

**SOUTH AFRICA'S BANK LICENCING REQUIREMENTS IN LIGHT OF ITS  
BANKING SECTOR LIBERALISATION COMMITMENTS UNDER THE GENERAL  
AGREEMENT ON TRADE IN SERVICES: A LEGAL PERSPECTIVE**

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## **DECLARATION**

I declare that this Mini-Dissertation is hereby submitted for the award of Legum Magister (LLM) in Trade and Investment at the International Development Law Unit, Faculty of Law, University of Pretoria is my original work and it has not been previously submitted for the award of a degree at this or any other tertiary institution.

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## **Abbreviations**

<b>CTS</b>	<b>Council for Trade in Services</b>
<b>CTIFS</b>	<b>Committee in trade in Financial Services</b>
<b>FSB</b>	<b>Financial Services Board</b>
<b>FSAP</b>	<b>Financial Sector Assessment Programmed</b>
<b>FSA</b>	<b>Financial Services Agreement</b>
<b>GATS</b>	<b>General Agreement on Trade and Services</b>
<b>GATT</b>	<b>General Agreement on Tariffs and Trade</b>
<b>IMF</b>	<b>International Monetary Fund</b>
<b>MFN</b>	<b>Most Favored Nation</b>
<b>NT</b>	<b>National Treatment</b>
<b>ROSC</b>	<b>Report on Observance of Standard and Codes</b>
<b>SARB</b>	<b>South African Reserve Bank</b>
<b>WB</b>	<b>World Bank</b>
<b>WPGR</b>	<b>Working Party on GATS Rules</b>
<b>WGDR</b>	<b>Working Group on Domestic regulation</b>



**WTO**      **World Trade Organisation**

## Chapter one

### Introduction

#### 1.1 Background to the research

On 26 February 1998 South Africa submitted its third supplementary commitment schedule under the General Agreement on Trade and Services (GATS).<sup>1</sup> It has been advanced that, South Africa's liberalisation commitments were based on three conditions: first, a desire to protect the country's investors from 'unscrupulous foreign entities selling financial products from offshore locations'.<sup>2</sup> Second, regulations were needed, to level the playing fields between domestic and foreign financial institutions that established (or had already established) a commercial presence within South Africa's domestic market.<sup>3</sup> Third, a change of regulations was required to ensure that domestic financial institutions were not hindered by local regulations in their attempts to become more internationally competitive.<sup>4</sup> Therefore, South Africa mostly made unbound banking sector commitments.

The GATS is one of about sixty agreements and decisions reached at the conclusion of the Uruguay Round (UR) of the multilateral trade negotiations (1986-1994).<sup>5</sup> It was signed in 1994 and entered into force in January 1995.<sup>6</sup> South Africa signed the GATS on 15 April 1994. As noted, in 1999 South Africa was one of the fifty-two countries that accepted the Financial Services Agreement, commonly known as the fifth protocol to the GATS.<sup>7</sup>

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<sup>1</sup> World Trade Organisation 'South Africa Schedule of Specific Commitments Supplement 3 GATS/78/Suppl.3' 1998 [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009DP.aspx?language=E&CatalogueIdList=10361.2947.20075.10347&CurrentCatalogueIdIndex=0&FullTextSearch](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009DP.aspx?language=E&CatalogueIdList=10361.2947.20075.10347&CurrentCatalogueIdIndex=0&FullTextSearch) (accessed 23 May 2014); H Falkena, R Bamber, D Llewellyn & T Store 'Financial Regulation in South Africa' 2001 [http://www2.resbank.co.za/internet/Publication.nsf/LADV/E8D79424F5A87CA542256B52005CA2B3/\\$File/fregch1.pdf](http://www2.resbank.co.za/internet/Publication.nsf/LADV/E8D79424F5A87CA542256B52005CA2B3/$File/fregch1.pdf) (accessed 23 May 2014); R Wolfrum, PT Stoll and C Feinaugle (ed) *WTO Trade in Services* (2008) 2 for a more extensive history on the negotiations of the trade in services.

<sup>2</sup> M Soko 'Thrown in at the deep end: South Africa and the Uruguay Round of multilateral trade negotiations, 1986-1994' (2010) 29 *Politeia* 12.

<sup>3</sup> Soko (n 2 above) 12.

<sup>4</sup> Soko (n 2 above) 12.

<sup>5</sup> WTO 'The General Agreement on Trade in Services (GATS): objectives, coverage and disciplines' 2014 [http://www.wto.org/english/tratop\\_e/serv\\_e/gatsqa\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm) (accessed 25 May 2014).

<sup>6</sup> WTO (n 5 above).

<sup>7</sup> WTO (n 5 above).

The GATS aims to promote trade liberalisation through a rule-based system founded on principles agreed upon by the Members.<sup>8</sup> This means that the making of commitments by Members is the first step towards progressive liberalisation. The next step would be successive rounds of negotiation to allow greater liberalisation of the committed sectors and subsectors alike.

The GATS contain obligations for its Members.<sup>9</sup> These are categorized into two broad groups: general obligations (Most Favored Nation (MFN) and transparency) that automatically apply to all Members and services sectors and specific obligations which relate to market access and national treatment. These commitments are elaborated in each country's schedule and they vary from country to country.<sup>10</sup>

As stated above, at the time of making its banking sector commitments, South Africa opted to make mostly “unbound” commitments.<sup>11</sup> This means that South Africa reserved the right to implement laws and regulations to limit or extend market access and national treatment at its discretion.<sup>12</sup> Under the GATS once a commitment is made it wears a permanent character.<sup>13</sup> In terms of Article XXI, specific commitments may be modified subject to certain procedures.<sup>14</sup> Countries which may be affected by such modifications can request the modifying Member to negotiate compensatory adjustments; these are to be granted on an MFN basis.<sup>15</sup>

The GATS does not serve to limit the policy making space of Members.<sup>16</sup> The agreement

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<sup>8</sup> WTO (n 5 above).

<sup>9</sup> WTO (n 5 above).

<sup>10</sup> WTO (n 5 above).

<sup>11</sup> WTO (n 5 above).

<sup>12</sup> K Mwenda *Legal aspects of banking regulation: Common law perspectives from Zambia* (2010) 10 defines regulation as a set of binding rules issued by a private or public body. These can be defined as those rules that are applied by all regulators in the fulfilment of their function in the financial service area; they include such prudential rules as those influencing the conditions of access to the market. Regulation for financial services comprises a combination of two or more of the following (a) primary enabling legislation; (b) secondary legislation issued pursuant to the enabling statute; (c) principle, rules and codes issued by regulators and (guidance or policy directives issued by the regulatory authority see Mwenda *Legal aspects of banking regulation: Common law perspectives from Zambia* (2010) 10.

<sup>13</sup> WTO (n 5 above).

<sup>14</sup> General Agreement on Trade Services (GATS), 1995 [http://www.wto.org/english/docs\\_e/legal\\_e/26-gats.pdf](http://www.wto.org/english/docs_e/legal_e/26-gats.pdf) (accessed 25 May 2014).

<sup>15</sup> WTO (n 5 above).

<sup>16</sup> WTO (n 5 above).

expressly recognizes that Members have the right to regulate to fulfill their policy objective.<sup>17</sup> What the agreement does is that, it establishes a framework of rules to ensure the reasonable, objective and impartial manner of service regulations so that they do not pose unwarranted barriers to trade.<sup>18</sup>

The banking sector is the backbone to a country's economic growth.<sup>19</sup> The WTO secretariat Members' are of the view that, 'opening markets to foreign financial firms can benefit both consumers of financial services and the domestic economy as a whole'.<sup>20</sup> This is because it facilitates savings and investments through the taking of deposits which contribute to a more resilient domestic financial system.<sup>21</sup> They go on to say that the presence of foreign firms has the potential to create competition and efficiency for financial services.<sup>22</sup> In practice, this would require a member state to schedule comprehensive commitments that would allow for meaningful negotiations towards progressive liberalisation. The simple fact of the matter is that without such comprehensive commitments progressive liberalisation remains an unattainable aspiration.

The banking sector in South Africa is regulated by a wide scope of legislation and regulations.<sup>23</sup> The cornerstone of the regulation and supervision of banks in South Africa is the Banks Act 94 of 1990 and regulations promulgated under the Act, particularly the Regulations relating to Banks of 12 December 2012. The enactment into law of the Banks Act increased the number of registered banks to forty-three by the end of 2001.<sup>24</sup>

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<sup>17</sup> WTO (n 5 above).

<sup>18</sup> GATS, 1995 (n 14 above) Article VI: I.

<sup>19</sup> SARB 'Risk Management' 2014 <http://www.resbank.co.za/AboutUs/RiskManagement/Pages/default.aspx> (accessed 23 May 2014).

<sup>20</sup> M Kono, P Low, M Luanga, A Mattoo, M Oshikawa & L Schuknecht 'Opening Markets to Financial Services and the Role of GATS' (1997) 21 [http://www.wto.org/English/res\\_e/booksp\\_e/special\\_study\\_1\\_e.pdf](http://www.wto.org/English/res_e/booksp_e/special_study_1_e.pdf) (accessed 23 May 2014).

<sup>21</sup> Kono *et al* (n 20 above) 21.

<sup>22</sup> Kono *et al* (n 20 above) 21.

<sup>23</sup> WTO 'Working Party on Domestic regulations S/WPDR/M/58' (19 June 2013) 3 where the South Africa representative mentions that regulation is not enough to induce liberalisation.

<sup>24</sup> The Banking Association of South Africa (BASA) '2012 South African Banking Sector Overview' 2012 <http://www.banking.org.za/index.php/our-industry/2012-south-african-banking-sector-overview/> (accessed 25 May 2014).

The main regulator responsible for administering applicable legislation for the banking sector is the South African Reserve Bank (SARB).<sup>25</sup> The SARB works to achieve a sound, efficient banking system for the country.<sup>26</sup> They achieve this by issuing bank license to the qualified applicant and monitoring their activities in terms of the Banks Act.

The South African government aims to move towards a twin peaks model of regulation.<sup>27</sup> This entails that the monitoring of the health and soundness of financial institutions will generally be exercised by the SARB, with the financial market conduct regulated by the Financial Services Board (FSB).<sup>28</sup> The persistent changes in the regulatory framework for the banking sector have been a cause of concern for most bankers. While it appears to create efficiency and effectiveness most banks have lost money to adjusting their systems, money that could have been used to increase effectiveness development.

Effective Banking Regulation has always been a priority of the South African Government. The pressure to regulate effectively stems from the fear of the potential negative externalities, most notably the risk of systemic failure coupled with this is the need to limit moral hazard by banks and to ensure that banks have the incentive to allocate credit and perform other functions cautiously.<sup>29</sup>

South Africa has generally done well in terms of implementing effective bank regulation from the 1965 Banks Act to the current 1990 Banks Act.<sup>30</sup> Risk management was the underpinning philosophy in drafting the current Banks Act of 1990.<sup>31</sup> In South Africa as defined by the SARB, risk management is done for protection of the national interest. This aligns with the

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<sup>25</sup> SARB (n 19 above).

<sup>26</sup> SARB (n 19 above).

<sup>27</sup> National Treasury Republic of South Africa 'A safer financial Sector to Serve South Africa Better' (2011) 28 <http://www.treasury.gov.za/documents/national%20budget/2011/A%20safer%20financial%20sector%20to%20serve%20South%20Africa%20better.pdf> (accessed 23 May 2014).

<sup>28</sup> National Treasury Republic of South Africa (n 27 above) 28.

<sup>29</sup> E Gilbert, E Calitz & S Du Plessis 'Prudential regulation, its International background and performance of banks: A critical review of South African performance since 1970' (2009) 24 *South African Journal of Economic History* 48.

<sup>30</sup> Gilbert *et al* (n 29 above) 43.

<sup>31</sup> Banks Act 94 of 1990 Preamble.

SARB's Constitutional mandate to protect the value of the currency with the interest of balanced and sustainable economic growth in the Republic..<sup>32</sup>

South Africa's financial service sector has been assessed by the international Monetary Fund (IMF) and the World Bank (WB) in the Report on Observance of Standards and Codes (ROSC).<sup>33</sup> In general, the ROSC assessors found the supervision of South African banking to be of a high standard and that the regulatory framework is generally sound, as tested by the ability of the South African financial sector to weather the global financial crisis relatively well.<sup>34</sup> The last detailed assessment was in March 2010.<sup>35</sup> It entailed a critical analysis of South Africa's adherence to international banking, (also insurance and securities market) regulatory standards in terms of their Financial Sector Assessment Program (FSAP). ROSC forms the basis of the global peer review mechanism for regulatory standard. It assesses the financial stability and compliance by countries with three key standards: banking supervision, securities market regulation and insurance regulation.<sup>36</sup>

South Africa's bank regulators value effective and legitimate banking regulation. This value system has influenced the manner South Africa has made the banking sector commitments under the GATS. It can be said that, the country has erred on the side of caution in making its commitments as it focused on revamping its regulatory framework after. To date, the framework is still under construction

## 1.2 Research Problem

The Commitments under the GATS regime do not serve to limit the policy making space of

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<sup>32</sup> SARB (n 19 above); Constitution of the Republic of South Africa 108 of 1996, section 224.

<sup>33</sup> National Treasury Republic of South Africa "Press Release: IMF/WB Financial Sector Assessment Programme" 2010 [http://www.treasury.gov.za/comm\\_media/press/2010/2010120801.pdf](http://www.treasury.gov.za/comm_media/press/2010/2010120801.pdf) (accessed 23 May 2014).

<sup>34</sup> According to the latest World Economic Forum Competitive Survey 2012/13, SA banks are rated 2nd out of 144 countries for soundness, while the country was rated 3rd for financial sector development. [http://www3.weforum.org/docs/WEF\\_GlobalCompetitivenessReport\\_2012-13.pdf](http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2012-13.pdf) (accessed 23 May 2014).

<sup>35</sup> World Economic Forum Competitive Survey (n34 above).

<sup>36</sup> JB Cronje 'A GATS perspective on South Africa's Employment Services Bill' 2014 <http://www.tralac.org/discussions/article/5349-a-gats-perspective-on-south-africa-s-employment-services-bill.html>; JB Cronje 'The admission of foreign legal practitioners in South Africa: A GATS perspective' 2013 available at <http://www.tralac.org/publications/article/4593-the-admission-of-foreign-legal-practitioners-in-south-africa-a-gats-perspective.html> (accessed 23 May 2014).

Members. The agreement expressly recognizes that Members have the right to regulate to fulfill their policy objective.<sup>37</sup> What the agreement does is that it establishes a framework of rules to ensure the reasonable, objective and impartial manner of service regulations so that they do not pose unwarranted barriers to trade.<sup>38</sup> Under the GATS, every Member is required to make scheduled commitments. In 1998, South Africa scheduled market access and national treatment commitments in the banking sector.

At the time of scheduling its banking-sector commitments, South Africa opted to make mostly “unbound” commitments. This means that South Africa reserved the right to implement laws and regulations to limit or extend market and national treatment at its discretion.

The problem is that, South Africa’s reserved right to regulate the issuance of banking licenses and registration at its discretion in the light of its scheduled commitments to banking liberalisation under the GATS in relation to market access might not promote the underlying theme of progressive liberalisation. These two standpoints are diametrically opposed. The legal analysis of this antithesis is the overarching objective of this mini-dissertation.

### **1.3 Research Questions**

Broadly speaking, this study will interrogate the implementation of South Africa’s reserved right to regulate the issuance of banking licenses at its discretion in the light of the scheduled commitments to financial services liberalisation under the GATS in relation to foreign bank presence.

Specifically, the investigation to provide answers to the following research questions;

- (i) What are the related laws governing South African banking sector?
- (ii) What is the regulatory environment of the South African banking sector especially as it relates to market access of foreign banks?

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<sup>37</sup> WTO (n 5 above).

<sup>38</sup> GATS (n 14 above) Article VI: I.

- (iii) What are the implications of South Africa's right to regulate the issuance of banking licenses in the light of its market access commitments in banking services sector under the GATS?
- (iv) What is the future of South Africa's banking sector commitments in the circumstance?

#### **1.4 Thesis Statement**

South Africa's reserved right to regulate the issuance of banking licenses and registration at its discretion in the light of its scheduled commitments to financial services liberalisation under the GATS in relation to market access to foreign bank branches does not promote progressive liberalisation

#### **1.5 Justification**

South Africa has the most sophisticated banking commitment schedule in Africa and comprehensive banking laws to match it. For the government of South Africa and the world at large, this study will unpack the effects or lack thereof that banking commitments have on the molding of its banking laws. The study has the potential to expose problems that other African countries might have with regards their GATS commitments in general. Some authors contend that the GATS is a *de- facto* investment agreement, the merits of such an assertion needs to be interrogated.

This work will also contribute to the limited body of literature on South Africa's bank regulations in light of it's the GATS commitment. While much has been written on trade in services, not much has been written from the perspective of the member state's existing laws and regulations.

#### **1.6 Proposed Methodology**

This is a desk and library based research. As such, it relies on both published and unpublished material; it takes into account significant primary and secondary sources of information on the topic in addressing the research questions. The primary sources include the GATS Agreement and all the relevant annexures and South Africa's banking Act of 1990 and the Regulations



relating to banks of 2012. The secondary sources of information include, but not limited to, relevant journal articles, papers and/ or articles written by academicians and researchers on issues relevant to the study. The study relies also heavily on Internet public sources. Speeches and daily newspapers containing information relevant to the issues under discussion will also be considered.

The approach to the information obtained from these sources is descriptive, analytical and exploratory in nature. The aim is to build on the existing literature on Banking law Regulation with a view of International commitments.

### **1.7 Preliminary Literature Review**

A limited body of literature exists concerning the notion of the GATS remove banking sector commitments. There are some scholarly works on the nature, scope and application of the GATS. The existing research further reveals that scholarly opinions on the relevance of the GATS are sharply divided. There are two conflicting views on the relevance of the Financial Service commitments under the GATS.

The WTO as supported by several industrialized countries is of the view that financial service commitments are beneficial to developing and LDC's as they bring about transparency of laws and competition in industry. The developed countries have fully realized the importance of services to their economies and have continued on signing parallel trade in services agreement.<sup>39</sup> The contrary view from other scholars is that the GATS is designed to promote deregulation and privatization for the benefit of the industrialized countries.

Legislation governing the financial sector in South Africa is primarily the Banks Act 1990 and the Banking Regulations of 2012. These are designed to serve the achievement of a sound, efficient banking system in the interest of the depositors and the whole economy. There are several scholarly articles documenting the efficacy and interpretation of the banking laws of

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<sup>39</sup> <https://servicescoalition.org/negotiations/trade-in-services-agreement> (accessed 23 May 2014)

South Africa. The Banking Regulation Review gives an account of some of the philosophical underpinnings of South Africa's banking laws and regulations.

