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**LEGAL AND REGULATORY CHALLENGES IN THE IMPLEMENTATION
OF THE AFRICAN CONTINENTAL FREE TRADE AREA AGREEMENT
PROTOCOL ON TRADE IN SERVICES IN MOZAMBIQUE**

by

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DECLARATION

I declare that this mini-dissertation which is hereby submitted for the award of Master's of philosophy (Mphil) in International Trade and Investment Law in Africa at International Development Law Unit, Centre for Human Rights, 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. Other works referred to are accordingly acknowledged.

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08 October 2021.

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A luta continua!
(Samora Machel)

LIST OF ACRONYMS

AfCFTA - African Continental Free Trade Area
ANAC - National Administration of Conservation Areas
AU - African Union
COVID-19 - Coronavirus disease 2019 SARS-CoV-2
EAC - East African Community
ERP - Economic Rehabilitation Programme
FDI - Foreign Direct Investment
FRELIMO - Frente de Libertação de Moçambique
GDP - Gross Domestic Product
GATS - General Agreement on Trade in Services
GATT - General Agreement on Tariffs and Trade
INAE - National Inspectorate of Economic Activities
INATUR - Mozambique National Institute of Tourism
INCM - Mozambique National Communications Institute
INAC - National Institute of Civil Aviation
INATER - National Institute of Land Transport
INAHINA - National Institute of Hydrology
ISIC - International Standard Industry Classification
IACM - Mozambique Civil Aviation Institute
IMF - International Monetary Fund
LAM - Mozambique Airlines
LDCs - Least Developed Countries
MICTUR - Ministry of Culture and Tourism
MTC - Ministry of Transport and Communications
MFN - Most-Favoured-Nation
NAICS - North American Industry Classification System
OECD - Organisation for Economic Co-operation and Development
RECs - Regional Economic Communities
RoO - Rules of Origin
RENAMO - Mozambican National Resistance
SADC - African Development Community

SAP - Structural Adjustment Programme

SIC - Standard Industrial Classification

SDGs - Sustainable Development Goals

SACU - Southern African Customs Union

TFTA - Tripartite Free Trade Area

WTO - World Trade Organization

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ABSTRACT

The Agreement establishing the African Continental Free Trade Area (AfCFTA) entered into force on 30 May 2019, and trade under the AfCFTA started on 1 January 2021. The AfCFTA adopted a Protocol on Trade in Services, which entered into force on 30 May 2019, with the aim of establishing a single market for services in Africa. Mozambique signed the AfCFTA Agreement on 23 March 2018 and is still in the process of legal review and harmonization of its domestic legislation to ratify and deposit the Agreement. This mini-dissertation examines the potential legal and regulatory challenges to overcome for the implementation of the AfCFTA Protocol on Trade in Services, in Mozambique, with focus on the initial five (5) priority services: transport; communication; finance; tourism and business service. The research analyses the Mozambican legal framework for the following four (4) modes of supply of these priority services in international trade: cross-border supply, consumption abroad, commercial presence, and presence of natural persons in Mozambique. The Mozambican legal framework has too many measures affecting trade in services and market access. Before the country ratifies the AfCFTA Agreement, it is important to expedite the process of updating and harmonizing its legal framework for trade in services to accord with the best practices under the AfCFTA Protocol on Trade in Services. The research recommends that Mozambique must address the legal and regulatory challenges to supply of services and provide effective market access to boost intra-African trade in services. It further recommends that Mozambique must invest in capacity building and training of all public stakeholders and institutions in the trade area as well as the private sector.

CHAPTER 1

1 INTRODUCTION

1.1 Background of the Research

The African Continental Free Trade Area ('AfCFTA') entered into force on 30 May 2019. The Protocol on Trade in Services ('Protocol'), part of the AfCFTA Agreement which was presented for signature in March 2018, entered into force along with the Agreement on 30 May 2019.¹ The AU Heads of States and Government did, however, decide on 5 December 2020, at the 13th Extraordinary Session of the Assembly of the Africa Union, to launch trade on 1 January 2021, even though negotiations on tariff schedules and Rules of Origin (RoO), and schedules of specific commitments for the five priority services sectors (business services, communications, finance, tourism and transport) are ongoing. The deadline to finalise these negotiations is June 2021.²

The general objectives and aims of the AfCFTA are to create a single and liberalized market for goods and services, facilitated by the movement of persons to deepen the economic integration of the African Continent.³ To operate and implement all its objectives, the AfCFTA has adopted protocols on trade in goods and services, rules and procedures for the settlement of disputes, competition policy, and intellectual property rights.

Mozambique signed the AfCFTA Agreement on 23 March 2018 and is still in the process of legal review and harmonization of its domestic legislation to ratify and deposit the Agreement.

Due to the currently increasing importance of the services sector on global production and now for Africa, this research examines the legal and regulatory barriers to overcome to implement the AfCFTA Protocol on Trade in Services in Mozambique. The services sector represents a significant component of Mozambique's Gross Domestic Product (GDP) with a contribution of

¹ B Chaytor 'Creating a single African market on trade in services: Negotiating the Schedules of Specific Commitments under the Protocol on Trade in Services' *Trade Law Centre-tralac* 2019 at 3 <https://www.tralac.org/blog/article/14293-creating-a-single-african-market-on-trade-in-services-negotiating-the-schedules-of-specific-commitments-under-the-protocol-on-trade-in-services.html> (accessed 30 May 2021).

² Trade Law Centre - tralac 'African Continental Free Trade Area (AfCFTA) frequently asked questions' *tralac* 2021 at 4-5 <https://www.tralac.org/publications/article/13784-afcfta-questions-and-answers.html> (accessed 1 June 2021).

³ Article 3 of the AfCFTA,

around 48, 1% percent to the GDP.⁴ Considering the schedules of specific commitments under the AfCFTA Protocol on Trade in Services, this research analyses the five initial priority services, namely (i) transport, (ii) communication, (iii) finance, (iv) tourism, and (v) business service for the first phase of liberalization (out of 12 total). The five services have been adopted to implement as a pilot project for the first phase (Phase I). The research analyses how these five priority services are supplied in cross-border trade, consumption abroad, commercial presence, and presence of natural persons in Mozambique.

Through best practice, this research intends to give support and recommendations to the Mozambique legal framework, legislators, and policymakers to improve and provide for a legal and policy framework to fully implement and operationalize the AfCFTA Protocol on Trade in Services in the country. The research looks at World Trade Organization (WTO) rules and obligation on trade in services to all state members, particularly on the schedule of specific commitments made by Mozambique under the General Agreement on Trade in Services (GATS), and the legal framework on trade in services under the AfCFTA Protocol on Trade in Services and the schedule of specific commitments.

1.2 Statement of the Problem

The agreement establishing the AfCFTA was signed at the 10th Extraordinary Summit of the AU Assembly on 21 March 2018 in Kigali, Rwanda. The AfCFTA Agreement entered into force on 30 May 2019, and trade started on 1 January 2021. The AfCFTA adopted the Protocol on Trade in Services, which entered into force on 30 May 2019, along with the AfCFTA agreement, whose aim is to establish a single market in services.

The implementation of the AfCFTA was defined to be more at the level of the state parties that have ratified the AfCFTA Agreement or acceded to it, and for which the AfCFTA Agreement is in force. Additionally, the eight RECs have been officially recognized as building blocks of the AfCFTA, including the Southern African Development Community (SADC).⁵ However, it has

⁴ *Contas Nacionais (Ano Base 2014 = 100) 4º Trimestre 2020 (2021)* <http://www.ine.gov.mz/> (accessed 13 June 2021).

⁵ They are the Arab Maghreb Union (AMU), the Common Market for Eastern and Southern Africa (COMESA), the Community of Sahel-Saharan States (CEN-SAD), the East African Community (EAC), the Economic Community of Central African States (ECCAS), the Economic Community of West African States (ECOWAS), the Intergovernmental Authority on Development (IGAD), and the Southern African Development Community (SADC).

been argued that the SADC Protocol on Trade in Services has not yet entered in force and its provision presents a lack of ambition in dealing with challenges of globalization and the integrated market. Mozambique is a SADC member state and signed the AfCFTA Agreement on 23 March 2018. It is however still in the process of legal review and harmonization of its domestic legislation to ratify and deposit the Agreement.

The Mozambican legal framework is novel and with many challenges. This is why this study examines and interrogates the legal and regulatory barriers to overcome to implement the AfCFTA Protocol on Trade in Services in Mozambique.

1.3 Research Question

In the quest to examine and understand the legal and regulatory challenges to implement the AfCFTA Protocol on Trade in Services in Mozambique, this research examines the following questions:

1. What is the legal framework for trade in services in Mozambique, particularly on transport, communication, finance, tourism, and business services?
2. What is the progress of implementation and service liberalization in Mozambique to meet the regulatory reform to ratify the AfCFTA?
3. What are the main challenges in reform the legal framework on trade in services to liberalize the market and ratify the AfCFTA Protocol on Trade in Services?
4. How can the lessons learned from the attempts to implement the SADC Protocol on Trade in Services help in the implementation of the AfCFTA Protocol on Trade in Services?

1.4 The Objective of the Study

Generally, this study discusses the legal framework of the AfCFTA Protocol on Trade in Services, and the potential legal and regulatory challenges to implementing in Mozambique, with great focus on the initial five (5) priority services, which are (i) transport; (ii) communication; (iii) finance; (iv) tourism; and (v) business service. In particular, this paper tries to:

1. Analyse the Mozambique legal framework for four modes of supply of these services through cross-border trade, consumption abroad, commercial presence, and presence of natural persons in Mozambique.
2. Analyse the AfCFTA Protocol on Trade in Services.

3. Analyse the legal framework and the implementation of the GATS.
4. Give recommendations to the Mozambican legislator and Policy Makers on the process of harmonization of domestic laws to ratify the AfCFTA.

1.5 Research Hypothesis:

It is hypothesized that the current Mozambique legal framework on trade in services must be reformed to adopt the AfCFTA Protocol on Trade in Services. The harmonization of Mozambique's legal framework on trade in services will allow the country to ratify the AfCFTA Agreement and adopt a schedule of specific commitments to liberalize the trade in services in the continent.

1.6 Significance of the Study

Services have become a transformational force in the global economy, changing the structure of markets and accounting for the majority of GDP and employment in most African countries. Nowadays, with the appearance of the COVID-19 pandemic and the consequent closing of borders and restriction on the international market, more and more services, and trade is being conducted and provided through e-commerce, demonstrating the important role of this sector in the modern economy. In Mozambique, the services sector represents a significant component of GDP with a contribution of around 48.1% percent, and sectors such as tourism and transport have the potential to become a very large source of export earnings.

The AfCFTA Protocol on Trade in Services aims to establish a single market for services in Africa. The implementation of the AfCFTA is defined to be more at the level of the State Parties, and the RECs as building block. However, since the Protocol on Trade in Services was adopted, the literature analysing the process of legal reform and implementation of the Protocol by the state members in their respective jurisdictions and RECs, as well as the challenges that lie ahead in its materialization are very low. Most of the literature available analyse the trade in services from a global perspective or developed countries.

In addition to that, research on trade in services within the SADC region and Mozambique is extremely scanty and limited. Therefore, this research intends to mainly contribute by giving some resources and guides to the process of legal reform of Mozambique's legal framework on trade in

services, including the schedule of specific commitments to be given under ratification of the AfCFTA.

1.7 Literature Review

Notwithstanding its importance, trade in services is a quite recent topic worldwide, which has evolved since the adoption of GATS. In Africa, since the AfCFTA Protocol on Trade in Services was signed and entered into force, a limited number of literature has been written to analyse the process of legal reform and implementation of the Protocol by the state's members in their respective jurisdictions and RECs, as well as the challenges that lie ahead in its materialisation. Besides the scarcity of African scholars analysing the implementation of the AfCFTA Protocol on Trade in Services by states members, significant materials revolve around the GATS and WTO trading system and the AfCFTA Protocol on Trade in Goods. This study analyses the Mozambican legal framework on trade in services, looking at its domestic legislation and provisions, to determine whether it will meet the objectives and provisions of the AfCFTA Protocol on Trade in Services.

This literature review begins with some books and articles about services and trade in services, general and legal concepts, its importance on the global trade system, including nowadays during this period in which the global trade has been facing restrictions due to the Covid-19 pandemic. It also includes the scholars' thoughts and analysis of services and trade in Africa, the importance in the economic growth of the continent considering Africa its peculiarities and diversity.

R Wolfrum, P Stoll, and others citing E Barth and W Krajewski argue that the GATS does not define the notion of "services" as such, since the contracting parties could not agree on a definition.⁶ Furthermore, several scholars described services as "immaterial goods" with a series

⁶ E Barth 5 (1994), 455; W Krajewski 136–137, para. 432 in R Wolfrum, PT Stoll & C Feinäugle (eds) *WTO—Trade in services* (2008) 38.

of qualities like intangibility,⁷ invisibility,⁸ lack of suitability for storage,⁹ lack of transportability,¹⁰ and coincidence of production and consumption.¹¹

Sampson and Snape argue that physical closeness is often a prerequisite for trade in services. In international trade, this closeness can be reached by the entry either of the service supplier or the consumer into the other's country or by a permanent branch of the service supplier being established in the country of the consumer.¹²

However, Cass and Noam put forward a hybrid position on the definition of services, which considers seeming as appropriate to use, merely as a working formula, a definition that, on the one hand, stresses the immateriality of the services but, on the other hand, also makes it clear that this criterion must be handled with care. Thus, one could say, as proposed in the literature, that services are commercial activities that are not embodied directly in tradeable, tangible products.¹³

Jensen finds that the GATS definition embodies what is generally referred to as the four "modes" of service trade: Mode one is the cross-border provision, for example when software is produced in one country and shipped via the internet to another; Mode two is consumption abroad, for example, when a vacationer travels to a resort in another country and purchases hotel accommodations, meals, and other services there; Mode three is commercial presence in a foreign country, for example, when a restaurant chain opens a branch outside its home country; and Mode four is temporary movement of natural persons across borders, for example, when a business consultant travels to visit a foreign client.¹⁴

Van der Marel and Shepherd¹⁵ articulate that the modes of supply for trade in services should not be limited to the GATS modes of supply, as other modes relate to any service input in the

⁷ Engel, in: Oppermann & Molsberger (eds), 213, 214, in R Wolfrum, PT Stoll & C Feinäugle (eds) *WTO—Trade in services* (2008) 40

⁸ R Wolfrum, PT Stoll & C Feinäugle (eds), *WTO—Trade in services* (2008) 40

⁹ Ipsen & Haltern, 85 in R Wolfrum, PT Stoll & C Feinäugle (eds), *WTO—Trade in services* (2008) 40

¹⁰ Sindelar, 9 in R Wolfrum, PT Stoll & C Feinäugle (eds), *WTO—Trade in services* (2008) 40.

¹¹ Eiteljörge, in: Klein et al.(eds), 137, 139; Wegmann & Müller, 11, in R Wolfrum, PT Stoll & C Feinäugle (eds), *WTO—Trade in services* (2008) 40

¹² Sampson & Snape, *World Econ.* 8 (1985), 171, 172; Stern & Hoekman, *Issues, World Econ.* 10 (1987), 39, 40–42; Bhagwati, in: Giarini (ed.), 3, 7.

¹³ Cass & Noam, in: Friedmann & Mestmäcker (eds), 43, 39; Mestmäcker, in: Friedmann & Mestmäcker(eds), 9, 13; Koehler, in R Wolfrum, PT Stoll & C Feinäugle (eds), *WTO—Trade in services* (2008) 35.

¹⁴ J Jensen *Global Trade in Services: Fear, facts, and offshoring* (2011) 28.

¹⁵ E Van der Marel & B Shepherd *International Tradability Indices for Services* World Bank (2013) <https://openknowledge.worldbank.org/handle/10986/16901> License: CC BY 3.0 IGO (accessed 1 June 2021).

production of goods. In the same way, Antimiani and Cernat argue that this latest mode has created a further requirement to understand its impact on trade; in the production of goods, this mode exists to service the productivity of goods. They further argue that mode five is the ‘new’ mode, this mode applies to the exporting of services and is different from the four existing modes of the GATS; this mode’s unique attribute is that it attracts tariff payments. For the authors, the fifth mode is decisive in the facilitation of technological advancements and can be found in the manufacturing of specific goods, where services such as the design and research that goes into the production of a good are noted to attract tariffs.¹⁶ Mode five of services is defined as services that are used in the production of goods; this includes services such as research and development, design and engineering in the production of goods.¹⁷

Very little is known about trade in services in Africa and its prospective impact. The continent’s potential to engage in trade in services, especially in dynamic knowledge-intensive activities remains neglected.¹⁸ Nora Dihel and Arti Grover have written one of the first relevant books on Trade in Services in Africa, which analyses the understanding and concept of trade in services in Africa, challenges to trade in services in Africa, the unexplored sectors in Africa trade in services, and proposed innovative policy solutions. They analyse opportunities for services trade in Africa, the role of services in trade diversification, and economic upgrading on the continent. They focus on less explored services such as informal trade in services, education and health services, and services related to mining that are rarely associated with trade in services in Africa. The book provides the necessary broad base for successful implementation reforms across the continent.

According to Nora Dihel and Arti Grover trade in services and related regulatory reforms are critical for growth and economic development in Africa.¹⁹ Services matter for growth, productivity, poverty reduction, and jobs in Africa.²⁰ They further conclude that at the conceptual level there is basic evidence to support that services liberalization brings significant welfare benefits in addition to aggregate and sector growth gains.²¹

¹⁶ A Antimiani & L Cernat ‘Liberalizing global trade in mode 5 services: How much is it worth?’ (2018) 52(2) *Journal of World Trade* at 65-83.

¹⁷ Antimiani & Cernat (n 16 above).

¹⁸ N Dihel & AG Goswami *From hair stylists and teachers to accountants and doctors: The unexplored potential of trade in services in Africa* (2016) xvii.

