 above) 97

⁸³ GATS (n 15 above) Article II

agreement entering into force members were permitted to seek exemptions to the MFN rule.⁸⁴ The agreement contains an Annexure on Article II exemption which contains the conditions under which a member may be exempted from its MFN obligation.⁸⁵ New exemptions are only granted to new members upon accession.⁸⁶ Current members can only seek new exemptions by way of a waiver under Article IX:3 of the WTO Agreement.⁸⁷ All exemptions granted to members are subject to review and should not be in place for longer than 10 years.⁸⁸ Another exception to the MFN rule is Article V of the GATS: Economic Integration. Article V of the GATS can be viewed as an exemption to the MFN rule as in principle the MFN rule is a prohibition of preferential arrangements among groups of members. Article V of the GATS allows groups of members to enter into economic integration agreements for the trade of services provided that certain conditions are met.

Another general obligation of the GATS is transparency⁸⁹, it requires that amongst other things members publish all measures of general application and establish national enquiry points in order to respond to other members' information requests. Article III also requires that members inform the Council for Trade in Services, if they introduce any new regulations, or make any changes to existing laws, which significantly affect trade in services that are covered by its specific commitments under this Agreement⁹⁰.

Specific commitments

There are two types of Specific Commitments covered by the GATS, these are market access⁹¹ and national treatment⁹².

Market access, is a specific commitment that is negotiated on a sector specific basis amongst members. Article XVI (2) contains an exhaustive list of measures that members can impose to limit market access in sectors in which they have made specific commitments.⁹³ Some of these

⁸⁴ https://www.wto.org/english/tratop_e/serv_e/7-iiexem_e.htm

⁸⁵ as above

⁸⁶ as above

⁸⁷ as above

⁸⁸ as above

⁸⁹ GATS (n 15 above) Article III

⁹⁰ as above

⁹¹ GATS (n 15 above) Article XVI

⁹² GATS (n 15 above) Article XVII

⁹³ GATS (n 15 above) Article XVI (2)

restrictions on market access are quantitative restrictions such as the number of service suppliers, the value of service transactions and the number of natural persons employed.⁹⁴

National Treatment, Article XVII of the GATS sets out that members do not enact discriminatory measures that will benefit domestic services or service suppliers.⁹⁵ Members cannot extend treatment less than that stated in their schedules.⁹⁶ The extension of national treatment can be subject to certain qualifications and conditions and unlike the provisions on market access there is no exhaustive list of measures that limit national treatment.⁹⁷ Some examples of the limits to national treatment *inter alia* include nationality and residency requirements, licensing and qualification requirements.⁹⁸

2.4.3 Scheduling commitments

The GATS requires that members have a Schedule of Specific Commitments in which they identify the services sectors in which they guarantee market access and national treatment⁹⁹. There are two approaches to scheduling specific commitments these being, the negative or positive list approaches. In the positive list approach sectors in which commitments are to be undertaken are selected individually and members specify which sub-sectors are covered.¹⁰⁰ Under the negative list approach everything is fully committed unless it is specifically excluded, here members specify which sectors are not covered by commitments.¹⁰¹ The positive list approach to scheduling is viewed as being less efficient in terms of its effect on liberalisation, the negative list is preferred as it offers greater transparency and is seen as having a more positive effect on liberalisation.¹⁰² While the negative list approach to scheduling is considered to be more transparent, it requires that countries make more extensive commitments which in turn restricts policy space.¹⁰³ The GATS

⁹⁴ as above

⁹⁵ GATS (n 15 above) Article XVII

⁹⁶ GATS (n 15 above) Article XVII (1)

⁹⁷ https://www.wto.org/english/tratop_e/serv_e/guide1_e.htm (accessed 17 July 2017)

⁹⁸ as above

⁹⁹ as above

¹⁰⁰ R Adlung and H Mamdouh 'How to Design Trade Agreements in Services: 'How to Design Trade Agreements in Services: Top Down or Bottom Up?' (2013) Staff Working Paper ERSD-2013-08 *World Trade Organisation* 1

¹⁰¹ as above

¹⁰² Adlung and Mamdouh (n 112 above) 7

¹⁰³ Catteneo (n 45 above) 16

use the positive list approach to indicate sectoral coverage and the negative list approach to indicate limitations to market access and national treatment in the identified sectors.¹⁰⁴

2.5 Article V: Economic Integration

Article V of the GATS is a derogation from the MFN rule as stated in Article II of the treaty. Members are permitted to form PTAs for the liberalisation of trade in services. A PTA constituted under Article V of the GATS permits members to discriminate against the services or service providers who are not members of the PTA¹⁰⁵ If a member invokes GATS Article V as an exception to the MFN rule, it bears the burden of proving the specific PTA is consistent with the GATS, as in it meets the conditions set out in Article V (1).¹⁰⁶

Article V (1) reads as follows:

1. This agreement shall not prevent any of its members from being a party to or entering into an agreement liberalizing trade in services between or among the parties to such an agreement, provided that such an agreement:
 - (a) has substantial sectoral coverage¹⁰⁷, and
 - b) provides for the absence or elimination of substantially all discrimination, in the sense of Article XVII, between or among the parties, in the sectors covered under subparagraph (a), through:
 - (i) elimination of existing discriminatory measures, and/or
 - (ii) prohibition of new or more discriminatory measures, either at the entry into force of that agreement or on the basis of a reasonable time-frame, except for measures permitted under Articles XI, XII, XIV and XIV bis

¹⁰⁴ P Low and A Mattoo, 'Is There a Better Way? Alternative Approaches to Liberalization Under the GATS' http://tradeservice.mofcom.gov.cn/upload/2008/08/18/1219022407969_58106.pdf (accessed 9 August 2017) 22

¹⁰⁵ SM Stephenson, 'Regional Agreements on Services in Multilateral Disciplines: Interpreting and Applying GATS Article V' in SM Stephenson (eds) *Services in the Western Hemisphere: Liberalisation, Integration and Reform* (2000) 91

¹⁰⁶ Wang (n 52 above) 398

¹⁰⁷ The footnote to Article V(I)(a) provides that: "This condition is understood in terms of number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the a priori exclusion of any mode of supply"

All PTAs in trade in services must meet these two conditions set out in Article V(I) of the GATS, by providing substantial sectoral coverage and ensuring the absence or elimination of substantially all discrimination.

It is important to note that there has been difficulty in interpreting the requirements set out in Article V of the GATS as the article does not offer any guidance in this regard. There is yet to be a decision that interprets the provisions of Article V(I) in depth this unlike its counterpart in the trade of goods Article XXIV of the GATT where the WTO offered guidance on how to interpret this article in *Understanding on the Interpretation of Article XXIV of the GATT 1995*.

2.3.1 Substantial sectoral coverage

The requirement that a PTA in trade in services must have ‘substantial sectoral coverage’ is a significant one. It prohibits members to such agreements from picking and choosing among services sectors in a haphazard fashion that might not bring about any meaningful liberalisation. Article V(I)(a) is accompanied by a footnote that states that substantial sectoral coverage should be understood in terms of number of sectors, volume of trade affected and modes of supply. The footnote further states that such agreements should not *a priori* exclude any of the four modes of supply, meaning that such an agreement cannot provide that services in all sectors will only be supplied through one particular mode supply.

As previously stated there has been great difficulty interpreting what constitutes substantial sectoral coverage. It has been argued that the inquiry on whether or not an agreement meets the substantial sectoral coverage condition must be a quantitative, qualitative or a hybrid one.¹⁰⁸ A quantitative test is problematic as it would only considers the number of sectors covered by an agreement rather than considering whether or not it covers crucial sectors.¹⁰⁹ While a qualitative test would consider whether or not an agreement covers crucial sectors, it may overlook the fact an agreement covers a limited number of sectors.¹¹⁰ It would seem that a hybrid inquiry is the best approach to be adopted in analysing whether or not an agreement meets the substantial sectoral coverage requirement, it would cater for both the quality and the number of sectors covered. Wang suggests that the references to number of sectors and trade volume made in the footnote to Article

¹⁰⁸ Wang (n 52 above) 407

¹⁰⁹ Wang (n 52 above) 409

¹¹⁰ as above

V(I)(a) requires a quantitative consideration and while, the reference to the modes of supply mode requires a qualitative consideration.¹¹¹ It can therefore be argued that the GATS test for substantial sectoral coverage is a hybrid test, that is both qualitative and quantitative.¹¹²

Cronje argues that the substantial sectoral coverage condition requires that coverage of not all the sectors but requires coverage of more than some the sectors.¹¹³ This interpretation is rather vague and does not offer much clarity on the meaning of the condition. In his paper on the liberalisation of services in the Eastern African Community, Cronje finds that the EAC's agreement for the liberalisation of services meets the substantial sectoral coverage condition as it covers 7 out of the 12 sectors.¹¹⁴ This is 58% of the sectors that could possibly be covered by the agreement. Meanwhile the EC has argued this condition would be satisfied if an agreement covers 80% of services sectors.¹¹⁵ It should be kept in mind is that Article V(3)(a) provides that when developing countries are members to such an agreement, flexibility is to be applied in evaluating whether the agreement satisfies the conditions of Article V.1 in this case the condition of substantial sectoral coverage. As a result, substantial sectoral coverage should be interpreted in a manner that takes the members' levels of development into consideration.