For a better understanding of the ideas to the GATS underpinning, the WTO Secretariat Publication gives insight<sup>40</sup>. The handbook aims to provide a better understanding of the GATS and the challenges and opportunities of the ongoing negotiations. This text gives a plain vanilla interpretation of the GATS agreement. From the works and writings of Panagiotis Delimatsis<sup>41</sup> and Sydney J Key,<sup>42</sup> it is clear that the GATS contain some controversial aspects. Their critical analysis will serve as valuable input in the chapter that analyses South Africa's banking sector commitments.<sup>43</sup>

Markus Krajewski provides the first analytical account of the potential impact of incompatibilities between national regulatory regimes and the rules and obligations imposed by GATS and the author warns on the need to understand the relationship between GATS obligations and regulatory policies and instruments.<sup>44</sup>

More literature touching on the subject is consulted in the progress of the research.

From the foregoing, it is clear that there are several divergent views on the true nature and purpose of the GATS agreement. While the friends of the GATS advocate that it is a superior agreement that will lead to liberalisation, which will open up the markets to increase competition and in turn improve quality of the services, some authors are of the view that the GATS is a creation by the western powers so as to maintain their GDPs at the cost of developing and LDC

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<sup>40</sup> WTO Trade in Services Division *A Handbook on the GATS Agreement* (2005).

<sup>41</sup> P Delimatsis *International Trade in Services and Domestic Regulations: Necessity, Transparency and Regulatory Diversity* (2007)

<sup>42</sup> S Key *The Doha Round and Financial Services Negotiations* (2003).

<sup>43</sup> Max Planck Institute for Comparative Public Law and International Law's commentary on the interpretations of the provisions in the GATS breaks down the GATS starting with the negotiating history of the GATS followed by its Preamble and all the articles of GATS, the Annexes and Protocols to the GATS as well as the Understanding on Commitments in Financial Services. This account is well rounded as it gives contributions from different authors providing different perspectives.

<sup>44</sup> M Krajewski *National Regulation and Trade Liberalisation in Services: The Legal Impact of the General Agreement on Trade in Services (GATS) on National Regulatory Autonomy* (2003).

countries. These diametrically opposed views are incapable of being reconciled. Consequently, it remains to be found whether the GATS agreement is capable of attaining progressive liberalisation.

## **1.8 Overview of Chapters**

Chapter one introduces the study. It provides a brief overview of the GATS. It further outlines the nature of the study, significance, methodology and literature review. This chapter will form the basis of the study that will follow, because the most important impact areas will be defined in this chapter for research in the later chapters. Chapter two reviews the legislation, regulation and literature on the landscape of South Africa's bank landscape past and present to lay the foundation for a discussion of South Africa's contemporary banking license regulation. Chapter three explains the nature of regulation. How, why and what do governments regulate? Beyond the regulation of the governments', the chapter explores the provisions of regulation in terms of the GATS. The chapter outlines the relationship between governments' regulatory autonomy and the rules on domestic regulations under the GATS. Chapter four interprets the South African banking sector Commitment Schedule. The chapter details and explains the scope and meaning of the banking commitments as undertaken by South Africa. The chapter is introduced by a general background of the GATS. Chapter five discusses the future of South Africa's banking sector commitments under GATS. Chapter six will be the final chapter and will provide a summary of findings, conclusions and recommendations.

## Chapter two

### Historical and legal Evolution of the banking sector in South Africa

#### 2.1 Introduction

This chapter details the motivating factors behind the various bank legislation and regulations with particular reference to bank licencing and registration. Banks are very important to any country not just to its finances but also to facilitate economic growth.<sup>45</sup> Among other things, they facilitate the taking of deposits and rendering of loans which is an imperative for economic growth.<sup>46</sup> The history of the banking sector is relevant to this study because it lays the foundation for understanding the current banking regulation framework. A synopsis of the historical evolution of banking will assist in understanding the banking sector scheduled commitments under the GATS.

#### 2.2 Historical background

The first bank in South Africa was the Bank van Leening which was established in 1793 by two visiting commissioners sent out from Holland to investigate and reorganise the administration of public affairs.<sup>47</sup> Its aim was to supply long-term credit as a result of there being a great shortage of currency and considerable dissatisfaction among the colonist.<sup>48</sup> In 1808, the Government, allowed the first bank subsidiary to be established in the Republic.<sup>49</sup> This was known as the Lombard Discount Bank a subsidiary of Bank van Leening.<sup>50</sup>

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<sup>45</sup> A Busch *Banking Regulation and Globalisation* (2009) 23; JR Barth, G Caprio & R Levine *Rethinking Bank Regulation: Till Angels Govern* Cambridge University Press: New York (2006) i.

<sup>46</sup> K van Wyk 'Regulation of the Financial Markets' in K van Wyk, Z Botha & I Goodspeed (ed) *Understanding South African Financial Markets* (2012) 61.

<sup>47</sup> N,Willies *Banking in South African Law* (1981)10; L Fourie, H Flakena & W Kok *Fundamental of the South African Financial System* (1992) 7.

<sup>48</sup> Willis (n 47 above) 10.

<sup>49</sup> Willis (n 47 above) 11.

<sup>50</sup> Willis (n 47 above) 11.

Lax lending policies were adopted due to the absence of domestic laws regulating the conduct of banks.<sup>51</sup> This led to the establishment of about twenty-nine banking institutions in the Cape Colony, all of which were entitled to issue bank notes without restriction.<sup>52</sup>

The Colonial Banks, as they were referred to, were banking enterprises established by local businessmen and farmers.<sup>53</sup> The first one was the Cape of Good Hope Bank founded in 1837.<sup>54</sup> This was the first privately owned bank.<sup>55</sup> It grew to be one of the largest banks by 1860.<sup>56</sup>

Imperial banks were limited liability banks established with capital raised in the London capital market for the purpose of overseas banking.<sup>57</sup> The first of such banks at the Cape was the London and South African Bank which opened in Cape Town in 1861.<sup>58</sup> This was followed shortly afterwards in 1862 by the Standard Bank of South Africa Ltd.<sup>59</sup> The proliferation of the imperial banks led to the absorption of the colonial banks into the branch banking networks of the imperial banks.<sup>60</sup> The absorption was further influenced by the failure of the colonial banks which failure was caused by inability of individual and often badly capitalised banks to sustain losses incurred by bad debts.<sup>61</sup>

The Standard Bank of British South Africa Ltd was founded in 1862.<sup>62</sup> After amalgamation with the London and South African Bank in 1877, it became known as Standard Bank of South Africa

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<sup>51</sup> Willis (n 47 above) 11.

<sup>52</sup> Willis (n 47 above) 11. This development took place between the period of 1836 and 1961. It must also be noted that at this point there was no formal currency in South Africa; H.A.F Barker, *The Principles and practice of banking in South Africa* (1927)282.

<sup>53</sup> B Kantor ‘Cape Bank Act of 1891’ 1975 <http://www.zaeconomist.com/research/1975b.pdf> (accessed 23 May 2014) (Article has no page numbers)

<sup>54</sup> Kantor (n 53 above).

<sup>55</sup> Kantor (n 53above).

<sup>56</sup> Kantor (n 53 above).

<sup>57</sup> Kantor (n 53 above).

<sup>58</sup> Kantor (n 53 above).

<sup>59</sup> Kantor (n 53 above).

<sup>60</sup> Kantor (n 53 above).

<sup>61</sup> Kantor (n 53 above).

<sup>62</sup>Fourie *et al* (n 47 above) 72.

Ltd.<sup>63</sup> The Netherlands Bank of South Africa Ltd (called Nedbank Ltd since 1971) was established in 1898.<sup>64</sup> Barclays National Bank Ltd entered South Africa in 1926 when it took over the National Bank of South Africa.<sup>65</sup> Volkskas Co-operative Ltd, a national savings bank, was founded in 1934, and in 1941 became a commercial bank, known as Volkskas Ltd.<sup>66</sup> Various foreign banks established themselves in South Africa after the Second World War, one of them being South African bank of Athens Ltd (1947) established to serve the Hollanders who had settled in South Africa.<sup>67</sup>

### 2.2.1 Legal framework

At the time, each province regulated its banking differently from the other. The most prominent legislation was the Cape Bank act 6 of 1891. It was promulgated in order to consolidate and amend the law relating to banking and to secure and regulate the circulation of Bank Notes.<sup>68</sup> Its establishment was soon after the failures of three important colonial banks.<sup>69</sup> According to Kantor the reason for the bank failure was the ‘...inability of individual and often badly under capitalised banks to sustain losses incurred by bad debts rather than being part of the repercussions of liquidity crisis...’<sup>70</sup> Bank liquidity was not at this time a pivotal requirement in the existing legislation.

The Cape Act required the banks to furnish quarterly statements of assets and liabilities in prescribed detail to the Treasurer of the Colony.<sup>71</sup> It was drafted using the United States (US) Banks Act of 1863.<sup>72</sup> It empowered the Treasurer to inspect the affairs of any bank. Any bank issuing notes had to deposit security for the full amount of its issue with the Treasurer.<sup>73</sup> A levy

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<sup>63</sup>Fourie *et al* (n 47 above) 72.

<sup>64</sup>Fourie *et al* (n 47 above) 72.

<sup>65</sup>Fourie *et al* (n 47 above) 72.

<sup>66</sup>Fourie *et al* (n 47 above) 72.

<sup>67</sup>Fourie *et al* (n 47 above) 72.

<sup>68</sup> Kantor (n 53 above);. Similar provisions were enacted in the Transvaal in 1893 and in the Orange River Colony in 1902 Willis (n 45 above) 14.

<sup>69</sup> There were the Union Bank, the Cape of Good Hope bank and Paarl bank.

<sup>70</sup> Kantor (n 53 above).

<sup>71</sup> Kantor (n 53 above).

<sup>72</sup> Kantor (n 53 above).

<sup>73</sup> Kantor (n 53 above).

was imposed to issuing banks and the government assumed responsibility for the payment of notes in gold in the event of the default of an issuing bank.<sup>74</sup> These were the first steps towards controlling bank entry. The government enjoyed a preferential right over all the assets of the bank as security.<sup>75</sup> It is submitted that this Act was not as effective in terms of bank licencing regulation because its reason for promulgation was to reduce the reliance of the Cape on the London Capital Market.<sup>76</sup>

The loosely drafted bank licencing and liquidity requirements led to bank failure. The failing banks were mostly the colonial banks. This created a void in the sector which precipitated the increase of foreign bank entry, in particular of locally financed banking institutions.<sup>77</sup> In order for these banks to attract deposits, banks were required to show proof of substantial resources of their own.<sup>78</sup> This was a further advancement in limiting the scope of bank entry.

This led to high competition in the form of explicit interest rate to attract deposits and for foreign exchange business.<sup>79</sup> Attempts to monopolise the industry succeeded only after 1905.<sup>80</sup> This was done through takeovers and absorption of banks leading to the increase of concentration of banking in South Africa.<sup>81</sup> Such that by 1980 the ‘big five’ commercial banks were in order of total asset size; Barclays National Bank Ltd; The Standard Bank of South Africa Ltd; Volkskas Ltd; Nedbank Ltd and The Trust Bank of Africa Ltd.<sup>82</sup>

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<sup>74</sup> Kantor (n 53 above).

<sup>75</sup> Willis (n 46 above) 11.

<sup>76</sup> Kantor (n 53 above).he makes this observation based on the fact that two other measures taken, establishment of a Cape Post Office Savings bank in 1883 and the local issue of Treasury Bills, were more in line with getting independent than micro regulation of existing banks.

<sup>77</sup> Kantor (n 53 above).

<sup>78</sup> Kantor (n 53 above).

<sup>79</sup> Kantor (n 53 above) this was in 1891.

<sup>80</sup> Kantor (n 53 above).

<sup>81</sup> Kantor (n 53 above).

<sup>82</sup> Willis (n 47 above).13 Barclays and Standard Bank being part of the big banks introduced the English banking law into the South African banking sector.

When the Bank's Act Bill was still in its committee stage in the Cape Legislative Assembly, there was an attempt to amend it to the effect that the Cape Treasurer should be allowed to accept Cape government securities, Natal Securities, gold or bonds either in London, Cape Town or Port Elizabeth, as security for the bank's note issues.<sup>83</sup> This suggestion was vehemently opposed in favour of autonomy of each province.<sup>84</sup> This trend continued until such a time in 1890 during a monthly meeting of the Cape Chamber a remark was made to the effect that the issue of bank notes had lost value as most farmers in other districts would not take anything but gold for exchange of their produce.<sup>85</sup> It was clear to the Chamber that this would mean a restricted trade and general inconvenience.<sup>86</sup>

Kantor concludes that the Cape Bank Act of 1891 was essentially created as an experiment in the capturing of a demand for government securities.<sup>87</sup> Further and slight controls in banking were introduced in the Union Act of 1917.<sup>88</sup> In 1942, the Banking Act 38 of 1942 repealed the 1917 Union Banks Act as well as the remaining provisions of the old provincial ordinances. This Act was repealed and replaced by the Banks Act 23 of 1965 which was a great departure from the controls imposed under the previous legislation

### **2.2.2 South African Reserve Bank (SARB)**

One of the reasons for the establishment of the SARB was to deal with unsatisfactory monetary and financial conditions of the time.<sup>89</sup> The different laws of the provinces with regard the issuing of currency were affecting trade in the Union.<sup>90</sup> The Currency and Banking Act 31 of

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<sup>83</sup> Willis (n 47 above).13.

<sup>84</sup> Willis (n 47 above).13.

<sup>85</sup> Willis (n 47 above).13.

<sup>86</sup> Willis (n 47 above).13 It was also in this meeting were the practice of the American and Australian governments with regard the controlling of the issuance of bank notes was discussed.

<sup>87</sup> Willis (n 47 above).13.

<sup>88</sup> Willis (n 47 above).13.

<sup>89</sup> Fourie *et al* (n 45 above) 60; South African Reserve Bank 'Fact leading to the founding of the Reserve Bank' (2007) 2 <https://www.resbank.co.za/Lists/News%20and%20Publications/Attachments/4999/Fact%20Sheet%206.pdf> (accessed 23 May 2014) where they discuss the different monetary policies that existed in the Union at that time.

<sup>90</sup> South African Reserve Bank (n 89 above) 2.



1920 provided, among other things, for the establishment of the Reserve Bank.<sup>91</sup> The Reserve Bank opened its door for business on 30 June 1921.<sup>92</sup>

The functions of the SARB as it was formed were to be the custodian of cash reserves, lender of last resort, bank of central clearance, and settlement of interbank claims, custodian of the major country's gold and other foreign reserves.<sup>93</sup> The role of custodian of the cash reserves of other banks was one of the biggest roles.<sup>94</sup> The role was derived from the section in the Act that states that a minimum credit balance, calculated in portion to the banks' demand deposit and time liabilities, had to be maintained with the Bank by other banking institutions.<sup>95</sup> This requirement would serve to limit bank entry.

The SARB operations were hampered by various statutory restrictions until the introduction of a more comprehensive revision of the Bank's powers under the Reserve Bank Act of 1944.<sup>96</sup> These changes strengthened the Bank's ability in carrying out an effective monetary policy.<sup>97</sup> This led to the realisation that the monitoring of monetary policies could lead to the stability of the economy and potential growth.<sup>98</sup> All these Changes were brought together in the Reserve Bank Act 90 of 1989.<sup>99</sup> It set the framework for the minimum reserve requirement, also called the reserve cash requirement.<sup>100</sup> In terms of the SARB Act, a bank has to hold deposits with SARB equal to 2.5 per cent of its adjusted total liabilities to the public.<sup>101</sup>

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<sup>91</sup> The bank was modelled on the laws pertaining to the Federal Reserve System in the United States of America. Fourie *et al* (n 45 above) 4.

<sup>92</sup> South African Reserve Bank (n 89 above) 2.

<sup>93</sup> South African Reserve Bank (n 89 above) 4.

<sup>94</sup> South African Reserve Bank (n 89 above) 4.

<sup>95</sup> South African Reserve Bank (n 89 above) 4.

<sup>96</sup> Fourie *et al* (n 45 above) 60.

<sup>97</sup> Fourie *et al* (n 45 above) 60.

<sup>98</sup> Fourie *et al* (n 45 above) 61.

<sup>99</sup> Fourie *et al* (n 45 above) 61.

<sup>100</sup> Fourie *et al* (n 45 above) 61.

<sup>101</sup> Section 10A.

### 2.1.3 The Banks Act 94 of 1990

The preamble of the Banks Act states that it provides for the regulation and supervision of banks.<sup>102</sup> It mainly focuses on prudential regulation of banks.<sup>103</sup> The Registrar and the SARB are tasked with ensuring compliance with the provisions of the Banks Act.<sup>104</sup> In order to fulfil this rule they imposed strict and rigid registration and licencing requirements.<sup>105</sup> The Act requires that applicants also apply for authorisation to establish a business of a bank.<sup>106</sup>

In terms of section 2 the SARB, the Land Bank, the Development Bank of South Africa as well as Mutual Banks and any other institution or body designated as exempt by the Minister of Finance are exempt from the act.<sup>107</sup>

#### 2.1.3.1 Registration Process

It is a requirement that all banks are registered as a public company.<sup>108</sup> Section 12 makes it clear that “any” person who wishes to conduct the business of a bank may apply to the Registrar for authorisation to establish such bank. The limiting factor to registration is the ability to comply with the prudential regulations as prescribed.<sup>109</sup>

Foreign banks are required to comply with certain conditions as imposed by the Registrar in order to receive his permission to carry on the business of a bank.<sup>110</sup> The Registrar has to satisfy

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<sup>102</sup> Long title of the Banks Act.

<sup>103</sup> K van Wyk ‘Regulation of the Financial markets’ in van Wyk, Botha & Goodspeed ( n 46 above)71.

<sup>104</sup> Section 4.

<sup>105</sup> Section 11 which provides that “...no person shall conduct the business of a bank unless such a person is a public company and is registered as a bank in terms of the Banks Act”

<sup>106</sup> Section 12.

<sup>107</sup> Section 2.

<sup>108</sup> Section 1. “the business of the Bank” is also extensively defined under section 1.

<sup>109</sup> Section 1 defines that bank regulation refers to regulations in terms of the act as defined in section 90 of the act. For instance section 35 requires that A bank, a branch by means of which a foreign institution is under section 18A authorised to conduct the business of a bank in the Republic and a representative office established in terms of section 34 shall obtain from the Registrar a business licence pertaining to its particular business in respect of each year ending on the thirty-first day of December against payment of the prescribed licence fees; Chapter III deals with the authorisation to establish a bank, the registration of banks and the cancellation of the registration of banks.