¹⁹ Dihel & Goswami (n 18) 4.

²⁰ Dihel & Goswami (n 18) 8.

²¹ Dihel & Goswami (n 18 above).

Regis Y. Simo, who analyses the Trade in Services in the African Continental Free Trade Area, has written a pertinent article about the AfCFTA agreement on Trade in Services: Prospects, Challenges, and WTO Compatibility. According to Regis, the liberalization of trade in services, when associated with reform of relevant policies, is capable to spur both sectoral and economy-wide improvements in performance. He argues that, while African countries tackle services at domestic, regional, and multilateral levels, their approach usually suffers from a lack of policy coherence at these three levels, hence preventing them from benefitting from service trade liberalization.²²

Some scholars argue that services are an important feature of any economy, both in industrialized and poorer countries. Services provide essential inputs to most other businesses, and as much as 30% of value-added in the export of goods is from services inputs.²³ Back to Regis Simo, he argues that these figures however do not capture all activities since more and more evidence shows that the role of services in international trade, and African trade as well, is greatly underestimated in statistics.²⁴ Like Nora Dihel and Arti Grover Goswami, he also concludes that this is essentially the consequence of the fact that much trade in the services sector in Africa occurs informally.

According to some scholars who have studied the AfCFTA Protocol on Trade in Services, it is argued that currently, the Protocol is incomplete, and it will be some time before any services sector commitments are made under the AfCFTA, and thus before any actual services trade can occur under this Agreement.²⁵ The AfCFTA negotiations take place in phases. Phase I covers trade in services.²⁶ The negotiations to finalise the rules of origin, schedules of tariff concessions and schedules of specific commitments for the five priority services sectors (business services; communications; finance; tourism, and transport) are ongoing. The deadline to finalise the development of schedules of specific commitments in the five priority sectors is June 2021.²⁷

²² RY Simo 'Trade in Services in the African Continental Free Trade Area: Prospects, Challenges and WTO Compatibility' (2020) 23 65–95 *Journal of International Economic Law* at 66.

²³ OECD 'Trade policy implications of Global Value Chains' (2013), available at http://www.oecd.org/sti/ind/Trade_Policy_Implications_May_2013.pdf (accessed 30 May 2021).

²⁴ Simo (n 22) 68.

²⁵ Tralac – trade law centre 'Trade in services negotiations under the AfCFTA' *tralac* 25 March 2020 at 1 <https://www.tralac.org/publications/article/14461-trade-in-services-negotiations-under-the-afcfta-q-a.html> (accessed 31 May 2021).

²⁶ Tralac (n 2) 3.

²⁷ Tralac (n 2) 7.

According to the Guidelines and Modalities, the scheduling of the service takes a positive listing, General Agreement on Trade in Services (GATS)-plus approach. This means each State Party lists each sector that they are committing under the AfCFTA.²⁸ The commitments by State Parties that are members of the WTO must build on their GATS commitments. State Parties must offer more access in their AfCFTA schedule to AfCFTA member countries than they offer under the GATS to all WTO countries. For non-WTO members, the baseline is the current state of liberalisation and domestic regulation. Mozambique has been a member of WTO since 26 August 1995 and a member of GATT since 27 July 1992, and its commitments under GATS are limited to financial services (excluding insurance).²⁹

In 2012, the SADC Protocol on Trade in Services was concluded, and Mozambique signed the Protocol.³⁰ Stern, Truen, and Ramkolowan argue that a regional agreement on trade in services, such as Protocol on Trade in Services would be beneficial to the region as it would provide SADC regulators with a binding framework, that would bring about the changes needed to create a more competitive services sector.³¹ They find that the Protocol on Trade in Services is not ambitious and is unlikely to take SADC countries beyond their already existing commitments under the GATS.³²

1.8 Delineation and Limitation of the Study

This study focused on analysis of the AfCFTA Protocol on Trade in Services and the potential legal and regulatory barriers to implementing the Protocol in Mozambique. The research analyses the initial five (5)-priority services (i) transport; (ii) communication; (iii) finance; (iv) tourism, and (v) business services for the first phase of liberalisation. In the same way, the research analyses the supplying of these services through cross-border trade, consumption abroad, commercial presence, and presence of natural persons in Mozambique.

²⁸ Tralac (n 2) 8.

²⁹ Mozambique and WTO https://www.wto.org/english/thewto_e/countries_e/mozambique_e.htm (accessed 13 June 2021).

³⁰ The other countries that have signed the Protocol thus far are The Democratic Republic of Congo, Lesotho, Malawi, Mauritius, The Republic of Seychelles, Eswatini, the United Republic of Tanzania, and the Republic of Zambia

³¹ M Stern, S Truen S, Y Ramkolowan ‘SADC trade in services: Negotiating the national interest’(2011) *Occasional Paper* No 93 South African Institutional International Affairs 63 at 22.

³² Stern, Truen & Ramkolowan (n 31) 28.

The main limitation of this study is the access to significant literature that analyses the process of legal reform and implementation of the protocol by state members. On another hand, the lack of trade in services within the SADC region, which makes it difficult to assess the level of commitment of the region and Mozambique.

1.9 Research methodology

The research paper is mainly desktop and library-based. The approaches adopted is descriptive, analytical, comparative, and prescriptive.

The descriptive approach is adopted in analysing and examining the Mozambique legal framework on trade in services and its commitment under the SADC region and GATS. The analytical approach is adopted in analysing and examining how the AfCFTA Protocol on Trade in Services will be able to assist Mozambique in Trade in Services sector. The comparative approach is adopted in analysis and comparison of AfCFTA Protocol on Trade in Services and Mozambique's legal framework on trade in services.

Lastly, the prescriptive approach is adopted in making recommendations to Mozambican legislators and policymakers.

1.10 Organization of the chapters

To address the whole research problem, the research is comprised of five chapters.

Chapter 1

The first chapter introduces the research paper and outlines the background of the research, the statement of the problem, and the questions to be answered. It also contains the objective of the study, the significance of the study, literature review, delineation, and limitation of the study, research methodology, and a synopsis of each chapter.

Chapter 2

This chapter introduces the general concept of services and trade in services. The chapter also defines the services and trade in services, its scope, and the importance of trade in services for the world its economic relations, and Africa its economic integration.

Chapter 3

This chapter looks at AfCFTA Protocol on Trade in Services. It provides an analysis of the current legal framework and phases to implement the Protocol on Trade in Services and the Schedule of Commitments. In addition, it also gives a brief analysis of the GATS and its influence on Trade in Services in the AfCFTA.

Chapter 4

This chapter provides an analysis of Mozambique's legal framework on trade in services, looking at the priority services sectors, and the ways of supply trade in services. In addition, the chapter provides an analysis and discussion of the domestic legal and regulatory challenges and barriers that need to be overcome in implementing the protocol in Mozambique.

Chapter 5

This chapter provides a conclusion and recommendation to the legal framework and policymakers based on the research paper to help the process of reform of domestic laws to overcome the legal and regulatory barriers on the process of implementation of AfCFTA Protocol on Trade in Services.

CHAPTER 2

2 THE GENERAL CONCEPT OF SERVICES AND TRADE IN SERVICES

2.1 Introduction

The chapter defines the services and trade in services, its scope, importance, and benefits of trade in services for the world its economic relations, and Africa's intra-trade service economic integration.

2.2 Defining Services

A first positive attempt to determine the notion of services referred to the International Standard Industry Classification (ISIC)³³ in its second revision 1968.³⁴ According to that classification, the products of certain sectors, professions, and enterprises are generally regarded as services. The classification lists the major divisions of infrastructure (electricity, gas and water; construction; transport, storage, and communication), trade (whole-sale and retail trade, restaurants, and hotels), business services (financing; insurance; real estate), and public services (community, social and personal services), each of them with a series of subdivisions.³⁵ The United States used a similar Standard Industrial Classification (SIC),³⁶ which was replaced in 1997 by the North American Industry Classification System (NAICS).³⁷ NAICS was developed jointly by the US, Canada, and Mexico to provide new comparability in statistics about business activity across North America. In its 2002 version, it lists 17 major service divisions, among them beside divisions already mentioned in the ISIC, e.g. the following: information; professional, scientific and technical services; management of companies and enterprises; educational services; health care and social assistance; art, entertainment and recreation; accommodation and food services.³⁸

The GATS does not define the notion of "services" as such, since the contracting parties could not agree a definition.³⁹ Art. I:3 lit. b states only that "services" include any service in any sector,

³³ International Labour Organization <<http://laborsta.ilo.org/applv8/data/istic2e.html>> (accessed 1 October 2007).

³⁴ Eiteljörge, in: Klein et al.(eds), 138–139 in R Wolfrum *et al* (eds), *WTO – Trade in services* (2008) 39.

³⁵ Zacharias 'Article 1 GATS' in R Wolfrum *et al* (eds), *WTO—Trade in services* (2008) at 39.

³⁶ United States Department of Labor <http://www.osha.gov/pls/imis/sic_manual.html> (accessed 30 August 2021).

³⁷ North American Industry Classification System <<http://www.census.gov/epcd/naics02/naicod02.htm>> (accessed 30 August 2021).

³⁸ Zacharias 'Article 1 GATS' in Wolfrum *et al* (n 35 above).

³⁹ Barth (n 6) 38.

which clarifies that the scope of the Agreement is not limited to certain types of services or services in certain sectors. Also, the Appellate Body had not hitherto found it necessary to define “services” in abstract terms. It, rather, took a programmatic approach indicating which sector was affected in the cases that had so far been decided under GATS.⁴⁰

For OECD, "Services" are defined in paragraph 3 b) of Article I as including any service in any sector. They disagree with idea of certain sectors are excluded from the agreement. According to OECD, all sectors are covered, including possible future services, but there are some sectors where not all major players have made specific commitments, such as audio-visual services.⁴¹

In order to help countries negotiate and schedule their commitments, the GATT Secretariat has issued a services sectoral classification list. It is neither binding nor exhaustive. But, even though not all countries have followed it, the list gives an indication of what is generally considered as an existing service.

The list comprises eleven (11) sectors, each divided in several subsectors such as business, communication, construction, distribution, education, environmental, financial, health, tourism, recreational, and transport services.⁴²

A category of services that are excluded from the coverage of the GATS is, in any of the above sectors, the group of services supplied in the exercise of government authority in accordance with Art. I:3 lit. b. This exception is, however, limited: where a Government acts on a commercial basis and/or as competitor with other suppliers, its activities are treated like those of any private supplier. This also includes State-owned commercial enterprises which are covered by GATS general obligations such as MFN, as well as by specific commitments on market access and national treatment. The second exception is laid down in para. 2 of the Annex on Air Transport Services. This provision says that the Agreement shall not apply to measures affecting traffic rights and services directly related to the exercise of traffic rights.⁴³ Furthermore, services purchased by governmental agencies for governmental, non-commercial purposes (government procurement)

⁴⁰ Canada—Autos, WT/DS139/AB/R, WT/DS142/AB/R, para. 157; EC—Bananas III, WT/DS27/AB/R, paras 323–228.

⁴¹ Organisation for Economic Co-operation and Development, *The General Agreement on Trade in Services (GATS): An Analysis* (1994) at [https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=OCDE/GD\(94\)123&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=OCDE/GD(94)123&docLanguage=En) at 6.

⁴² OECD (n 41) 6-7.

⁴³ WTO, Handbook, 6–7 in R Wolfrum *et al* (eds), *WTO – Trade in services* (2008) 44.

are not covered by the principal provisions of the GATS, i.e. MFN, market access and national treatment.

The GATS obligations also apply to services supplied by monopolies. Under Article VIII, Members must ensure that monopoly suppliers of services in its territory act in conformity with GATS obligations, including MFN. Monopolies must also be prevented from abusing their monopoly position when supplying services outside their monopoly.

Furthermore, services are described as “immaterial goods” with a series of qualities like intangibility,⁴⁴ invisibility,⁴⁵ lack of suitability for storage,⁴⁶ lack of transportability,⁴⁷ and coincidence of production and consumption.⁴⁸

From the analysis of the key elements of services, it understands that Services are intangible because it is not embodied in concrete or corporeal objects as such. For example, the services delivered through TICs or a client who had a meeting and benefits for legal advice from his/her lawyer.

But services often involve materially tangible objects, such as in particular when faulty machines are repaired.⁴⁹ Moreover, there are some services that are embodied in objects which can be traded,⁵⁰ a phenomenon which had been called in literature a “disembodiment of services”.⁵¹ An example of this is the making of computer programs the result of which is software inscribed on a data carrier or memory medium.⁵²

Services that are not embodied in corporeal objects are invisible in the sense that they cannot be caught by the typical border controls.⁵³ For instance, a doctor based abroad can assist or deliver an online surgery service with a patient in another different country.

The lack of suitability for storage and lack of transportability means that a service is “consumed” at the moment in which it is supplied to the consumer. The services delivered can not be storage and transport from one place to another. However, this criteria can not be used in every case to

⁴⁴ Engel (n 7 above).

⁴⁵ Carreau *et all.* 291 (para. 446); Engel, in: Oppermann & Molsberger(eds), 213, 214 in R Wolfrum *et all* (eds), *WTO – Trade in services* (2008) 40.

⁴⁶ Ipsen & Haltern (n 9 above).

⁴⁷ Sindelar (n 10 above) .

⁴⁸ Eiteljörge (n 34) 40.

⁴⁹ Cass & Noam, in: Friedmann & Mestmäcker(eds), 43, 46; Grubel, in: Vosgerau(ed.), 257, 259 in R Wolfrum *et all* (eds), *WTO – Trade in services* (2008) 40.

⁵⁰ Krommenacker, 5 in R Wolfrum *et all* (eds), *WTO – Trade in services* (2008) 40.

⁵¹ Bhagwati, *World Econ.* 7 (1984), 133, 137–138 in R Wolfrum *et all* (eds), *WTO – Trade in services* (2008) 40

⁵² R Wolfrum, PT Stoll & C Feinäugle (eds), *WTO—Trade in services* (2008) Koninklijke Brill NV. Printed in the Netherlands, Article I GATS 40.

⁵³ Koehler, 32 in R Wolfrum *et all* (eds), *WTO – Trade in services* (2008) 40.

describe services in a clear-cut manner, since there are services sectors in which the services are embodied in corporeal goods, suitability for storage and transportability may exist. For instance, a written legal opinion or a computer program stored on a pen drive.

After all, it seems to be appropriate to use, merely as a working formula, a definition which, on the one hand, stresses the immateriality of the services but, on the other hand, also makes it clear that this criterion must be handled with care.⁵⁴ Thus, one could say, as proposed in literature, that services are commercial activities which are not embodied directly in tradeable, tangible products.⁵⁵

2.3 Trade in Services

Trade in services, however, is somewhat harder to conceptualize. Because services are intangible, the image of a service being traded comes less readily to mind. Yet services are traded, and in a variety of ways.⁵⁶ According to Article I:2 GATS, Trade in Services is defined as the supply of a service, which includes the production, distribution, marketing, sale, and delivery of a service (Art. XXVIII lit. b) and, thus, all steps of the added value that the service goes through on its way from the producer to the consumer,⁵⁷ by four means or modes of supply, namely (i) cross-border supply, (ii) consumption abroad, (iii) commercial presence, and (iv) presence of natural persons.

The Article 1:2 GATS also provides a prerequisite and condition to be satisfied in order to define trade in services, such as (i) the trade must be transboundary in nature, i.e. the trade must cross a specific boarder and affect other different Member's territory and thus have (ii) an international dimension, i.e. a transaction between economic subjects of different Members.

The GATS four modes of supply, according to Article I:2 GATS, will be analysed below.

2.3.1 Cross-Border Supply (Art. I:2 lit. a)

According to Article I:2 lit. a), the first mode of supply (mode 1), commonly referred to as “cross-border supply”, comprises “the supply of a service from the territory of one Member into the territory of any other Member”.

⁵⁴ Wolfrum, Stoll & Feinäugle (eds) (n 52) 42-43.

⁵⁵ Cass & Noam (n 13) 42-43.

⁵⁶ JB Jensen, *Global Trade In Services: Fear, Facts, And Offshoring* (2011) 27.

⁵⁷ Michaelis, in: Hilf & Oeter (eds), 375, 388, para. 32 in R Wolfrum *et all* (eds), *WTO – Trade in services* (2008) 48.

In this mode, both the consumer (see Art. XXVIII lit. i) and the service supplier (see Art. XXVIII lit. g) remain in their respective territories, whereas the delivered service as such crosses the border.⁵⁸ Therefore, the service supplied crosses the border, with neither the consumer moving nor the supplier establishing himself abroad. For example, a Mozambican consumer in Maputo can benefit from a service delivered by a South African supplier based in Johannesburg without a personal contact face to face between the parties. The personal contact between the parties to deliver the service is replaced by another transportable medium, such as written documentation or a computer disk or pen drive, or when it can be sent across borders through TICs, telecommunications channels, in particular by telephone and the internet. As regards its structure, cross-border supply is similar to trade in goods.⁵⁹

2.3.2 Consumption Abroad (Art. I:2 lit. b)

The second mode of supply (mode 2), referred to as “consumption abroad” or “movement of consumers”, becomes relevant if there is a supply “in the territory of one Member to the service consumer of any other Member” (Art. I:2 lit. b).⁶⁰ In this mode of supply, the consumer (or his property, such as in car repair) crosses the border to consume the service abroad. For example, a Mozambican who has is the owner of a Mercedes Benz car during holiday travels to Johannesburg by crossing the Lebombo border, and during the holidays in South Africa, he goes to Mercedes Benz Agency in Sandton city to do a full mechanical service in his car. While the Mozambican citizen is waiting for the maintenance of his car, he decides to visit a law office to get legal assistance about his project in South Africa. Another example is a Mozambican student who was admitted to attend a law course at the University of Lisbon in Portugal, and he travels to Lisbon and pays his school fees and education services there while is living and studying in Lisbon. As we can see from these examples, this mode of supply can apply to almost any service but is especially relevant in the tourism sector when the consumer travel to supplier service territory and benefit from the service delivered there. Hence, it is not the service that crosses the border, but the consumer who moves to the territory of the supplier to receive services, for example, tourism services, medical treatment in a foreign hospital, or educational services when studying abroad.⁶¹

⁵⁸ Wolfrum, Stoll & Feinäugle (n 52) 49.