Another element to be considered in the interpretation of substantial sectoral coverage is whether members are permitted to exclude core infrastructural services such as financial, communications and transportation services.¹¹⁶ Some argue that the substantial sectoral coverage does not allow for the exclusion of major or essential services sectors.¹¹⁷ The GATS does not expressly mention whether an agreement can exclude essential or major sectors from its ambit.¹¹⁸ Some argue that the wording of the footnote which refers to the number of sectors implies that such an agreement need not cover all the services sectors.¹¹⁹ So an agreement that excludes some core services will not be found to be inconsistent with the substantial sectoral coverage condition.

¹¹¹ as above

¹¹² as above

¹¹³ JB Cronje 'Is the liberalisation of trade in services in the EAC complaint with WTO Law?' (2011) Trade Brief No. S11TB07/2011 5

¹¹⁴ Cronje (n 125 above) 10

¹¹⁵ P Sauvé and N Ward, 'The EC-CARIFORUM Economic Partnership Agreement: Assessing the Outcome on Services and Investment' (2009) *European Centre for International Political Economy* 22

¹¹⁶ Wang (n 52 above) 409

¹¹⁷ as above

¹¹⁸ as above

¹¹⁹ as above

Lastly it is important to note that this condition cannot be phased in, such an agreement must meet this condition at the outset, this does not mean that members are not permitted to implement specific commitments over a specified time period.¹²⁰

2.3.2 Elimination of discrimination

GATS Article V (I)(b) states that PTAs for the liberalisation of trade in services must ensure the absence or elimination of substantially all discrimination. The agreement must eliminate discrimination the sense of Article XVII (National Treatment) so it does not extend to discrimination in terms of Article XVI (Market Access).¹²¹ The agreement must also prohibit the implementation of new or more discriminatory measures. Such elimination must be done either at time of the entry into force of the agreement or on the basis of a reasonable time-frame.¹²² Cronje argues that Article V(1)(b) requires a standstill on the introduction of new discriminatory measures and then requires the removal of existing measures by the time the agreement enters into force or within reasonable time.¹²³ He argues that a standstill alone would not be sufficient for the elimination of substantially all discrimination, as there might already be a substantial number of discriminatory measures already in place.¹²⁴

The measures referred to in Article V(I)(b)(ii) do not include measure permitted articles; XI (International Monetary Fund Provisions on Payments and Transfers), XII (Balance of Payments), XIV (General Exceptions related to health, safety, taxation and public order) and XIV bis (National Security).

A point of contention when interpreting this condition is what constitutes a reasonable time for members to eliminate all discriminatory measures. According to the Understanding on the Interpretation of Article XXIV of GATT 1995, 10 years constitutes a reasonable time frame, with regards to Article V of the GATS the Council on Trade in Services suggests that a reasonable time be no more than 5 years.

¹²⁰ Cronje (n 125 above) 10

¹²¹GATS (n15 above) Article V(I)(b)(i)

¹²² GATS (n 15 above) Article V(I)(b)(ii)

¹²³ Cronje (n 125 above) 7

¹²⁴as above

2.3.3 Article V (3)(a)

Article V (3)(a) of the GATS provides flexibilities for developing countries regarding the conditions set out in Article V (1) of the GATS. Article V(3)(a) of the GATS reads as follows:

Where developing countries are parties to an agreement of the type referred to in paragraph 1, flexibility shall be provided for regarding the conditions set out in paragraph 1, particularly with reference to subparagraph (b) thereof, in accordance with the level of development of the countries concerned, both overall and in individual sectors and subsectors.

This flexibility offered to developing countries in the above provision can be interpreted to mean that developing countries are expected to cover less sectors and that do not have to eliminate as many discriminatory measures.¹²⁵

2.6 Developing countries and the multilateral liberalisation of trade in services

In the 1980s prior to the development of the GATS, some developing countries had begun to undertake domestic regulatory reforms to liberalise their services sectors.¹²⁶ This was based on the realisation that an inefficient services industry was not conducive to economic development, and that "...liberalising access to service markets was a potentially low cost and effective method of improving the quality and efficiency of domestic service sectors."¹²⁷ It would be these very same countries such as Brazil and India that would be strongly opposed to the development of a multilateral framework for the liberalisation of trade in services.¹²⁸

The development of a multilateral framework for the liberalisation of trade in services first emerged in the Uruguay Round. The development of the GATS was gravely opposed by developing countries led by Brazil and India, they argued that services trade was primarily a matter of domestic regulatory conduct and such should be left out of the ambit of the multilateral trade

¹²⁵ Cronje (n 125 above) 10

¹²⁶ B Hoekman, 'Developing Countries and the Uruguay Round Negotiations on Services' (1993) Policy Research Working Paper 1220 *The World Bank* 2

¹²⁷ as above

¹²⁸ as above

regime.¹²⁹ The development of a multilateral framework for the liberalisation of services trade was also viewed to be hostile to the development prospects of developing countries, as they did not have a comparative advantage in the production or exchange of services.¹³⁰

Very few African countries have been open to negotiating market access and liberalising trade in services, which is very ironic considering that this is one region in the developing world where a focus on services could lower trade costs, lead to efficiency in extractive and agricultural industries and bring about comparative advantage labour- intensive services.¹³¹

The reluctance of developing countries to liberalise services trade is motivated by the fact that they do not believe that such liberalisation would bring about any meaningful gains as they do not have the comparative advantage in service trade unlike developed countries.¹³² Policy formulation in services is generally given lower priority in many African economies, because of this belief that they do not have a comparative advantage in services.¹³³

Due to their reluctant participation in the trade in services negotiations during the Uruguay Round the initial sets of commitments arising from this round of negotiations liberalisation obligations were imposed on developing countries.¹³⁴ During this round developing countries only made market access commitments which were in fact minimal and just bound the status quo, in general committed substantially less than developed countries.¹³⁵ A 2004 summary of Liberalisation Commitments by Country Groups, showed that Least Developed Countries committed on average committed to liberalising 20 subsectors, while developing countries committed to liberalising 54 subsectors this pales in comparison to the commitments in a 106 subsectors made by transitioning economies and commitments in a 108 sectors made by developed countries¹³⁶ The current impasse of the services negotiations in the Doha Round has led to developing countries entering into preferential agreements for the liberalisation of services, an example of such agreements are North-

¹²⁹ P Sauvé, 'Developing Countries and the GATS 2000 Round' (2000) 34(2) *Journal of World Trade* 85

¹³⁰ as above

¹³¹ Sauvé and Ward (n 127 above) 2-3

¹³² J Hodge and HK Nordas, 'Liberalisation of Trade in Producer Services - the Impact on Developing Countries' 7 (1999) *Chr. Michelsen Institute* 1

¹³³ Sauvé and Ward (n 127 above) 7

¹³⁴ Marchetti (n 1 above) 89

¹³⁵ as above

¹³⁶ Marchetti (n 1 above) 91

South agreements like the European Union(EU) Economic Partnership Agreements(EPAs).¹³⁷ The effect of these North-South agreements on services liberalisation is that developing countries have been forced to make GATS plus commitments, which has a direct impact on their policy development space.¹³⁸

In order to fully enjoy the gains to be made from liberalisation, developing countries will have to make meaning full commitments in the upcoming rounds of negotiations.