<sup>110</sup> Section 34 (1). Section 1 defines what a “branch of a bank” means an institution by means of which a bank conducts the business of a bank outside the Republic.

himself that proper supervision will be exercised by the supervisory authority in the foreign institution's country of *domicile*.<sup>111</sup>

Two applications need to be made to the Registrar before commencing doing business, an application for authorisation and one for registration.<sup>112</sup> First time applicants must furnish proof to the Registrar that it complied with the relevant prudential requirements.<sup>113</sup> This process is designed to ensure the financial stability of the sector, particularly to ensure banks have a safety net to prevent bank failure. The detrimental effect of bank failure can be illustrated by Saambou's experience.<sup>114</sup>

### **2.1.3.2 Branches of foreign institutions**

A foreign bank is defined as an institution which has been established in a country other than the Republic and which lawfully conducts in such other country a business similar to the business of a bank. As stated above, written prior authorisation must be granted from the Registrar.<sup>115</sup>

The detailed process is as follows; the institution is required in manner and on the form prescribed in the Regulations to lodge with the Registrar a written application which shall be by a written statement containing the prescribed information and the prescribed fee.<sup>116</sup> In certain instances the Registrar may require further information with regard to the nature and extent of supervision exercised or to be exercised by the responsible supervisory authority of the foreign institution's country of *domicile*.<sup>117</sup>

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<sup>111</sup> Section 34 (2B) (b).

<sup>112</sup> Section 12 and 16.

<sup>113</sup> Section 17(b).

<sup>114</sup> [http://www.treasury.gov.za/comm\\_media/speeches/2002/2002021401.pdf](http://www.treasury.gov.za/comm_media/speeches/2002/2002021401.pdf) (accessed 24 May 2014): Saambou's demise was caused by unfavorable micro lending businesses. This talks to bank regulation specially capitalisation requirements as they are the safety nets to bank regulation.

<sup>115</sup> Section 18A.

<sup>116</sup> Section 18A (n 112 above).

<sup>117</sup> Section 18A (n 112 above).

The foreign branch is required to obtain an annual business licence from the Registrar.<sup>118</sup> For the licence to be approved certain prudential regulations must be complied with.<sup>119</sup> The core requirement is the maintenance of a minimum level of capital.<sup>120</sup>

## **2.2 Contemporary banking**

Post-apartheid introduced a new landscape to the South African banking sector.<sup>121</sup> This section of the work aims to highlight the most fundamental changes in the banking sector by highlighting changes made to specific pieces of legislation and the introduction of other relevant legislation to the sector.

### **2.2.1 The Banks Amendment Bill of 2012**

The Bank Act of 1990 was amended, among other things, to comply with the requirement of the Basel Committee of Banking Supervision.<sup>122</sup> The highly anticipated Basel III accords change the prudential requirements for banks' conduct. This led to the amendment of the Act. As will be seen in Chapter three the bank liquidity requirements are changed by the new accords. This emphasises the value placed in the banking sector's compliance with International Best Practices.

### **2.2.2 Regulations relating to banks**

The regulations detail the procedure (section 52-57) for application forms and certificates of registration.<sup>123</sup> Chapter V prescribes the formula for the annual licence as contemplated in section 35 of the Act. The branch office is required to pay a minimum fee of six thousand rands

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<sup>118</sup> Section 35.

<sup>119</sup> Section 13(2) (f).

<sup>120</sup> As mentioned above a certain level of capital helps create a cushion to absorb losses, if any of the risks to which banks are exposed in the conduct of their business should materialise. This would provide a safeguard against the risk of insolvency. It also imposes an indirect constraint on the ability of the bank's management to expand the bank's activities. See Chapter VI "Prudential Requirements" of the Banks Act, 1990

<sup>121</sup> K van Wyk 'Regulation of the Financial markets' in van Wyk, Botha & Goodspeed ( n 46 above)71.

<sup>122</sup> Banks Amendment Bill, 2012 published in Government Gazette No. 35880 of 16 November 2012.

<sup>123</sup> Regulations Relating to Banks published under Government Notice R1029 in Government Gazette 35950 of 12 December 2012

and a maximum fee of three hundred thousand rands for an annual licence.<sup>124</sup> The precise meaning of regulation will be amplified in Chapter three below.

Foreign branch operations are regulated in terms of the ‘Conditions for the conducting of the business of a bank by a foreign institution by means of a branch in the Republic’.<sup>125</sup> The specific prudential requirements that apply to branches include the following:<sup>126</sup>

- (i) The relevant foreign institution (or the banking group of which it forms part) is required to hold net assets of at least US\$1 billion and the institution itself (on entity basis must hold net assets of at least US\$400 million;
- (ii) The foreign institution must have a long-term investment-grade credit rating acceptable to the Registrar of Banks; and
- (iii) The sum of the branch’s capital may not fall below 250 million rand or a minimum of 9.5 percent of its assets and other risk exposures.

Representative offices can also conduct business in South Africa.<sup>127</sup> A representative office differs from a branch in that it may merely promote or assist the business which the foreign bank conducts overseas but may not conduct the business of a bank itself.<sup>128</sup> The reason for its establishment is to promote or assist the business of a foreign bank which can only be done when the Registrar of Banks has approved and licensed the representative office.<sup>129</sup> There are no onshore capital requirements for a representative office.<sup>130</sup>

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<sup>124</sup> Regulations Relating to Banks (n123above) section 60.

<sup>125</sup> National Gazette No 30627, 01 Jan 2008, Vol 51; L Panougiias *Banking Regulation and World Trade Law: GATS, EU and ‘Prudential’ Institution Building* (2006) 57 where he discusses the disadvantages with Foreign bank branches.

<sup>126</sup> Banks Act; J de Langa & M Gibson ‘South Africa’ in Putnis (ed) *The Banking Regulation Review* (2013) 694.

<sup>127</sup> Section 34.

<sup>128</sup> Section 34.

<sup>129</sup> Section 34.

<sup>130</sup> Section 34.

South African banks are public companies incorporated in terms of the Companies Act 2008.<sup>131</sup> Banks are subject to this Act which applies generally to companies incorporated in South Africa and external companies with branch operations in the country.<sup>132</sup>

### 2.2.3 Directives

In terms of section 6 (6) of the Banks Act of 1990 the Registrar is empowered to issue directive from time to time regarding the application of the Act. Directives serve to amend existing regulatory provisions so as to align them in accordance with the latest international regulatory market best practices and specific policy related proposals or developments.<sup>133</sup> Directive issued to exempt branches of foreign banks from making certain disclosure as would have been expected of all banks in terms of the sections 43(3) of the Bank Regulation, are an example of such power.<sup>134</sup>

The Issuing of directives illustrate the versatility of the legislative framework of the South African banking sector. The enacted laws and regulations are subject to constant administrative scrutiny in order to ensure the fairness in treatment of foreign bank branches.

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<sup>131</sup> Companies Act 71 of 2008, section 1 which defines an external company as guided by section 8 (3).

<sup>132</sup> Companies Act (n 131 above ) section 1 which defines external company - External Companies, example a foreign bank branch, must register with the Companies and Intellectual Property Commission (the CIPC) within 20 business days after beginning to conduct business in South Africa; In terms of s 23 of the Companies Act 71 of 2008 (the Act), companies incorporated in jurisdictions outside South Africa are required to register as external companies with the Companies and Intellectual Property Commission (CIPC) within 20 business days of starting to conduct business in South Africa. Failure to register as an external company within three months of commencing business or non-profit activities in South Africa could result in the CIPC issuing a compliance notice to the foreign company requiring it to register within 20 business days of receipt of the notice. Alternatively, if it fails to register within this time, the CIPC may require the foreign company to cease carrying on business or activities in South Africa.

<sup>133</sup> Executive Summary Directive 3/2009 issued in terms of section 6(6) of the Banks Act 94 of 1990 [https://www.resbank.co.za/Lists/News%20and%20Publications/Attachments/3392/d3\\_09.pdf](https://www.resbank.co.za/Lists/News%20and%20Publications/Attachments/3392/d3_09.pdf) (accessed 26 May 2014).

<sup>134</sup> Directive 3/2009 (n 134 above).

#### 2.2.4 Four pillar-banking system

The banking sector rests on four pillars namely Amalgamated Banks of South Africa (ABSA), First National Bank (FNB), Standard Bank Limited and Nedcor Bank Limited (the big four).<sup>135</sup> The policy was employed to ensure the stability of the sector.<sup>136</sup> This serves to mitigate risk that can be incurred by the. SARB in its role of lender of last resort has mitigated its risk by maintaining only four important banks. In the case of bank failure, it can step in and rescue the bank in order to avoid systemic risk.

The four pillars policy was exposed in 2001 through the failed bid by Nedcor Bank to take over Standard Bank in 2001.<sup>137</sup> The government cited competition issues as the reason for refusal to grant a bank licence.<sup>138</sup> The concern was that, weak competition leads to lack of efficiency, innovation, consumer choice, high quality and low price.<sup>139</sup> Given the importance of banking it was viewed that the government would not allow these banks to fail.<sup>140</sup>

After the 2001 exposure of the big four banking policy, it became evident that the authorities have been applying it for a long time.<sup>141</sup> Such that when Barclays made an offer to Absa, it was reflective of entry into a new paradigm.<sup>142</sup> The thirty three billion bid by Barclays represented the biggest single direct foreign equity investment ever undertaken in South Africa banking sector.<sup>143</sup> The authorities' decision to allow Barclays to acquire Absa was perceived to be a green light for other foreign banks to enter South Africa.<sup>144</sup>

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<sup>135</sup> R Gidlow 'Foreign banks, exchange controls and the future of the four pillars bank policy in South Africa' (2010) 23 *South African Journal of Economic History* 35.

<sup>136</sup> Gidlow (n 136 above) 35.

<sup>137</sup> Gidlow (n 136 above) 35.

<sup>138</sup> Gidlow (n 136 above) 35.

<sup>139</sup> Gidlow (n 136 above) 35.

<sup>140</sup> Gidlow (n 136 above) 35.

<sup>141</sup> Gidlow (n 136 above) 35.

<sup>142</sup> Gidlow (n 136 above) 35.

<sup>143</sup> Gidlow (n 136 above) 35.

<sup>144</sup> Gidlow (n 136 above) 35.

### 2.3 Banks that are regulated in terms of other Acts

South Africa has enacted a range of new legislation in a bid to allow entities not registered as banks to offer some services to the unbanked citizens.<sup>145</sup> Fifty- four per cent of adults in South Africa report using a formal account enabling both deposits and withdrawals at a bank, credit union, cooperative, post office, or microfinance institution.<sup>146</sup> This could be as a result of dedication of the government to enact legislation so as to increase financial inclusion. The new legislation is:

- Mutual Banks Act 124 of 1993;
- Cooperative Act of 14 of 2005;
- Postal Service Act 124 of 1998;
- Dedicated Banks Draft Bill;
- Development Bank of Southern Africa Act 19 of 1997;
- Business Partner Limited;
- Microlending.

For these institutions, entry requirements of the Acts and exemptions above paint a consistent picture – easy, low and reduction of regulatory barriers.<sup>147</sup>

### 2.4 Other Legislation governing the conduct of banks in South Africa

The registration and licensing of banks in South Africa is primarily dealt with in the Bank Act of 1990. There are other legislation which are applicable to bank conduct. The contravention of the legislation could lead to cancellation of the bank licence. The secondary legislation imposes costs on banks which could serve as a barrier to trade.

#### 2.4.1 The Financial Sector Charter (FSC)

The Charter was developed to further the provisions of the Black Economic Empowerment (BEE) Charter.<sup>148</sup> It is aimed to increase the participation of the black population in banking and

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<sup>145</sup>South African Reserve Bank ‘Bank Legislation’ <https://www.resbank.co.za/RegulationAndSupervision/BankSupervision/BankingLegislation/Pages/default.aspx> (accessed 26 May 2014).

<sup>146</sup> The World Bank ‘South Africa ‘Economic update Focus on Financial Inclusion’ (2014) 17 <http://www.worldbank.org/content/dam/Worldbank/document/Africa/South%20Africa/Report/south-africa-economic-update-2013.05.pdf> (accessed 26 May 2014).

<sup>147</sup> SARB Bank Legislation (n 146 above)



to increase accessibility to banking.<sup>149</sup> The provisions of this charter have significantly changed the market access and national treatment commitments for South Africa Banks. High capitalisation requirements for the big banks have been maintained while making entry requirements for the smaller banks t less.<sup>150</sup>

The Act makes it conditional that entry is dependent on the entering bank's ability to comply with a certain level of conduct. The Charter requires that banks invest a certain percentage of their earnings in training black employees.<sup>151</sup> Further, the Charter makes it such that the priority is to develop the existing BEE accredited companies by providing infrastructure, technical, administrative and financial support.<sup>152</sup> In response to the FSC, the big four bags (and Postbank) launched a simple bank account (called a Mzansi account), which did not attract monthly fees.<sup>153</sup> By March 2008, the banks had opened 4.2 million Mzansi accounts.<sup>154</sup> The reports that followed this development suggested that many of the accounts have now become inactive.<sup>155</sup>

## 2.5 Conclusion

Traditional banking in South Africa was marred by inadequacies in its regulatory framework which was exacerbated by its fragmentation.<sup>156</sup> After 1994, the government has successfully endeavoured to consolidate bank legislation and make the requirements for registration and licencing of a bank transparent and accessible, infact the requirements for foreign branch establishment have been reduced by the Banks Amendment Act of 2012.<sup>157</sup> The operation of the four pillar banking remains a policy mechanism of the government. The government adheres to this policy as a way to maintain competition and financial stability. As a result of the operation

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<sup>148</sup> Broad based Black economic Empowerment Act (53/2003):Codes of Good Practice on Broad-Based Black Economic Empowerment Government Gazette 35914 of 26 November 2012 [http://www.thedti.gov.za/economic\\_empowerment/docs/beecharTERS/Financial\\_sector\\_code.pdf](http://www.thedti.gov.za/economic_empowerment/docs/beecharTERS/Financial_sector_code.pdf) (accessed 24 May 2014)

<sup>149</sup> Codes of Good Practice on Broad Based Black Economic Empowerment (n 149 above) preamble.

<sup>150</sup> Codes of Good Practice on Broad Based Black Economic Empowerment (n 149 above) preamble.

<sup>151</sup> Codes of Good Practice on Broad Based Black Economic Empowerment (n 144 above) 3.2.2.5.

<sup>152</sup> Banking Association South Africa 'Code of banking practice' 2012 3 [http://www.banking.org.za/downloads/Code\\_of\\_Banking\\_practice.pdf](http://www.banking.org.za/downloads/Code_of_Banking_practice.pdf) (accessed 7 May 2014).

<sup>153</sup> K van Wyk 'Regulation of the Financial markets' in van Wyk, Botha & Goodspeed ( n 46 above)76.

<sup>154</sup> K van Wyk 'Regulation of the Financial markets' in van Wyk, Botha & Goodspeed ( n 46 above)76.

<sup>155</sup> K van Wyk 'Regulation of the Financial markets' in van Wyk, Botha & Goodspeed ( n 46 above)76.

<sup>156</sup> Banking Association South Africa (n 146 above ) Paragraph 2.2.

<sup>157</sup> Banking Association South Africa (n 146 above Paragraph 2.2.1.

of the policy, secondary legislation has become increasingly important in regulating bank conduct in South Africa; it addresses the social reforms planned by the government. The secondary policy is part of the government's strategy to increase bank access to address the issue of the unbanked and hopefully the under-banked as well. For new entrant, it adds to the cost of doing business.

The SARB considers the history of banking as an important factor in developing regulations that will pave the path for the future banking sector in the country.<sup>158</sup> This is evident in the laws that have been implemented by the SARB to regulate the banking sector in contemporary South Africa.<sup>159</sup> It is submitted that this cautionary tale has led to a very risk averse bank regulatory framework.

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<sup>158</sup> Banking Association South Africa (n 146 above).Paragraph 2.2.2.

<sup>159</sup> Banking Association South Africa (n 153 above).Paragraph 2.4.

## Chapter three

### South Africa's banking Sector's Regulations in view of its financial services liberalising Commitments under GATS.

#### 3.1 Introduction

The economic policy of a country shapes and informs its approach to regulation.<sup>160</sup> In South Africa, regulatory reform is aided by Regulatory Impact Assessments (RIA).<sup>161</sup> The aim of RIA is to improve the regulatory process, through research and consultation. The GATS clarifies that countries have the right to implement prudential regulation and macroeconomic policy to enhance financial sector stability.<sup>162</sup> These should not impede on the role of GATS to attain progressive liberalisation. They should be for purposes that are deemed only necessary to financial stability.<sup>163</sup> South Africa has autonomously restructured their banking licensing requirements since its participation in the services trade negotiations under the WTO.<sup>164</sup> Stemming from the fact that bank licensing is crucial to many other factors, such as unemployment, social development and education, the industry is very well regulated.<sup>165</sup> This

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<sup>160</sup> De Kork 'Market-oriented economic policy versus quantitative controls' (1986) 42 available at <https://www.resbank.co.za/Lists/News%20and%20Publications/Attachments/5233/04Marketoriented%20economic%20policy%20versus%20quantitative%20controls.pdf> (accessed 10 May 2014) where the author states that the influence of economic policy must in any case not be overrated. Often the influence of economic policy is relatively small compared with other economic and non-economic influences which determine the course of the economy. See also p1 where they discuss the importance of sound economic policy to growth and p 22 where the authors emphasize policy is not enough there is a need for the certainty of policy direction in establishing confidence in the economy and providing the framework for growth; Manuel 'Economic Policy and South Africa's growth strategy (2007) 1 where he states that the new paths to growth have to be organic shoots growing out of the past as the events of the past determine the structure of the economy at [http://www.treasury.gov.za/comm\\_media/speeches/2007/2007031901.pdf](http://www.treasury.gov.za/comm_media/speeches/2007/2007031901.pdf) (accessed 10 May 2014)

<sup>161</sup> The Presidency: Republic of South Africa "Guidelines for the implementation of the regulatory impact/analysis assessment (RIA) process in South Africa" 2012 <http://www.thepresidency.gov.za/MediaLib/Downloads/Home/Publications/RegulatoryImpactAssessment/Guidelines2/Regulatory%20Impact%20Assessment%20Guideline%20February%202012.pdf> (accessed 22 May 2014)

<sup>162</sup> Chapter four paragraph 4.2.5 above.

<sup>163</sup> Chapter four (n 257 above) 4.2.5

<sup>164</sup> Chapter four (n 257 above) 4.2.5.