⁵⁹ ECJ, Opinion 1/94, [1994] E.C.R. I-5267.

⁶⁰ Wolfrum, Stoll & Feinäugle (n 52) 49.

⁶¹ Senti, LJZ 16 (1995), 77, 79; Michaelis, in: Hilf & Oeter(eds), 375, 388, para. 33; Sampson & Snape, World Econ. 8 (1985), 171, 173; Shackleton, World Econ. 4 (2003), 55, 59–64; Zacharias, WissR 38 (2005), 290, 296–297 in R Wolfrum *et all* (eds), *WTO – Trade in services* (2008) 49.

It always requires a physical movement by the consumer from one territory to the service supplier territory.

2.3.3 Commercial Presence (Art. I:2 lit. c)

According to Article I:2 lit. c, it is a characteristic of trade in services that the service is supplied “by a service supplier of one Member, through commercial presence in the territory of any other Member” (mode 3).

Thus, “commercial presence” means any type of business or professional establishment within the territory of a Member for the purpose of supplying a service. The notion includes the constitution, acquisition, or maintenance of a juridical person (see Art. XXVIII lit. l, m, and n), or the creation or maintenance of a branch or a representative office (see Art. XXVIII lit. d).⁶² For instance, a supplier of services (foreign bank) establishes a branch or subsidiary bank in Mozambique to deliver financial services in the territory. It is often manifested as a foreign direct investment (FDI) in the consumer’s territory.

In this mode, the "commercial presence" is only authorised for the purpose of supplying a service. It would no longer be protected if, and to the extent that, an established foreign enterprise wished to move into a non-services sector (or a services sector not covered by the host-country’s specific commitments).⁶³

Since the supply of services by commercial presence is connected with direct investments abroad,⁶⁴ the GATS is even called a “multilateral investment treaty for services”.⁶⁵

2.3.4 Presence of Natural Persons (Art. I:2 lit. d)

In this called mode 4, the supplier crosses the border to provide service abroad through the presence of natural persons that means the physical presence of a natural person/individual in the consumer’s territory.

This means the crossing of the border by a natural person of one Member (see Art. XXVIII lit. k) for the purpose of delivering a service in the territory of another Member; thereby, the stay of the natural person is limited to the duration of the supply.⁶⁶

⁶² Wolfrum, Stoll & Feinäugle (n 52) 51.

⁶³ OECD (n 41) 8.

⁶⁴ Barth (n 6) 51-52.

⁶⁵ Barth (n 6) 52.

⁶⁶ Koehler, 94 in R Wolfrum *et all* (eds), *WTO – Trade in services* (2008) 52.

The fourth mode of supply is the subject of a separate Annex to the GATS that applies to “measures affecting natural persons who are service suppliers of a Member, and natural persons of a Member who are employed by a service supplier of a Member, in respect of the supply of a service” (para. 1 of the Annex on Movement of Natural Persons).⁶⁷

The Annex on Movement of Natural Persons Supplying Services under the Agreement (para. 2) provides that the Agreement does not apply to measures affecting individuals seeking access to the employment market of a Member, or to measures regarding citizenship, residence, or employment on a permanent basis. In fact, this mode of supply can be classified as sensitive, because it interferes and affects with countries’ sovereign rights to control the Migration movement and flow, the entry of individuals into their territory. Furthermore, the Members are free not to guarantee market access and national treatment regarding the presence of natural persons, or to limit them to certain groups of persons, by regulations within their Schedules of specific commitments.⁶⁸ The Annex also reserves countries’ rights to regulate immigration and access to the employment market, and expressly recognises that visa requirements may be applied in a discriminatory manner.⁶⁹ The Mozambique domestic legislation establish a system of immigration which include the need to obtaining documents permitting expatriates to stay and live in the country, such as: (i) Visas; (ii) temporary or permanent residence authorizations (commonly known as “DIREs” – *Documentos de Identificação de Residentes Estrangeiros*; and (iii) others. For employment market, the domestic legislation provides some rules such as the need to obtaining work permission that include communications of employment within the prescribed quota, or work authorizations when the statutory quota has been exhausted. The expatriates must obtain Mozambican educational equivalence certificates for degrees obtained when necessary for work authorization.

A foreign self-employed service provider will simply move to the territory of the consumer to supply his or her service. For instance, when a South African business consultant travels from Johannesburg to Maputo to visit a foreign client in Mozambique; or a SASOL employee in its headquarters in South Africa moves temporarily to SASOL Mozambique branch in Temane. However, the Mozambique domestic legislation provides some mandatory requirements such as

⁶⁷ Wolfrum, Stoll & Feinäugle (n 52) 52.

⁶⁸ Michaelis (n 57) 52.

⁶⁹ OECD (n 41) 8.

the need to obtaining a business visa and short-term work permit, for cases involving employees who intend to work for short periods of time.

This labour mobility of the service provider is typically temporary. Employees will be foreign natural persons who need not have the same nationality as the service provider and who is employed with regard to the supply of the service.⁷⁰

The employer or service provider in that case may be located abroad or have a commercial presence in the territory of the consumer.⁷¹

2.4 Measures

Article XXVIII (a) stipulates that a measure by a Member may take the form of a law, regulation, rule, procedure, decision, administrative action or any other form.

Regarding the central level, the GATS is not restricted to measures taken by government departments. Rather, it also applies to measures of “authorities” which are not directly part of the government, such as independent regulatory commissions or other public entities vested with regulatory competence.⁷² For instance, the Mozambican Competition Authority which has recently started operating in Mozambique under the Law 10/2013 of 11 April (Competition Law), subsequently regulated by Decree No. 97/2014 of 31 December (Regulation of Competition Law), and its organic statute approved by Decree No. 37/2014 of 1 August; or the Bank of Mozambique which is the regulatory and supervisory authority of banking activities, securities exchange, and insurance services provided by banks and microfinance institutions in the country, under the Law 1/92, of 3 January - Organic Law, which defines the nature, objectives, and functions of the BOM as the central bank, authorize the commencement and cessation of all financial businesses, and disciplinary conduct and of individuals.

Art. I:3 lit. a (ii) extends the scope of the GATS beyond the sphere of the territorial governments and authorities to non-governmental bodies. Such a body could be any association, institution or other entity regardless of its legal constitution and its status under public or private law if governmental powers were delegated to it. This includes for example private associations licensing doctors or lawyers. The GATS can in that regard penetrate into the area of self-regulation,⁷³ not

⁷⁰ Wolfrum, Stoll & Feinäugle (n 52) 53.

⁷¹ Footer & George, in: Macrory et al.(eds), 799, 826 in R Wolfrum et all (eds), *WTO – Trade in services* (2008) 53.

⁷² Krajewski, National Regulation, 63 in R Wolfrum *et all* (eds), *WTO – Trade in services* (2008) 55.

⁷³ Krajewski, National Regulation: in R Wolfrum (n 72 above).

least professional self-regulation.⁷⁴ For instance, the Mozambican Bar Association which operates under its statutes approved by the Law No. 28/2009 of 29 September, and the Law 5/2014 of 05 February, which approves the legal regime applicable to law firms operating in Mozambique; Regulations on registration and practice of foreign lawyers; and Law No. 24/2009 of 28 September, Law on the Exercise of Private Medicine; Law No. 3/2006, of 3 May, which creates the Mozambique Medical Association (*Ordem dos Médicos de Moçambique*) and approves its Statute.

Measures by private actors affecting trade in services are normally outside the scope of the GATS. In fact, private trade barriers are considered in only the provisions on monopolies (Art. VIII) and business practices (Art. IX).⁷⁵ However, GATT and WTO case law suggests that a private action encouraged or supported by a government and not merely tolerated by it could be regarded as a government measure which is within the scope of the GATS.⁷⁶ This interpretation of the term “measure” coincides with the standards of international law on state responsibility, which provide that a “conduct acknowledged and adopted by a state as its own” can be seen as an act of that state.⁷⁷

2.5 The importance of services and benefits of liberalisation

The service sectors are an important and growing sector of the global economy, including for African continent. It is an important input for all aspects of processing and production.

In Africa, the importance of service is greater than that reflect in the statistics and official data, because most of the services are informal but with a direct impact on the countries’ GDP and employment opportunities. Currently during the Covid-19 pandemic with all restrictions imposed by countries on the global trade, services has showing as an alternative to maintain trade between the countries (international trade), and contributing to the economic development.

The liberalisation is good for many authors in the economy, including the producers, exporters, and all economic activities. It provides access to efficient and essential services. Furthermore, liberalisation also contributes to satisfy individual demand and social needs. The benefits of liberalisation services to improve the global and continental GDP are so many as we discuss below.

⁷⁴ Krajewski, *Wirtschaftsvölkerrecht*, 138, para. 436 in R Wolfrum *et all* (eds), *WTO – Trade in services* (2008) 56

⁷⁵ Öhlinger, 79 in R Wolfrum *et all* (eds), *WTO – Trade in services* (2008) 56.

⁷⁶ Zdouc, in: Ortino & Petersmann (eds), 381, 387–389; Zdouc, Legal Problems, 111–114 in R Wolfrum *et all* (eds), *WTO – Trade in services* (2008) 56.

⁷⁷ Krajewski, National Regulation, 65; Zdouc, Legal Problems, 111–112 in R Wolfrum *et all* (eds), *WTO – Trade in services* (2008) 56.

2.5.1 The importance of services for world and African Intra-trade services

The services sector plays an increasingly important role in the global economy and the growth and development of countries through the generation of opportunities for greater income, productivity, employment, investment, and trade.⁷⁸

Services occupy a growing and central place in both domestic economies and international economic relations. They now account for the bulk of global foreign direct investment and world trade. Service sectors also play a multifaceted and significant role in connecting countries to the international trading system, and matter greatly to economic development and the achievement of the Sustainable Development Goals (SDGs).⁷⁹

Services generate more than two-thirds of global GDP, employ the highest proportion of workers in the large majority of countries, and generate most new jobs. The contribution of services to national economies has been increasing over time for countries at all levels of development.⁸⁰

Besides contributing a huge share of total output and many good jobs, the service sector provides key intermediate inputs to other sectors—including manufacturing. Banking, legal services, marketing, R&D, design, engineering, project management, software, and telecommunications all provide crucial inputs to other activities throughout the economy. These business services have the capacity to improve the quality, efficiency, and competitiveness of other firms in the economy. In addition, these services establish key linkages to the global economy—and, as a result, are key drivers of export growth (even of manufactured goods).⁸¹

The service sector is very important and deserves significantly more attention than it has tended to receive under global and domestic levels.

Globally, one main importance in services trade, which contributes its growth, is the falling travel costs. Because modes 2 and 4 involve the travel of either the consumer or the producer of a service, any decline in the cost of travel can lower the costs of importing and exporting services. And travel costs have indeed fallen dramatically in recent decades: international passenger airfares have been cut by more than half since 1987. Lower airfares make it less expensive to travel to consume or produce services.⁸²

⁷⁸ UNCTAD Prosperity for all <https://unctad.org/topic/trade-agreements/services> (accessed 11 August 2021).

⁷⁹ Services Trade Policies And Their Contribution To Connectivity And Development https://www.wto.org/english/res_e/booksp_e/aid4trade17_chap4_e.pdf (accessed 11 August 2021) at 112.

⁸⁰ Services Trade Policies And Their Contribution To Connectivity And Development (n 80 above).

⁸¹ Jensen (n 56) 20.

⁸² Jensen (n 56) 30.

Another one is the falling costs of information and communications technology. We are witnessing a time of revolution in information and communications technology.

Three related trends have vastly increased the ability of people and firms to transfer knowledge around the world without having to go there personally.⁸³ First, dramatically falling prices of information technology (IT) hardware led to the widespread adoption of personal computers, first in the developed world and now increasingly in the developing world.⁸⁴ Second, the increased interconnectedness of all this hardware via the internet has made it nearly effortless for users of those computers to share information with each other.⁸⁵ Third, rapidly falling telecommunications costs have enabled firms to expand the geographic reach of this technology to encompass most of the world.⁸⁶ These related developments have created an unprecedented opportunity to exchange information across large distances economically, creating a platform for dramatically increased trade in services.⁸⁷

The effect of the Internet on services trade growth is positive and significant. Countries that have greater Internet penetration also have had higher growth in services trade in recent years.⁸⁸ Nowadays, during the Covid-19 pandemic, due to restrictions imposed around the world to physical contact between producers and consumers, the trade in service through e-commerce has been so relevant to the global trade and economy. The supply of service has been delivered through the internet (online supply), because the borders are closed, and there is no movement of goods and people.

Despite the great economic importance of services for Africa, trade in services on the continent remains far below its potential. Services account for only 22% of African trade and African exports remain highly concentrated on agriculture and primary goods (UNCTAD, 2017).⁸⁹ Africa accounts for only 2% of global service exports and African service exports are largely dominated by travel (42% of African service exports).⁹⁰ The sector of services is therefore a serious avenue for

⁸³ Jensen (n 56 above).

⁸⁴ Jensen (n 56 above).

⁸⁵ Jensen (n 56 above).

⁸⁶ Jensen (n 56 above).

⁸⁷ Jensen (n 56 above).

⁸⁸ C Freund & D Weinhold 'The internet and international trade in services' (2002), 236-240 *The American Economic Review*, Vol. 92 No. 2 at 238.

⁸⁹ X Keller 'AfCFTA and Trade in Services for development' (2019) at <https://www.giz.de/en/downloads/Policy%20Paper%20-%20Trade%20in%20Services.pdf> (accessed 11 August 2021) at 4.

⁹⁰ Keller (n 89 above).

economic transformation of the continent⁹¹ and can attract much needed foreign investments and private equity finance into Africa. For instance, about 48% of foreign direct investments (FDIs) flowing to Africa in 2014 went into services, up from 24% in 2011.⁹²

These figures however do not capture all activities since more and more evidence shows that the role of services in international trade, and in African trade as well, is greatly underestimated in statistics.⁹³ This is essentially the consequence of the fact that much trade in the services sector occurs informally.⁹⁴

Trade in services and related regulatory reforms are critical for growth and economic development in Africa.⁹⁵

In Africa, services offer opportunities for export diversification according to the countries products. On other hand, the import services increase competition, better technologies, access to foreign capital, and it can have a positive impact on the domestic business environment, such as health, education, and financial services.

Services matter for growth, productivity, poverty reduction, and jobs in Africa.⁹⁶ Going beyond the formal services sectors, in Africa services trade contributes to significant improvements in the livelihoods of services providers engaged in informal cross-border transactions such as hairdressing gardening, education, health, construction, and housekeeping.⁹⁷ Hence, it also employed a considerable proportion of youth, including women, and promoting gender equity.

2.5.2 Benefits of liberalisation for the world and African intra-trade services

The WTO provides six main benefits of services liberalization which are economic performance, development, consumer savings, faster innovation, greater transparency and predictability and technology transfer⁹⁸

⁹¹ In 2013, services represented about 81% of the GDP in Seychelles. In Djibouti (77%); Mauritius (71.5%); Cabo Verde (70.3%); South Africa (69.1%); Botswana (61.8%); Senegal (60.1%); Eritrea (60.0%); Lesotho (60.0%); Gambia (60.0%). See UNECA's Economic report on Africa 2015: *Industrializing through trade* (2015) <https://repository.uneca.org/bitstream/handle/10855/22767/b11524819.pdf?sequence=1&isAllowed=y> at 130.

⁹² UNCTAD's *World investment report 2015: Reforming international investment governance* (2015) https://unctad.org/system/files/official-document/wir2015_en.pdf at 32–35.

⁹³ Simo (n 22) 69.

⁹⁴ Dihel & Goswami, (n 18)) 31–45.

⁹⁵ Dihel & Goswami (n18) 4.

⁹⁶ Dihel & Goswami (n18) 8.

⁹⁷ Dihel & Goswami (n18) 9.

⁹⁸ https://www.wto.org/english/tratop_e/serv_e/gats_factfiction3_e.htm (accessed 12 August 2021).

There is a general presumption in the poorer countries that they will lose from global services trade liberalisation since their domestic service industries are inefficient and non-competitive.⁹⁹ This view is despite the arguments from economists as to the gains to domestic consumers from lower prices and the joint benefits which accrue to both exporting and importing countries from exploiting comparative advantage and improved market access opportunities abroad.¹⁰⁰

Both some earlier and recent models captures FDI effects (effectively GATS Mode 3 commercial presence and ownership restrictions) and more recent work captures labour mobility effects (GATS Mode 4 restrictions on mobility of service providers). Existing literature estimates suggest very large global gains from the removal of immigration restrictions to cross-border flows of labour services, and seem to point to a conclusion that this could be the biggest part of the services liberalisation nexus for developing countries.¹⁰¹

The presumption behind most discussion of potential developing country interests in services trade liberalisation is that countries gain from more open services trade in ways which are similar to trade liberalisation in goods.¹⁰²

Within the services trade community and in the policy literature in general, there is an understanding that the outcomes of services liberalisation will depend heavily on the regulatory environment and the need for liberalisation to be under-pinned by a sound regulatory framework.¹⁰³

Barriers to service provision may operate through entry barriers to local markets (rights to establish, or to provide services), rules on conduct (regulation), on the number and size of competitors in a market (competition rules), and in other ways. As a result many more barriers come into play with services than with goods trade. They are more complex, and their effects more numerous. Market structure, conduct and performance are all key and all need to be evaluated when discussing quantitative impacts of global liberalisation of services trade on poorer developing countries.¹⁰⁴

Importantly, barriers affecting trade in services—for all modes of supply—lead many African service suppliers to engage in informal trade and/or significantly reduce their productivity. The

⁹⁹ J Whalley 'Assessing the Benefits to Developing Countries of Liberalisation in Services Trade' (2004) The University of Western Ontario Blackwell Publishing Ltd at 1224.