Developing countries have underestimated the role that trade in services could play in boosting their total trade, mainly due to the great importance is given to mineral and agricultural commodities.¹³⁹ A number of developing countries are fast becoming examples of how liberalization of trade in services can help countries diversify their economies and expand their services sectors. For example, Kenya has been able to diversify its financial services hubs in Kenya, the growth of air transport in Ethiopia, and Mauritius has seen a boost of health and business tourism.¹⁴⁰

2.7 Conclusion

The importance of services to economic growth cannot be overstated. There is a need for African countries to liberalise trade in services as such liberalisation can bring about benefits not only by boosting efficiency in the manufacturing of goods but such liberalisation will also allow them to diversify their trade. The GATS framework allows for the conclusion of PTAs for the liberalisation of trade in services, provided that such agreements meet the conditions set out in Article V (1) of the GATS.

SADC member states have concluded such a PTA for the liberalisation of services. The following chapter will focus on the SADC Protocol on Trade in Services, it will consider if it meets the conditions set out in Article V (1) of the GATS. It will also look at the core provisions to determine if this Protocol will assist SADC members in creating an integrated services market.

¹³⁷ Catteneo (n 45 above) 15

¹³⁸ as above

¹³⁹C Beverelli, 'What Impact Does Liberalising Trade in Services Have on Manufacturing' on <https://www.weforum.org/agenda/2015/10/what-impact-does-liberalising-trade-in-services-have-on-manufacturing/> (accessed 11 July 2017)

¹⁴⁰ Balchin (n 71 above) 8

Chapter 3

ANALYSIS OF SADC PROTOCOL ON TRADE IN SERVICES

3.1 Introduction

It will then analyse the SADC Protocol on Trade in Services, outlining the crucial provisions of the Protocol. A brief analysis of whether the Protocol meets the requirements set out in Article V of the GATS will also be undertaken. It will also look at all the service related protocols that already exist in region and what effect these if any will have on the operation of the Protocol on Trade in Services.

3.2 Historical overview of the Protocol on Trade in Services in SADC

The Southern African Development Community (SADC) was established in 1992 through the adoption of the SADC Treaty. The main objective of SADC is to achieve economic development and economic growth through regional integration. SADC is currently made up of sixteen-member states these are; Angola, Botswana, Democratic Republic of Congo, the Union of the Comoros, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe. Nine of SADC's sixteen-member states are Least Developed Countries.

Article 22 of the SADC Treaty allows for the conclusion of protocols in each area of cooperation. In 1996 the SADC member states concluded a Protocol on Trade, which entered into force in the year 2000. Article 23(1) of the Protocol on Trade, recognises the significant role of trade in services plays in the development of the economies of SADC member states. Article 23 (2) of the Protocol on Trade states that "Member states shall adopt policies and implement measures in accordance with their obligations in terms of the WTO's General Agreement on Trade in Services (GATS), with a view to liberalising their services sector within the Community." Paragraph 3.2.2.2 of the Regional Indicative Strategic Development Plan, recalls the objectives of SADC which are "[elimination of] obstacles to the free movement of capital, labour and goods and services and the improvement of the region's economic management and performance through regional cooperation

with the ultimate goal of eradicating poverty.”¹⁴¹ A draft annex to the SADC Protocol on Trade was developed in 2002, SADC member states eventually decided to conclude an independent protocol covering trade in services.

In August of 2012 SADC member states concluded the Protocol on Trade in Services, it is yet to enter into force. Prior to the conclusion of the Protocol on Trade in Services, member states took the decision in November 2011 to commence with negotiations for the liberalisation of six identified priority sectors these being; communication services, construction services, energy-related services, financial services, tourism services, and transport services.¹⁴² The first Round of Negotiations on liberalisation commitments in the six priority sectors commenced in April 2012. It was expected that the round would be concluded in 2015, three years after the negotiations commenced, the negotiations on the six identified priority services sectors are yet to be completed.¹⁴³ These negotiations are expected to result in market access commitments that will provide a predictable legal environment for the trade and investment within the services sector within the region.¹⁴⁴

At the same time member states are undertaking the negotiations in construction and energy-related services; and annexes on financial, postal and courier, and transport services due for conclusion by March 2018.¹⁴⁵

The Protocol on Trade in Services does not mandate the liberalisation of trade in services, rather it creates a legal framework that will allow for such liberalisation.¹⁴⁶

¹⁴¹ (n 25 above)

¹⁴² as above

¹⁴³ as above

¹⁴⁴ as above

¹⁴⁵ <https://tis.sadc.int/english/tis/documents-and-resources/records-of-meetings/forth-coming-tnf-services/> (accessed 30 July 2017)

¹⁴⁶ J Hawkins, ‘Assessment of Linkages Between the SADC Protocol on Trade in Services and Other SADC Protocols and Legal Instruments’ (2012) *Southern African Development Secretariat* 8

3.3 State of the services in SADC

SADC's service market is characterised by "moderate investment, comparatively high costs and limited access to services by the general public."¹⁴⁷

The services markets of SADC member states are very different, this is due to the fact that their economies are at different stages of development.¹⁴⁸ The total trade in services tends to vary vastly across the region with services accounting for less than 10% of total trade in Lesotho certain countries and over 40% of total trade for Mauritius.¹⁴⁹ Most SADC countries are net importers of commercial services with the exception of countries with significant tourist services sector such as Mauritius, Seychelles and Tanzania. Whilst South Africa is the largest exporter of services in the region.¹⁵⁰

Key service sectors such as financial, communication and transport services remain underdeveloped, overpriced and uncompetitive despite their importance for the growth and development of region's economies.¹⁵¹ This underdevelopment can be attributed largely to "the small size and modest income levels of most SADC economies".¹⁵² The size of SADC economies is not the only reason for the underperformance and underdevelopment of the region's service sector rather the weak competition and inappropriate regulation also contribute to the state of services.¹⁵³

¹⁴⁷ <http://www.sadc.in/themes/economic-development/trade-services/> (accessed 29 June 2017)

¹⁴⁸ Stern, Truen and Ramkolowan (n 2 above) 11

¹⁴⁹ as above

¹⁵⁰ Stern, Truen and Ramkolowan (n 2 above) 13

¹⁵¹ Stern, Truen and Ramkolowan (n 2 above) 18

¹⁵² as above

¹⁵³ Stern, Truen and Ramkolowan (n 2 above) 22

3.4 GATS Commitments of SADC Member States

All the SADC members are members of the WTO with the Seychelles being the latest member to accede to the WTO in 2015. All these countries have made commitments under the GATS to varying degrees. Mozambique and Madagascar have made the least number of commitment under the GATS, with both countries only committing to one service sector each.¹⁵⁴ Lesotho has made commitments in 10 services sectors.¹⁵⁵ Seychelles has made commitments in 11 services sectors.¹⁵⁶ South Africa has made commitments in 9 services sectors.¹⁵⁷ These three countries are the only countries out of the fifteen SADC member states that have made commitments in all the six priority sectors identified by the Protocol on Trade in Services. Madagascar is the only member state to have not made any commitments in the six priority sectors identified by SADC members. With regards to core infrastructural services sectors; seven members have made commitments in communication services, eight have made commitments in financial services, and only three members have made commitments in transport services.

¹⁵⁴ Mozambique's schedule of commitments GATS/SC/58 and Madagascar's schedule of commitments GATS/SC/51 available at https://www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm (accessed 9 August 2017)

¹⁵⁵GATS/SC/153 https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=132997&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True (accessed 9 August 2017)

¹⁵⁶GATS/SC/114 https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=4755&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True (accessed 9 August 2017)

¹⁵⁷GATS/SC/78 https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=10361,29477,20075,10347&CurrentCatalogueIdIndex=3&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True (accessed 9 August 2017)

3.5 The SADC Protocol on Trade in Services

3.5.1 Objectives

Article 2 sets out the objectives of the SADC Protocol on Trade in Services, it aims to;

1. progressively liberalise intra-regional trade in services on basis of equity, balance and mutual benefit with the objective of achieving the elimination of substantially all discrimination between the State Parties and liberal trading framework for trade in services with the view of creating a single market for trade in services;
2. promote sustainable economic growth and development, there raising the standard and quality of life of the people of Southern Africa, supporting the socially disadvantaged and alleviating poverty through regional integration in the area of services;
3. enhance economic development, diversification, local, regional, and foreign investment in services economies of the Region;
4. ensure consistency between liberalisation of trade in services and the various SADC Protocols on specific services sectors;
5. pursue services liberalisation, while preserving the right to regulate and to introduce new regulations; and
6. enhance the capacity and competitiveness of the services sectors of the State Parties.