<sup>165</sup> N Cattaneo 'Services Trade Liberalisation and the Role of the Services Sector in South Africa Development' 2011 *South African Institute of International Affairs* 6 <http://www.saiia.org.za/occasional-papers/services-trade-liberalisation-and-the-role-of-the-services-sector-in-south-african-development> (accessed 25 May 2014); J Fourie 'The renaissance of African Economic History' (2012) 1 *South African Economic History Annual* 5 [http://www.ehssa.org.za/wp-content/uploads/SAEHA2013\\_lowres.pdf](http://www.ehssa.org.za/wp-content/uploads/SAEHA2013_lowres.pdf) (accessed 25 May 2014).

chapter explores the bank licensing regulatory framework as developed in South Africa in view of its banking commitments under GATS. This analysis will reveal whether this framework is intended to lead to progressive liberalisation.

### 3.2 Regulation

Regulation refers to the diverse set of instruments by which governments adopt to set requirements on businesses and citizens.<sup>166</sup> This includes laws, regulations and directives.<sup>167</sup> Krajewski maintains that regulation should not focus solely on the concept of restricting private choices for a collective good; rather regulation is more adequately understood as a process of guiding and influencing economic factors.<sup>168</sup> Its nature is such that it needs flexibility and space to function properly, because it depends on the respective historic and political circumstances of a country.<sup>169</sup> The rationales for regulation as a general rule falls into three categories, economic, social and administrative.<sup>170</sup>

Entry control is an example of a type of regulation.<sup>171</sup> They require individual and businesses to obtain authorization before pursuing a certain activity. Entry controls are regarded as regulatory instruments with a high degree of intervention; as such they are generally used for the public interest purpose.<sup>172</sup> This explains the reasons why SARB uses licencing as one of its main tools to ensuring stability of the banking sector.

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<sup>166</sup> The Presidency: Republic of South Africa 'Guidelines for the implementation of the regulatory impact/analysis assessment (RIA) process in South Africa' (2012) 5 <http://www.thepresidency.gov.za/MediaLib/Downloads/Home/Publications/RegulatoryImpactAssessment/Guidelines2/Regulatory%20Impact%20Assessment%20Guideline%20February%202012.pdf> (accessed 22 May 2014).

<sup>167</sup> Delamatsis (n 161 above) 91.

<sup>168</sup> Krajewski (n 43 above) 4.

<sup>169</sup> Krajewski (n 43 above) 4.

<sup>170</sup> Delamatsis (n 161 above) 9.

<sup>171</sup> Delamatsis (n 161 above) 9: other examples are standards, price control, public ownership and public monopolies, information regulatory measure, typology (economic incentive, behavioural controls and restrictions on activities).

<sup>172</sup> Delamatsis (n 161 above) 27.

The regulatory framework must promote legitimate liberalisation efforts. This must be based on a credible and non-discriminatory framework. The framework must be such that it advances social objectives based on distributive justice.<sup>173</sup> In South Africa, the current banking regulatory framework is focused on enhancing stability of the banking system, implementation of the twin peaks model of regulation, propelling BEE in the banking industry through FSC, and improving access to basic financial services such as saving products for the majority of South Africans'.<sup>174</sup>

### 3.3 Progressive liberalisation

Progressive liberalisation is a process introducing greater market openness and a competitive market environment.<sup>175</sup> Such a process requires the removal of obstacles to market entry and competition.<sup>176</sup> As such, it can be a process of re-regulation or deregulation.<sup>177</sup> Under the GATS, progressive liberalisation should happen through scheduled rounds of negotiations. The Member is expected to submit its offer, which will serve as a reference point in the negotiations.<sup>178</sup> The negotiations aim to attain a balance between domestic regulation and trade liberalisation.<sup>179</sup>

Krajewski makes a distinction between domestic liberalisation and international liberalisation.<sup>180</sup> Domestic liberalisation aims at ensuring competitive markets for domestic economic actors, whereas international liberalisation aims at ensuring competitive environment for international actors.<sup>181</sup> A market can be highly open domestically and provide a competitive environment for domestic actors, but may be closed for international actors. In South Africa this is illustrated by

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<sup>173</sup> Economic Development Department Republic of South (n 340 above) 2. Also, governments aim to promote sustainable development. Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs, see The World Bank Group 'What is sustainable development' 2001 <http://www.worldbank.org/depweb/english/sd.html> (accessed 25 May 2014).

<sup>174</sup> National Treasury Republic of South Africa (n 35 above) 23.

<sup>175</sup> Delamatsis (n 41 above) 5; Wolfrum *et al* (n 1 above) 24.

<sup>176</sup> Delamatsis (n 41 above) 5.

<sup>177</sup> Delamatsis (n 41 above) 5.

<sup>178</sup> P Delamatsis 'Determining the necessity of domestic regulations in services – The best is yet to come' 19 *European Journal of International Law* 366 <http://www.ejil.org/pdfs/19/2/187.pdf> (accessed 24 May 2014); Wolfrum *et al* (n 1 above) 25; GATS (n 14 above) Article XIX.

<sup>179</sup> Delamatsis (n 41 above) 366.

<sup>180</sup> Krajewski (n 44 above) 5.

<sup>181</sup> Krajewski (n 44 above) 5.

the operation of the big four banks. However, opening a market to foreign service suppliers also requires domestic liberalization because of legal, political and practical reasons.<sup>182</sup> This study agrees with the view of Krajewski that, international liberalization often coincides or reinforces domestic liberalization in practical terms.<sup>183</sup> A strong domestic regulatory regime will be able to sustain international liberalisation.

There is no set formula for liberalisation. A few key points are necessary in order for it to occur.<sup>184</sup> Political stability and a sound economy are necessary prerequisites.<sup>185</sup> As such, sound macroeconomic management, an adequate basic system for banking supervision and its effective implementation, and the absence of major political lending and other abuses of the financial system are practices that complement liberalisation.<sup>186</sup> Policies are not static they dependent on the functioning of these ingredients otherwise there are of no real use.<sup>187</sup>

### **3.4 Regulation of bank licencing**

Banks are regulated by the Banking Supervision Department (BSD) of the SARB in respect of their banking (deposit-taking) activities.<sup>188</sup> As one of the Bank's core departments, the BSD is fully committed to achieving its mission of promoting the soundness of the domestic banking system and to contribute to financial stability.<sup>189</sup> The BSD models its regulatory and supervisory framework on;<sup>190</sup> the 25 Core Principles for Effective Banking Supervision (the Core Principles) as published by the Basel Committee on Banking Supervision (BCBS);<sup>191</sup> and the Basel II, Basel

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<sup>182</sup> Krajewski (n 44 above) 5.

<sup>183</sup> Krajewski (n 44 above) 5.

<sup>184</sup> WTO (n 40 above) 33.

<sup>185</sup> WTO (n 40 above) 33.

<sup>186</sup> WTO (n 40 above) 33.

<sup>187</sup> WTO (n 40 above) 33.

<sup>188</sup> SARB 'Bank Supervision'(n 146 above)

<sup>189</sup> SARB 'Bank Supervision'(n 146 above)

<sup>190</sup> SARB 'Bank Supervision'(n 146 above)the global financial crisis, which commenced in 2007, revealed and accentuated fundamental weaknesses in international financial markets. In response to these weaknesses, international standard-setting bodies such as the G-20, the FSB and the BCBS announced various initiatives, strategies, and new or amended requirements and standards. The BSD continuously monitor these developments, and incorporates them into its supervisory approach as and when deemed appropriate.

<sup>191</sup> Basel Committee of Banking Supervision (BCBS) 'Core Principles for Effective Banking Supervision' (2006) <http://www.bis.org/publ/bcbs129.pdf> (accessed 10 May 2014).

2.5 and Basel III frameworks.<sup>192</sup> Further, the BSD participates and contributes to different forums including the BCBS and its subgroups, the Group of Twenty (G-20) Finance Ministers and Central Bank Governors and the Financial Stability Board (FSB).<sup>193</sup>

### 3.5 Basel Committee on Bank Supervision

Since the 1990s South Africa through the Banking Supervision Department of the South African Reserve Bank (SARB) has been following and closely aligning its policies and procedures with guidance and principles issues by BCBS.<sup>194</sup> It officially became a member in 2009.<sup>195</sup>

### 3.6 Basel III

Basel III accord is a set of reform measures designed by BCBS, to strengthen the regulation, supervision and risk management of the banking sector.<sup>196</sup> They are aimed at improving the banking sector's financial soundness, transparency, disclosure and economic stress<sup>197</sup>.

The reforms target microprudential regulation.<sup>198</sup> These microprudential banking regulations have not yet addressed the conflict between trade disciplines and banking regulation.<sup>199</sup> This

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<sup>192</sup> Bank for International Settlement (BIS) 'International regulatory framework for banks (Basel III)' (2014) <http://www.bis.org/bcbs/basel3.htm> (accessed 10 May 2014).

<sup>193</sup> BIS ( n 192 above).

<sup>194</sup> Global Partnership for financial inclusion 'South Africa's engagement with the standard setting bodies and the implications for financial inclusion' (2011) 2 <http://www.gpfi.org/sites/default/files/documents/South%20Africa%20E2%80%99s%20Engagement%20with%20Standard%20Setting%20Bodies%20and%20Implications%20for%20Financial%20Inclusion.pdf> (accessed 10 May 2014).

<sup>195</sup> BIS 'Basel Committee Membership' (2014) <http://www.bis.org/bcbs/membership.htm> (accessed 12 April 2014).

<sup>196</sup> Bank Supervision Department (BSD) 'Annual Report 2012' 16 <https://www.resbank.co.za/Lists/News%20and%20Publications/Attachments/5733/01%20Annual%20Report%202012.pdf> (accessed 20 May 2014)

<sup>197</sup> The efficiency of Basel III to do this effectively has been discussed at length: CP Georg 'Basel III and the Systemic Risk Regulation – What Way Forward' (2011) [http://pubdb.wiwi.uni-jena.de/pdf/wp\\_hlj17-2011.pdf](http://pubdb.wiwi.uni-jena.de/pdf/wp_hlj17-2011.pdf) (last accessed 24 May 2014); AB Wignall & Atkinson 'Thinking beyond Basel III: Necessary Solutions for Capital and Liquidity' 2010 *OECD Journal: Financial Markets Trends*. <http://www.oecd.org/finance/financial-markets/45314422.pdf> (accessed 25 May 2014)

<sup>198</sup> Microprudential regulation also known as bank-level, or microprudential, regulation, which will help raise the resilience of individual banking institutions to periods of stress: BIS 'International Regulatory Framework for Banks (Basel III)' (2014) <http://www.bis.org/bcbs/basel3.htm> (accessed 22 May 2014) Procyclical is a condition of positive correlation between the value of a good, a service or an economic indicator and the overall state of the economy. In other words, the value of the good, service or indicator tends to move in the same direction as the economy, growing when the economy grows and declining when the economy declines. Some examples of

surfaces issues of legitimacy that may arise when transforming these standards for the application of legally binding trade disciplines to national regulation.<sup>200</sup> This introduces an important dimension to the study which pertains to the strict implementation and adherence to international best practices in banking. South Africa strictly adheres to the implementation of the BCBS recommendations; does such strict adherence lead to violation of the scheduled commitments in banking? The answer to this question ties in to the matter presented below with regards when to draw the line. The balance needs to be maintained between domestic regulations and scheduled commitments in order to attain progressive liberalisation.

Systematic risk is of pivotal concern to bank market access regulation. It is defined as the conditional probability of failure of a large number of financial institutions.<sup>201</sup> The effect of systemic failure can be illustrated by the global financial meltdown in 2007/08.<sup>202</sup> The crisis was caused by large savings in emerging economies like China flowing to industrialized countries which funded high levels of debt-financed consumption in those countries.<sup>203</sup>

Regulators' job is to reduce systemic failure. This is done by setting comprehensive prudential requirements.<sup>204</sup> In cases of bank failure, the regulatory structure should reduce the impact of the failure.<sup>205</sup> However, as risk taking is a normal part of an active a market, regulation should not

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procyclical economic indicators are GDP, labor and marginal cost. Most consumer goods are also considered procyclic, because consumers tend to buy more discretionary goods when the economy is in good shape. Economic indicators can have one of three different relationships to the economy: procyclic, countercyclic (indicator and economy move in opposite directions) or acyclic (indicator has no relation to the health of the economy) <http://www.investopedia.com/terms/p/procyclical.asp> (accessed 12 April 2014.); Financial Stability Forum 'Reducing procyclicality arising from the bank capital framework' (2009) [https://www.financialstabilityboard.org/publications/r\\_0904f.pdf](https://www.financialstabilityboard.org/publications/r_0904f.pdf) (accessed 12 April 2014)

<sup>199</sup> Delamatsis (n 41 above) 3.

<sup>200</sup> Delamatsis (n 41 above) 3.

<sup>201</sup> K Giesecke & B Kim 'Systemic Risk: What defaults are telling us' (2009) 1 <http://www.bis.org/repofficepubl/hkimr201007.02.pdf> (accessed 26 May 2014).

<sup>202</sup> K van Wyk 'Regulation of the Financial markets' in van Wyk, Botha & Goodspeed (n 46 above) 116; Kono *et al* (n 32 above) 29: where the authors provide five case studies in banking Crisis and Reform on Chile 1981-83, Estonia (1992-94), Ghana (1983-89), Malaysia (1985-88) and Nordic Countries (late 1980s –early 1990s).

<sup>203</sup> K van Wyk 'Regulation of the Financial markets' in van Wyk, Botha & Goodspeed (n 46 above) 116.

<sup>204</sup> K van Wyk 'Regulation of the Financial markets' in van Wyk, Botha & Goodspeed (n 46 above) 116.

<sup>205</sup> K van Wyk 'Regulation of the Financial markets' in van Wyk, Botha & Goodspeed (n 46 above) 116.



stifle legitimate risk. Institutions should be allowed to absorb some losses without failing or affecting other institutions.<sup>206</sup>

South African banking regulations are molded against both international principles and social transformation economic policies as drafted by the government.<sup>207</sup> There is a high level of protectionism of the banking sector. It is very difficult to determine where the line should be drawn in reforming policy and advancing liberalisation. Over regulation can be costly to banks and affect their performance. Maybe this can be a definite point when the line should be drawn, when the costs outweigh the benefits.

### 3.7 Economic programmes

South Africa looks to the market operation in order to determine the role and operation of the economy.<sup>208</sup> This approach implies minimum intervention by the authorities as the market mechanism is assumed to achieve the highest efficiency in terms of the allocation of resources.<sup>209</sup> South Africa, like other Governments following this approach, acknowledges that at times market imperfections do arise which justifies intervention by way of regulations from the authorities.<sup>210</sup> That understanding leads to the promulgation of legislation to regulate industries, and create regulatory authorities and authorize them to influence the economy according to

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<sup>206</sup> K van Wyk 'Regulation of the Financial markets' in van Wyk, Botha & Goodspeed ( n 46 above) 116.

<sup>207</sup> Chapter three para 3.6.

<sup>208</sup> K van Wyk 'Regulation of the Financial markets' in van Wyk, Botha & Goodspeed ( n 46 above)111; Fourie (n 166 above) 14: the authors describes different forms of reasoning that can be gleaned from economic history such as deductive reasoning (developing an understanding bases on theory) and inductive reasoning (analyzing events through an examination of the available facts) which factors are both essential to decision making. The authors further explain that policy makers face challenges when calling on history in deciding which analogies to be drawn. He concludes that one answer is provided by "structure –mapping "approach which suggests that humans are quick to draw structural parallels between events. A more cynical explanation, he adds, is that analysts draw on experiences that are closest to hand 'availability' heuristic; For a further expositions of how economic history finds even greater policy relevance during financial crises as it provides an immediate guide for action when times is a scarce

<sup>209</sup> K van Wyk 'Regulation of the Financial markets' in van Wyk, Botha & Goodspeed ( n 46 above) 111.

<sup>210</sup> K van Wyk 'Regulation of the Financial markets' in van Wyk, Botha & Goodspeed ( n 46 above) 111.

government policy.<sup>211</sup> The underlying policy that informs and shapes regulations is important to understand for the simple reason that it determines the future of the regulatory framework.

### 3.7.1 Economic programs between 1994 – 2009

The new government, in 1994, set out on a path to improve the lives of all South African citizens.<sup>212</sup> The strategy was to employ economic policies that would decrease the inequality gaps.<sup>213</sup> The three policies employed to attain this goal were; the Reconstruction and Development Programme (RDP), The Growth and Employment Redistribution Programme (GEAR) and the Accelerated and Shared Growth Initiative of South Africa (AsgiSA).<sup>214</sup>

The RDP reprioritized spending toward social development, and was based on the key mandate of meeting basic needs, developing human resources, building the economy and democratising state and society.<sup>215</sup> It also advocated for prudent fiscal policy, among other things.<sup>216</sup> It did not address the objectives aimed at social reforms, which relate to public finance.<sup>217</sup> As such, it was then supplemented by GEAR in 1996.<sup>218</sup>

GEAR was predicated on the attainment of macroeconomic stability as a basis for economic growth.<sup>219</sup> It went into overdrive on fiscal reform<sup>220</sup> This led to the application of a more

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<sup>211</sup> K van Wyk 'Regulation of the Financial markets' in van Wyk, Botha & Goodspeed (n 46 above) 111.

<sup>212</sup> UNISA 'A broad review of the new growth path framework with a specific emphasis on the feasibility of its proposed targets 2011' 1 <http://www.unisa.ac.za/contents/faculties/ems/docs/Press413.pdf> (accessed 7 April 2014); National Treasury Republic of South Africa 'National Treasury Strategic Plan 2008/11' (2008) 10. <http://www.treasury.gov.za/publications/strategic%20plan/Strat%20Plan%202008-2011.pdf> (accessed 24 May 2014); National Treasury of the Republic of South Africa 'GEAR' <http://www.treasury.gov.za/publications/other/gear/> (accessed 24 May 2014), National Treasury of the Republic of South Africa 'RDP' [http://www.treasury.gov.za/documents/national%20budget/1998/review/chapter\\_01.pdf](http://www.treasury.gov.za/documents/national%20budget/1998/review/chapter_01.pdf) (accessed 25 May 2014); National Treasury of the Republic of South Africa 'AsgiSA' <http://www.treasury.gov.za/documents/mtbps/2007/mtbps/Chapter%205.pdf> (accessed 25 May 2014).

<sup>213</sup> UNISA (n 213 above) 1.

<sup>214</sup> UNISA (n 213 above) 1.

<sup>215</sup> National Treasury Republic of South Africa (n 213 above) 8.

<sup>216</sup> National Treasury Republic of South Africa (n 213 above) 8.

<sup>217</sup> National Treasury Republic of South Africa (n 213 above) 10.

<sup>218</sup> National Treasury Republic of South Africa (n 213 above) 3.