¹⁰⁰ Whalley (n 99 above).

¹⁰¹ Whalley (n 99) 1228.

¹⁰² Whalley (n 99) 1229.

¹⁰³ Whalley (n 99) 1232.

¹⁰⁴ Whalley (n 99 above).

case studies included in Dihel and Goswami (2016) demonstrate that entrepreneurs are able to circumvent formal barriers to cross-border trade in services and that there is substantial demand for services imports, suggesting that liberalization and services trade facilitation—to remove the need for bribes and more generally to lower transaction costs and reduce the ability of incumbent services industries (e.g. professional associations) to restrict foreign entry—have great potential to both further expand trade and increase welfare (the gains from trade).¹⁰⁵

Developing countries as many African countries, in particular, are likely to benefit significantly from further domestic liberalization and the elimination of barriers to their exports. The income gains from a reduction in protection to services are estimated to be multiples of those from trade liberalization in goods.¹⁰⁶ However, these benefits from liberalisation are not conceded or achieved automatically. To obtain substantial gains from liberalisation of services, it is important to eliminate trade barriers, ensure effective regulation and complementary policies to help improve access to essential services for the poor.

Efficient services, such as telecommunications, transport, and finance, provide a direct benefit to consumers, and also help shape overall economic performance in developing countries.

2.6 Conclusion

The GATS does not define the notion of “services”. However, the literature defines services as commercial activities that are not embodied directly in tradeable, tangible products. On other hand, Article 1:2 GATS provides two prerequisites and conditions to be satisfied to define trade in services, such as (i) the trade must be transboundary, and (ii) have an international dimension. Article I:2 GATS, defines trade in services like the supply of a service, which includes the production, distribution, marketing, sale, and delivery of a service (Art. XXVIII lit. b) by four means or modes of supply, namely cross-border supply, consumption abroad, commercial presence, and presence of natural persons.

The scope of service and trade in services covers all sectors of activities, including regulatory measures taken by any entity of WTO Members, except those services supplied in the exercise of governmental authority (Articles I:3 paragraphs a) b) and c).

¹⁰⁵ Newfarmer, RS; Page, J & Tarp, F *Trade in services. Opening markets to create opportunities, industries without smokestacks industrialization in Africa Reconsidered* (2018) A study prepared by the United Nations University World Institute for Development Economics Research (UNU-WIDER) at 160.

¹⁰⁶https://documents1.worldbank.org/curated/en/285571468337817024/310436360_20050012013700/additional/multi0page.pdf (accessed 12 August 2021).

The services sector plays a greater role and importance in the global economy through positively influence macro and micro countries' economic growth, development and ensure welfare to the citizens. Currently, with the Covid-19 pandemic and restriction of physical contact between producers and consumers, it has become so evident with the emergence of new technology, in particular, the internet and e-commerce to provide a new medium of trade and exchanges different from the traditional ways of trade, and consequently reducing trade costs, including transport costs.

In Africa, the services sector is the cornerstone for growth, productivity, poverty reduction, and jobs, and apart from the formal services sectors, services trade contributes to significant improvements in the livelihoods of services providers engaged in informal cross-border transactions.

There are many benefits of services liberalization in Africa. However, to achieve such benefits African countries must remove barriers affecting trade in services to faster economic growth, development and diversify their trade.

CHAPTER 3

3 ANALYSIS OF AfCFTA PROTOCOL ON TRADE IN SERVICES

3.1 Introduction

This chapter looks at AfCFTA Protocol on Trade in Services. It starts providing a brief overview of the AfCFTA Agreement, its objectives and the principles that govern the Agreement, and how is supposed to materialise the Agreement, its scope and the phases adopted to negotiate the Protocols (3.2).

Then, it provides an analysis of the current legal framework and phases to implement the Protocol on Trade in Services and the rules and process of Schedule of Commitments. In addition, it also gives a brief comparative analysis of the GATS and its influence on Trade in Services in the Protocol (3.3).

3.2 A Brief Overview of AfCFTA Agreement

The African Continental Free Trade Area (AfCFTA) is, in addition to being a free trade area, a flagship project of the African Union (AU) in terms of Agenda 2063¹⁰⁷. It offers a member-driven blueprint for attaining inclusive and sustainable development across the continent. It is anchored in an overarching Agreement, Protocols and additional Annexes and appendices.

They constitute a single undertaking. The AU Summit adopted the AfCFTA Agreement in March 2018, in Kigali, Rwanda.¹⁰⁸

According to Article 3 of the AfCFTA, the Agreement's main general objectives are (i) to create a single continental market for goods and services, with free movement of business persons and investments; (ii) expand intra-Africa trade across the regional economic communities and the continent in general; (iii) enhance competitiveness and support economic transformation.¹⁰⁹

¹⁰⁷ Tralac trade law centre 'The African Continental Free Trade Area a tralac guide' *tralac* 2020 at 6 <https://www.tralac.org/documents/resources/booklets/4062-afcfta-a-tralac-guide-7th-edition-august-2020/file.html> (accessed 13 September 2021).

¹⁰⁹ Article 3 AfCFTA.

On the same way, the Article 4 of the AfCFTA Agreement establishes the Agreement's specific objectives, such as (i) progressively eliminate tariffs and non-tariff to trade in goods, and liberalise trade in services; (iii) cooperate on investment, intellectual property and competition policy; (iv) establish a mechanism for settlement of disputes and maintain an institutional framework for the implementation of the AfCFTA.¹¹⁰

The Principles that govern the AfCFTA Agreement are established in the Article 5. The principles establish that the AfCFTA is driven by Members States, using the RECs' Free Trade Areas as building blocs, flexibility, transparency, MFN, reciprocity, substantial liberalisation, consensus in decision-making, and adoption of best practices.¹¹¹

The AfCFTA Agreement refers to Member States and State Parties. The "Member States" are the Member States of the AU. The "State Parties" are the AU Member States that have ratified the AfCFTA Agreement or acceded to it, and for which the AfCFTA Agreement is in force. Only the State Parties will have rights and obligations under the AfCFTA Agreement.¹¹² It means that, if Mozambique ratifies the AfCFTA Agreement, it will be part of the Agreement as State Party, and consequently the Agreement will enter into force within the Mozambique territory. The country will be subject of rights and obligations under the Agreement. Here is applied the analogy of the general principle of international law and contract law "pacta sunt servanda". As a general principle of law, it is believed that all member nations are "civilized" and are expected to follow the principle of pacta sunt servanda when dealing with obligations, agreement and promises. The Article 26 of the Vienna Convention states that "every treaty in force is binding upon the parties to it and must be performed by them in good faith". The Article 406 of the Mozambican Civil code also establishes the principle of pacta sunt servanda as the obligation of the parties to full comply with the terms and conditions of contract on its performance.

To materialise the AfCFTA, eight (8) RECs are recognised by the AU and the Agreement as build blocs.

¹¹⁰ Article 4 AfCFTA.

¹¹¹ Article 5 AfCFTA.

¹¹² Tralac (n 2) 2.

The RECs are not part of the Agreement as contractual parties, and consequently they do not have rights and obligations of a contractual party. The Article 19(2) of the AfCFTA Agreement states “State Parties that are members of other regional economic communities, regional trading arrangements and custom unions, which have attained among themselves higher levels of regional integration than under this Agreement, shall maintain such higher levels among themselves.” This means that the recognized RECs, as well as customs unions such as the Southern African Customs Union (SACU) and those planned for in some of the RECS, and the Tripartite Free Trade Area (TFTA), once in force, shall be maintained (see also Art 8(2) of the AfCFTA Protocol on Trade in Goods).¹¹³

The AfCFTA Agreement is the founding agreement of the AfCFTA. It establishes the African Continental Free Trade Area, and its scope provides for Protocols on Trade in Goods, Trade in Services, Investment, Intellectual Property Rights, and Competition Policy.¹¹⁴

The AfCFTA negotiations take place in phases. Phase I covers trade in goods and services as well as dispute settlement. The Article 7 establishes Phase II negotiations covers intellectual property rights, investment, and competition policy. A Phase III has been added and will cover e-commerce. In the light of the Covid-19 pandemic, e-commerce has shown how important it is to respond to the constraints of international trade as borders are closed and the movement of people and goods is restricted. On the other hand, e-commerce has reduced the costs associated with classical commerce, especially those linked to transport, including trade barriers. Therefore, given the current experience in the implementation of e-commerce, it is perhaps the best opportunity and moment to include e-commerce in the first phases of the Agreement's implementation, and not relegate it to the last phase. Even with restrictions, people are still trading via internet and it is contributing to the economic growth and welfare of countries and citizens.

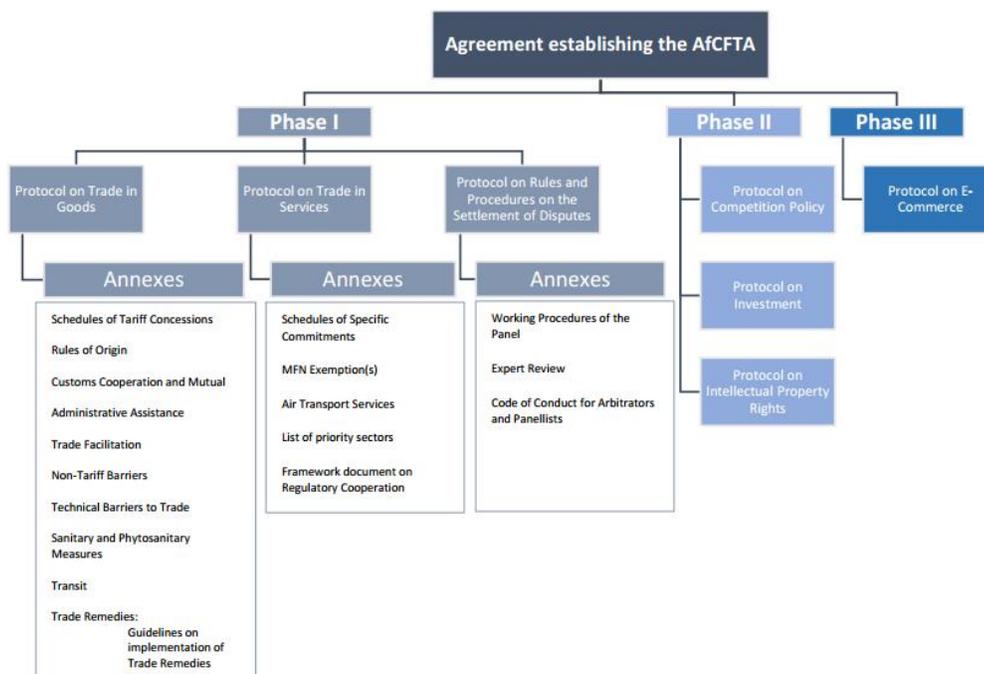
Below we present the table with the implementing phases of the AfCFTA Agreements.

¹¹³ Tralac (n 2) 2-3.

¹¹⁴ Article 6 AfCFTA.

Table 1: Architecture of the AfCFTA

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The AfCFTA Agreement, Protocol on Trade in Goods, Protocol on Trade in Services and Protocol on Rules and Procedures on the Settlement of Disputes (and their annexes and appendices) officially entered into force on 30 May 2019. However, the negotiations to finalise the rules of origin, schedules of tariff concessions, and schedules of specific commitments for the five priority services sectors (business services; communications; finance; tourism and transport) are ongoing. The deadline to finalise these negotiations is June 2021.¹¹⁵

At the time of writing this thesis, there is no official statement or position from the AfCFTA Secretariat regarding the deadline. This delay obviously will compromise all schedules already approved.

According to Article 9 AfCFTA, the institutions responsible for the implementation, facilitation, administration, and monitoring of the AfCFTA include the Assembly, the Council of Ministers, the Committee of Senior Trade Officials, the Secretariat and various technical committees.

¹¹⁵ Tralac (n 2) 3-4.

The Article 20 establishes AfCFTA Dispute Settlement Mechanism. The AfCFTA Dispute Settlement Mechanism adopts and replicates, with the necessary adaptations, the WTO dispute settlement system. The principles and procedures appear in a dedicated Protocol.

The Protocols of the AfCFTA Agreement establish various technical committees to assist with the implementation of the Agreement. The committees comprise designated representatives from State Parties. The Committee on Trade in Services will facilitate the operation of the Protocol on Trade in Services.¹¹⁶

According to Article 14, the process of decision making of the AfCFTA institutions (The Assembly, the Council of Ministers, and the Committee of Senior Trade Officials) on substantive issues shall be taken by consensus. However, decisions on questions of procedure shall be taken by a simple majority of State Parties, eligible to vote.

So far, 36 countries out of 54 countries have signed and ratified the AfCFTA Agreement. The AU Heads of States and Government did however; decide on 5 December 2020, at the 13th Extraordinary Session of the Assembly of the Africa Union, to launch trade on 1 January 2021, despite the fact that negotiations on tariff schedules and Rules of Origin (RoO) are not yet finalized.¹¹⁷The trade has been carried on under the reciprocal offers between the States Members.

3.3 Analysis of AfCFTA Protocol on Trade in Services

The Protocol on Trade in Services (and its annexes) – hereinafter the Protocol, officially entered into force on 30 May 2019 as part of the consolidated text of the Agreement establishing the AfCFTA at the March 2018 Kigali Summit.

At the July 2018 Summit, the Assembly adopted five (5) priority services sectors for initial commitments. The priority services sectors are transport, communications, tourism, financial, and business services.¹¹⁸However, the negotiations to finalise the schedules of specific commitments for the five (5) priority services sectors (business services; communications; finance; tourism and transport) are ongoing. The deadline to finalise these negotiations was June 2021. Therefore, it is clear that this deadline has not been met, so we are awaiting for an official position from the AfCFTA Secretariat to update the data and information, and if possible set a new deadline.

¹¹⁶ Tralac (n 2 above).

¹¹⁷ Tralac (n 2) 5 – 6.

¹¹⁸ Tralac (n 2) 7.

There is no definition of a service under the Protocol. However, the Article 1 (p) of the AfCFTA Protocol on Trade in Services defines trade in services as “the supply of service: (i) from the territory of one State Party into the territory of any other State Party; (ii) in the territory of one State Party to the service consumer of any other State Party; (iii) by a service supplier of one State Party, through commercial presence in the territory of any other State Party; and (iv) by a service supplier of one State Party, through presence of natural persons of a State Party in the territory of any other State Party”.

The AfCFTA Protocol on Trade in Services follows the same definitions of trade in services established under the GATS (Article 1:2) by four means or modes of supply (cross-border supply, consumption abroad, commercial presence, and presence of natural persons).

The Article 2 of the Protocol establishes the scope of application that applies to measures by State Parties affecting trade in services based on the four (4) modes of supply of a service as defined in Article 1(p) of the Protocol.

The Protocol excludes from scope the procurement by government agencies purchased for government purposes and not with a view to commercial re-sale (Article 2 (4)).

The Protocol considers services as including any service in any sector of activities except services supplied in the exercise of governmental authority (Article 2 (b)). Service supplied in the exercise of governmental authority means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers (Article 2 (c)).

The Protocol shall not apply to measures affecting (i) air traffic rights, however granted; and (ii) services directly related to the exercise of air traffic rights (Article 2 (5)). However, it shall apply to measures affecting (i) aircraft repair and maintenance services; (ii) the selling and marketing of air transport services; and (iii) computer reservation system (CRS) services.

The principal objective of the Protocol is to support the objectives of the AfCFTA, as set out in Article 3 of the AfCFTA Agreement, particularly to create a single liberalised market for trade in services in Africa (Article 3 (1)). On same way, the Protocol defines its specific objectives, among others: (i) enhance competitiveness of services; (ii) promote sustainable development; (iii) foster domestic and foreign investment; (iv) progressively liberalise trade in services; and (v) promote

research and technological advancement in the field of services to accelerate economic and social development.¹¹⁹

The Part IV of the Protocol provides the general obligations and disciplines to the contracting parties. The general obligations and disciplines, which are to be followed by all State Parties to the AfCFTA, largely follow a GATS approach (Articles 4–17).¹²⁰

The Article 4 establishes the key obligation Most-favoured-National treatment (MFN) which consists in treatment no less favourable than a contract state party shall accord to like services and service suppliers of any Third Party (A third country is any country that is not party to an agreement between two other countries, i.e., a country that is not party to the AfCFTA Agreement). However, nothing in the Protocol shall prevent a State Party from entering into a new preferential agreement with a Third Party, in accordance with Article V of the GATS provided such agreements do not impede or frustrate the objectives of the Protocol. Such preferential treatment shall be extended to all State Parties on a reciprocal and non-discriminatory basis. As with the Protocol on Trade in Goods, the aim is to extend preferences between State Parties on the African continent.¹²¹

Notwithstanding the MFN general obligations, the Protocol provides the possibility to two (2) or more State Parties to conduct negotiations and agree to liberalise trade in services for specific sectors or sub-sectors in accordance with the objectives in the Protocol. Other State Parties shall be afforded opportunity to negotiate the preferences granted therein on a reciprocal basis.¹²²

The Protocol establishes that a State Party shall not be obliged to extend preferences agreed with any Third Party prior to the entry into force of the Protocol, of which that State Party was a member or a beneficiary, provide that he may afford opportunity to the other State Parties to negotiate the preferences granted therein on a reciprocal basis.¹²³

On the other hand, the provisions of the Protocol shall not be so construed as to prevent any State Party from conferring or according advantages to adjacent countries in order to facilitate exchanges limited to contiguous frontier zones of services that are both locally produced and consumed.¹²⁴

¹¹⁹ Article 3 (2) Protocol on Trade in Services.

¹²⁰ International Trade Centre ‘A business guide to the African Continental Free Trade Area Agreement’ 2018 at 33 https://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/AfCFTA%20Business%20Guide_final_Low-res.pdf (accessed 25 August 2021)

¹²¹ International Trade Centre (n 120 above).