The primary objective of the Protocol is to create an integrated services market in the region, that is competitive and enhances economic development. This primary objective will be reached through the progressive liberalisation of services trade. Such liberalisation will be undertaken in a manner that takes into consideration the need for member states to regulate their individual services sectors. It can be argued that the wording of this article suggests that member states will probably reach the objective of liberalisation in different time frames.¹⁵⁸

3.5.2 Scope of application

Article 3 of the Protocol on Trade in Services sets out the scope of application of the Protocol. It states that the protocol shall apply to all measures by member states that affect trade in services.

¹⁵⁸ Cronje (n 47 above) 7

The Protocol will not apply to those services that are supplied in the exercise of governmental authority.¹⁵⁹ In terms of the Article 3 (2) trade in services means the supply of a service:

1. from the territory of one-member states into the territory of another member states;¹⁶⁰
2. in the territory of a member state to the service consumer of another member;¹⁶¹
3. by a service supplier of a member state through commercial presence in the territory of another member state¹⁶²; and
4. by a service supply of a member state through the presence of natural persons in the territory of another member state.¹⁶³

The meaning of trade in services provided for in the Protocol on Trade in Services is the same as the meaning provided in the GATS.

The Protocol applies to measures that affect the supply of services whether they be laws, regulations, rules and procedures, but it does not apply to measures that do not directly affect the supply of services such as those that are within the normal course of carrying a business.¹⁶⁴

3.5.3 Progressive trade liberalisation

Article 16 of the Protocol on Trade in Services sets out the meaning of progressive trade liberalisation. It provides the following;

1. State Parties shall enter into successive rounds of negotiations three after the completion of the previous one with a view to achieving an integrated regional services market for services. Such negotiations shall be in conformity with Article V of the GATS and aim at promoting economic growth and development for all member states.
2. State Parties shall negotiate the liberalisation of the six priority services sectors (communication, construction, energy-related, financial, tourism and transport services).

¹⁵⁹Protocol on Trade in Services (n 27 above) Article 3(5)(a)

¹⁶⁰Protocol on Trade in Services (n 27 above) Article 3(2)(a)

¹⁶¹ Protocol on Trade in Services (n 27 above) Article 3(2)(b)

¹⁶² Protocol on Trade in Services (n 27 above) Article 3(2)(c)

¹⁶³ Protocol on Trade in Services (n 27 above) Article 3 (2) (d)

¹⁶⁴ Cronje (n 47 above) 12

Subsequent negotiations shall cover all services sectors subject to Article 3. These negotiations shall also include negotiations under Article 4.

3. The first round of negotiations shall be concluded no later than three (3) years after the commencement of such negotiations.
4. Negotiations shall be in conformity with the principle of asymmetry, reflecting individual State Parties' disadvantages by reason of size, structure, vulnerability and level of development of their economy. During the negotiations, State Parties shall not introduce new or more discriminatory barriers to trade in services. For each round of negotiations, the TNF-Services shall adopt negotiating guidelines.
5. State Parties' lists of commitments, upon adoption, shall be an integral part of this Protocol. Individual State Parties, which are disadvantaged by reason of size, structure, vulnerability and level of development of their economy shall benefit from flexibility for the implementation of the commitments negotiated under each round of negotiations.

The concept of progressive liberalisation of services trade is a commitment to liberalise trade in services through successive rounds of negotiations. It takes into consideration the size and state of the members economies and where necessary those members whose economies are disadvantaged due to their size will be extended flexibilities. This suggests that disadvantaged members will be given more time to implement the commitments they have negotiated under the Protocol. 13 of SADC's members are least developed countries, so such countries will benefit from the flexibility extended in Article 16(5) of the Protocol.

3.5.4 Movement of natural persons

Article 17 of the Protocol on Trade in Services deals with the Temporary Movement of Natural Persons. The article states that the protocol does not prohibit members from applying their domestic laws and regulations regarding the entry, stay, work and establishment of natural persons.¹⁶⁵ This is provided that these measures are not applied in a manner that impairs the benefits of other members under the protocol.¹⁶⁶ This article also states that the protocol will not apply to measures affecting "natural persons seeking or taking employment in the labour market

¹⁶⁵Protocol on Trade in Services (n 27 above) Article 17(1)

¹⁶⁶ as above

of a State Party”.¹⁶⁷ Regulations affect natural persons of one member state seeking employment in the territory of another member are left in the ambit of each individual state. The fact that the Protocol on Trade in Services does not contain any specific provisions on the movement of natural persons has been heavily criticised as one of the flaws of the Protocol. Specific provisions on the movement of natural persons are essential for the effective operation of the Protocol because with the exception of services supplied from the territory of one member state into the territory of another member state, services supplied through the other modes of supply require the movement of natural persons in one way or another.¹⁶⁸

It could be argued that the Protocol on Trade in Services does not contain any specific provisions the movement apart from those mentioned above because the Draft Protocol on the Facilitation of Movement of Persons (Draft FMP Protocol) is meant to regulate the free movement of natural and as such drafters of the Protocol omitted specific provisions on the movement of natural persons.

The Draft FMP Protocol unlike the Protocol on Trade in Services provides for the right of establishment¹⁶⁹ The right of establishment “encompasses permission for the exercise of economic activity and profession either as an employee or self-employed person; and establishing and managing a profession, trade, business or calling.”¹⁷⁰ In essence the right of establishment is essential in supporting Mode 4 services; which are services that will be supplied through the presence of natural persons in another member’s territory.

3.5.5 Mutual recognition

The Protocol on Trade in Service states that the no later than two years of the Protocol entering into force, the TNF-Services shall begin negotiating an agreement providing for the mutual recognition of requirements, qualifications, licences and other regulations.¹⁷¹

¹⁶⁷ as above

¹⁶⁸ Hawkins (n 158 above) 16

¹⁶⁹ Hawkins (n 158 above) 14

¹⁷⁰ Hawkins (n 158 above) 16

¹⁷¹ Protocol on Trade in Services (n 27 above) Article 7(1)

Mutual recognition and regulatory cooperation amongst members of a PTA in trade in services is necessary as barriers to trade in services are generally in the form of domestic regulations such as technical standards, licensing and requirements relating to qualifications.¹⁷²

The Protocol only contains a commitment to negotiate an agreement on mutual recognition, rather than providing rules for the mutual recognition and regulatory cooperation. Cronje argues that in order for PTAs on the liberalisations of services to be operational member states are required to “Simplify administrative requirements and procedures; recognise each other’s systems, practices and requirements”¹⁷³

This suggest that rules for mutual recognition and regulatory cooperation must be in place at the time that an agreement enters into force, as they are essential for the effective operation of the Protocol.

3.5.6 General Obligations and Specific Commitments

Like the GATS the Protocol on Trade in Services also contains general obligations and specific commitments. General obligations provisions apply unconditionally across the board to all member states and specific commitments provisions may apply if a member state chooses make commitments in a particular sector.

General Obligations

Most Favoured Nation

Article 4 of the Protocol on Trade in Services provides that State Parties must adhere to the MFN principle. It requires that member states immediately and unconditionally accord to services and services suppliers of another member state treatment no less favourable than that the accords to like services and services suppliers of any other State Party or third country.

Like the GATS the Protocol on Trade in Services also has exceptions to the MFN rule. Article 4 (2) permits members to enter into preferential agreements with other members, such agreements must be in line with the objectives of the Protocol. This is provided that other member states are

¹⁷² Mattoo and Fink (n 20 above) 9

¹⁷³ as above

afforded the opportunity to negotiate the preferences granted therein on a reciprocal basis.¹⁷⁴ Members are also permitted to enter into preferential agreements with third parties provided that such agreements do not impede or frustrate the object of the Protocol on Trade in Services, and that other member states are granted reasonable opportunity to negotiate on the preference granted therein on a reciprocal basis.¹⁷⁵ The Protocol on Trade in Services also member states to maintain any preferential agreements that they entered into prior to the being adopted, this is provided that other state parties are afforded the opportunity to negotiate on the preferences granted in that preferential agreement.¹⁷⁶ The conditions must be met by that the preferential agreements contemplated in Article 4 of the Protocol vary in stringency.¹⁷⁷ Preferential agreements that were entered into with third parties prior to the adopted of the Protocol on Trade in Services are subject to the least stringent set of conditions.¹⁷⁸ Whilst the conditions pertaining to new preferential agreements entered between third parties and member states are the most stringent.¹⁷⁹

Currently a number of SADC members are parties to or are negotiating preferences under other preferential trade agreements for the liberalisation of services trade. For example, Tanzania has negotiated services preference under the EAC, this preferential agreement was entered into prior to the adoption of the Protocol on Trade in Services. According to Article 4(4) of the Protocol on Trade in Services, Tanzania would have to afford other state parties the opportunity to negotiate on the preferences it granted under the EAC services negotiations. that preferential agreement.