<sup>219</sup> National Treasury Republic of South Africa (n 213 above) 3.

consistent monetary policy, as one of its successes.<sup>221</sup> Macroeconomic stability encouraged foreign capital and encouraged foreign investment.<sup>222</sup> As stated by Faulkner and Loewald ‘...sustaining economic growth is the overriding objectives of economic policy...’<sup>223</sup> South Africa was well on its way. With the increase in foreign investment the government realized the importance of public sector infrastructural investment to future growth and it introduced AsgiSA.<sup>224</sup> All this growth was made conducive by a well controlled banking sector.

The three economic policies above were geared at increasing financial stability post-apartheid while ensuring social transformation.<sup>225</sup> Foreign investment was considered important towards economic growth but government still maintained a level of protectionism as seen in the revised GATS commitments of 1998.<sup>226</sup>

### **3.7.2 Economic programmes between 2009 to present**

The government through its policies managed to stabilize macroeconomic policy, in the period under review above, created a solid foundation for microeconomic policy reforms. Such reform is necessary to lift growth rates.<sup>227</sup> The President of South Africa, Jacob Zuma, in his inaugural State of the Nation Address in June 2009 stated that:

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<sup>220</sup> National Treasury Republic of South Africa (n 213 above) 3.

<sup>221</sup> National Treasury Republic of South Africa (n 213 above) 3.

<sup>222</sup> National Treasury Republic of South Africa (n 213 above) 3.

<sup>223</sup> C Faulkner & C Loewald ‘Policy Change and Economic Growth: A case study of South Africa’ 2008 The Commission on Growth and Development 10 [http://www-wds.worldbank.org/external/default/WDSContentServer/WDS/IB/2010/12/06/000333038\\_20101206014823/Rendered/PDF/577400NWP0Box353767B01PUBLIC10gcwp041web.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDS/IB/2010/12/06/000333038_20101206014823/Rendered/PDF/577400NWP0Box353767B01PUBLIC10gcwp041web.pdf) (accessed 24 May 2014).

<sup>224</sup> National Treasury Republic of South Africa (n 213 above) 44.

<sup>225</sup> Faulkner *et al* (n 224 above) 27.

<sup>226</sup> Chapter four para 4.5

<sup>227</sup> TA Manuel ‘Economic policy and South Africa’s Growth Strategy’ (2007) 7 <http://www.treasury.gov.za/comm-media/speeches/2007/2007031901.pdf> (accessed 25 May 2014)

“.....The creation of decent work will be at the center of our economic policies and will influence our investment attraction and job creation initiatives. In line with our undertakings, we have to forge ahead to promote a more inclusive economy”.<sup>228</sup>

While the new growth focuses on the creation of decent work, It recognises that jobs can only be created in a more developed, democratic, cohesive and equitable economy.<sup>229</sup> This explains the government’s new focus on financial inclusion.<sup>230</sup> In light of the worldwide experiences, after the financial crises, the new growth plan combines macroeconomic and microeconomic interventions for addressing issues of financial stability.<sup>231</sup>

The government intends to achieve benefits of the New Growth Path by focusing on key policies and programmes over at least a decade.<sup>232</sup> This means the legislative and regulatory framework will be designed for mass reach and potential impact on the job quality. The growth path therefore proposes strategies to deepen the domestic and regional market by, among other things, widening the market for South African goods and services through a stronger focus on exports to the region and other rapidly growing economies.<sup>233</sup>

Evident from the last mentioned strategy, South Africa’s market access plans are targeted at penetration of other markets to export its goods and services.<sup>234</sup> Further, the trade policy for South Africa is specifically aimed at identifying opportunities for exports in external markets and

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<sup>228</sup> President Jacob Zuma ‘Address by His Excellency Mr Jacob Zuma on the occasion of his Inauguration as fourth President of the Republic of South Africa’ (2009) <http://www.thepresidency.gov.za/pebble.asp?releid=762> last accessed 10 May 2014.

<sup>229</sup> President Jacob Zuma (n 229 above).

<sup>230</sup> Chapter 2 paragraph 2.4.1.

<sup>231</sup> Economic Development Department Republic of South Africa “The new growth path framework” 2011 6 available at <http://www.economic.gov.za/communications/publications/new-growth-path-series> last accessed 10 May 2014; National Treasury of the Republic of South Africa (2011)

<sup>232</sup> Economic Development Department Republic of South (n 232 above) 6.

<sup>233</sup> Economic Development Department Republic of South (n 232 above) 6.

<sup>234</sup> This is evidenced by the current increase in penetration in foreign markets by South African Banks. Standard Bank’s presence in Angola <http://www.standardbank.co.za/portal/site/standardbank/menuitem.de435aa54d374eb66fcb695665c9006a0/?vgnnextoid=b708166c8045b210VgnVCM100000c509600aRCRD> last accessed 10 May 2014; Economic Development Department Republic of South (n 232 above) 36 of framework which makes reference to core action in the social economy development to include financial service.

using trade agreements and facilitation to achieve these.<sup>235</sup> The policy focus is to ensure co-ordination between developmental finance institutions, regulatory bodies, government procurement, industrial policy, and macroeconomic policies in order to promote domestic manufacturing.<sup>236</sup> This focus was emphasized by the President at his second inauguration,<sup>237</sup>

“...the economy will be transformed through industrialization, broad-based black economic empowerment and through strengthening ... development finance institutions will become engines of development, complementing the State in promoting inclusive economic growth”.

Such a focus in policy will affect its negotiating position for the advancement of its commitments under the GATS. The plan of the government is to employ policy that will facilitate transformation of the society. As such, at the WTO, it will maintain efforts to advocate protection of policy space for development strategies, and resist rigid formula-driven proposals to influence trade liberalisation.<sup>238</sup>

### 3.8. Domestic regulations and the GATS

GATS article VI deals with domestic regulations. It is advanced that domestic regulations are complementary provision to national treatment and market access provisions; they should not be discriminatory or restrict the market but they may impede trade in services.<sup>239</sup> There are no set parameters as to the procedure that must be followed in drafting domestic regulations; provision is only made with regards the administration of the drafted provisions.<sup>240</sup>

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<sup>235</sup> Economic Development Department Republic of South (n 232 above) 24. It further states that the trade policy must remain pragmatic and evidence based in pursuing core socio-economic goals, particularly decent work and inclusive and balanced growth, without acceding unnecessarily to narrow interests or failing to respond to real economic needs.

<sup>236</sup> Van der Merwe As SA Changes trade policy tack, observers call for greater transparency Engineering News 2010 2 available at <http://www.engineeringnews.co.za/page/trade> (accessed 10 May 2014).

<sup>237</sup> President Jacob Zuma ‘Address by His Excellency Mr Jacob Zuma on the occasion of his Inauguration as fifth President of the Republic of South Africa’ (2014) <http://www.thepresidency.gov.za/pebble.asp?relid=17449> (accessed 25 May 2014).

<sup>238</sup> Economic Development Department Republic of South ‘The new growth path framework’ (2011) 24 <http://www.economic.gov.za/communications/publications/new-growth-path-series> (accessed 25 May 2014).

<sup>239</sup> Krajewski (n 44 above) 168.

<sup>240</sup> Krajewski (n 44 above) 168.

### 3.8.1 Administration of domestic regulations

Paragraph 1 of Article VI GATS reads:

“In sectors where specific commitments are undertaken, each Member shall ensure that all measures of *general application affecting* trade in services are *administered* in a *reasonable, objective and impartial manner*”.

This general principle guides the understanding and interpretation of the specific obligations contained in the other provisions of Article VI.<sup>241</sup> It encompasses sound regulatory principles of consistency and predictability.<sup>242</sup> The principle of consistency, which has its roots in administrative law, is considered a key principle of best practices in the regulatory behaviour in order to inspire confidence in the regulatory regime and give a degree of predictability and legal certainty to those being regulated.<sup>243</sup>

From a reading of the provision, measures addressing specific situations would not be subject to the obligation of due administration. In contrast, measures of general application, i.e. measures that affect ‘an unidentified number of economic operators’, or, cover ‘a range of situations or cases would fall under Article VI:1.<sup>244</sup> The article embodies the provisions of Administrative law where procedurally fair administration of the law is a requirement.<sup>245</sup> Regulations of general application would therefore make the government vulnerable to litigation. As such the article intrinsically advocates that the substance of the regulations should be well thought out so as to allow for their fair administration.

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<sup>241</sup> Krajewski (n 44 above) 168; The other provision are Article VI:2 – prompt review of, and appropriate remedies for, administrative decisions, Article VI:3-Information by the domestic competent authorities and timely decision as regards an application, Article VI:4 – The substantive obligation, Article VI:5- The substance obligation of transitional nature and Article VI:6-Adequate procedures for verifying competence of professionals. These provisions will not be discussed in this paper. The tone of their application is set in Article VI:1 and for the purposes of this paper that is sufficient; Delimatsis (n 41 above) 83 for a fuller treatment of the test for domestic regulations.

<sup>242</sup> Delimatsis (n 1411 above) 86.

<sup>243</sup> Delimatsis (n 141 above) 86.

<sup>244</sup> Delimatsis (n 141 above) 86.

<sup>245</sup> Promotions of Administrative Justice Act 3 of 2000, section 3

Any complaint relating to the substantive content of a Member's domestic regulations of general application and not to their administration should not be deemed as falling under this article.<sup>246</sup> As such, only the manner in which domestic regulations are applied or administered falls within the ambit of Article VI: 1.<sup>247</sup> This cements the fact that GATS does not interfere with the policy making autonomy of the country. The country can enact any regulations as it deems necessary as long as their administration is objective, impartial or reasonable.<sup>248</sup> However, it is important to realise that only reasonable, objective and impartial regulations can be applied in a reasonable, objective and impartial manner.

### 3.8.3 Trade Policy Review Mechanism under WTO

The objectives of the Trade Policy Review Mechanism (TPRM) as expressed in Annex 3 of the Marrakesh Agreement is to promote the smooth functioning of the multilateral trading system by enhancing the transparency of Members' trade policies.<sup>249</sup> This furthers the point that, the WTO does not interfere in the member states autonomy in the making of regulations. All WTO Members are subject to review under the TPRM.<sup>250</sup> South Africa is reviewed every six years.<sup>251</sup>

South Africa's third policy review, since independence, was done in 2009.<sup>252</sup> South Africa emphasised that while strong economic fundamentals exist, there is a need for a more focused

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<sup>246</sup> Delimatsis (n 141 above) 86.

<sup>247</sup> Delimatsis (n 141 above) 86.

<sup>248</sup> Appellate Body Report, EC – Bananas III, para 19; and Panel Report, EC – Selected Customs Matters, para 7.112. Also see Argentina – Hide and Leather Panel that found that a measure can still be challenged under Article X GATT if its substantive content is 'administrative in nature'. The Panel noted that, in such cases, the important question is whether the substance of the measure at hand is administrative in nature, i.e. whether it provides for a certain *manner of applying* substantive rules, or, rather, entails substantive issues that would be better tackled under the GATT provisions.

<sup>249</sup> General Agreement on Tariffs and Trade, 1994 Annex 3 -Trade Policy Review Mechanism: [http://www.wto.org/english/docs\\_e/legal\\_e/29-tprm\\_e.htm](http://www.wto.org/english/docs_e/legal_e/29-tprm_e.htm) (accessed 25 May 2014).

<sup>250</sup> Annex 3 (n 250 above).

<sup>251</sup> Annex 3 (n 250 above).

<sup>252</sup> WTO 'Trade Policy Review Reports by the Members of the South African Customs Union' WT/TPR/G/22 (2009) [http://www.wto.org/english/tratop\\_e/tpr\\_e/tp322\\_e.htm](http://www.wto.org/english/tratop_e/tpr_e/tp322_e.htm) (accessed 10 May 2014). The Report reviewed that 260. South Africa's banking sector comprises commercial banks (foreign and domestically owned), mutual banks, co-operative banks, and development banks). Four commercial banks, Amalgamated Bank of South Africa (ABSA), FirstRand Bank, Nedbank, and Standard Bank, all of which are privately owned, account for almost 84% of total assets and have a strong presence in the other SACU countries. Foreign presence in these four banks has increased significantly since the previous Review of SACU in 2003. The requirements (e.g. minimum capital requirements) for establishing a domestic or foreign bank are the same. In mid-2008, there were 19 registered

approach to support continued economic growth and employment creation in order to achieve the goals of reducing poverty and unemployment by 2014.<sup>253</sup> The country acknowledges that it has a strong economic philosophy but that philosophy must be effectively translated into its regulatory framework. This has been done so far, for instance, by broadening economic participation in banking for instance through the enactment of secondary legislation such as FSC.<sup>254</sup>

### 3.9 Conclusion

The GATS rules serve to regulate the process of the administration of the Members domestic regulations. Thus, the substantive content of regulations fall outside the scope and ambit of the GATS rules. South Africa has undertaken intensive and extensive economic reform through the different programmes since 1994. This reform has been reflected in its bank regulation. Regulations set the tone for market access and national treatment commitments. The consistent theme with regards South Africa bank licencing requirements is that they are moulded with reference to international best practices and government transformative policies. It can be concluded that the regulatory framework is fair and just and a definite base for progressive liberalisation. The next TPR for South Africa will be in 2015; in this review one would expect an elaborate detail on the banking regulatory framework in so far as it has changed since 2009. The review should highlight that the process of bank licencing in South Africa is administered in a reasonable objective and impartial manner. The government transformative policies and international best practices determine the regulatory framework for licencing. South Africa does not sustain quantitative or qualitative quotas in market access for banking. What makes entry is the high level of prudential regulations as advocated by the BCBS. The analysis above reveals that to an extent the South African authorities are not balancing the domestic regulations and scheduled commitments. They are focused on domestic regulation which goes against the purport of the GATS agreement.

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commercial banks in South Africa (14 domestic and 5 foreign owned), and two registered mutual banks. The structure of a mutual bank is designed to be less formal and simpler than that of a traditional bank.

<sup>253</sup> Trade Policy Review Report (n 253 above) 29.

<sup>254</sup> Trade Policy Review Report (n 253 above) 29.



## Chapter four

### South Africa's banking sector scheduled commitments under the GATS

#### 4.1 Introduction

South Africa adopted the GATS fifth protocol on Financial Services in 1998.<sup>255</sup> The last three chapters of this paper have detailed the intensive and extensive regulatory reform that the government has implemented since the re-entry of South Africa into the multilateral trading system. The preamble to the GATS states that it is intended to contribute to trade expansion 'under conditions of transparency and progressive liberalisation and as a means of promoting the economic growth of all trading partners and the development of developing countries'.<sup>256</sup> South Africa keeps up with the transparency obligation through constant notification to the Members of all changes to its regulatory framework that might affect trade in services.<sup>257</sup> This chapter reviews the nature of the commitments and assesses the country's compliance to date.

#### 4.2 The GATS at a glance

This section will provide a brief discussion of the features of (GATS) that are relevant to the discussion relating to bank licencing commitments as made by South Africa. Particular emphasis will be placed on market access and national treatment provisions.<sup>258</sup>

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<sup>255</sup>South Africa's Schedule of Commitments Supplement 3(n 1 above).

<sup>256</sup> GATS, 1995 (n 14 above).

<sup>257</sup>WTO 'Working Party on Domestic Regulations S/WPDR/M/58' (30 August 2013) paragraph 1.10 [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S006.aspx?Query=%28%20@Symbol=%20s/c/n/\\*%29%20and%20%28%20@Title=%20south%20africa%20%29&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChannel=true#](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=%28%20@Symbol=%20s/c/n/*%29%20and%20%28%20@Title=%20south%20africa%20%29&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChannel=true#) (accessed 24 May 2014).

<sup>258</sup> For fuller treatments of GATS, B Hoekman 'Tentative First Steps: An Assessment of the Uruguay Round Agreement on Services'(1995) *World Bank Conference on The Uruguay Round and Developing Economies* <http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-1455> (accessed 24 May 2014) , and A Mattoo 'Financial Services and the World Trade Organisation: Liberalisation Commitments of the Developing and Transition Economies'(1999) *The World Bank Development Research Group Trade* <http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-2184> (accessed 24 May 2014); A Gkoutzinis 'International Trade in Banking Services and the Role of the WTO: Discussing the Legal Framework and Policy Objectives of the General Agreement on Trade in Services and the Current State of Play in the Doha round of Negotiations' (2005) 39 *International lawyer* 890 [http://www.shearman.com/~media/Files/NewsInsights/Publications/2005/12/International-Trade-In-Banking-Services-and-the- /Files/View-Full-Text/FileAttachment/FIA\\_122005.pdf](http://www.shearman.com/~media/Files/NewsInsights/Publications/2005/12/International-Trade-In-Banking-Services-and-the- /Files/View-Full-Text/FileAttachment/FIA_122005.pdf) (accessed 24 May 2014).

The architecture of the GATS hinges on a three-tier structure.<sup>259</sup>

- (i) A framework agreement, which defines the obligations accepted by the Members;
- (ii) Eight Annexes which address horizontal (e.g. movement of natural persons) and sector specific (e.g. Financial Services) matters; and
- (iii) Schedules of specific commitments that Members have chosen to undertake and which apply to services sectors, subsectors or activities listed therein, subject to terms, qualifications, or conditions.<sup>260</sup>

#### 4.2.1 Trade in Services

The GATS does not exactly define services.<sup>261</sup> The agreement defines what constitutes trade in services by defining it through four modes of supply. The four modes of supply are as follows:<sup>262</sup>

- (i) Mode 1 - Cross-border supply occurs when a service crosses a physical frontier. For example, a domestic consumer takes a loan or purchases an insurance cover from a financial institution;
- (ii) Mode 2 - Consumption abroad whereby consumers buy services abroad, sometimes by physically moving to the location of the suppliers, as in the case of tourism services, or by sending their property abroad, as in the case of ship repair services;
- (iii) Mode 3 - Commercial presence whereby for instance, a foreign bank or transport company establishes a branch or subsidiary in another Member's territory to deliver services; and
- (iv) Mode 4 - Temporary movement of natural persons whereby for example natural persons supply construction services in the territory of another Member.

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<sup>259</sup> Delamatsis (n 41 above) 27.

<sup>260</sup> In pursuant to Article XX: 3 GATS the schedule are an integral part of the GATS. According to Delimatsis (n 161 above) 27 this means that while each Schedule reflects the commitments made by one Member, the schedules represent a common agreement among all Members. Appellate Body Report, *US-Gambling*, paras 159-160; also see Appellate Body Report, *EC-Computer Equipment*, para 109. Commitments in Members' Schedules are part of the terms of the GATS and thus are to be interpreted in accordance with the rules of treaty interpretation as set out in the *Vienna Convention* (Article 31-33).

<sup>261</sup> GATS, 1995 (n 14 above).

<sup>262</sup> Delimatsis (n 41above) 26.

All four modes are very relevant to banking services in one form or another. However, because this study deals with licencing of foreign bank branches, mode 3 that deals with commercial presence is the most relevant mode.