¹²² Article 4(3) Protocol on Trade in Services.

¹²³ Article 4 (4) Protocol on Trade in Services.

¹²⁴ Article 4 (5) Protocol on Trade in Services.

A State Party may maintain a measure which is inconsistent with MFN general obligations, provided it is listed in the MFN exemption list. The agreed list of MFN exemptions shall be annexed to the Protocol. States Parties shall regularly review MFN exemptions, with a view to determining which MFN exemptions can be eliminate.¹²⁵

The Article 5 of the Protocol provides the principle of transparency, which consist in each State Party, must publish all relevant measures that pertain to or affect the operation of the Protocol. Essentially the obligation to publish promptly all relevant measures in a medium that is accessible, such as through national gazettes, newsletters, Hansard or websites – are very similar to GATS. Article 6 echoes GATS by clarifying that nothing in the Protocol would require the disclosure of confidential information and data.

Under the general obligation to provide special and differential treatment (Article 7), the Protocol obliges State Parties, in the interest of increasing beneficial participation in trade in services, to (i) provide special consideration to the progressive liberalisation of service sectors commitments and modes of supply; (ii) grant flexibilities such as transitional periods, within the framework of action plans, on a case by case basis, to accommodate special economic situations and development, trade and financial needs in implementing the Protocol; and (iii) accord special consideration to the provision of technical assistance and capacity-building through continental support programmes.¹²⁶

The Protocol provides to State Parties the right to regulate within its territory. According to the referred provision, each State Party may regulate and introduce new regulations on services and services suppliers within its territory in order to meet national policy objectives, in so far as such regulations do not impair any rights and obligations arising under the Protocol.¹²⁷

The issue of domestic regulation goes to the heart of trade in services, since barriers to trade in services are found not at the borders but in the way that countries regulate services within their territories. All countries have the right to regulate services and service suppliers in order to meet national policy objectives, such as to ensure quality of services or other consumer protection reasons. In the GATS, the right is enshrined in the Preamble, whereas in the AfCFTA Protocol on

¹²⁵ Article 4 (6) of the Protocol on Trade in Services.

¹²⁶ International Trade Centre (n120) 34.

¹²⁷ Article 8 Protocol on Trade in Services.

Trade in Services a specific article has been adopted (Article 8). In both cases, the right to regulate is qualified in the sense that such regulations should not impair any rights or obligations arising under the Protocol.¹²⁸

In fact, this is the key objective of this research. That is why on chapter 4, we will discuss the question of how Mozambique is exercising its right to regulate on services and services suppliers within its territory in order to meet the rights and obligations established under the Protocol before ratifying the AfCFTA Agreement. Indeed, even after the country ratify the Protocol, it is mandatory to exercise its right to regulate on services sector without preventing any rights or obligations established under the Protocol.

The Protocol also provides that in sectors where specific commitments are undertaken each State Party shall ensure that all ‘measures of general application’ affecting trade in services are administered in a reasonable, objective, transparent and impartial manner (Article 9). The article quotes almost word for word from GATS Article VI.¹²⁹

The same Article 9 of the Protocol provides that each State Party shall maintain or institute, as soon as practicable, judicial, arbitral or administrative tribunals or an independent procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services. In addition, where authorisation is required for the supply of a service liberalised under the Protocol, the competent authorities of a State Party shall, within a reasonable period of time after the submission of an application considered complete under domestic laws and regulations, inform the applicant of the decision concerning the application. At the request of the applicant, the competent authorities of the State Party shall provide, without undue delay, information concerning the status of the application.

The Article 10 of the Protocol provides the Mutual Recognition of standards or criteria for the authorization, licensing or certification of services suppliers. Furthermore, a State Party, without discrimination between State Parties, may recognise the education or experience obtained, requirements met, or licenses or certification granted in another State Party, and such recognition,

¹²⁸ International Trade Centre (n120) 34.

¹²⁹ International Trade Centre (n120 above).

which may be achieved through harmonisation or otherwise, may be based upon an agreement or arrangement with the State Party concerned or may be accorded autonomously.

Partner States of the EAC are already negotiating mutual recognition agreements for certain professional services, and SADC is expected to follow suit. Mutual recognition of professional qualifications is a key business interest for those involved in the supply of professional services. It is noteworthy that the AU Protocol relating to Free Movement of Persons, Right of Residence and Right of Establishment, adopted in January 2018 and open for signature, includes in Article 18 a provision that State Parties shall mutually recognize academic, professional and technical qualifications of their nationals to promote the movement of persons among the AU Member States.¹³⁰

The Protocol provides for basic general obligations on State Parties to ensure that monopoly and exclusive service suppliers do not engage in anti-competitive practices, and to open consultation channels with other State Parties with a view to eliminating such practices. Articles 11 and 12 are the same as GATS Articles VIII and IX.¹³¹

The Protocol obliges State Parties not to apply restrictions on international transfers and payments for current transactions relating to its specific commitments (Article 13). This is qualified by allowing State Parties to take measures that may restrict trade in services, in the event of serious balance of payments and external financial difficulties or threat thereof (Article 14). This is identical to GATS Articles XI and XII.¹³²

The Articles 15 and 16 of the Protocol provide the general exceptions and security exceptions, respectively, to apply the Protocol.

Regarding the general exceptions, it establishes that the Protocol shall not prevent the measures adopted by State Party to protect public morals or maintain public order; protect human, animal or plant life or health, necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of the Protocol, inconsistent with National Treatment and Most Favoured National obligation.¹³³

¹³⁰ International Trade Centre (n120) 34-35.

¹³¹ International Trade Centre (n120) 35.

¹³² International Trade Centre (n120 above)

¹³³ Article 15 of the Protocol on Trade in Services.

On the other hand, the security exceptions provides that nothing in the Protocol shall be construed to require any state to furnish any information, disclosure of which it considers contrary to its essential security or any action, in pursuance of its obligations under the United Charter for maintenance of international peace and security. These provisions are identical to GATS Articles XIV and XIV bis.

The Article 17 of the Protocol establishes the rules about subsidies related to trade in services that State Parties provide to their domestic suppliers. According to the Protocol, nothing shall be construed to prevent State Parties from using subsidies in relation to their development programmes, and any state which considers that is adversely affected by a subsidy may request consultations with State Party on such matters.

Unlike GATS Article XV, which provides for WTO Members to enter into negotiations with a view to developing the necessary multilateral disciplines to avoid trade-distortive effects of such subsidies, Article 17 of the Protocol does not go that far but rather recognizes that State Parties may use subsidies in relation to their development programmes.¹³⁴

The Protocol Part V provides the progressive liberalisation to be held by State Parties in relation to trade in services negotiations under the AfCFTA. Given that Article 18 of the Protocol provides for successive rounds of negotiations, it follows that some order of priority needs to be applied to the list of possible service sectors that will be subject to the liberalisation process.¹³⁵

This does not imply, as some Member States have assumed, that sectors not included amongst the priorities for the first round are not important, but rather that the negotiations will tackle all sectors in a sequence.¹³⁶

Indeed, it will be important that the AfCFTA has ‘substantial sectoral coverage’ in order to meet the requirements of Article V of the GATS, which permits parties to an economic integration agreement and not to extend the preferences to all WTO Members under the MFN principle.¹³⁷

As we referred above, according to the Protocol for the first phase, five sectors will be given priority, namely: business services (including professional services), communication, finance, tourism and transport services. For that, the liberalisation process shall focus on the progressive

¹³⁴ International Trade Centre (n 120) 35.

¹³⁵ International Trade Centre (n 120 above).

¹³⁶ International Trade Centre (n 120 above).

¹³⁷ International Trade Centre (n 120 above).

elimination of the adverse effects of measures on trade in services as a means of providing effective market access with a view to boosting intra-African trade in services. However, based on the principles of variable geometry and reciprocity (set out in the agreed negotiating modalities), those Member States that wish to liberalize more sectors than the five chosen priorities are free to do so, because Member States have always been at liberty to liberalize autonomously.

The Article 19 of the Protocol provides the market access that each State Party through the four (4) modes of supply shall accord services and service suppliers of any other State Party treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its schedule.

The market access refers to the access to its territory given by one State Party to the services and service suppliers of any other State Party. The essence of the commitment is that 'like' services and services suppliers of another State Party will be treated on the same way, without discrimination.

The Schedule identifies the sectors or subsectors covered, and the terms, limitations and conditions applicable in each of the four (4) modes of supply. In granting market access on this basis, State Parties commit to according services and service suppliers of any other State Party 'treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.'¹³⁸

The Article 19 of the Protocol paragraph 2 provides that 'in sectors where market access commitments are undertaken, the measures which a State Party shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule.

The Article 20 of the Protocol provides National treatment which is the treatment that a State Party will give to a service or service supplier of another State Party compared to a domestic 'like' service or service supplier.

The Protocol Article 20 paragraph 1 provides that in all sectors inscribed in the schedule, and subject to any conditions and qualifications set out therein, each State Party shall accord to services and service suppliers of any other State Party treatment no less favourable than that it accords to

¹³⁸ International Trade Centre (n 120) 37.

its own like services and service suppliers, subject to the conditions and qualifications agreed and specified in its Schedule of Specific Commitments.

As established in the GATS, the Article 20 paragraph 2 of the Protocol provides that ‘a State Party may meet the [national treatment] requirement by according to services and service suppliers of any other State Party either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers. Article 20 paragraph 3 of the Protocol also provides that formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the State Party compared to like services or service suppliers of any other State Party.

Thus, it can be seen that the definition of national treatment can be quite wide, in that it would apply if a measure by a State Party ‘modifies the conditions of competition in favour of [domestic] services or service suppliers.’ Where it wishes to apply different treatment, this must be listed in the Schedule.¹³⁹

The Article 21 of the Protocol provides additional commitments, which is the possibility to State Parties, in addition to market access and national treatment established in articles 19 or 20 of the Protocol, respectively, negotiate commitments with respect to measures affecting trade in services. Moreover, the Protocol refers that such negotiated commitments may include but are not limited to ‘measures regarding qualification, standards or licensing matters’. Such commitments shall be inscribed in a State Party’s Schedule of Specific Commitments under the Article 22 of the Protocol. In the WTO, the main use of this provision has been the adoption by certain WTO Members of a reference paper on pro-competitive commitments relating to the regulation of basic telecommunications. The central aim was to ensure that incumbent telecom operators who control access to domestic networks (referred to as major operators) do not control access to ‘essential facilities’ in an anti-competitive way.¹⁴⁰

Following the previous Articles 19, 20 and 21 of the Protocol, the Article 22 of the Protocol provides that each State Party shall set out in a schedule, the specific commitments that it undertakes under market access, national treatment and additional treatment.

¹³⁹ International Trade Centre (n 120) 38.

¹⁴⁰ International Trade Centre (n 120) 38.

As in GATS, with respect to sectors where such commitments are undertaken, the Protocol establishes that each Schedule of Specific Commitments shall specify: (i) terms, limitations and conditions on market access; (ii) conditions and qualifications on national treatment; (iii) undertakings relating to additional commitments; and (iv) where appropriate the time-frame for implementation of such commitments, including their date of entry into force.

Regarding the importance of schedule of specific commitment in create a single African services market, Beatrice Chaytor, a senior trade lawyer in the Department of Trade and Industry at the AU Commission concluded that the Protocol without a schedule of specific commitment is merely a skeleton¹⁴¹. The meat on the bones of this skeleton will be the schedules of specific commitments, and the framework for regulatory cooperation, to be annexed to the Protocol, along with any sectoral annexes.¹⁴² The completed schedules are usually the result of what is known as a ‘request-offer’ process, whereby countries exchange a ‘request’ for certain concessions in their export market(s) and ‘offer’ concessions domestically in return.¹⁴³

Indeed, governments must develop both a request and an offer, which are in effect technical documents that translate national and regional services interests into specific negotiating positions. It is important before presenting the schedule of commitments, the State parties analyse careful their domestic reality and legal framework. The regulatory assessments help to establish which regulations currently exist within the domestic legislation for the five (5) priority service sectors, and serve as a basis for formulating offers and requests.

Careful preparation for services negotiations is essential, since services commitments last for the indefinite future and are extremely difficult to modify.¹⁴⁴

In addition, it was determined that for those AU member states that are WTO members, the starting point for negotiations on the schedules of specific commitments would be deeper commitments than are currently scheduled under the GATS (“GATS plus”). For those AU member states that are non-WTO members, the starting point for negotiations would be autonomous liberalisation at the national level.¹⁴⁵

¹⁴¹ Chaytor (n 1) at 2.

¹⁴² Chaytor (n 1 above).

¹⁴³ Chaytor (n 1 above).

¹⁴⁴ Chaytor (n 1 above).

¹⁴⁵ Chaytor (n 1 bove).

Therefore, each member state would be required to commit a minimum threshold of sectors and subsectors, in order to create the single market for services in Africa and to ensure that all AfCFTA state parties are starting from the same point, taking into account the principle of variable geometry enshrined in the AfCFTA Agreement. This threshold should reflect: a) substantial liberalisation of sectors and sub-sectors on a reciprocal basis; and b) effective elimination of barriers to trade in services. In addition, in scheduling their specific commitments, member states would use the GATS W/120 list for the classification of services sectors, and the latest UN CPC classification list for the sub-sectors.¹⁴⁶

In the table below (Table 2), the numbers (1) to (4) correspond to the four (4) modes of supply already described on previous chapters. In each of the columns, limitations are listed. Thus, ‘None’ means no limitations, i.e. the subsector and mode of supply is fully liberalized. ‘Unbound’ means that the State Party has reserved its position entirely to introduce new, possibly more restrictive regulations, and has made no binding commitment. Where a specific limitation is listed, it is taken that the sector is liberalized except to the extent of the limitation listed.

Table 2
Format of Schedules of Commitments¹⁴⁷

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
A. Hotel and restaurant services (including catering) (CPC 641-643)	(1) Unbound (2) None (3) Commercial presence is allowed only in the form of a juridical person	(1) Unbound (2) None (3) None (4) Unbound, except as indicated in the horizontal section.	
B. Travel agencies and tour operator services (CPC 7471)	- Foreign capital participation is limited to 49%. (4) Unbound, except as indicated in the horizontal section.		

According to the Article 23 of the Protocol a State Party may only modify or withdraw any commitment in its schedule of commitment, at any time, after three (3) years have elapsed from

¹⁴⁶ Chaytor (n 1 above).

¹⁴⁷ International Trade Centre (n 1) 37.

the date on which that commitment entered into force. For that, the State Party must notify its intent to modify or withdraw a commitment to the Secretariat no later than three (3) months before intended date of implementation of the modification or withdrawal. It means that, even during the first three (3) years which the commitment entered into force, a State Party may anticipate and request modify and withdraw any commitment in its schedule start submitting the request 3 months before completing the first three years.

The modifying State Party shall enter into negotiations with a view to reaching agreement on any necessary compensatory adjustment with an affected State Party, and if the agreement is not reached between the State Parties, such affected State Party may refer the matter to the dispute settlement body. The Article 20 of the AfCFTA Agreement establishes a Dispute Settlement Mechanism for the AfCFTA to settle disputes arising between State Parties.

However, the Protocol on Rules and Procedures on the Settlement of Disputes, which will administer the Dispute Settlement Mechanism, and the Dispute Settlement Body are not yet full operating. It means that the State Parties should give more privilege to other means to settle disputes arising between the parties such as conciliation, mediation and arbitration, which provide even faster means to resolve disputes.

Last but not least the Part VI of the Protocol establishes the institution provisions. It provides norms regarding consultation and dispute settlement (Article 25), implementation, monitoring and evaluation of the protocol (Article 26); technical assistance, capacity building and cooperation (Article 27), the Protocol's annexes that are an integral part; and the amendment of the Protocol (Article 29).

3.4 Conclusion

The Agreement establishing the AfCFTA was signed at the 10th Extraordinary Summit of the AU Assembly on 21 March 2018 in Kigali, Rwanda. The AfCFTA Agreement entered into force on 30 May 2019. The trade started on 1 January 2021, despite the fact that negotiations on tariff schedules and Rules of Origin (RoO) are not yet finalized. The trade has been carried on under the reciprocal offers between the States Members.

The AfCFTA is the continent's most ambitious integration initiative. According to the Articles 3 and 4 of the Agreement, the main objectives of the AfCFTA are (i) create a single continental market for goods and services, with free movement of business persons and investments; (ii)

expand intra-Africa trade across the regional economic communities and the continent in general; (iii) enhance competitiveness and support economic transformation in the continent.

Mozambique signed the Agreement on 23 March 2018. It is still in the process of legal review and harmonization of its domestic legislation to ratify and deposit the Agreement. It means that the country is classified as a Member State as an AU Member.

However, once Mozambique ratify the AfCFTA Agreement, it will be classified as a State Party with rights and obligations under the Agreement. The Agreement will be applicable within the Mozambique territory as a State Party.

The Protocol on Trade in Services (and its annexes) is a part of the AfCFTA Agreement and is composed of 29 articles. For the implementation, it has adopted five (5) priority services sectors for initial commitments, namely (i) transport, (ii) communications, (iii) tourism, (iv) financial, and (v) business services that should be supply by the four (4) modes of supply. However, the negotiations to finalise the schedules of specific commitments for the five (5) priority services sectors are ongoing. The deadline to finalise these negotiations was June 2021.

In general, the Protocol largely follows a GATS-plus approach, and tries to respond and accommodate the social-development, economy, and legal framework reality of most of African countries.

CHAPTER 4

4 ANALYSIS OF MOZAMBIQUE'S LEGAL FRAMEWORK ON TRADE IN SERVICES

4.1 Introduction

This chapter provides an analysis of Mozambique's legal framework on trade in services, looking at the five (5) priority services sectors (business services, communications, finance, tourism, and transport) to be implemented within territory for the first phase of Protocol by four (4) means or modes of supply of trade in services, namely (i) cross-border supply, (ii) consumption abroad, (iii) commercial presence, and (iv) presence of natural persons.