Hawkins argues that permitting member states to enter into preferential agreements amongst themselves could potentially fragment the SADC services market further, going against its objective of create one integrated services market in the region.¹⁸⁰ In the same breath, these preferential agreements amongst state parties could be used as a tool for progressive liberalisation of services sectors.¹⁸¹

¹⁷⁴ Protocol on Trade in Services (n 27 above) Article 4(2)

¹⁷⁵ Protocol on Trade in Services (n 27 above) Article 4(3)

¹⁷⁶ Protocol on Trade in Services (n 27 above) Article 4(4)

¹⁷⁷ Hawkins (n 158 above) 9

¹⁷⁸ as above

¹⁷⁹ as above

¹⁸⁰ as above

¹⁸¹ as above

Apart from entering into preferential agreements the Protocol on Trade in Services also permits state parties to maintain measures inconsistent with the MFN principle, provided that these measures are included in the MFN exemption list which is annexed to the document.¹⁸²

Transparency

Article 8 of the Protocol on Trade in Services sets out various obligations that state parties must meet with regards to the publication of measures affecting trade in services. Members are expected to promptly publish any law, regulations and any other measure relating to measures covered by the Protocol, they are also expected to publish any agreements that they are party to that affect trade in services.¹⁸³ According to Article 8(3)(a) provides that State Parties have one year after the Protocol has entered into force to create entry points for the purposes of providing information relevant to matters covered by the Protocol.¹⁸⁴ Disadvantaged economies are given flexibility in terms of the one-year time limit.¹⁸⁵ Member states are also obliged to endeavour to offer other State parties the opportunity to comment on any measure of general application that they wish to adopt into law.¹⁸⁶

Specific commitments

Specific commitments are the commitments that state parties undertake when they liberalise a particular services sector; like in the GATS these specific commitments are market access and national treatment.

Market Access

Article 14 of the Protocol on Trade in Services lays out the rules relating to market access. According to this provision in those services sectors including modes of supply where specific commitments are made state parties are prohibited to place numerical restrictions on the number of services suppliers¹⁸⁷, the total value of service transactions¹⁸⁸, the total number of service

¹⁸² Protocol on Trade in Services (n 27 above) Article 4(5)

¹⁸³ Protocol on Trade in Services (n 27 above) Article 8(1)

¹⁸⁴ Protocol on Trade in Services (n 27 above) Article 8(3)(a)

¹⁸⁵ Protocol on Trade in Services (n 27 above) Article 8(3)(b)

¹⁸⁶ Protocol on Trade in Services (n 27 above) Article 9 (1)

¹⁸⁷ Protocol on Trade in Services (n 27 above) Article 14(a)

¹⁸⁸ Protocol on Trade in Services (n 27 above) Article 14 (b)

operations or on the total quantity of service output¹⁸⁹, limitations on number of persons that maybe employed¹⁹⁰, restrictions or requirements of a specific type of legal entity through which services can be supplied¹⁹¹ and limitations on the participation of foreign capital in the sup[ply of a service.¹⁹²

The market access prohibitions laid out in Article 14 of the Protocol on Trade in Services are similar to those laid out in Article XVI (2) of the GATS.

National Treatment

According to Article 15 of the Protocol on Trade in Services member states are required to grant to all services and service suppliers of another state party in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and services suppliers.¹⁹³ A member state would be in contravention the national treatment rule if the treatment given to another member state “modifies the conditions of competition in favour of the services and services suppliers of a state party compared to the like services and services suppliers of another state party.”¹⁹⁴ Members are permitted to maintain conditions and qualifications to national treatment provided that these conditions and qualifications are set out in their list of commitments.¹⁹⁵

3.6 Guidelines for the first round of negotiations.

Article 16(4) of the Protocol on Trade in Services states that for each round of negotiations, the TNF-Services shall adopt negotiating guidelines. In November of 2009 the TFN-Services adopted the negotiation guidelines for the first round of SADC Trade in Services negotiations.¹⁹⁶ The guidelines set out the objectives and principles of the negotiations, the modalities and procedures for the negotiations and how commitments will be scheduled.

¹⁸⁹ Protocol on Trade in Services (n 27 above) Article 14(c)

¹⁹⁰ Protocol on Trade in Services (n 27 above) Article 14 (d)

¹⁹¹ Protocol on Trade in Services (n 27 above) Article 14 (e)

¹⁹² Protocol on Trade in Services (n 27 above) Article 14 (f)

¹⁹³ Protocol on Trade in Services (n 27 above) Article 15 (1)

¹⁹⁴ Protocol on Trade in Services (n 27 above) Article 15(3)

¹⁹⁵ Protocol on Trade in Services (n 27 above) Article 15 (4)

¹⁹⁶ Negotiating and Scheduling Guidelines for the 1st Round of SADC Trade in Services Negotiations, adopted by the TNF-Services on 11 November 2009, Approved by the CMT on 12 February 2011.

The guidelines reiterate that negotiations will be done the basis of progressive liberalisation, while giving due respect to the member states' national policy objectives.¹⁹⁷ The negotiating guidelines also state that the first round of negotiations will focus solely on the six priority sectors identified in Article 16 (2), and that those members who wish to make commitments beyond the six priority sectors may do so.¹⁹⁸ It states that “subsequent negotiations will include all services sectors covered by the SADC Protocol on Trade in Services”, it is not clear which other services sectors are referred to here as the Protocol on Trade in Services only identifies the six priority services sectors.

According to the guidelines the starting point for negotiations of specific commitments shall be based on the member's existing GATS schedules, in the case where a SADC member state is not a member of the WTO such a member state will begin negotiations on a blank schedule of commitments.¹⁹⁹ The Comoros Islands are the only SADC member state that is not a member of the WTO, they are currently in the process of acceding to the WTO.²⁰⁰ So it will begin on a blank schedule of commitments. SADC members have made varying GATS commitments. A country such as Madagascar has not made any commitments in the six priority sectors, while countries such as the Seychelles, Lesotho and South Africa have made commitments in all six priority sectors. In essence a country like Madagascar that has not made any commitments in the six priority sectors will also be starting negotiations on blank schedule of commitments.

SADC members will create their schedules of commitments using the positive list approach.²⁰¹ The positive list approach requires that sectors in which commitments are to be undertaken are selected individually and member specify which sub-sectors are covered.²⁰² The positive list approach to scheduling is viewed as being less efficient in terms of its effect on liberalisation, the

¹⁹⁷ (n 203 above) Paragraph 3

¹⁹⁸ (n 203 above) Paragraph 5

¹⁹⁹ (n 203 above) Paragraph 8

²⁰⁰ https://www.wto.org/english/thewto_e/acc_e/al_comoros_e.htm (accessed 17 August 2017)

²⁰¹ S Stephenson, “Overview of Various Approaches to Services Liberalization Training Workshop on Trade in Services Negotiations for AU-CFTA Negotiators” August 2015

http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150504.pdf (accessed 30 August 2017)

²⁰² R Adlung and H Mamdouh ‘How to Design Trade Agreements in Services: ‘How to Design Trade Agreements in Services: Top Down or Bottom Up?’ (2013) Staff Working Paper ERSD-2013-08 *World Trade Organisation* 1

negative list is preferred as it offers greater transparency and is seen as having a more positive effect on liberalisation.²⁰³

The negotiating guidelines state that negotiations shall be “in conformity with the principle of asymmetry, reflecting individual State Party’s disadvantages by reason of size, structure, vulnerability and level of development of their economy. Disadvantaged State Parties shall be granted the flexibility to open fewer sectors and liberalise fewer types of transactions .”²⁰⁴

3.7 The SADC Protocol on Trade in Services and Article V of the GATS

As discussed in the preceding chapters in order for a preferential agreement on trade in services to be WTO compliant it must meet the conditions set out in Article V (1) of the GATS. Article 16 (1) of the Protocol on Trade in Services states that SADC’s negotiations on the liberalisation of services trade will be in conformity with Article V of the GATS.