#### 4.2.2 Commitments under GATS

Members make general commitments which apply across the board and specific commitments which relate to the actual commitments undertaken by the Member. The first general obligations are transparency, which requires, inter alia, that each Member publishes promptly “all relevant measures of general application” affecting trade in services.<sup>263</sup> The second general obligation is the MFN principle which prevents Members from discriminating among their trading partners. The Agreement, however, permits Members to list temporary exemptions to MFN.<sup>264</sup>

The Members’ are obliged to notify the Council for Trade in Services at least annually of all legal or regulatory changes that significantly affect trade in sectors where specific commitments have been made.<sup>265</sup> There is also the requirement to establish enquiry points which provide specific information to other Members upon request.<sup>266</sup> There is no general requirement to disclose confidential information.<sup>267</sup> The liberalising content of GATS depends on the extent and nature of sector-specific commitments assumed by individual Members.<sup>268</sup> The core provisions of the GATS in this context relate to market access (Article XVI) and national treatment (Article XVII). These provisions are subject to the limitation that a Member has scheduled.<sup>269</sup> GATS commitments are guarantees and the absence of such guarantees need not mean that access to a particular market is denied.<sup>270</sup> Simply stated, the Member’s scheduled commitments clarify the

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<sup>263</sup> GATS, 1995 (n 14 above) Article II; B Bowen, B ‘Transparency in Trade Policymaking: Lessons for South Africa from Australia’s Experiences’ <http://www.saiia.org.za/policy-briefings/transparency-in-trade-policymaking-lessons-for-south-africa-from-australias-experiences> (accessed 24 May 2014).

<sup>264</sup> GATS, 1995 (n 14 above) Article VII: 1. The exemptions are subject to review and should, in principle, not last more than ten years.

<sup>265</sup> WTO (n 40 above) 7.

<sup>266</sup> WTO (n 40 above) 7.

<sup>267</sup> GATS, 1995 (n 14 above) Article III.

<sup>268</sup> WTO (n 40 above) 7

<sup>269</sup> WTO (n 40 above) 7

<sup>270</sup> Mattoo, A ‘national Treatment in the GATS: Corner-stone or Pandora’s Box’ (1997) *WTO Trade in Services Department* 37.

status quo, but because there is sometimes a gap between the regulatory framework and the scheduled commitments during the successive rounds of negotiations preventing more commitments from being scheduled and clarified.

#### 4.2.3 Market access<sup>271</sup>

The GATS is a very flexible agreement that allows each Member to adjust the conditions of market entry and participation to its sector-specific objectives and constraints.<sup>272</sup> Liberalisation under the GATS does not mean deregulation or privatisation. Examples of market access limitation are numerical quotas and economic needs tests which are a form of quantitative entry controls and qualitative entry controls respectively. In scheduled sectors, the existence of any of these limitations has to be indicated with respect to each of the four modes of supply.<sup>273</sup>

The impact of the market access obligations generally depends on the actual schedules. Members retain the freedom to keep the measures mentioned in Article XVI: 2 of the GATS (prohibited market access limitations) if they enter them into their schedules.<sup>274</sup> In order for this to happen successfully, governments and negotiators must be aware of all national regulation which could be covered by the scope of Article XVI.<sup>275</sup> Market access limitations thrust at the goal of trade liberalisation because only through reduction of entry barriers can there be a conducive market access environment. Essentially, progressive liberalisation is a way of advocating for fair play in trade of services. Such fairness is attained firstly by market access requirements that are reasonable, objective and impartial. With that in mind; a careful

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<sup>271</sup> For details of the benefits of increased market access in trade in services: WTO 'International Trade and Market Access Data' (2013) [http://www.wto.org/english/res\\_e/statis\\_e/statis\\_bis\\_e.htm?solution=WTO&path=/Dashboards/MAPS&file=Map.wcdf&bookmarkState={%22impl%22:%22client%22,%22params%22:{%22langParam%22:%22en%22}}](http://www.wto.org/english/res_e/statis_e/statis_bis_e.htm?solution=WTO&path=/Dashboards/MAPS&file=Map.wcdf&bookmarkState={%22impl%22:%22client%22,%22params%22:{%22langParam%22:%22en%22}}) (accessed 24 May 2014).

<sup>272</sup> WTO (n 40 above) 8; Gkoutzinis (n 259 above) 899 where he discusses that market access is not discussed in the agreement but there is little doubt that the concept refers to the ability of exporting firms to provide services in one of the four modes of trade in services.

<sup>273</sup> WTO (n 40 above) 8.

<sup>274</sup> Krajewski (n 44 above) 95.

<sup>275</sup> Krajewski (n 44 above) 95.

assessment of a country's regulatory framework and anticipated changes needs to be in the full knowledge of negotiators.<sup>276</sup>

Limited progress has been made with regards to negotiations on Market access. The Council for Trade in Services observed that there could be further progress made on market access for some Members by binding of areas of autonomous liberalisation or by lifting the restrictions for commercial presence.<sup>277</sup> Foreign bank entrant in South Africa is determined by very high prudential regulations which very much restrict entry.

#### 4.2.4 National Treatment

Article XVII defines national treatment as treatment no less favourable than accorded to like domestic services and service suppliers.<sup>278</sup> In other words WTO members may not discriminate between foreign and domestic services and service suppliers. Members may inscribe on national treatment in their schedules with respect to each of the four modes of supply, as in the case of the market access provision. National treatment can be a form of direct barrier to trade in financial services.<sup>279</sup> An example of limitation on national treatment is a limitation on the location of branches applying only to branches or operations of foreign institutions;<sup>280</sup> In South Africa this would be the requirements that are imposed in the FSC.

The WTO uses the 'likeness' test in order to determine what constitutes a true discrimination under national treatment.<sup>281</sup> The argument is that foreign branches by their very nature are not

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<sup>276</sup> Krajewski (n 44above) 95.

<sup>277</sup> WTO Council in Trade in Services (Special Session) 'Negotiations on Trade in Services' 2011 TN/S/36.

<sup>278</sup> Gkoutzinis (n 259 above ) 900 where he discusses that a Member grants full national treatment in a given sector and mode conditions of competition no less favorable to services or services suppliers of the Members than those accorded to its own like services and service suppliers. He goes on to say that the national treatment standard does not require formally identical treatment of domestic and foreign suppliers: formally different measures can in some cases result in less favorable treatment of foreign suppliers (de facto discrimination); Mattoo (n 271 above)37

<sup>279</sup> Gkoutzinis (n 259 above) 900.

<sup>280</sup> Gkoutzinis (n 259 above) 900.

<sup>281</sup> Delimatsis (n 41 above) 72 the 'proportionality test has been applied to determine likeness, in WTO Appellate Body Report: Japan – Taxes on Alcoholic Beverages WT/DS8/AB/R,WT/DS10/AB/R, WT/DS11/AB/R (96-3951) (October 4, 1996) acknowledged the indeterminacy of the 'likeness' term by likening it to an accordion and that the discretionary definition does not determine from whose perspective that it should be judged Krajewski (n 44 above) 116.

like domestic banks due to their dependence on their parent bank, home regulatory and supervisory regime.<sup>282</sup> Therefore, the host country can regulate their conduct differently from that of domestic banks.<sup>283</sup> This is an on-going debate.

The problems of discriminatory national treatment regulations can be avoided, if both the home and the host country of the foreign branch have adopted and implemented the Basel accords. It therefore means prudential regulation is on the same level and what could be deemed as strict licensing compliance requirements would be a standard practice.<sup>284</sup> Thus eliminating all perception of discriminatory treatment.

#### **4.2.5 Annex on Financial Services (Annex)<sup>285</sup>**

Banks are closely regulated by governments throughout the world given that they are crucial to economic stability.<sup>286</sup> The annex is intended to clarify some core GATS provisions as they apply to financial services.<sup>287</sup> It defines financial services as “...any service of a financial nature offered by a financial service supplier of a Member.” This excludes state-owned or controlled entities.<sup>288</sup>

A lot of debate has gone on with regarding the scope and nature of the GATS on a Members’ governments’ autonomy to pursue sound regulatory and macroeconomic policies. To attempt to clarify this position, it is important to look at some of the exceptions allowed governments when

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<sup>282</sup> Delimatsis (n 41 above) 72.

<sup>283</sup> Delimatsis (n 41 above) 77.

<sup>284</sup> Delimatsis (n 41 above) 78.

<sup>285</sup> Annex on Financial Services [http://www.wto.org/english/tratop\\_e/serv\\_e/10-anfin\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/10-anfin_e.htm) (accessed 30 may 2014) Applies to measures affecting the supply of financial services except services supplied in the exercise of governmental authority, i.e. Monetary and Exchange rate policies, statutory systems of social security or public retirement plans and activities conducted by a public entity for the account or with the guarantee or using the financial resources of the government. For more detail on the negotiations of the fifth protocol [http://www.wto.org/english/tratop\\_e/serv\\_e/finance\\_e/finance\\_fiback\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/finance_e/finance_fiback_e.htm) (accessed 1 April 2014) and [http://www.wto.org/english/news\\_e/pres97\\_e/pr86\\_e.htm](http://www.wto.org/english/news_e/pres97_e/pr86_e.htm) and [http://www.wto.org/english/news\\_e/pres97\\_e/pr76\\_e.htm](http://www.wto.org/english/news_e/pres97_e/pr76_e.htm) (accessed 1 April 2014).

<sup>286</sup> WTO (n 40above) 11.

<sup>287</sup> WTO (n 40 above) 11.

<sup>288</sup> WTO (n 40 above) 11.

drafting domestic regulations as defined in article VI.<sup>289</sup> It requires that in terms of all specified commitments that all regulations are administered in a reasonable, objective and impartial manner.

First exception is the prudential regulation. In financial services, specific commitments are made in accordance with the Annex, as illustrated above, which compliments the basic rules and definitions of the GATS taking into account the specific characteristics of financial services. Section 2 (a) states that:

Notwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking measures for prudential reasons, including for the *protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed* by a financial service supplier to ensure the integrity and stability of the financial system.

It further states that where prudential measures do not conform to other provisions of the GATS; they must not be used as a means of avoiding commitments or obligations under the Agreement.<sup>290</sup> Regulators would seem to have considerable discretion in their choice of prudential measures because there is no definition or indicative list of such measures provided in the Annex.<sup>291</sup>

The second exemption is macroeconomic policy. An example of this is balance of payment which is affected by an increase of imports over exports.<sup>292</sup> Conditions in the banking sector could be affected through the impact of such interventions. In the banking sector this could lead to the limiting of bank entry in favour of national banks exporting their services in order to address the balance of payment. Such policies are excluded from the scope of the GATS.<sup>293</sup> This further covers reserve bank prudential requirements on banks as they could be justified measures

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<sup>289</sup>GATS, 1995 (n 14 above).

<sup>290</sup>This language is weaker than that in Article XIV GATS, 1995 (n 14 above).

<sup>291</sup>Annex on Financial Services (n 286 above).

<sup>292</sup>SARB Conference 'The South African account in the context of SA macroeconomic challenges' [http://www2.resbank.co.za/internet/Publication.nsf/LADV/A49AAAD3FF35C6084225729D0033FAA5/\\$File/Smit.pdf](http://www2.resbank.co.za/internet/Publication.nsf/LADV/A49AAAD3FF35C6084225729D0033FAA5/$File/Smit.pdf) (accessed 30 May 2014).

<sup>293</sup>Annex on Financial Services (n 286 above) Article 1:3.

taken to maintain financial stability as covered by the Annex.<sup>294</sup> This introduces another dimension to the study, Members can go too far in regulating so as to maintain protectionist policies and justify the measures under the provisions of the annex. Again, the question is where is the line drawn?

The Annual Report of the Committee on Trade in Financial Services to the Council for Trade in Services (2013) reveals that most Members appreciate the need to focus on macroprudential regulation in view of the recent financial crisis.<sup>295</sup> At the meeting, Members shared diverse experiences which showed that no “one-size-fits-all” model was available for the implementation of macroprudential policies and regulation.<sup>296</sup> It was suggested that the Committee should be kept abreast of developments regarding prudential regulation, so as to better understand the effects of these regulations and policies on the trade in financial services.<sup>297</sup>

This explicit request puts the Members to task, in that as the Members’ undertake their financial services reform they are expected to keep the council updated. Further, this could enhance negotiations in that once the countries have reported their efforts in autonomous liberalisation; those efforts can be captured in their GATS commitments. It is a win-win solution because if negotiating countries have all implemented the Basel III accords, liberalisation can occur while still ensuring financial stability.

In the meeting held by the Committee on Trade in Services (CTS) in March 2013, the South African representative informed that the country had taken a number of steps to strengthen its financial services sector.<sup>298</sup> The CTS went on to state that the country is on the path towards

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<sup>294</sup> Annex on Financial Services (n 286 above).

<sup>295</sup> WTO ‘Annual report of the Committee on Trade in Financial Services to the Council for Trade in Services’ (2013) S/FIN/28.

<sup>296</sup> WTO Annual report (n 296 above).

<sup>297</sup> WTO Annual report (n 296 above).

<sup>298</sup> WTO ‘Committee on Trade in Financial Services: Report’ 20 March 2013” Note by the Secretariat S/FIN/M/76 a [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=123654,120885](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=123654,120885).



improving the prudential regulation of banks.<sup>299</sup> In order to strengthen prudential and market supervision, South Africa would be implementing the “twin-peaks” model of financial regulation.<sup>300</sup>

#### 4.3. Vienna Convention on Law of Treaties and the GATS

The GATS is an international agreement and consequently customary rules of treaty interpretation apply to its interpretation.<sup>301</sup> Customary rules of international treaty interpretation are codified in Articles 31 to 33 of the Vienna Convention on the Law of Treaties.<sup>302</sup> These rules have been applied by the Appellate Body of the WTO and can be said to be accepted.<sup>303</sup> The central norm of treaty interpretation is Article 31:1 of the Vienna Convention:

“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objective and purpose”

Article 32 of the Vienna convention stipulates that the preparatory work and the circumstances of the treaty conclusion may be taken into account as an additional interpretative tool. When interpreting the commitment schedules a wholesome approach is required to stay in line with the provisions of International law. The GATS scheduled commitments will be interpreted in line with the object and purpose of the agreement. The GATS as highlighted above, is to contribute to trade expansion under conditions of transparency and progressive liberalisation

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<sup>299</sup>Committee on Trade in Financial Service (n 296 above).

<sup>300</sup>Committee on Trade in Financial Service (n 296 above); National Treasury Republic of South Africa (n27 above).

<sup>301</sup>J Pauwelyn ‘The Role of Public International Law in the WTO: How far can we go?’ (2001) *95 American Journal of International Law* 538; Article 3:2 of the Dispute Settlement Understanding (DSU) [http://www.wto.org/english/tratop\\_e/dispu\\_e/dsu\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm) (accessed 24 May 2014).

<sup>302</sup>Vienna Convention on the Law of Treaties concluded at Vienna 23 May 1969 <http://www.worldtradelaw.net/misc/viennaconvention.pdf> (accessed 24 May 2014).

<sup>303</sup> US — Gasoline, p. 17, DSR 1996:I, p. 3 at 16 (WT/DS2/AB/R) [http://www.wto.org/english/tratop\\_e/dispu\\_e/repertory\\_e/i3\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/repertory_e/i3_e.htm) (accessed 24 May 2014)

#### 4.4 Interpreting the GATS schedules

The GATS is a complex document which requires a certain level of expertise to interpret. Further, the GATS provisions are generally foggy and add to this complexity. A case in point is the above discussed domestic regulations. Banking in itself is a multi-disciplinary field and also requires cross disciplines to interpret and understand the commitments as made. That same level of dedication is required to draft meaningful and comprehensive commitments.

There are several reasons that have been cited regarding the complexity of interpretation of the GATS. Among them is the fact that, schedules do not necessarily provide information on all impediments to trade and investment in services.<sup>304</sup> The GATS requires countries to list in their national schedules only those sectors in which they accord foreign service providers either market access or national treatment, with respect to at least one mode of supply.<sup>305</sup> Members may impose new or additional trade restrictions.<sup>306</sup> These factors combine to make precise interpretation of certain commitments difficult.<sup>307</sup>

Another problem relates to identifying the difference between *de facto* and *de jure*. In some cases, Members list restrictions that may not be enforced in practice.<sup>308</sup> In this instance, a country may appear to be more restrictive than it actually is. Conversely, some Members impose informal regulatory practices on foreign service providers that constitute effective trade barriers, yet do not delineate these practices in national schedules.<sup>309</sup> A clear case of this is the deposit limitation that was imposed on foreign bankers in South Africa and later changed by domestic regulations but still reflected in its schedule,

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<sup>304</sup> US International Trade Commission in General Agreement on Trade and Services: 'Examination of the schedule of commitments submitted by African Trading Partners' (1999) 1-13 <http://www.usitc.gov/publications/docs/pubs/332/pub3243.pdf> (accessed 1 April 2014).

<sup>305</sup> US International Trade Commission (n 305 above)13.

<sup>306</sup> US International Trade Commission (n 305 above).

<sup>307</sup> US International Trade Commission (n 305 above).

<sup>308</sup> This as illustrated above by South Africa's National treatment limitation on commercial presence the application has been changed in terms of restrictions on setting up foreign bank branches yet the 1998 commitment schedule still reflects a limitation of R1 million.

<sup>309</sup> US International Trade Commission (n 305)13.

Both of the reasons are evident in the reading of South Africa's scheduled commitments in banking. Thus it may be argued that lack of precision in interpretation has led to the perception that South Africa has made foggy commitments. It can be advanced that; 'unbound' commitments by South Africa could simply reflect steady and a cautionary approach to the negotiations as opposed to being a means to avoid progressive liberalisation. However, the contrary is also true; Members could be hiding behind this dilemma to make safe commitments so as not allow for progressive liberalisation.

When scheduling commitments Members have to weary of how they will be interpreted. This understanding informs the ambit of the scheduled commitments. The process leading up to scheduling of the commitment is taken into account when interpreting the scheduled commitments; this would refer to the member domestic regulation landscape.

#### **4.5 Schedule of commitment**

The schedules contain horizontal commitments as well as specific commitments.<sup>310</sup> Horizontal commitments refer to all sectors as committed by the member state while specific commitments refer to the commitments specifically as committed by the Member.<sup>311</sup> The schedule is set out in four columns. The first column specifies the sector or sub-sector concerned, the second column sets out any limitation on market access that fall within the six types of restrictions mentioned in Article XVI: 2.<sup>312</sup> The third column contains any limitations that a Member may want to place, in accordance with Article XVII, on national treatment.<sup>313</sup> A final column provides the opportunity to undertake additional commitments as envisaged in Article XVIII.<sup>314</sup>

Any of the entries under market access or national treatment may vary within a spectrum. The opposing ends are full commitments without limitation ("none") and full discretion to apply any

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310WTO (n 40 above) 18.