In addition, the chapter provides an analysis and discussion of the domestic legal and regulatory challenges and barriers that need to be overcome in implementing the protocol in Mozambique.

4.2 General Overview on Trade in Services in Mozambique

Mozambique achieved its independence from Portugal in 1975, after five hundred (500) years of colonialism rule and ten (10) years of war struggle for independence. The country immediately after the independence adopted a communist/socialist pattern of political system and economic development model with centralized planning for about two decades. However, since the late 1970s, the new republic was plunged into a civil war for sixteen (16) years between the Government of Mozambique led by FRELIMO and RENAMO, a rebel movement, which caused severe damage to human life, social infrastructure as well as economic development.

The war ended with a cease-fire agreement with the rebel movement in 1992 in Rome, Italy (The Rome General Peace Accords, officially the General Peace Accords). In 1994, Mozambique held the first democratic general elections and adopted a multiparty democracy. As consequence of this political and socio-economic transformation, the stability has started emerging in the country, and the socio economic situation rapid changes since the introduction of a multiparty system and deepen economic reforms has been adopted in Mozambique. Trade liberalization and economic reform have shown significant signs of success in Mozambique since the late 1980s and

accelerated after the end of the civil war in 1992, according to a new WTO report on the trade policies of Mozambique.¹⁴⁸

In order to address the challenges of economic development, and to manage the mounting external and internal debt, Mozambique initiated the Structural Adjustment Programme (SAP) in 1987. The SAP aimed at reducing the government control over the economy, promoting the agricultural production, improving the marketing of agricultural products, reducing internal and external trade imbalances, improving resource distribution, and expanding the private sector in economic activities. In the process, most of the industries and parasitical enterprises owned by the government were privatized.¹⁴⁹

In the context of poor economic performance, the government of Mozambique introduced a comprehensive Economic Rehabilitation Programme (ERP/SAP) in 1987, with the assistance of the IMF and the World Bank. Subsequently, the reform effort was renamed Economic and Social Rehabilitation Programme (ESRP) in 1989 to focus on the social dimensions of the adjustment effort.¹⁵⁰ As consequence, currently most sectors of Mozambique's economy are open to 100 percent foreign investment, and foreign investors generally receive the same treatment as domestic investors.

Service sector contributes about 48, 1% percent to the GDP. The key service sector businesses in Mozambique are construction, tourism, transport, energy, communication, banking, and consultancy.¹⁵¹ Mozambique has been a member of WTO since 26 August 1995 and has adopted the General Agreement on Trade in Service of the WTO (GATS), which came into force in January 1995. The GATS is the first and only set of multilateral rules governing international trade in services in Mozambique. As member of the WTO, the Mozambican government shows its commitment to liberalise the services under GATS. However, opening services markets to foreign competition is not an easy task. It involves a broad and complex set of polices, regulatory instruments, institutions and constituents, domestic and foreign, public and private. Therefore, considerable care must be taken in assessing the nature, pace and sequencing of regulatory reform

¹⁴⁸ https://www.wto.org/english/tratop_e/tpr_e/tp154_e.htm (accessed 08 September 2021).

¹⁴⁹ A Bila, H Chambal & V Tamele 'Opportunities and risks to liberalise service' (2007) 11.

¹⁵⁰ Bila, Chambal & Tamele (n 149) 14.

¹⁵¹ Bila, Chambal & Tamele (n 149) 10.

and liberalisation to meaningfully sustain a country's growth and development prospects.¹⁵² The same commitment to liberalise the services in the country has been shown by signing the AfCFTA Agreement to liberalise trade in Africa, including services under the Protocol on Trade in Services. Mozambique's commitments under the GATS are limited to financial services (excluding insurance).¹⁵³ The WTO report says that continued reform in the services sector, mainly in areas such as telecommunications and transportation services, will help to improve the international competitiveness of Mozambican products by reducing costs. Such reforms will also contribute to the development of other branches, including tourism. Continued implementation of the privatization programme, mainly in the services sector, together with the improvement of Mozambique's commitments under the GATS, will help to bolster confidence and contribute to attracting the foreign investment needed.¹⁵⁴

Mozambique, as other LDCs in Africa, is facing difficulties on how to negotiate international agreements on trade services, such as the GATS Agreement and still in process of negotiation of the AfCFTA Agreement, mainly on identifying the sectors and sub-sectors to liberalise or present a schedule of specific commitment. In addition, the country has been faced difficult to present a detailed evaluation of the impact/implications of such liberalisations, for the sake of their fragile economy, as well as the difficulties to fulfil the technical formalities of requests/offers, addressed by their partners. There is lack of human resources (experts in these issues) and financial resources, to participate in the WTO and AfCFTA issues in general and in particular in trade in services. These problems are compounded by lack of data or real statistics of trade in services in Mozambique. In order to respond this challenge, the country must invest in capacity building and training of all stakeholders in the trade area, including the private sector and strength the institutional capacity.

The liberalisation of international services transactions in Mozambique poses considerable challenges. For instance, there are many regulations and measures in several services activities imposing restrictions and barriers on trade in services and contributing to the complexities of liberalisation of international services transactions in the country.. Open services market done with

¹⁵² Bila, Chambal & Tamele (n 149 above).

¹⁵³ https://www.wto.org/english/tratop_e/tpr_e/tp154_e.htm (accessed 08 August 2021).

¹⁵⁴ https://www.wto.org/english/tratop_e/tpr_e/tp154_e.htm (accessed 08 August 2021).

the right policy mix can facilitate and encourage innovation, efficiency and quality improvement.¹⁵⁵

Liberalisation in services often involves legislative, administrative and institutional reforms and therefore requires a more extended timetable than is required in the case for liberalisation of trade in goods, for example.

4.3 Analysis of Mozambique's legal framework on trade in services

The economic importance of services in the economy of Mozambique has grown considerably. Nowadays, service sector contributes about 48, 1% percent to the GDP. The key service sector businesses in Mozambique are construction, tourism, transport, energy, communication, banking, and consultancy.

In this chapter we will analysis Mozambique's legal framework on trade in services looking at the five (5) priority services sectors defined by the Protocol namely (i) business services, (ii) communications; (iii) finance; (iv) tourism and (iv) transport. The analysis provides in this chapter look at how to implement these services within territory for the first phase of Protocol by four (4) means or modes of supply of trade in services (i) cross-border supply, (ii) consumption abroad, (iii) commercial presence, and (iv) presence of natural persons.

4.3.1 Business services

According to WTO classification, business and professional services include: (i) Accountancy services, (ii) Advertising services, (iii) Architectural, and engineering services, (iv) Computer and related services, and (v) Legal services.

For the business and professional services in Mozambique, our analysis is restricted to two main business and professional services, namely legal and health services, as an overview of the all business sector in the country.

¹⁵⁵ Bila, Chambal & Tamele (n 149) 7.

4.3.1.1 Legal services

For the legal services in Mozambique, the regulatory and supervisory authority is called Mozambican Bar Association (private authority) under the Law No. 28/2009 of 29 September, which approves the Bar Association Statutes (Article 1(1)). This law regulates the composition of the Mozambican Bar Association and the rights and duties of the lawyers/ attorneys and trainees lawyers in Mozambique.¹⁵⁶ Mozambican Bar Association is independent of law firms and service suppliers in Mozambique. According to the Bar Association Statutes, the Bar has autonomy in its rules and functioning.¹⁵⁷

Mozambican Bar Association is independent of State bodies, including the Ministry of Justice, since it has been granted financial, administrative and patrimonial autonomy under the Law No. 28/2009 of 29 September, which approves the Bar Association Statutes (Article 1(3)).

Mozambican law firms and lawyers registered at the Mozambican Bar Association are not prohibited to supply legal services through cross-border supply. For instance, a law firm or lawyer based in Maputo can provide a legal assistance to a client based abroad through internet, telephone, and other means of communication. The same applies to citizens based in Mozambique, who can freely receive legal assistance from a law firm or lawyer based abroad through internet, telephone, and other means of communication. The Mozambican law does not prevent the supply of service through consumption abroad to Mozambican citizen abroad or to a foreign citizen in Mozambique.

Looking at means of supply of service through the commercial presence and establishment of foreign supplier's legal representation in Mozambique, the Mozambican legislation in general enables foreign entities to do business in the country with limited liability either by incorporating a company or registering a branch. However, legal services are an exception to the above rule as foreign entities are not allowed to establish in country representation office or any other form of representation to practice law and legal consultancy.¹⁵⁸ Foreign suppliers may only conclude cooperation agreement with local law firms to only provide training, exchange of experience, publication of articles, access to regional and international market but not for the prosecution of

¹⁵⁶ <https://www.oam.org.mz/leis-e-normas/> (accessed 10 September 2021).

¹⁵⁷ Article 1(2) of the Law No. 28/2009 of 29 September.

¹⁵⁸ Article 52 of the Law No. 28/2009 of 29 September (Bar Association Statutes) <https://www.oam.org.mz/leis-e-normas/> (accessed 11 September 2021).

legal services.¹⁵⁹ The law firm in Mozambique are required to adopt the names of their shareholders lawyers and cannot adopt the name of a foreign law firm. Also, even where there is some sort of association between a local law firm and a foreign law firm, the former can only do certain things and should remain independent from the latter.

For the supply of services through presence of natural persons, the Mozambique Bar Association Statutes¹⁶⁰ establish that the foreign natural persons may be registered as a member of the Mozambique Bar Association to work, practice or consult in Mozambique in connection with domestic legal law (not foreign law).

According to the Regulation for Registration of Foreign Lawyers in Mozambique,¹⁶¹ any citizen, who does not hold Mozambican nationality and is registered in a foreign Bar Association or similar institution, is considered as a foreign lawyer. The Regulation establishes that only foreigners with a degree in law from a Mozambican higher education institution may register with the Mozambican Bar Association under the same terms as Mozambicans.¹⁶²

According to the general requirements for registration of foreign lawyers at the Mozambique Bar Association, the lawyer must, within 90 (ninety) days of registration, present a visa to stay in Mozambique.¹⁶³

The registration of a foreign lawyer with the Mozambique Bar Association shall also depend upon the verification of the following general requirements:¹⁶⁴ (i) the existence of governmental agreements or treaties establishing a regime of reciprocity for the practice of Mozambican lawyers in the foreign lawyer's country of origin, (ii) Membership of a foreign bar association or similar institution; and (iii) to be approved in the evaluation and aptitude examination of the Mozambican Bar Association.

In addition to the general requirements, there are also special requirements that establish that foreign lawyers wishing to be admitted to the Mozambique Bar Association must cumulatively

¹⁵⁹ Article 42 of the Law No. 5/2014 of 5 February which approves the legal regime applicable to law firms operating in Mozambique (Law Firms Regulations or LFR) at <https://www.oam.org.mz/leis-e-normas/> (11 September 2021).

¹⁶⁰ Law No. 28/2009 of 29 September.

¹⁶¹ Mozambique Bar Association - Regulation for the Registration of Foreign Lawyers in Mozambique (RRFLM) which entered into force on 1 January 2012 <https://www.oam.org.mz/leis-e-normas/> (11 September 2021).

¹⁶² Article 3 of the RRFLM.

¹⁶³ Article 5 (1) of the RRFLM.

¹⁶⁴ Article 5 (2) of the RRFLM.

meet the following requirements:¹⁶⁵ (i) 20 (twenty) years of legal practice, (ii) proficiency in Portuguese language; (iii) criminal record duly recognised by the Mozambican authorities, (iv) not be suspended or barred from the exercise of the legal profession in any jurisdiction, and (v) provide a tax quitclaim certificate for the last 5 (five) years from its country of origin and from the countries where he/she have practiced law.

Registration is subject to the existence of vacancies determined as follows: (i) 2% when the number of Mozambican lawyers is less than 1000 (one thousand); (ii) 1.5% when the number of Mozambican lawyers is more than 1000 (one thousand) but less than 2000 (two thousand); (iii) 1% when the number of Mozambican lawyers exceeds 2000 (two thousand).

Currently, the Mozambican Bar Association has 2312 (two thousand, three hundred and twelve) registered lawyers.¹⁶⁶ Out of a total number of registered lawyers, only 20 (twenty) are foreign lawyers, and mostly are from Portuguese nationality.¹⁶⁷

The process to allow a foreign lawyer to practice in Mozambique can take years, because of several requirements and procedures imposed by law, which can be classified as barriers to liberalise trade in services under the principles and provisions of the Protocol.

There are other measures affecting the supply of legal services in Mozambique, such as requirements that impose conditions on setting of prices, fees or rates;¹⁶⁸ advertising prohibited;¹⁶⁹ limitation on cross border transfers by customers.¹⁷⁰ The Competition Policy also applies to activities in legal services. The Law Firm Regulation provides that competition law applies in the sector of professional legal services.¹⁷¹ According to the Mozambican Competition Law¹⁷² foreign professionals are not allowed to physically establish in country and practice law in Mozambique in respect to foreign legal services/advice on foreign law.

In cases where the law firm or foreign lawyer does not agree with a decision taken by the Mozambique Bar Association, an appeal to Administrative Court should be submitted, considering that the Bar Association is a public authority.¹⁷³ The administrative court is the tribunal with

¹⁶⁵ Article 6 of the RRFLM.

¹⁶⁶ <https://www.oam.org.mz/advogados-inscritos/> (accessed 11 September 2021).

¹⁶⁷ <https://www.oam.org.mz/advogados-estrangeiros-inscritos/> (accessed 11 September 2021).

¹⁶⁸ Article 66 Mozambique Bar Association.

¹⁶⁹ Article 78 Mozambique Bar Association.

¹⁷⁰ Mozambique Central Bank Notice 20/GBM/2017 of 11 December Standards and Procedures Exchange.

¹⁷¹ Article 3 of the Law No. 10/2013 of 11 April 2013 (Competition Law)..

¹⁷² Articles 3 and 29 of the Competition Law.

¹⁷³ Article 25 of the Decree 97/2014 of 31 January (Competition Law Regulations)

jurisdiction and power to judge disputes related to legal services (and other services) in Mozambique between a public institutions and a particular person, including a foreign service provider.

Resolution Mechanism is available for the parties in the Competition Law, under the Article 34 where it is referred to the process of investigation of abusive acts by the Competition Authority. In addition, general mechanisms may also be used (arbitration as well as court decisions).¹⁷⁴

In summary, the legal practice in Mozambique can only be carried out by suppliers duly registered in Mozambique Bar Association. Thus, legal foreign services (legal practice and consultancy on foreign law) are not allowed in the country.

4.3.1.2 Health services

The health services in Mozambique is regulated by the Law No. 24/2009 of 28 September, Law on the Exercise of Private Medicine; Law No. 3/2006, of 3 May, which creates the Mozambique Medical Association (*Ordem dos Médicos de Moçambique*) and approves its Statute; Law No. 2/2016 of 11 January, which creates the Mozambique Nurses Association and approves its Statute (*Ordem dos Enfermeiros de Moçambique*); and the Presidential Decree No 11/95 of 29 December, which defines the objectives, duties and powers of the Ministry of Health.

The Ministry of Health is the regulatory authority for the sector and is classified as not independent body. It is a central body of the State that, in accordance with the principles, objectives and tasks defined by the Government, is responsible for implementing health policy in the public, private and community domains.¹⁷⁵

In order to supply services in the national territory, the foreign supplier should be duly registered at the Mozambican Medical Association (in case of doctors and dentists) and obtain a professional identity card, or be registered at the Mozambique Nurses Association and obtain a nurse card (in cases of midwives, nurses, physiotherapists and paramedics)¹⁷⁶. And a company which provides these services should have the required operating license to be issued by the Ministry of Health.

There are no restrictions to the supply of services through cross-border using the internet.

¹⁷⁴ Article 41 and following Law No. 10/2013 of the Competition Law.

¹⁷⁵ Article 1 and Article 3(1) c) of the Presidential Decree No 11/95 of 29 December 1995. Article 11 Law No. 24/2009 of 28 September 2009, which approves the Law on the Exercise of Private Medicine.

¹⁷⁶ Article 5 Law No. 24/2009 of 28 September, and Articles 8 of Law No. 2/2016 of 11 January.

Regarding the consumption abroad of services, in Mozambique, national or foreign citizens residing in Mozambique are free to use health services abroad. There are no restrictions to benefit from health services abroad.

For supply of service through commercial presence it is mandatory to register a company and license to operate in Mozambique.

Foreigners are allowed to establish a new locally incorporated company in Mozambique. Companies wishing to obtain a license in the Republic of Mozambique need to comply with requirements such as:¹⁷⁷(i) Articles of Association published in the Official Gazette; (ii) Unique Tax Identification Number of the Company (NUIT); and (iii) Comply with health technical requirements. Others specific requirements result from Ministry of Health's internal policies.

According to the law, a company incorporated in Mozambique must justify before the Bank of Mozambique the origin and the purpose of foreign capital (foreign investment).¹⁷⁸

Foreign investors are allowed to acquire a controlling stake in a domestic entity throughout the all economic sectors except those that are reserved for the exclusive property and exploitation of the State. In general, Mozambican commercial law does not impose any limitation on investors who invest the majority capital in a national company, depending on the type of activities that company carries out. For example, for activities such as explosives manufacturing, private security, among others, most shares must be owned by Mozambican partners and this limitation is regulated in the regulations for each activity.

In Mozambique the name of foreign firm names is prohibited. The firm must, mandatorily, be written in the official language (Portuguese). However, there are some exceptions notably when the use of a foreign firm aims to facilitate the penetration in the market under the scope of activities intended. With the exception above, the use of the firm in other languages is allowed only if encloses an official translation.¹⁷⁹

Regarding the supply of health services through presence of natural persons in Mozambique, a company shall be duly registered. An individual would be able to work, in the health sector, in

¹⁷⁷ Article 9 Decree Law No. 2/2005, which approves the Commercial Code, Regulations of the registration of legal entities, approved by Decree Law No. 1/2006, of 3 May, Article 2(a) & 3(a).