3.7.1 Substantial sectoral coverage

The first condition set out in Article V of the GATS states that all preferential agreements for the liberalisation of services must provide for substantial sectoral coverage. Such substantial sectoral coverage must be understood in terms of number of sectors, volume of trade affected and modes of supply. This condition prohibits members to such agreements from picking and choosing among services sectors in a haphazard fashion that might not bring about any meaningful liberalisation.

The enquiry on whether or not an agreement has substantial sectoral coverage is both qualitative and quantitative. The qualitative enquiry looks at whether or not the agreement has covered crucial sectors such as communication, transportation and financial services, while the quantitative element looks at the number of sectors covered by the agreement.

When applying the qualitative test to substantial sectoral coverage; the six priority sectors identified by the SADC member states include core infrastructural services sectors that have been argued to be essential intermediate products. The six priority services sectors include,

²⁰³ Adlung and Mamdouh (n 112 above) 7

²⁰⁴ (n 203 above) Paragraph 15

communication, transportation and financial services. With regards to the quantitative enquiry the Protocol on Trade in Services covers six priority services out of the twelve sectors identified by the GATS. If one extends the argument made by JB Cronje that this condition requires that coverage of not all the sectors but requires coverage of more than some the sectors, one could argue that an agreement such as the Protocol on Trade in Services does not meet the quantitative enquiry on substantial sectoral coverage.

As mentioned above substantial sectoral coverage is to be understood in terms of modes of supply covered by a preferential agreement for the liberalisation of services trade. Article 3 of the Protocol on Trade in Services on the scope of application states that services will be supplied through the four modes of supply.²⁰⁵ While the Protocol on Trade in Services states that services will be supplied through the four modes of supply, it does not contain provisions for the right of establishment nor does it contain any specific provisions on the movement of natural persons.²⁰⁶ This could potentially affect the supply of services through Mode 3²⁰⁷ (the supply of a service by a service supplier of a member state through commercial presence in the territory of another member state) and mode 4²⁰⁸ (the supply of a service by a service supplier of a member state through the presence of Natural Persons in the territory of another member state.)

Article 16(2) states that state parties shall negotiate on the six priority services sectors and that “Subsequent negotiations shall cover all services sectors...”. A preferential formed under Article V off the GATS must meet the substantial sectoral coverage at the outset.²⁰⁹ This condition cannot be phased in; the Protocol on Trade in Services would have had to have met the substantial sectoral coverage requirement at the outset. While the requirement must be met at the outset it does not mean that members are not permitted to implement specific commitments over a specified time period.²¹⁰ In the case of SADC members could have identified more services sectors than the six priorities to ensure that the Protocol on Trade in Services met the substantial sectoral coverage

²⁰⁵ Protocol on Trade in Services (n 27 above) Article 3(2)

²⁰⁶ Stern, Truen and Ramkolowan (n 2 above) 28

²⁰⁷ Protocol on Trade in Services (n 27 above) Article 3(2)(c)

²⁰⁸ Protocol on Trade in Services (n 27 above) Article 3(2)(d)

²⁰⁹ Cronje (n 125 above) 10

²¹⁰ as above

requirement, they could have gone on to negotiate specific commitments in the sectors over a specified time.

3.7.2 Elimination of discrimination

GATS Article V (I)(b) states that PTAs on trade in services must ensure the absence or elimination of substantially all discrimination, such elimination must happen within a reasonable time. The agreement must eliminate discrimination the sense of Article XVII (National Treatment) so it does not extend to discrimination in terms of Article XVI (Market Access).²¹¹ The agreement must also prohibit of new or more discriminatory measures. Such elimination must be done either at time of the entry into force of the agreement or on the basis of a reasonable time-frame.

Stern, Truen and Ramkolowan argue that in practice there are very few legal barriers to market access and national treatment in SADC's services sectors as they are generally unregulated, with the exception of core infrastructural services; financial services, transportation and communications services sectors.²¹² Nonetheless the Protocol on Trade in Service must ensure the absence or the substantial elimination of all discrimination.

Cronje argues that Article V(1)(b) requires a standstill on the introduction of new discriminatory measures and the removal of existing measures by the time the agreement enters into force or within reasonable time.²¹³ He argues that a standstill alone would not be sufficient for the elimination of substantially all discrimination, as there might already be a substantial number of discriminatory measures already in place.²¹⁴

Article 16(4) of the Protocol on Services states that during the negotiations, member states are not permitted to introduce new or more discriminatory barriers to trade in services. This provision is a standstill provision as per Cronje's argument it prohibits members from introducing new or more discriminatory measures.

²¹¹ GATS (n 15 above) Article V(I)(b)(i)

²¹² (n 2 above) 26

²¹³ Cronje (n 125 above) 7

²¹⁴ as above

The Protocol on Trade in Services does not contain provisions that speak directly to the removal of already existing measures.

Article V(1)(b) speaks to elimination of discriminate in terms of national treatment. Article 15(4) of the Protocol on Trade in Services states that “State Parties may maintain conditions and qualifications to national treatment provided that these conditions and qualifications are set out in their lists of commitments.”²¹⁵ Under the GATS the elimination of discrimination does not extend to measure permitted under articles XI (International Monetary Fund Provisions on Payments and Transfers), XII (Balance of Payments), XIV (General Exceptions related to health, safety, taxation and public order) and XIV bis (National Security) of the GATS. Unlike the GATS the Protocol on Trade in Services does not list the areas in which conditions and qualifications to national treatment may be maintained. The Protocol does not eliminate all national treatment restrictions in the covered sectors as it permits members to maintain conditions and qualifications to national treatment as long as these conditions and qualifications are set out in their lists of commitments.

The Protocol on Trade in Services provides for a standstill on the introduction of new discriminatory measures but it does not make provisions for the elimination of discriminatory measures already in place, rather it permits members to maintain conditions and qualifications to national treatment, nor does it make provisions for members to eliminate discriminatory measures within a particular time frame.

This could have an adverse effect on the process of liberalisation in the region as barriers to trade in services are usually in the form of discriminatory regulations. While it is important for members to maintain policy space in which they can enact measures in that will allow them to reach their national policy objectives, there is a need to ensure that these regulations are not a way to create more barriers to entry.

²¹⁵ Protocol on Trade in Services (n 27 above) Article 15(4)

3.7.3 The Protocol on trade and services and Article V(3)(a) of the GATS

Article V(3)(a) of the GATS provides flexibilities for developing countries regarding the conditions set out in Article V (1) of the GATS. Since the parties to the Protocol on Trade and Services are developing countries, when determining whether or not the protocol meets the conditions set out in Article V (1) cognisance must be paid to flexibilities granted in Article V(3)(a) of the GATS.

The flexibility offered to developing countries in the above provision can be interpreted to mean that developing countries are expected to cover less sectors and that they can eliminate less discriminatory measures.²¹⁶ If one applies the above interpretation to the Protocol on Trade in Services, one can argue that the protocol meets the condition of substantial sectoral coverage but it does not meet the condition of the elimination of substantially all discrimination.

The Protocol on Trade in Services does not the elimination of substantially all discrimination condition as the flexibility offered in Article V(3)(a) allows developing countries to eliminate less discriminatory measures. As discussed above the Protocol on Trade and Services does not contain any provisions for the elimination of discriminatory measures, rather it only prohibits members from putting new or more discriminatory measures in place. So even when one evaluates whether or not the Protocol on Trade and Services eliminates substantially all discrimination in terms of Article V(3)(a), the findings are that it does not meet this condition.

3.8 Protocol on Trade in Services and other SADC services protocols

One of objectives of the Protocol on Trade in Services is to ensure consistency between the liberalisation of trade in services and the various protocols in specific services sectors.²¹⁷ The Preamble to the Protocol also recognises to the need to have consistency between all of SADC's trade in services protocols and the Protocol itself.