311WTO (n40 above) 18.

312WTO (n 40above) 18.

313WTO (n 40 above) 18.

314WTO (n 40above) 18.

measure falling under the relevant article (“unbound”).<sup>315</sup> The schedule is divided into two parts. While Part I lists “horizontal commitments”, that is entries that apply across all sectors that have been scheduled, Part II sets out commitments on a sector by sector basis.<sup>316</sup>

#### 4.5.1 Antecedent to South Africa’s commitments.

South Africa’s readmission into the multilateral trade system in the early 1990s was one of the key events that marked the end of exclusion which was brought about by the country’s apartheid policies.<sup>317</sup> During the Uruguay Round of Trade Negotiations South Africa was designated as a transitioning country.<sup>318</sup> The intricacy of the negotiating round caught the South African negotiating team off guard. It was reported the team struggled to keep up and as such struggled to make comprehensive commitments.<sup>319</sup> The ministry responsible for trade negotiations, the Department of Trade and Industry (DTI), suffers from severe capacity constraints, which is compounded by a complex and an ever-intensifying bilateral agenda.<sup>320</sup>

#### 4.5.2 Banking sector scheduled commitments<sup>321</sup>

During the Uruguay Round, South Africa undertook extensive horizontal commitments. South Africa did not undertake any commitments with regards commercial presence and cross-border

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<sup>315</sup> WTO (n 40 above) 18.

<sup>316</sup> WTO (n 40 above) 18.

<sup>317</sup>Soko (n 2 above) 4 ; Ramphela ‘Restoring South Africa’s place in the International’ (2013) <http://agangsa.org.za/news/entry/restoring-south-africas-place-in-the-international-community> (accessed 1 April 2014) where she explains that in the period immediately following the onset of democracy in 1994, South African foreign policy reflected a desire to integrate the country into the global system; N Steyler ‘Global Governance and the national sovereignty: The World Trade Organisation and the South Africa’s new Constitutional framework’ (1999) *Law democracy and development* <http://www.saflii.org/za/journals/LDD/1999/6.pdf> (accessed 24 May 2014).

<sup>318</sup> Two reasons account for this classification: the first concerns the country’s international role in the immediate post-war period. Secondly, the country was classified as developed, because it conformed to the World Bank criteria for developed economies. While South Africa tried to argue that it is a developing country. The US supported by the EU and Japan, refused to categorise South Africa as a developing nation: instead, the country was recognized as a transitional economy. For a further discussion see Steyler (n 213 above) 9.

<sup>319</sup> Steyler (n 213 above) 9

<sup>320</sup> I Stuart & R Cassim ‘Liberalising South Africa’s Trade in Services: County Study on South Africa’ (2008) 1 [http://www.ictsd.org/downloads/2008/04/ip\\_services\\_02.pdf](http://www.ictsd.org/downloads/2008/04/ip_services_02.pdf) (accessed 1 April 2014); International trade Agreements: South Africa’s Current and Future Trade Agreements (2009) [http://www.tips.org.za/files/south\\_african\\_trade\\_agreements\\_sept\\_2010.pdf](http://www.tips.org.za/files/south_african_trade_agreements_sept_2010.pdf) (accessed 28 May 2014)

<sup>321</sup>Gkoutzinis (n 259 above) 879 where he discusses the tradability of Banking Services.

supply.<sup>322</sup> In terms of Market Access limitation on the presence of natural persons- South Africa extensively listed its threshold.<sup>323</sup> The only allowed presence is that of very skilled persons being your executives, managers and specialists.<sup>324</sup> For all other persons South Africa reserved the right to regulate.

In terms of National Treatment, South Africa made commitments regarding commercial presence, ‘local borrowing by South African registered companies with a non-resident shareholding of 25 per cent or more is limited’. Secondly, with regard of the presence of natural persons, it made “unbound” commitments save the category of persons listed in the market access column.<sup>325</sup>

In 1998, South Africa submitted a supplementary schedule of commitments to revise its financial services specific commitments.<sup>326</sup> In terms of National Treatment commitments regarding commercial presence, it is required that, ‘branches of foreign banks in South Africa must maintain a minimum balance of R1million on the deposit of natural persons’.<sup>327</sup> This was a direct limitation on national treatment as the same was not required for domestic banks.

The market access limitations relate to prudential regulation. The limitation states that, ‘dealings in foreign exchange in South Africa must be carried out through a dealer authorised by the South African Reserve Bank. Only banks registered to operate in South Africa with the required

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<sup>322</sup> General Agreement on Trade in Services, “South Africa Schedule of Commitment’ GATS/SC/78 (1994) [http://www.wto.org/english/tratop\\_e/serv\\_e/telecom\\_e/sc78.pdf](http://www.wto.org/english/tratop_e/serv_e/telecom_e/sc78.pdf) (accessed 8 May 2014). It must be noted that the schedule exhibited very little commitment by scheduling “unbound” for most of the mode. In fact national treatment was scheduled at “none” in terms of commercial presence. This further illustrates that the South African negotiators could have been overwhelmed by the negotiating process thereby making minimal commitments.

<sup>323</sup> M Vander Stichele ‘Critical Issues in the Financial Sector’ 2004 Stichting Onderzoek Multinationale Ondernemingen (SOMO) Financial Sector report 175 [http://www.somo.nl/html/paginas/pdf/Financieel\\_sector\\_report\\_05\\_NL.pdf](http://www.somo.nl/html/paginas/pdf/Financieel_sector_report_05_NL.pdf) (accessed 17 May 2014). Where the author discusses the advantages and disadvantages of liberalisation.

<sup>324</sup> Vander Stichele (n 324 above).

<sup>325</sup> Vander Stichele (n 324 above).

<sup>326</sup> South Africa’s Schedule of Commitments Supplement (n 1 above).

<sup>327</sup> South Africa’s Schedule of Commitments Supplement (n 1 above) 2.

minimum capital base are eligible to seek authorisation as a foreign exchange dealer.<sup>328</sup> Limitation on market access in terms of the presence of natural persons is ‘unbound’ except as indicated in the horizontal section.

The schedule further goes on to state that, ‘companies involved in asset management, collective investment schemes and custodial services for securities and financial instruments (including equities and bonds) need to be incorporated as public companies in South Africa and registered with the supervisory authority.’<sup>329</sup> Finally, it states that, ‘trading for the account of customers on a licenced exchange requires separately capitalised incorporation in South Africa as a public or private company and registration with the relevant supervisory authority’.

The South African schedule compared to the other schedules of OECD members is very conservative, particularly the banking sector scheduled commitments. Most commitments are “unbound” reflecting the protectionism policy of the government on the banking sector.<sup>330</sup> In the spirit of the objects and purpose of GATS it would appear that the commitments as scheduled will not attain progressive liberalisation. South Africa has the privilege of unfettered discretion to regulate so as to allow since 1994. It is time that the scheduled commitments reflect an apparent agenda to liberalise. From the observations above, it would appear that South Africa is moving in one direction by pushing for marker access in other markets while allowing very limited penetration into its own market.

South Africa has received requests to liberalise financial services from several WTO members, including the United States (US), European Union (EU) and Egypt.<sup>331</sup> Prompted partly by these requests and other factors, the regulations recently employed by South Africa have addressed

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<sup>328</sup> South Africa’s Schedule of Commitments Supplement (n 1 above) 2.

<sup>329</sup> South Africa’s Schedule of Commitments Supplement (n 1 above) 2.

<sup>330</sup> South Africa’s Schedule of Commitments Supplement (n 1 above) 2.

<sup>331</sup> Steuart *et al* (n 321 above) 10. South Africa has received requests to liberalize financial services from the following WTO Members: Australia, the EC, Egypt, Japan, Norway, Panama, Switzerland, Taiwan and the US. Egypt; the only other African Member to submit a request to South Africa on financial services

some of the concerns raised in requests from different Members. Regulations on banking ensure that foreign providers of banking and other financial services are treated no differently from their local counterparts.<sup>332</sup> Specifically addressed is the restriction requiring foreign banks to maintain a minimum balance of one million rands on the deposit accounts of natural persons has been removed.<sup>333</sup>

In terms of market access, foreign banks may open subsidiaries, branches or representative offices. In terms of the Banks Act of 1990, registered banks operating as branches or subsidiaries may trade fully as banks, whereas representative offices may only play a facilitating and marketing role and cannot accept deposits.<sup>334</sup>

As discussed in Chapter two, and three above, over the years the regulatory authorities have allowed the creation of second tier banks aimed at the lower-end retail segment of the market for which market access requirements will be less stringent.<sup>335</sup> This increases participation for the smaller tier banks; it does not significantly make the banking sector more accessible with reference to the position of the big banks in South Africa. Lack of new competition can be a significant bar to market access and present a violation of the commitments undertaken by South Africa under GATS.<sup>336</sup>

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<sup>332</sup> Banks Act 94 of 1994 Amendment of Regulations ‘Conditions for the conducting of business of a bank by a foreign institution by means of a branch in the Republic’ Government Gazette 30627 1 January 2008.

<sup>333</sup> Conditions for the conducting of business of a bank by a foreign institution by means of a branch in the Republic (n 232 above) section 5.

<sup>334</sup> P Hawkins ‘Liberalisation, Regulation and Provision: The Implications of Compliance with International Norms for the South African Financial Sector’ (2001) <http://www.tips.org.za/publication/liberalisation-regulation-and-provision-implications-compliance-international-norms-sout> (accessed 24 May 2014)

<sup>335</sup> As discussed in Chapter 2.

<sup>336</sup> A Mattoo ‘Shaping Future GATS Rules for Trade in Services’ (2000) <http://elibrary.worldbank.org/doi/pdf/m10.1596/1813-9450-2596> (accessed 17 May 2014)

### 4.5.3 Future of negotiations in trade in services

At the Bali Conference, members agreed to prepare a work programme for concluding the Doha Round negotiations by the end of 2014.<sup>337</sup> At the meeting on 1 April, members stressed the importance of the services negotiations in the Doha Round and expressed their readiness to engage in the post-Bali work programme.<sup>338</sup> Delegations stressed the need to concentrate on what was 'doable' and to advance on the basis of transparency and inclusiveness.<sup>339</sup>

In terms of the commitment schedules, before members submit their revised services offers (a key future step of the services talks) many members underscored the need for openness to new approaches.<sup>340</sup> Governments are expected to modify foggy entries before trade frictions actually arise.<sup>341</sup> Voluntary amendments to commitment schedules should attract less friction from Members.<sup>342</sup> One suggestion was to take inspiration from regional trade agreements on services, where many members had gone well beyond the provisions contained in the (GATS) by binding existing levels of market access.<sup>343</sup> Some delegations also expressed concerns about "cherry picking" issues with regards scheduling of commitments.<sup>344</sup>

As South Africa prepares for the upcoming negotiations in trade in services, it is paramount for the negotiators to start taking stock of regulations that could have an impact on market access and national treatment in the banking sector. South Africa's banking sector is very well regulated and that regulation should be seen to reflect in its commitment schedules. Detailed

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<sup>337</sup> WTO 'Bali Ministerial Declaration and Decision' (2013 [http://wto.org/english/thewto\\_e/minist\\_e/mc9\\_e/balipackage\\_e.htm](http://wto.org/english/thewto_e/minist_e/mc9_e/balipackage_e.htm)) (accessed 8 May 2014).

<sup>338</sup> WTO 'Members emphasize importance of services in post-Bali work programme' (2014) [http://www.wto.org/english/news\\_e/news14\\_e/serv\\_01apr14\\_e.htm](http://www.wto.org/english/news_e/news14_e/serv_01apr14_e.htm) (accessed 8 May 2014).

<sup>339</sup> WTO (n 329 above).

<sup>340</sup> WTO (n 329 above).

<sup>341</sup> R Adlung, P Morrison, M Roy & W Zhang "Fog in GATS Commitments – Boon or Bane" (2011) [http://www.wto.org/english/res\\_e/reser\\_e/ersd201104\\_e.pdf](http://www.wto.org/english/res_e/reser_e/ersd201104_e.pdf) (accessed 17 May 2014)

<sup>342</sup> Adlung *et al* (n 242above) 6.

<sup>343</sup> Bali Ministerial Declaration (n338 above).

<sup>344</sup> Bali Ministerial Declaration (n338 above).



commitments are peremptory to progressive liberalisation of the banking sector. South Africa must be seen to depart from its past defensive position in services trade negotiations.<sup>345</sup>

#### 4.6 Conclusion

The banking scheduled commitments are not much to write about because South Africa has made mostly ‘unbound’ commitments. There are no comprehensive commitments to market access and national treatment in the current schedule. South Africa has had over a decade of almost completely unfettered discretion to reform its regulatory landscape. As observed in the previous in Chapter three, it has successfully build a robust banking sector. This gives South Africa the opportunity to time its future liberalisation measures in its schedule of commitments.<sup>346</sup> This will serve to improve South Africa’s negotiating position. Further, it could lead to greater and more consistent reforms in the banking sector policies as government departments are obliged to maintain the commitments as scheduled. In the upcoming Doha round of negotiations, the scheduled commitments will be considered under a different light. This is owing to the fact that South Africa has significantly transformed its regulatory landscape as such it would be expected to schedule comprehensive commitments. The social transformation policies such as those embodied in the FSC need to be treated with circumspection; otherwise South Africa will see another decade of unfettered regulatory discretion which poses a direct challenge to progressive liberalisation. However, it must be borne in mind that GATS is a fledging instrument. The incompleteness of the GATS rules creates opportunity for most countries to avoid making comprehensive commitments. Particularly the financial services negotiations because it is a newer agreement. The solution to such problem would be further negotiations on the expected content of the rules. The understanding of the rules will allow South Africa to make more comprehensive commitments on market access and national treatment in its banking sector. Just as the rules are a work in progress, it can also be argued that South Africa’s scheduled commitments is also a work in progress.

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<sup>345</sup> M Dube ‘Where to for South Africa and the Doha Development Agenda’ (2012) <http://www.saiia.org.za/opinion-analysis/where-to-for-south-africa-and-the-doha-development-agenda> (accessed 19 May 2014).

<sup>346</sup> Stuart *et al* (n 321 above) 4.

## Chapter five

### The future of South Africa's GATS commitments

#### 5.1 Introduction

South Africa is a loyal member to the international disciplines that govern banking and its development. South Africa, as of 1994, had made banking licensing commitments under the auspice of the WTO.<sup>347</sup> Since then the government has undertaken to autonomously open up the banking sector. Foreign bank presence has increased since 1994.<sup>348</sup> The biggest challenge faced by the government is the social economy.<sup>349</sup> The balance between transforming a society and maintaining the international best practices has led to several attempts at autonomous liberalisation. The purpose of this chapter is to provide an analysis of the future of bank licensing in South Africa. What effect will that have on the WTO commitments as made by South Africa? While this chapter does not expressly carry out a comparative study, it is submitted that SARB through its membership to international organisations regulating banking conduct of the global banking systems has intrinsically compared South Africa to its trading partner.<sup>350</sup>

#### 5.2 The road so far

The South African banking sector has expanded steadily, and has been regarded as fundamental to economic growth.<sup>351</sup> After the Saambou incident, a process of consolidation started in the South African banking sector, which enhanced the dominant market share of the big four banks in South Africa.<sup>352</sup>

The re-entry of Barclays Bank into South Africa via the takeover of Absa Bank highlights the future of the four pillars bank policy in South Africa, which entailed keeping four large

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<sup>347</sup> South Africa Schedule of commitments (n 323 above)

<sup>348</sup> Chapter two para 2.2.1

<sup>349</sup> Chapter four para 4.7.

<sup>350</sup> Chapter two para 2.2.2.

<sup>351</sup> Chapter four para 4.7.2.

<sup>352</sup> Gidlow (n 136 above) 35.

independent banks.<sup>353</sup> The re-entry of Barclays also highlights the future of foreign bank involvement in South Africa.<sup>354</sup>

### 5.3 New bank entrants

Banks in South Africa are not worried about the potential threat of new entrants into the market.<sup>355</sup> This is because expectation of new entrants (local and foreign) over the next three years is low.<sup>356</sup> This could be as a result of the anticipated financial sector reform through the introduction of Basel III and twin peaks model of regulation. However, the likelihood of foreign banks entering is still considered higher than the establishment of a new local bank.<sup>357</sup> Foreign banks are generally bigger and would be likely able to meet the capital requirements as will be introduced by the Basel III accords. Foreign entry is expected from Russia, India, America, China, Brazil and Nigeria.<sup>358</sup>

Regulatory reform is regarded as the most significant development and weakness facing the banking industry.<sup>359</sup> Such regulation will serve to make the South Africa bank sector more robust as a result of the increased prudential regulation.<sup>360</sup> Basel III reforms are highly anticipated in South Africa.<sup>361</sup> The robustness of South Africa's banking regulatory framework strengthens its domestic banks and makes it easier for them to penetrate other markets.

Research done by Price Waterhouse Coopers (PWC) forecasts high population growth on the African continent, with the total population expected to exceed two billion by 2050.<sup>362</sup> These growth rates are very appealing to the business of banking for South Africa banks, whose focus has turned on exporting bank services.<sup>363</sup> Of the banks that participated in the survey, more than fifty percent expect that between ten percent and fifteen percent of their after-tax profits are to be generated from sub-Saharan operations (excluding South Africa) in the next three to five

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<sup>353</sup> Gidlow (n 136 above) 35.

<sup>354</sup> Gidlow (n 136 above) 35.

<sup>355</sup> PWC 'Shaping the bank of the future South African banking survey 2013' 8 [http://www.pwc.co.za/en\\_ZA/za/assets/pdf/south-african-banking-survey-2013.pdf](http://www.pwc.co.za/en_ZA/za/assets/pdf/south-african-banking-survey-2013.pdf) (accessed 14 May 2014).

<sup>356</sup> PWC (n 356 above) 8.

<sup>357</sup> PWC (n 356 above) 8.

<sup>358</sup> PWC (n 356 above) 8.

<sup>359</sup> PWC (n 356 above) 8.

<sup>360</sup> PWC (n 356 above) 8.

<sup>361</sup> Chapter four Paragraph 4.6.

<sup>362</sup> PWC (n 356 above) 37.