¹⁷⁸ Notice No. 20/GBM/2017 - Establishes the Rules and Procedures to be observed in foreign exchange operations, Article 73 (1 & 2).

¹⁷⁹ Article 21 (1) (2) and (3) of the Commercial Code.

Mozambique, if: (i) there is a company licensed for this purpose; and (ii) the foreign employee is whether transferred from another company (shareholder) of the company registered in Mozambique or admitted to start working.

There are two ways for a foreign natural person, who wants to work, practice or consult in Mozambique, to be hired for long term work, namely:¹⁸⁰ (i) communication under the statutory quotas or special quota granted under an investment project approved by the Government; and (ii) work authorization granted under the discretionary powers of the Minister of Labor.

The communications (also known as ‘work permits within the quota’) should be made use of if:¹⁸¹

- (i) The number of foreign employees intended to be contracted is within established quotas, namely:
 - 5% of the total number of employees in large enterprises (i.e., more than 100 people);
 - 8% of the total number of employees in medium-sized enterprises (between 11 and 100 people); and
 - 10% of the total number of employees in small enterprises (10 or fewer people); or
- (ii) There is specific provision in the prospective employer’s investment contract with the government of Mozambique for the employment of a percentage of foreign employees that is greater or less than the percentages set out above.

The work authorizations (also known as ‘work permits outside the quota’) are granted by the Minister of Labor on a case-by-case basis if the following preconditions are met: (i) there are no Mozambican employees qualified to do the particular job; or (ii) the number of qualified Mozambican employees is insufficient to meet the demand.

Further to the above, there are also short-term work permits which are issued for 90 days for consecutive or interspersed period during a calendar year.

The exercise of medicine by doctors and the recognition of their qualifications in Mozambique depends on prior registration with the Mozambican Medical Association.¹⁸² The employee should first obtain the work permit and then apply for the authorization to practice as medical doctor or dentist on the Mozambican Medical Association. The requirements are established in the Regulations on the Mechanisms and Procedures for the Hiring of Foreign Citizens and Article of

¹⁸⁰ Decree No. 37/2016 of 31 August (the Regulations on the Mechanisms and Procedures for the Hiring of Foreign Citizens) and Article 8(1) Law 3/2006, 3 May.

¹⁸¹ Article 31 (5) of the Law No. 23/2007, of 1 August – Mozambique Labor Law.

¹⁸² Article 5 of the Law No. 24/2009, 28 September and Article 8(1) Law No. 3/2006, 3 May.

the Mozambican Medical Association. It is mandatory to prove an academic certificate in Medicine, obtain a certificate of equivalence issued by the Ministry of Education and favorable opinion from Ministry of Health and Mozambican Medical Association.¹⁸³ In Mozambique, all academic documents earned abroad must be certified and approved by the Ministry of Education, in order to be recognized in Mozambique.¹⁸⁴

The exercise of nursing and paramedical service by foreign nurses and paramedical persons and the recognition/registration of their professional qualifications depends on prior registration with the Mozambican Nurses Association, and obtaining the respective identification card. The employee must apply in order to get the license. The Mozambican Nurses Association will analyse the application and decide if the employee fulfil the criteria or not.¹⁸⁵

In summary, the findings to supply health services in Mozambique are relatively similar to legal services. The legal framework for the supply of health services by foreigners in Mozambique is bureaucratic, with many legal restrictions and barriers, making it difficult for health professionals to supply services in the country, even to assist emergency cases.

For the business services, the main legal challenges to overcome before the ratification of the Protocol in Mozambique are the lack of rules to mutual recognition of legal professional qualifications, and standards or criteria for authorization, licensing, or certification to supply services in Mozambique. The legal framework violates market access and national treatment principles. The rules to supply business services violate the objectives of the protocol to enhance the competitiveness of services and progressively liberalise trade in services.

4.3.2 Communications services

Mozambique was one of the first countries in the region to embark upon telecom reform and open the sector to competition. The mobile segment, in particular, has shown strong growth since the launch of services by Vodacom Mozambique to compete against mCel, the then-mobile subsidiary

¹⁸³ Article 5 of the Law No. 24/2009, 28 September, and Article 8(1) of the Law 3/2006, of 3 May, and Decree No. 37/2016 of 31 August.

¹⁸⁴ Article 1(1) Ministerial Diploma No.196/2012, 29 August & Article 8(1) of the Law 3/2006, of 3 May and Law 24/2009, 28 September.

¹⁸⁵ Law No. 24/2009 of 28 September, and Articles 8 & 9 of the Law No. 2/2016 of 11 January.

of the national telco Telecomunicações de Moçambique (TdM). Additional competition followed in late 2020 with the launch of services by Movitel.¹⁸⁶

Following years of poor management and underachievement, TdM and mCel merged, in early 2019, to create a new operator Mozambique Telecom (Tmcel). In the process, the structure of the market changed from having four operators (TdM, mCel, Vodafone Mozambique and Movitel) to three (Tmcel, Vodafone Mozambique and Movitel). At the same time, a new licensing regime ensured that by mid-2019 all three operators had been provided with universal licenses, enabling them to offer all types of telephony and data services.¹⁸⁷

The Mozambique National Communications Institute (INCM) is the communications regulatory authority in Mozambique, and its scope is the regulation of the communications sector, namely telecommunications and postal services.¹⁸⁸ INCM has legal personality and administrative autonomy (capacity to carry out own administrative acts), financial (ability to decide its expenses and its budget) and assets (capacity to own assets).¹⁸⁹

The purpose of the INCM is to regulate, supervise, inspect, sanction and represent the telecommunications and postal sector in Mozambique. The INCM is subject to the supervision of the Minister responsible for the area of communications.¹⁹⁰

Regarding the cross-border supply of services in the telecom mobile services (mobile money), services such as Mpesa, IZI, Mkesh, Conta Móvel and E-mola do not work abroad as well as other similar services do not work in Mozambique. The mobile financial services is limited to the Mozambique territory, which means that a citizen cannot benefit from this service or other similar service abroad, even around the SADC region.

There are limitations on cross-border transfers by customers (e.g. for services payments or for depositing money abroad). According to the article 43 of the Notice 20/GBM/2017, services

¹⁸⁶ <https://www.budde.com.au/Research/Mozambique-Telecoms-Mobile-and-Broadband-Statistics-and-Analyses#> (accessed 14 September 2021).

¹⁸⁷ <https://www.budde.com.au/Research/Mozambique-Telecoms-Mobile-and-Broadband-Statistics-and-Analyses#> (accessed 14 September 2021).

¹⁸⁸ Article 3 of the Decree No. 39/2021 of 17 June which approves the Organic Statute of the National Institute of Communications of Mozambique (INCM).

¹⁸⁹ Article 2 of the Decree No. 39/2021 of 17 June.

¹⁹⁰ Article 14(2) of the Law No. 4/16, of 3 June and Article 5 of the Decree No. 39/2021 of 17 June.

payments to abroad are subject to registration at the Commercial Bank which will intermediate the operation.

Mozambique legislation does not prohibit the supply of communication services through consumption abroad.

The supply of communication services through commercial presence in Mozambique, in case of establishment of foreign internet, fixed-line and foreign mobile telecommunications service is allowed only by means of registering a company given that one of the licensing requirements is the articles of association and in Mozambique only companies have articles of association. A branch is considered as a foreign commercial representation which registration does not require articles of association to be published in the Official Gazette.¹⁹¹ Therefore, a foreigner service provider is not allowed to establish a branch as the primary form of commercial presence to supply communications service in Mozambique. This is obviously a barrier to commerce and liberalization of service, because the process of registering a company is long, with many requirements and procedures.

Mozambique has signed some bilateral agreement in order to allow the supply of some foreign services. There is a Memorandum of Understanding (MoU) signed between Malawi Communications Regulatory Authority and INCM for the following aspects: a) signal cross-borders, b) roaming agreement, c) interlink agreements; d) services in areas without coverage and e) broadcasting. There is another MoU signed between National Agency Communications of Brazil (ANATEL) and INCM for cooperation of telecommunication projects, scientific and technological development, convergence of services, universalization, among others.

A MoU entered into the National Regulatory Authorities of Angola, Brazil, Mozambique, Portugal and other CPLP countries for the establishment of an Association of Regulatory Authorities for the Communications and Telecommunications of CPLP countries.

In Mozambique, there is no automatic recognition of a foreign licence to supply communications services within the country.¹⁹² In order to obtain a communication license (telecommunication, internet, mobile) it is necessary: (i) Articles of association published in the Official Gazette; (ii) Unique tax identification number of the company (NUIT); and (iii) Technical project.

¹⁹¹ Article 7 (1) of the Decree No 26/2017, of 30 June 2017, which approves the Regulations of the Licensing of Telecommunications and Scarce Resources.

¹⁹² Article 7 (1 & 2) of the Decree No 26/2017.

In addition, the communications operator must notify the Regulatory Authority (INCM) prior to its activity, attaching the documentation mentioned above.

For the supply of service through presence of natural persons, the process is the same as described above in the supply of other services. First, a company shall be duly registered. An individual would be able to work, practice or consult in Mozambique in relation with this sector if: (i) there is a company licensed for this purpose; and (ii) the foreign employee is whether transferred from another company (shareholder) of the company registered in Mozambique or admitted to start working. A work permit and work visa would be required under the immigration laws.

For the supply of communications services in Mozambique, the main challenges to overcome before the ratification of the Protocol are (i) restrictions on the supply of mobile services (mobile money) abroad as well as other similar services that do not work in the country; (ii) limitation on cross-border transfers by customers; (iii) the supply of communication services can be done only through using registering a company; (iv) there is no automatic recognition of foreign licence to supply communications services; and (v) barriers in immigration laws.

4.3.3 Finance

The banking and financial sector is regulated and supervised by the central bank (Bank of Mozambique).¹⁹³ In order to protect the interests of the financial sector service provider, the *Associação Moçambicana de Bancos* (AMB) was set up and it shares information among the members and consults and lobby on issues of common interest.¹⁹⁴

The Law No. 20/20, of 31 December (Law of Credit Institutions and Financial Companies) governs the process of establishment and the business of financial institutions and the supervision and control of financial institutions in Mozambique.

In Mozambique, financial institutions are credit institutions or financial companies. Credit institutions are banks, finance lease companies, credit co-operatives, factoring companies, investment companies, micro-banks and electronic cash institutions. Financial companies are financial brokerage companies, brokerage firms, investment fund management companies, asset management companies, venture capital companies, group purchasing management companies,

¹⁹³Law No. 1/92, of 3 January 1992 - Organic Law of the Bank of Mozambique.

¹⁹⁴ Bila, Chambal & Tamele (n 149) 37.

credit card issuer or management companies, exchange bureaux and discount houses.¹⁹⁵ The business of taking deposits or other repayable funds from the public for their own use and of acting as an intermediary in the settlement of payment transactions may only be carried on by banks.¹⁹⁶ The Mozambican banking system consists of 19 banks out of a total 40 financial institutions. The Credit institutions and financial companies authorised to operate in Mozambique must be properly registered with the Bank of Mozambique.

Regarding the supply of finance service through cross-border, for instance, to pay for imports, Mozambican firms need to justify their payment to the Bank of Mozambique and obtain authorization to make foreign payments. This is a common practice but can be lengthy and cause the importer to take more time to process payments.¹⁹⁷ According to article 108 of the Foreign Exchange Regulations, the physical entry and exit of foreign notes and coins in the national territory is limited to the amount equivalent to USD 5,000.00 (five thousand US dollars), and no declaration is required.¹⁹⁸ All amount above 5,000.00 (five thousand US dollars) needs special authorization from the Central Bank. On the other hand, the same Foreign Exchange Regulation, in its article 109, establishes that the physical entry and exit of national notes and coins of an amount superior to 10.000,00 MT (ten thousand meticaís), approximately USD 158,73 (one hundred fifty-eight United State dollars and seventy-three cents), must be declared. ¹⁹⁹ These are not a considerable amount for a commercial perspective, and can be classified as a barrier to commerce in intra-Africa trade market.

Foreign exchange is available to importers and exporters to finance current account transactions. An application to purchase the necessary foreign currency must be approved by the Bank of Mozambique before an exporter or importer may purchase foreign currency from commercial banks or exchange houses. Such applications are routinely approved by the Central Bank within 15 days, upon presentation of documents relating to the goods in question.²⁰⁰ It also can be

¹⁹⁵ Morais Leitão, Galvão Teles, Soares da Silva & Associados (Morais Leitão) and HRA Advogados (HRA) *Guide to Doing Business in Mozambique* (2020) at 36.

¹⁹⁶ M Leitão *et al* (n 196 above).

¹⁹⁷ <https://www.trade.gov/country-commercial-guides/mozambique-trade-financing> (accessed 15 September); Notice No. 20/GBM/2017 - Establishes the Rules and Procedures to be observed in foreign exchange operations.

¹⁹⁸ NOTICE No. 20/GBM/2017 of 11 December.

¹⁹⁹ NOTICE No. 20/GBM/2017 of 11 December.

²⁰⁰ <https://www.trade.gov/country-commercial-guides/mozambique-trade-financing> (accessed 15 September); Notice No. 20/GBM/2017.

considered as a barrier to trade in service. In order to get this authorization, a particular must wait for the approval of the Central Bank that can take 15 days or more days, hampering the speed and normal flow of commerce.

The Regulation of the Foreign Exchange Law²⁰¹ imposes restrictions on the free use of foreign currency in domestic transactions in Mozambique, aimed at combating the devaluation of the Metical against other foreign currencies and inflation, as well as proceeding with the "*meticalisation*" of the Mozambican economy. To this end, the specific revenues account was created, an account intended to receive only export revenues. The specific revenues account allows the retention of export revenues in foreign currency at 100%, but restricts the use of the funds deposited there.

Thus, the funds deposited in specific revenue accounts can only be used for: (i) settlement of any foreign transaction; (ii) provisioning of revenue specific account in another bank for payment abroad, upon presentation of the respective proof; (iii) amortization of foreign currency credits; (iv) constitution of term deposit, whose income is also subject to the limitations imposed on the revenue specific account; (v) and account closure.

Any use not foreseen above is not allowed. Where domestic payments are to be made, funds deposited in the specific revenue account must be converted into Meticais. It follows that local payments in foreign currency are limited, and domestic transactions must be in local currency, except where there are foreign currency accounts whose funds are not derived from export earnings, foreign direct investment, or external borrowing.

In general, there is no restriction on the supply of finance service through consumption abroad. However, it is not possible to make payments through mobile money services like Mpesa, eMola, Conta Móvel, Mkesh and IZI abroad. In countries like Mozambique (and in most countries in Africa) where access to financial services is restricted, "mobile money" offers an infrastructure that traditional banking has not been able to promote. Mobile money facilitates trade, allows the circulation of currency, the exchange of electronic money for physical money, all via a mobile phone even without internet access.

²⁰¹ Decree No. 49/2017 of 11 September, published by Notice No. 20/GBM/2017, as well as Notice No. 4/GBM/2018 of 22 March.

For the supply of finance service through commercial presence in Mozambique, the company will have to adopt one of the forms prescribed by law and obtain authorisation to carry on the business from the respective regulator - Bank of Mozambique.²⁰² The formation of credit institutions and financial companies depends on the authorisation to be granted, on a case-by-case basis, by the Governor of the Bank of Mozambique.²⁰³

Regarding the supply of finance service through presence of natural persons, the process is the same as described above in the supply of other services.²⁰⁴ However, in addition to the general rules, it is mandatory to obtain a special authorization from the Central Bank to work in Mozambique. Therefore, foreigner who is going to occupy a management and supervisory body, or an essential function in the bank, must demonstrate that he/she possesses the necessary suitability requirements for the exercise of the respective functions, namely suitability, professional qualification, independence, and availability.²⁰⁵

For the supply of financial services in Mozambique, the main challenges to overcome before the ratification of the Protocol are (i) restrictions in the physical entry and exit of foreign currency, (ii) restrictions on the free use of foreign currency in a domestic transaction in Mozambique, (iii) restrictions on payments through mobile services abroad and use of similar services in the country, (iv) the supply of financial services through cross-border to pay for imports needs to justify the payment to the Bank of Mozambique and get authorisation; and (v) In addition to migration requirements, the supply of finance service process through the presence of natural persons also requires a discretionary decision from the Bank of Mozambique. The Bank of Mozambique will decide if the person has or has no requirements and professional qualifications for the exercise of the position.

4.3.4 Tourism

The supply of tourism services is characterized primarily by the cross-border movement of consumers -- i.e. the consumer coming to the supplier, rather than the opposite as is the case with many other services. The industry is highly infrastructure dependent, and relies upon various

²⁰² Law No. 20/20, of 31 December.

²⁰³ Article 16 of the Law No. 20/20, of 31 December.

²⁰⁴ Decree No. 35/2016, of 31 August.