There are currently a number of protocols relating to trade in services that have been concluded, not all of these protocols have entered into force. These protocols will influence the type and scope of commitments that SADC members make under the Protocol on Trade in Services.²¹⁸

²¹⁶ Cronje (n 125 above) 10

²¹⁷ Protocol on Trade in Services (n 27 above) Article 2(3)

²¹⁸ Cronje (n 46 above) 9

Some of the protocols that have been concluded deal with the some of the priority services sectors identified by the Protocol on Trade in Services. These are the Protocol on Finance and Investment²¹⁹; the Protocol on Transport, Communications and Meteorology²²⁰; and the Protocol on Energy²²¹.

The Protocol on Trade in Services is focused on liberalising trade in services while the sector specific protocols contain sector specific provisions on cooperation.²²² For example the Protocol on Finance and Investment does not contain any provisions on specific commitments such as market access and national treatment, nor does it contain the obligation to liberalise financial services but it contains obligations that are aimed at achieving overall harmonisation of the SADC's member states financial services sector.²²³

Once the Protocol on Trade in Services enters into force it will have to be implemented in a manner that does not conflict with provisions of the protocols that have already been adopted by SADC.

3.9 Conclusion

SADC's services market is uncompetitive and inefficient with most of its members being importers of services. The community recognises that there are substantial gains to be made from the liberalisation of trade in services in the region. The Protocol on Trade in Services is meant to assist SADC in reaching its goal of a single integrated services market that will lead to a more competitive and efficient services sector. It does not seem as though that the Protocol will assist SADC in reaching its objectives, it lacks ambition not only in terms of the number of sectors it aims to liberalise but it does not set any rules for the elimination of discriminatory measures that affect the trade of services. The agreement does not mandate the liberalisation of trade in services nor does it provide any sector specific provisions. It does not provide for the movement of natural person, which could have an adverse effect on the supply of Mode 4 services. The fact that the Protocol also permits members to enter into bilateral agreements amongst themselves could have the effect of further fragmenting the market in a region that is already facing a number of

²¹⁹ This protocol entered into force on the 16th of April 2010

²²⁰ This protocol entered into force on the 6th of July 1998

²²¹ This protocol entered into force on the 17th of April 1998

²²² Hawkins (n 158 above) 13

²²³ Hawkins (n 158 above) 21

challenges in the trade of services. In order for the Protocol on Trade in Services to be successful members may have to reconsider the agreement in its current form.

The following chapter will consider the challenges facing the Protocol on Trade in Services and where possible it will provide recommendations on how such challenges will be overcome.

Chapter 4

CHALLENGES FACING THE PROTOCOL ON TRADE IN SERVICES UNDER SADC FRAMEWORK

4.1 Introduction

This chapter will set out to summarise all the challenges that arise from the Protocol on Trade in Services and how these challenges will affect the successful operation of the Protocol when it enters into force.

4.2 Challenges facing the Protocol on Trade in Services

The Protocol on Trade in Services is facing a number of challenges that will prevent it from reaching its objectives. Some of these challenges emanate from the Protocol itself while some are as a result of the state of economic integration in the region.

4.2.1 Commitment to Progressive Liberalisation

Under the Protocol on Trade in Services, SADC members commit to the progressive liberalisation of trade in services, meaning that full liberalisation will be reached after a series of rounds of negotiations. The Protocol only states that a new round will begin three years after the completion of the previous round and that the first round will come to an end three year after the commencement of the first round of negotiations.

This obligation of progressive liberalisation is very open ended, and does not mandate liberalisation of trade in services. The Protocol only provides a legal framework for such liberalisation.²²⁴ Members may commit to the progressive liberalisation, but this does not necessarily mean that they are forced to liberalise their services sectors. In essence members are provided with a legal framework for liberalisation but they are not necessarily required to liberalise

²²⁴ Hawkins (n 158 above) 10

their services sectors. In order to achieve a strengthened single integrated services market, it may be necessary for the Protocol to mandate liberalisation of services trade.

4.2.2 Number of services sectors liberalised

The Protocol on Trade in Services identifies six priority sectors in which members will negotiate services preferences in the form of market access and national treatment. In the preceding chapter it was found that the Protocol meets the condition of substantial sectoral coverage as mandated by Article V(1)(a) of the GATS because the flexibilities granted in Article V(3)(a) of the GATS that allow the developing countries to liberalise fewer sectors than developed countries. The condition of substantial sectoral coverage is an important one because the rationale for permitting PTAs for the liberalisation of trade in services is that such agreements will allow members to make more commitments at the regional level than they will at the multilateral level. Meaning that such agreements have to take countries further than their GATS commitments.

While the Protocol meet the substantial sectoral coverage condition, it will not necessarily take SADC members further than their GATS commitments. The Protocol identifies tourism as one of the six- priority sectors, thirteen of SADC's sixteen-member states have made commitments in the tourism sector at the multilateral level. Meaning that most of the members will not make many commitments in this sector as they have already done so in their GATS schedules of commitments. SADC members should have taken the time to look at sectors in which members have made very low commitments and added those to the priority sectors.

There are several services pacts in which developing countries are members that aim to make commitments in a high number of services sectors. One such example is the EU-CARIFORUM EPA, in this instance CARIFORUM countries aimed to liberalise between 65-75% of all services sectors, it must be noted though that they did not meet their targets.²²⁵ One can argue that in a case where a PTA sets out to negotiate in a high number of sectors and the members do not meet their initial targets it is likely that they will have made commitments in more sectors than in a situation where they had set out to negotiate on lesser sectors.

²²⁵ Stern, Truen and Ramkolowan (n 2 above) 25

4.2.3 Movement of natural persons

The Protocol on Trade in Services does not contain any specific provision on the movement of natural persons. As discussed in the previous chapter, drafters of the Protocol may have neglected to include provisions as the Draft FMP Protocol is meant to regulate the free movement of natural persons.

Provisions on the movement of natural persons are essential as they have a direct effect on the trade of services with the exception of services supplied through Mode 1, services supplied through the other modes of supply require the movement of natural person. This is the case especially for Mode 4 services that require the presence of natural persons within the territory of another member state. If SADC members aim to create an integrated services market it is imperative that rules relating to the movement of natural persons be concluded before the Protocol enters into force.

4.2.4 Elimination of discriminatory measures

Barriers to services trade are usually in the form of discriminatory measures, it is for this reason that GATS Article V(1)(b) requires that countries that wish to enter into PTAs to eliminate substantially all discriminatory measures already in place and to not implement new measures of a discriminatory nature.

The Protocol provides that members not introduce new or more discriminatory measures during negotiations.²²⁶ It does not require that members eliminate discriminatory measures that are already in place. If the Protocol is to be successful in the creation of a strengthened integrated regional services, members need to eliminate the discriminatory measures that are already serving as barriers to entry and trade.

4.2.5 Mutual recognition

The importance of mutual recognition in the efficient operation of a PTA for the liberalisation of trade in services cannot be underestimated. The Protocol on Trade in Service states that the no later than two years of the Protocol entering into force, the TNF-Services shall begin negotiating agreement providing for the mutual recognition of requirements, qualifications, licences and other

²²⁶ Protocol on Trade in Services (n 27 above) Article 16(4)

regulations.²²⁷ It is argued that in order for PTAs for the liberalisations of trade in services to be operational member states are required to; “recognise each other’s systems, practices and licensing requirements”²²⁸

If the members wait till the Protocol enters into force before they negotiate an agreement for mutual recognition they may find themselves in a situation where they are unable to fully enjoy the preferences negotiated in terms of the agreement due to incompatibility of minimum standards, qualifications, licences and other regulations.

4.2.6 Most Favoured Nation carve out

The MFN carve out contained in Article 4 of the Protocol permits members to enter into bilateral agreements amongst themselves. Members are also permitted to maintain PTAs entered into with third party states prior to the conclusion of the Protocol and they are also permitted to enter into new PTAs with third party states.²²⁹ Such agreements have the potential fragment the SADC services market further, defeating its objective of creating one integrated services market in the region.²³⁰ The allowance for members to enter into preferential agreements has the potential to impede and frustrate the Protocol’s objective of creating a single integrated services market in the region. These agreements could also frustrate the process of liberalisation in the region as they will lead to already limited resources being stretched further.

While it would seem that the rationale for permitting members to enter into such agreements is that they will promote further liberalisation of trade of services in the region, Article 4 of the Protocol does not make any provisions for instances where such agreements impede and frustrate Protocol’s objectives, nor does it guard against the further fragmentation of SADC’s services market.