<sup>363</sup> PWC (n 356 above) 37.

years.<sup>364</sup> The territories offering such growth potential are Nigeria Ghana and Kenya, as reported.<sup>365</sup>

According to the report, Standard Bank has significant geographic reach across Africa and recently re-emphasised the importance of this region to its growth aspirations.<sup>366</sup> The other larger banks in South Africa are also expecting to penetrated African markets.<sup>367</sup> FirstRand announced the acquisition of a bank in Ghana and indicated interest in two nationalised Nigerian banks.<sup>368</sup> Nedcor has the right to acquired up to 20% of Ecobank, a dominant player in West and Central Africa; and Absa is expected to conclude its acquisition of Barclays' operations in eight African countries, following regulatory approval.<sup>369</sup>

Foreign banks, like Bank of China, JP Morgan Chase, Citibank, surveyed also recognised opportunities across the continent and regard South Africa as an important launch pad into the rest of Africa.<sup>370</sup> Many are looking to set up office in Johannesburg as they plot their pan-African move.<sup>371</sup> The anticipated presence is; Chinese, Indian and European banks.<sup>372</sup> For example, Standard Chartered announced plans to relocate its African head office operations from Dubai to Johannesburg.<sup>373</sup>

#### **5.4 International evaluation on future growth**

South Africa's dedication to the financial sector reform has kept it at the forefront of financial reform globally.<sup>374</sup> The adoption of Basel III, the envisaged implementation of the Twin Peaks

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<sup>364</sup> PWC (n 356 above) 37.

<sup>365</sup> PWC (n 356 above) 37.

<sup>366</sup> PWC (n 356above) 37.

<sup>367</sup> PWC (n 356 above) 37

<sup>368</sup> PWC (n 356 above) 37.

<sup>369</sup> PWC (n 356 above) 38.

<sup>370</sup> PWC (n 356 above) 38.

<sup>371</sup> PWC (n 356 above) 38.

<sup>372</sup> PWC (n 356 above) 38.

<sup>373</sup> PWC (n 356 above) 38.

<sup>374</sup>Financial Services Board (FSB) 'Implementing a twin-peaks model of financial regulation in South Africa' (2013) 23 <https://www.fsb.co.za/Departments/twinpeaks/Documents/Twin%20Peaks%2001%20Feb%202013%20Final.pdf> (accessed 25 May 2014)

system, from 2014, will further reinforce South Africa's already strong financial regulation architecture.<sup>375</sup>

It is submitted that despite past progress, there remains considerable room for further trade reforms with reference to the banking commitments under the GATS. As far as the commitments schedules reviews, trade in services remains relatively protected.<sup>376</sup> Comprehensive trade liberalization does not appear to be emphasized in the government's current policies.<sup>377</sup> This is reflected in the regulations and legislation in banking – which focuses on incorporating international bank practices on banking without mention of the status of the existing banking commitments. Trade policy seems to be conducted on a case-by-case basis and guided more by industrial policy objectives.<sup>378</sup>

## 5.5 Banking licensing commitments

Chapter four detailed the nature of South Africa's banking licensing commitments beginning from 1994 right through to the most current supplementary schedule of 1998.<sup>379</sup> Chapter 4 detailed regulatory framework and reveals the gap with the scope of the South Africa banking licensing commitments.<sup>380</sup> Herein lays the opportunity for the South African negotiators. Further still, high predicted reforms are anticipated in the next coming years these can be crafted and designed into commitments which will allow for future liberalisation.

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<sup>375</sup> FSB (n 375 above) 23.

<sup>376</sup> International Monetary Fund (IMF) 'South Africa 2013 Article IV Consultation' (2013) 56 <http://www.imf.org/external/pubs/ft/scr/2013/cr13303.pdf> (accessed 25 May 2014).

<sup>377</sup> IMF (n 377 above) 57.

<sup>378</sup> IMF (n 377 above) 23; L Krugel 'Policy uncertainty plagues South Africa' (2013) <http://www.sablog.kpmg.co.za/2013/11/policy-uncertainty-plagues-south-africa/> (accessed 21 April 2014) where the author discusses the issues relating to the New Growth Plan and Broad Base Black Economic Empowerment, the president in his address fails to address the issue relating to Foreign direct investment as a priority sector.; M Isa 'Uncertainty makes firms reluctant to invest in South Africa, survey shows' <http://www.bdlive.co.za/economy/2013/02/19/uncertainty-makes-firms-reluctant-to-invest-in-south-africa-survey-shows> (accessed 21 April 2013); The good and bad: The strengths and weaknesses of doing business in South Africa' (2012) <http://www.oxfordbusinessgroup.com/news/good-and-bad-strengths-and-weaknesses-doing-business-south-africa> (accessed 21 April 2014): The author discusses the business environment in South Africa. While South Africa has a robust banking sector, it is not enough to attract investor confidence; Davis 'South Africa's Trade Policy and Strategy Framework (TPSF)' (2013) <http://www.thedti.gov.za/parliament/TPSF.pdf> (accessed 19 May 2014)

<sup>379</sup> Chapter four para 4.5

<sup>380</sup> D Blackmur "Regulatory Principles for South Africa" (2008) *Trade and Industrial Policy Strategies* [http://www.tips.org.za/files/Blackmur\\_24\\_Oct\\_2008.pdf](http://www.tips.org.za/files/Blackmur_24_Oct_2008.pdf) (accessed 19 May 2014).

Despite the fact that members can earn credit for autonomous liberalisation, most countries do not practice it, which begs the question as to the relevance of GATS commitments in attaining progressive liberalisation in the banking sector?<sup>381</sup> While this study cannot begin to fully answer that question, it is relevant to briefly look at some views in answer to this question as this could have a direct impact on the future of South Africa's banking licensing commitments.

## 5.6 Future of GATS commitments

South Africa has been fortunate that following the democratic elections in 1994, there has been a major rethink of policies in all service sectors.<sup>382</sup> This has provided a basis for understanding where the national interest lies. Furthermore, independent studies of most service sectors under negotiation were conducted by Trade and Industrial Policy Strategies (TIPS) for the Department of Trade and Industry (DTI) so as to further understand the role of services in the economy.<sup>383</sup> However, it has also been limited to the extent that trade in each service sector was rarely considered in the policy development process. Cases in point are education and health where the potential for foreign consumers to reinforce sectoral development was not part of the policy formulation process.

South Africa has been and remains cautious with foreign bank entrant because of the possible threat that their presence could cause on the domestic industry. The challenges posed by global giants are daunting and severe.<sup>384</sup> For example, in terms of scale there is a gap of assets and

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<sup>381</sup> WTO 'Negotiators agree on modalities for treatment of autonomous liberalization' (2003) [http://www.wto.org/english/news\\_e/pres03\\_e/pr335\\_e.htm](http://www.wto.org/english/news_e/pres03_e/pr335_e.htm) (accessed 25 May 2014).

<sup>382</sup> J Hodge "Does South Africa gain from the inclusion of services in trade agreements?" *University of Cape Town* [https://www.commerce.uct.ac.za/Economics/Programmes/postgraduate\\_programmes/masters/Specialisations/TRP/Research/Hodge\\_services.pdf](https://www.commerce.uct.ac.za/Economics/Programmes/postgraduate_programmes/masters/Specialisations/TRP/Research/Hodge_services.pdf) (accessed 19 May 2014).

<sup>383</sup> M Stern 'Predicting South African Trade in Services' 2002 *Trade and Industrial Policy Strategies* 16 <http://www.tips.org.za/files/564.pdf> (accessed 19 May 2014): Trade in financial services is positively related to income but negatively related to the population and land per worker. It would therefore seem that a country's total endowment of labour is less important than the level of development and concentration of the population. Wealthy and densely populated nations are more likely to specialise in trade in financial services. To the extent that developed nations do boast a greater proportion of high skilled labour these results do tend to support the application of comparative advantage to that sector.

application of comparative advantage to this sector 4

<sup>384</sup> Y Peng 'The Challenges of WTO entry into China's Banking industry' 9 <http://faculty.washington.edu/karyiu/confer/beijing06/papers/peng.pdf> (accessed 25 May 2014).

international networks between domestic and global financial institution.<sup>385</sup> Such gaps could stifle the infant bank industry as such any government, especially in developing and transitioning economies, would tend to lean on protectionist policies.

South Africa highlighted in its National Development Plan that a strong banking sector is a backbone to helping it reach its development objective by 2030.<sup>386</sup> This lends one to believe that it will absolutely protect its stability. So far this protection has led South Africa to have the most sophisticated banking sector in Africa. This study details that South Africa has been consistent in its approach to foreign bank entry. The biggest shift was in 1994 which shift was a necessary implication of the end of apartheid

The National Development Plan also highlights that South Africa will be focusing on developing its manufacturing industry.<sup>387</sup> A wholesome perusal of the plan reveals that major banking sector reform should not be anticipated within the period. This aligns with the findings of PWC on new bank entrant.<sup>388</sup> It is therefore submitted that, the landscape of the sector will remain essentially the same as depicted in this study.<sup>389</sup> Effectively, the banking sector commitments would also remain the same with changes as reflective of the reform under the Basel III.<sup>390</sup>

## 5.7 Conclusion

The future for foreign branch banking is easy to determine from a South African introspection of its regulatory space. First, it must be highlighted that since 1994 foreign bank licensing requirements have been accommodating to foreign bank entry. Secondly, South Africa will continue to base its bank licence regulation on the agreed international practices such as Basel

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<sup>385</sup> Peng (n 385 above) 9.

<sup>386</sup> National Planning Commission 'National Development Plan: Vision for 2030' (2011) 49 <http://www.npconline.co.za/medialib/downloads/home/NPC%20National%20Development%20Plan%20Vision%202030%20-lo-res.pdf> (accessed 25 May 2014).

<sup>387</sup> NDP (n 387 above) 49.

<sup>388</sup> Para 5.3 above.

<sup>389</sup> Chapter three (para 3.2 above).

<sup>390</sup> Chapter four (para 4.6 above).

III. Lastly, entry will heavily depend on the home country's ability to implement these standards into their bank regulatory framework.

As a general observation, South Africa has a very transparent growth agenda. At its core, is a stable banking sector. It becomes evident that the authorities will continue with a level of protectionism of the banking industry. The 'big four' banking policy is bound to see another paradigm.



## Chapter six

### Conclusions and Recommendations

#### 6.1 Summary of findings

The requirements for registration and establishment of a bank are transparent, in fact the requirements for foreign branch establishment have been reduced by the Banks Amendment act of 2012.<sup>391</sup> Secondary legislation has become increasingly important in regulating bank conduct in South Africa because it adds to the cost of doing business.<sup>392</sup> The government is working to increase bank access to address the issue of the unbanked, however, it still remains that many citizens of South Africa are under banked. The new enacted piece of legislation has reduced the entry requirements for specific banks so as to address the problem of the unbanked.<sup>393</sup>

Regulation is an interdisciplinary process which requires effective and efficient cooperation.<sup>394</sup> In South Africa the underlying theme for financial regulations is inclusive economic growth.<sup>395</sup> This is done under the strict guidance of International best practices, such as the Basel III. The regulatory landscape is sophisticated yet the bank licence commitment schedules do not reflect this.<sup>396</sup> Transparency alone does not lead to progressive liberalisation. South Africa is still operating on a protectionist agenda – an agenda that appears to be canvassed under compliance to international best practices in banking. In terms of soundness and stability of the financial sector South Africa has one of the best systems – meaning it is capable of more comprehensive and fuller commitments.

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<sup>391</sup> Chapter two para 2.2.

<sup>392</sup> Chapter two para 2.4.1

<sup>393</sup> Chapter two para 2.4.1

<sup>394</sup> Chapter three para 3.2

<sup>395</sup> Chapter three para 3.7

<sup>396</sup> Chapter three para 3.5 & 3.6

Interpreting South Africa's banking schedule of commitments, impresses that the regulatory framework is not developed – this not true.<sup>397</sup> South Africa, as it has been proved has a sophisticated banking sector which is globally competitive. With respect to the GATS, South Africa should not only endeavour to lock in the unilateral reforms made since 1994 but also commit to the timing of future liberalisation measures in its schedule of commitments. This will improve South Africa's offensive points and give it credit to rise more defensive points. All this must be considered with the view that that the GATS is a fledging instrument. Many of the GATS rules are not complete, and are largely untested. Service negotiations, especially in financial services have been delayed and are relatively new in the overall multilateral framework.<sup>398</sup> Some of the rules will need to be improved. Several more rounds of negotiations can serve to improve the nature of the commitments. This could be the reason why most countries, including South Africa, have not refrain from autonomous liberalisation.

The future of South African banking commitments all things being equal should improve.<sup>399</sup> New bank entrant will not improve immediately owing to the anticipated reform. Thereafter, it would be expected that commercial presence will increase. The scheduling of the timing of future liberalisation is the opportunity for South Africa. While its focus is on exports so as to increase its balance of payments, it should balance the domestic regulations and the banking commitments.<sup>400</sup> That means allowing bank entry. As stated in the introduction, South Africa's liberalisation commitments were based on three conditions: first, a desire to protect the country's investors from 'unscrupulous foreign entities selling financial products from offshore locations'.<sup>401</sup> Second, regulations were needed, to level the playing fields between domestic and foreign financial institutions that established (or had already established) a commercial presence within South Africa's domestic market.<sup>402</sup> Third, a change of regulations was required to ensure that domestic financial institutions were not hindered by local regulations in their attempts to

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<sup>397</sup> Chapter four para 4.4

<sup>398</sup> Chapter four para 4.2.3.

<sup>399</sup> Chapter five para 5.3.

<sup>400</sup> Chapter five para 5.3.

<sup>401</sup> M Soko 'Thrown in at the deep end: South Africa and the Uruguay Round of multilateral trade negotiations, 1986-1994' (2010) 29 *Politeia* 12.

<sup>402</sup> Soko (n 2 above) 12.

become more internationally competitive.<sup>403</sup> The study has exposed that this analysis of the commitments is true. South Africa must be seen to depart from this agenda.

## **6.2 Conclusion and Recommendations**

The diametrically opposed ends: domestic regulation and specific scheduled commitments are indeed opposed. They are not opposed in a way that they need to be unionised. They will continue to run parallel, this conclusion aligns with the spirit and purport of the GATS. The GATS rules are intended to allow for greater transparency with regards domestic regulation and not influence the way domestic regulations are made. From the analysis detailed in the paper, two opposing arguments can thus be advanced.

The first argument is that, South Africa since 1994 has drafted its economic policies with the aim of protecting its domestic industry. In Banking, this is reflected in the four pillar banking policy. At the WTO South Africa structured its market access commitments to reflect this agenda. In banking South Africa made mostly ‘unbound’ commitments in all four modes of supply. The nature of this commitment allows it a high level of unfettered discretion in drafting regulations; the only preserve is that their application is reasonable, objective and impartial. South Africa will contend that commercial presence of foreign bank branches has increased since 1994; however, this increase is also coincidental with the attainment of independence and not to the commitments as scheduled in the GATS. In the spirit of continuing protectionism of its banking sector, the new government’s economic programs are gearing the South African banks for market penetration into other regions of Africa. The policies advocate for an increase in exporting of services. Yet, market penetration into South Africa is still limited. With the knowledge that economic policies inform regulations, there is no hope in site for a more inclusive regulatory structure for banks. This is a breach of the GATS agreement as Members are expected to make commitments in good faith so as to promote progressive liberalisation yet the reregulation in South Africa promotes protectionism versus liberalisation.

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<sup>403</sup> Soko (n 2 above) 12.

The second argument is that, South Africa has since 1994 taken its international commitments and memberships very seriously. Under the GATS it made mostly ‘unbound’ commitments to its Banking sector market access. This was done so as to align such commitments with its regulatory reform agenda. Over the last decade, South Africa has systematically reformed its banking sector to allow for social transformation. The regulatory reform was informed by international best practices as well as government policies. The impact of such regulation was also tested by the government through the regulation impact assessment. Over the last 20 years the world over has seen different episodes of bank failure. This prompted the strengthening of the Basel accords to the Basel III which introduces stricter capital and prudential requirements. This makes bank entry world over very difficult as it increases the licencing requirements. As such, what is perceived as protectionism which limits foreign bank entry is actually standard regulatory practice. South Africa is guilty of loyally and promptly implementing the international best practices in order to strengthen its bank sector. The bank sector is pivotal to the government’s social transformation plans as such it guards its stability carefully. South Africa has upheld its GATS commitments. There is room for improvement in the scheduled bank commitments but that is not to say they were made in bad faith to perpetuate a protectionist agenda.

It is submitted that the two arguments above, though opposed are to an extent complimentary. It is true that South African policy over the decade has had an element of protectionism but that was a necessary step toward social transformation. There is no set formula for liberalisation just fundamental prerequisite, one of them being economic stability. The scheduled commitments under the GATS have been part of the body of international best practices that have informed the drafting of bank regulations. Further, the said commitments have served as a moderator between domestic regulation and progressive liberalisation. An example of this is the revised requirements pertaining the one million rands deposit limitation on foreign bank branches, which has been regulated away. While it might not be clear that progressive liberalisation is in the works in South Africa. It is clear that the government has worked to ensure that the prescribed prerequisites for liberalisation are in place – political and economic stability. The planned reforms coupled with the foundation laid already should open up bank entry to the more

sophisticated trading partners such as China, United States, Russia and Nigeria. While it might not be easy for most African banks to set up presence in South Africa, the systematic method applied in transforming the South African banking sector presents best practices that can advance their own sectors so as to create the opportunity for their banks to enter sophisticated markets.

The recommended way forward is that South Africa carefully schedules its commitments to the timing of future liberalisation agenda. It must make bold and comprehensive market access commitments so as to be seen to be promoting the goal of progressive liberalisation. This will elevate its negotiating position in the forthcoming Doha round of negotiations.

As highlighted above, the work focuses on two diametrically opposed ends and their effect on the scheduling of the commitments under the GATS. The analysis has exposed that indeed the regulations influence the scheduling of commitments. This means that the negotiators need to be weary of all the relevant factors that influence regulation in a particular sector in order for them to make comprehensive and full commitments. South Africa is in a good position because there is clarity and transparency on the present and future regulatory landscape. The next five years will see very little setting up of commercial presence by foreign banks. This is owing to the implementation of the Basel III accord and the twin peaks model of regulation. However, this does not prevent South Africa from scheduling commitment for future timing of progressive liberalisation.

For the rest of Africa, particularly South African Development Community (SADC), this research exposes the mammoth of a task that lies ahead in order for the SADC protocol on trade in services to work.<sup>404</sup> A thorough and comprehensive detailed report of the current regulation and factors that will influence their change needs to be carried out in each service sector. It is

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<sup>404</sup>[http://www.sadc.int/files/7313/6439/6118/Protocol\\_on\\_Trade\\_in\\_Services\\_-\\_2012\\_-\\_English.pdf](http://www.sadc.int/files/7313/6439/6118/Protocol_on_Trade_in_Services_-_2012_-_English.pdf) (accessed 25May 2014)

sustained that there can be not liberalisation without a sound regulatory framework. The analysis as detailed in the paper should serve as a framework for the content of such a report.

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