²²⁷ Protocol on Trade in Services (n 27 above) Article 7(1)

²²⁸ Cronje (n 46 above) 4

²²⁹ Protocol on Trade in Services (n 27 above) Article 4(3) and Article 4(4)

²³⁰ Marchetti (n 1 above) 9

4.2.7 Positive list approach to scheduling

SADC members have adopted the positive list approach to scheduling services commitments. As discussed in the preceding chapters the positive list approach to scheduling is not considered to be efficient for the liberalisation of services. The list approach to scheduling is seen as more transparent as it clearly shows “...the non-conforming regulations, where discrimination is practiced [and it will act] as a review and audit of national regulations”.²³¹

Such transparency is essential for SADC members as the Protocol on Trade in Services still permits members to maintain discriminatory regulations. The negative list approach may help members identify policies that are purely discriminatory or protectionist. The negative list will also assist SADC members in meeting their goal of creating an integrated market as it requires that members make more extensive commitments.²³² This is essential for the SADC region as most of its members have made very low commitments at the multilateral level and adopting the negative list approach might push them to make more meaningful commitments at the regional level.

4.2.8 Conclusion

The SADC Protocol on Trade in Services is facing a number of challenges that will prevent it reaching its objectives. There are a number of unresolved issues such the SADC members will have to settle before the Protocol enters into force, in order for it to be implemented efficiently. The following chapter will make recommendations on how the challenges identified above can be resolved.

²³¹ Stephenson (n 214 above)

²³² Catteneo (n 45 above) 16

Chapter 5

Recommendations and Conclusion

5.1 Recap of the research problem

This study aimed to interrogate whether the SADC Protocol on Trade in Services will be effective in strengthening the region's services market'. SADC members hold the view that an integrated regional market for services, complemented by cooperative mechanisms will create new opportunities for a dynamic business sector and strengthen the region's services capacity, its efficiency and competitiveness and expand the region's services exports. The members concluded a Protocol on Trade in Services in August of 2012 which is yet to come into force. The Protocol obliges members to progressively liberalise trade in services in six priority services sectors with the view that such liberalisation will lead to the creation of a single services market in the region.

However, the Protocol lacks ambition and will not take SADC members beyond their GATS commitments, it does not mandate the liberalisation of trade in services nor does it provide rule making mechanisms that will support the creation of a strengthened integrated services market.

It is against this backdrop that this study was conducted.

5.2 Summary of Findings

This study found that services are essential for economic development and growth as certain core infrastructural services play a significant role in the manufacturing of goods. It also found that while GATS Article V permits members to enter into PTAs for the liberalisation of services, such agreements must meet the conditions of substantial sectoral coverage and elimination of substantially all discriminatory measures. Unfortunately, there is uncertainty surrounding the interpretation of these conditions.

This study found that the SADC Protocol on Trade in Services meets the substantial sectoral coverage condition if it is interpreted in terms of the flexibilities granted to agreements that include

developing countries in Article V(3)(a) of the GATS. According to this study the Protocol on Trade in Services does not provide for the elimination of substantially all discrimination.

There are number of challenges that emanate from the Protocol on Trade in Services. The Protocol makes no provisions for the movement of natural persons leaving this sensitive subject to be regulated by the individual laws of each member state. The fact members are permitted to enter into bilateral agreements amongst themselves is problematic and could possibly lead to a more fragmented services sector in the region. Services trade is usually restricted through discriminatory measures, while the Protocol prohibits members from enacting new discriminatory measures it does make provisions for the elimination of those discriminatory measures already in place. The conclusion of an agreement on mutual recognition is delayed for once the Protocol has entered into force.

5.3 Recommendations

As explored in the previous chapter there are a number of challenges that may impede the successful implementation and operation of the SADC Protocol on Trade in Services. This section will make recommendations to SADC policy makers on how these challenges can be handled.

5.3.1 Commitment to Progressive Liberalisation

The SADC Protocol on Trade in Services only provides members with a legal framework liberalisation but they are not necessarily required to liberalise their services sectors. In order to achieve a strengthened single integrated services market, it is recommended that the Protocol to mandate liberalisation of services trade.

5.3.2 Number of services sectors liberalised

The SADC Protocol on Trade in Services only sets out to liberalise six of the twelve services sectors identified by the GATS. As discussed in the preceding chapter this is sufficient for the Protocol to meet the substantial sectoral coverage condition as set out in Article V(1)(a) of the GATS, but this will not take the SADC's member states further than their GATS commitments.

Considering that SADC seeks to create an integrated market for services that is both efficient and competitive, its members should consider increasing the number of sectors covered by the Protocol. SADC members should pay attention to those sectors in which members have made very low commitments in under the GATS.

5.3.3 Movement of natural persons

The SADC Protocol on Trade in Services does not contain any specific provisions for the movement of natural persons. The movement of natural persons plays a significant role in the efficient trade of services. The lack of such rules may have a negative effect on the operation of the Protocol.

It is recommended that members develop rules relating to the movement of natural persons. This is a task that is already underway. Article 26 of the Protocol provides that members may develop annexes that may be necessary for the facilitation of its implementation.²³³ SADC is currently working on an annex on the movement of natural persons especially for Mode 4 services.²³⁴ This is a laudable step that the members have taken, clear rules on the movement of natural persons including the right of establishment and any other residency related issues will assist in the effective trade of Mode 4 services.

5.3.4 Elimination of discriminatory measures

GATS Article V(1)(b) requires that countries that wish to enter into PTAs to eliminate substantially all discriminatory measures already in place at the times that the such a PTA enters into force and that they do not implement new measures of a discriminatory nature. The SADC Protocol on Trade in Services fails to make provisions for the elimination of discriminatory measures that are in place at the time that the Protocol enters into force. If the Protocol is to be successful in the creation of a strengthened integrated regional services, members need to eliminate the discriminatory measures that are already serving as barriers to entry and trade.

It is recommended that SADC members formulate guidelines for the elimination of discriminatory measures already in place. Article V (3)(a) of the GATS permits less developed members to eliminate less discriminatory measures and they are given a longer period over which such discriminatory measures can be eliminated. Such guidelines could set out reasonable timeframes over which SADC members can eliminate discriminatory measures.

²³³ Protocol on Trade in Services (n 27 above) Article 26

²³⁴ (n 155 above)

5.3.5 Mutual recognition

In order for a PTA for the liberalisations of trade in services to be operational member states are required to; recognise each other's systems, practices and licensing requirements inter alia. The SADC Protocol on Trade in Services does not make any provisions for mutual recognition, rather it postpones the development of an agreement on mutual recognition to no later than two after the Protocol has entered into force. This may have an adverse effect on the operation of the Protocol.

It is recommended that the SADC members begin working on an agreement that provides for mutual recognition. Ideally such an agreement should be concluded before the Protocol enters into force, as mutual recognition is necessary for the efficient operation of the Protocol on Trade in Services.

5.3.6 Most Favoured Nation carve out

The MFN carve out contained Article 4 of the Protocol permits members to enter into bilateral agreements amongst themselves. Article 4 of the Protocol does not make any provisions for instances where such agreements impede and frustrate Protocol's objectives, nor does it guard against the further fragmentation of SADC's services market.

It is recommended that the preferential agreements permitted under Article 4 of the Protocol be subject to review. A body should be tasked with reviewing the agreements to with the aim of ensuring that such agreements are not frustrating or impeding the process of liberalisation in the region, and that where it is found that this is the case procedures must be put in place to remedy this.

5.3.7 Positive list approach to scheduling

Currently SADC members have chosen to adopt the positive list approach to scheduling, this approach is not considered as suitable for the liberalisation of trade in services. It is recommended that SADC members adopt the negative list approach to scheduling as this method is more transparent.

5.4 Conclusion

The SADC Protocol on Trade in Services seems to lack ambition and will not be able to take members further than their GATS commitments. The Protocol is an admirable first step in the process of liberalising services in the region but it leaves a number of very significant issues for completion once it has entered into force. This lack of concrete rules will frustrate the operation of the Protocol and prevent it from meeting its objectives. In order for the Protocol to be successful in creating an integrated services market, SADC members will have to put in place rules or mechanisms that will create certainty for all members and support the operation of the Protocol once it has entered into force.

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