²⁰⁵ Article 27 of the Law No. 20/20, of 31 December.

transport services to deliver clients. Immigration and entry/exit control regulations have a direct influence on the supply of international tourism services.²⁰⁶

The tourism services sector is very limited in scope, and it is divided into four categories, namely (i) hotel and restaurants, (ii) travel agencies and tour operators services, (iii) tourist guide services, and (iv) others.²⁰⁷

In Mozambique, the tourism sector is seen as an opportunity to diversify the economy through its potential for export expansion, job creation, skills learning, and income generation. Mozambique can be considered an attractive destination for tourism because of its natural conditions, biodiversity, and cultural diversity. Its coastline of over 2,700 km offers excellent beaches, bays, and lagoons.²⁰⁸ Tourism is one of those sectors that have attracted major investment especially in the development of beach destinations along the coast. Mozambique's natural reserves, mountains, lakes and lagoons, and exceptional flora and fauna offer ample opportunity for developing other types of tourism.²⁰⁹ Tourism development in Mozambique is managed and controlled by a wide range of government bodies. The Ministry of Culture and Tourism (MICTUR) is responsible entity for tourism in Mozambique, under direct control of the Minister's office.²¹⁰

The Tourism Law of 2004²¹¹ sets down the enabling legislation that applies to tourism activities, including the declaration of priority tourism development areas, and public sector activities directed at promoting tourism, regulating the supply of tourism products and services, and defining the rights and responsibilities of tourists and consumers of tourism products and services. The Law also formally adopts the tourism policy and the strategic plan for tourism development, and allocates all major legal decisions regarding tourism ownership and regulation to the Council of Ministers. A range of legislation (decrees and diplomas) promulgated by MICTUR establishes the agencies of MICTUR, such as INATUR and ANAC, and creates implementing regulations, pertaining to operational issues both within MICTUR and within its structures and the tourism

²⁰⁶ WTO Council for Trade in Services S/CSS/W/125 (2001) https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=96826,72076,50858,103248,90629,29487,61965,60776,30991,80137&CurrentCatalogueIdIndex=7&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True (accessed 18 September 2021).

²⁰⁷ WTO Council for Trade in Services (n 206 above).

²⁰⁸ Newfarmer; Page & Tarp (n 105) 245-246.

²⁰⁹ Bila, Chambal & Tamele (n 149) 29.

²¹⁰ Resolution No. 15/2015, of 9 July - Organic Statute of the Ministry of Culture and Tourism of Mozambique.

²¹¹ Law No. 4/2004, of 17 June.

industry. These include for example INATUR statutes (Decree 85/2013); Tourist Lodging, Restaurants, Drinking Establishments and Dance Halls (regulations on licensing, grading and inspection - Decree 97/2013); Travel Agencies and Tourism regulations (Decree 41/2005); Tourist activities regulations (Decree 40/2007); and Gaming regulations (Decree 64/2010).²¹²

There are no legal limitations or barriers to supply tourism services through cross-border and consumption abroad.

For the supply of tourism service in Mozambique through commercial presence all tourism businesses require a license to operate and the application process is fairly similar for each type and category of accommodation.²¹³ A successful licence application process concludes when an applicant is issued an operating license (*alvará*) followed by grading and compliance inspection. The following five-step process applies:²¹⁴ (i) application: an initial request accompanied by an extensive executive project application being submitted to the licensing authority; (ii) approval: once the application has been approved the applicant can commence with construction; (iii) inspection and licensing: conducted by a team composed of up to seven members from different authorities and if passed an *alvará* or operating certificate should be issued within five working days; (iv) grading: after opening an accommodation establishment must apply to the grading authority (INATUR)²¹⁵ for grading; and (v) compliance inspections: to be conducted by INAE after six months of operation, based on 12 separate decrees that apply to tourism enterprises, which range from access of minors, to control of tobacco consumption, fire safety, electrical installations and hygiene requirements for foodstuffs.

As described above, there is need to improving efficiency and scope of license procedures by revising and simplifying license application requirements under the Mozambique legal framework on tourism service. All requirements and approvals for licensing procedures from different authorities at different licensing levels should be captured and MICTUR should map out a

²¹²Second Strategic Plan for the Development of Tourism in Mozambique, SPDTM II: Building a Leading Tourism Economy (2014), Volume 1: Core Report <https://www.biofund.org.mz/wp-content/uploads/2018/12/1543824558-F2227.Latest%20Vol%201%20Revised%20Summary%20Draft%20Vol%201%20V8%2019%20Jan%202015.Pdf> (accessed 17 September 2021) at 34.

²¹³ SPDTM II (n212) 15.

²¹⁴ SPDTM II (n212 above).

²¹⁵ Decree No 36/2008, of 17 September - Creates the National Institute of Tourism (abbreviated to INATUR), approves the respective Organic Statute.

sequence for combining similar requirements into a single simplified master process with clear steps and allocations of roles between all parties.

MICTUR should adapt licensing regulations to ensure a clear separation of licensing requirements and grading criteria, and grading should be removed as the basis for licensing.²¹⁶

For the supply of tourism service through presence of natural person in Mozambique there is considerable legal barriers to liberalise tourism services in order to meet the aims of the Protocol on Trade in Services. First, it is necessary to reduce access barriers for higher-value markets ensuring affordable and convenient air access, improving road and transport access to tourism nodes and lowering visa costs for high value leisure visitors.

There is a lack of competition and protective aviation policies, especially on key regional and local routes, result in high prices for air travel to and within Mozambique. The huge price differential between air travel to and in Mozambique and competitors in the region is clear and undermining the liberalisation of tourism sector in the country. It is necessary to bring the prices down, especially on regional and domestic route.

On other hand, in order to introduce a more competitive visa regime for high value tourists, it is suggests five methods for improving visa access, namely a) improve the delivery of information regarding visa requirements, b) facilitate current visa processes through more efficient use of modern information technologies, c) differentiate visa treatment for various types of temporary visitors, d) institute e-visa programs and e) establish regional uni-visa agreements.²¹⁷

For the supply of tourism services in Mozambique, the main challenges to overcome before the ratification of the Protocol are (i) improving efficiency and scope of license procedures by revising and simplifying license application requirements, (ii) create a single window for submission of applications, (iii) review the licensing regulations to ensure a clear separation of licensing requirements and grading criteria, (iv) reduce access barriers for higher-value markets ensuring affordable and convenient air access, improving road and transport access to tourism nodes and lowering visa costs for high-value leisure visitors.

²¹⁶ SPDTM II (n 212) 51-52.

²¹⁷ SPDTM II (n 212) 53.

4.3.5 Transport

Mozambique's strategic geographic location makes it a natural regional transport and service hub connecting several countries in Southern Africa like Botswana, South Africa, Swaziland, Malawi, Zambia and Zimbabwe. Mozambique has considerable experience in rendering transport and logistical services to the region. Railway and port charges still make up a large share of the country's public revenue and rail, road and port handling were major service industries.²¹⁸

The transport sector in Mozambique consists of a 4-mode transport system comprising air (airports), rail (railways), sea (ports), and road (roads). Each of the sub-areas has its own institutional insertion, the National Institute of Civil Aviation - INAC, the National Institute of Land Transport - INATER, the National Institute of Hydrology (INAHINA).

The transport sector, falls under the Ministry of Transport and Communications (MTC).²¹⁹

As referred above, the transport service in Mozambique is a large sector, and due to its extension, our analysis is restricted to the air transport.

Due to the importance of the air transport, the Protocol acknowledges the African Union Assembly Decision Assembly/AU/666 (XXX) adopted at the 30th Ordinary Session of the Assembly of Heads of State and Government of the AU, in Addis Ababa, Ethiopia on 28 January 2018 on the Establishment of a Single African Air Transport Market through the Implementation of the Yamoussoukro Decision.²²⁰

Further the Protocol recognises the potentially significant contribution of air transport services and, in particular, the Single African Air Transport Market to boost intra-African trade and fast track the African Continental Free Trade Area (AfCFTA).²²¹ So, the Air Transport Services was adopted as an annex to the Protocol.²²²

The air transport sector in Mozambique is regulated by the Mozambique Civil Aviation Institute (IACM), endowed with administrative, financial and patrimony autonomy, under the tutelage of the Ministry of Transport and Communication.²²³

²¹⁸ Bila, Chambal & Tamele (n 149) 24-25.

²¹⁹ Resolution No. 15/ 2015, of 9 July.

²²⁰ Preamble of the AfCFTA Protocol on Trade in Services.

²²¹ Preamble of the AfCFTA Protocol on Trade in Services.

²²² Article 28 (1) paragraph c) Protocol on Trade in Services.

²²³ Articles 9 and 10 (1) of Law No. 5/2016, of 14 June, which approves the Civil Aviation Law.

The regulatory authority can be classified as independent from service supplier(s), because the IACM is part of the public administration structure and as such acts without external influence of the service suppliers. In addition, it is of note that IACM play a superintendence role with respect to air transport services, by means of regulation, supervision, inspection, sanctioning and representation of the sector as a whole, which required a considerable degree of independence from service suppliers.²²⁴ However, the regulatory authority is not independent from the sector ministry, because the Minister of Transport and Communication oversees the Regulator Authority including those to revoke regulatory authority's certain decisions.²²⁵

For the supply of air transport through the cross-border mode in Mozambique and consumption abroad in principle there is no legal barriers or restrictions. There are no limitations on cross-border transfers. However, there are limitations on payments abroad via credit card.

Regarding the open skies policy, from the applicable legislation, one can conclude that there is an open skies policy in Mozambique. However, such a policy confines itself to the domestic market, which is justified by the fact that Mozambique has adopted a protectionist policy with respect to air transport.²²⁶ Which is why there is national flag carrier (*Linhas Aéreas de Moçambique, S.A. – LAM*) operating on a quasi-monopoly basis.

Regarding the commercial presence in Mozambique to supply air transport services it is not allowed the establishment of foreign suppliers of air freight services that would operate domestically or internationally. The foreign suppliers of air passenger services that would operate domestically or internationally must incorporate a full-fledged company, since only national air carriers are allowed to operate domestically or internationally.

Regarding the presence of natural persons in Mozambique, for the foreign natural persons work, practice or consult in the country it is applied the general rules of Decree No. 35/2016, of 31 August, which approves the Regulation on Mechanisms for Hiring of Foreign Employees as described above. However, Crews are exempted from visas but must present a professional license or certificate proving the capacity of crew member.²²⁷ There are no visas as such for crews as they

²²⁴ Articles 9 (3) & 10 (1) of Law No. 5/2016, of 14 June.

²²⁵ Article 10 (1) of the Law No. 5/2016, of 14 June.

²²⁶ Article 57(2) of the Law No. 5/2016, of 14 June.

²²⁷ Mozambique Aeronautical Information Publication, Gen 1.3, Section 2.2.

only need present the professional licence or certificate and such document allows for as much entries as need provided that is under the work performed as crew member.²²⁸

In addition, there is a preferential treatment applied to the Republic of Angola under the Resolution No. 54/2017, of 30 November, which ratifies the Agreement between the Government of the Republic of Mozambique and the Government of the Republic of Angola on Exemption of Visas in Ordinary Passport.

Regarding other measures affecting the supply of services, in Mozambique there are no legal provisions or regulatory requirements that impose conditions on the setting of prices, fees or rates as such. However, there are competition rules, based on reasonability, which shall be complied with when, inter alia, fixing prices. Such rules comprehend, inter alia, the total amount to be paid by the beneficiary, user or consumer including taxes, fees and sub charges due.²²⁹

In Mozambique the government controls the flag carrier (Linha Aérea de Moçambique, S.A – LAM), which operates on a de facto monopoly basis.²³⁰

For the supply of transport services in Mozambique, the main challenges to overcome before the ratification of the Protocol are (i) the protectionism policy adopted by the Government for supply domestic transportation, (ii) only national transportation companies are allowed to operate domestically, (iii) the regulatory authorities are not independent of the government (the sector ministry), and (iv) the transport services are very expensive and not affordable for most of the consumers.

4.4 Conclusion

Trade liberalisation and economic reforms have shown significant signs of success in Mozambique. The opportunities and risks of liberalizing trade in services are dedicatedly balanced in an environment where regulatory and institutional have been established only relatively recently, and which the restructuring of state arrests is still for complete.

Mozambique is a member of the WTO (GATS), and by signing the AfCFTA Agreement its government shows its commitment to liberalise the services under the Protocol.

²²⁸ Decree No. 108/2014, of 31 December, which establishes the Legal Regime applicable to Foreign Citizens regarding the Entry, Stay and Departure from the Country.

²²⁹ Article 4(2) (a) of Decree No. 35/2018, of 30 May, approves the Regulation on Competition in the Air Transport Services.

²³⁰ Article 5 of Ministerial Diploma No. 87/99, of 4 August, which approves the status of Linhas Aéreas de Moçambique, S.A (LAM).

Services in Mozambique can be utilised as an engine of economy growth. Therefore, it is important to move ahead in a process of updating the legal framework and harmonize with the best practices in the AfCFTA Protocol on Trade in Services and worldwide.

Last but not least important the country must invest in capacity building and training of all stakeholders in the trade area, including the private sector, and strengthen the institutional capacity.

CHAPTER 5

5 CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

African Continental Free Trade Area (AfCFTA) is a flagship project of Agenda 2063 of the African Union — Africa's development vision. The AfCFTA entered into force on 30 May 2019. On 1 January 2021, trade under the AfCFTA started in Africa and has been carried on under the reciprocal offers between the States Members.

According to AfCFTA Secretariat, 36 countries, out of 54, have so far ratified the Agreement. Mozambique signed the AfCFTA Agreement on 23 March 2018 and is still in the process of reviewing its domestic legislation to ratify and deposit the Agreement.

The general objectives of the AfCFTA are to create a single and liberalized market for goods and services, facilitated by the movement of persons to deepen the economic integration of the African Continent. The AfCFTA aims at accelerating intra-African trade and boosting Africa's trading position in the global market by strengthening Africa's common voice and policy space in global trade negotiations.

The negotiations under the AfCFTA take place in three phases: Phase I covers trade in goods and services as well as dispute settlement. Phase II covers intellectual property rights, investment, and competition policy. Phase III has been added and will cover e-commerce.

In the light of the Covid-19 pandemic, e-commerce has shown how important it is to respond to the constraints of international trade as borders are closed and the movement of people and goods is restricted. Therefore, given the current experience in the implementation of e-commerce, it is perhaps the best opportunity and moment to include e-commerce in the first phases of the Agreement's implementation, and not relegate it to the last phase.

To operate and implement all its objectives, the AfCFTA has adopted protocols on trade in goods and services, rules and procedures for the settlement of disputes, competition policy, and intellectual property rights. The Protocol on Trade in Services entered into force along with the AfCFTA Agreement, as a part of the Agreement (annex), with the aim to establish a single liberalised market for trade in services in Africa.

The AfCFTA negotiations to finalise the schedules of specific commitments for the five priority services sectors (business services; communications; finance; tourism and transport) are ongoing. The deadline to finalise these negotiations was June 2021. However, at the time of writing this

dissertation, there is no official statement or position from the AfCFTA Secretariat regarding the deadline. This delay will obviously compromise the schedules already approved.

The liberalisation process under the Protocol shall focus on the progressive elimination of the adverse effects of measures on trade in services as a means of providing effective market access with a view to boosting intra-African trade in services. Those Member States that wish to liberalize more sectors than the five chosen priorities are free to do so because the Member States have always been at liberty to liberalize autonomously.

For the ratification of the Protocol, Mozambique must present a schedule of commitment. The completed schedules are usually the result of what is known as a "request offer" process, whereby countries exchange a "request" for certain concessions in their export market(s) and "offer" concessions domestically in return. However, before presenting the schedule of commitments, Mozambique must analyse carefully its domestic reality and legal framework. The regulatory assessments help to establish which regulations currently exist within the domestic legislation for the five (5) priority service sectors and serve as a basis for formulating offers and requests.

In addition, it was determined that for those of AU member states that are WTO members like Mozambique, the starting point for negotiations on the schedules of specific commitments would be deeper commitments than those currently scheduled under the GATS ("GATS plus") where, for example, Mozambique's commitments are limited to financial services (excluding insurance). Regarding the business and professional services in Mozambique (legal and health services) for the supply of legal services in Mozambique, there are many legal restrictions and barriers to liberalize services in Mozambique such as foreign entities are not allowed to establish in the country representation office or any other form of representation to practice law and legal consultancy. Foreign suppliers may only conclude a cooperation agreement with local law firms to only provide training, exchange of experience, publication of articles, access to the regional and international market but not for the prosecution of legal services.

In addition, the law firm in Mozambique are required to adopt the names of their shareholder's lawyers and cannot adopt the name of a foreign law firm, even where there is some sort of association between a local law firm and a foreign law firm the local law firm can only do certain things and should remain independent from the foreign law firm.

For the supply of services through the presence of natural persons, the Mozambique Bar Association Statutes establish that the foreign natural persons may be registered as a member of the Mozambique Bar Association to work, practice, or consult in Mozambique in connection with

domestic legal law (not foreign law). However, only foreigners with a degree in Law from a Mozambican higher education institution may register with the Mozambican Bar Association under the same terms as Mozambicans. In addition, the lawyer must, within 90 (ninety) days of registration, present a visa to stay in Mozambique.

In addition to the general requirements, there are also special requirements establishing that foreign lawyers, who wish to be admitted to the Mozambique Bar Association, must cumulatively meet the following requirements: (i) 20 (twenty) years of legal practice, (ii) proficiency in the Portuguese language; (iii) criminal record duly recognised by the Mozambican authorities, (iv) not be suspended or barred from the exercise of the legal profession in any jurisdiction, and (v) provide a tax quitclaim certificate for the last 5 (five) years from its country of origin and from the countries where he/she have practiced law.

Registration is subject to the existence of vacancies determined by a quota. This long-term process with many requirements takes years. The procedures and barriers imposed by law to barrier a foreign lawyer to practice in Mozambique are contrary to the spirit and provision of the Protocol. For the health service, the Ministry of Health is the regulatory authority for the sector and is classified as a not independent body. To supply services in the national territory the foreign supply should be duly registered before the Mozambican Medical Association (in the case of doctors and dentists) and obtain a professional identity card, or be registered at the Mozambique Nurses Association and obtain a nurse card (in cases of midwives, nurses, physiotherapists and paramedics). The Ministry of Health issues the operating license. The general requirements related to obtaining licenses to operate in the health area are complex, bureaucratic, and long, involving too many institutions such as the Ministry of Industry and Trade, Tax Authority, Mozambique Central Bank, Ministry of Health.

An individual would be able to work, practice or consult in Mozambique in relation with health sector if: (i) there is a company licensed for this purpose; and (ii) the foreign employee is whether transferred from another company (shareholder) of the company registered in Mozambique or admitted to starting working. The admission process is similar in the legal services, with many legal restrictions and barriers such as (i) communication under the statutory quotas or special quota granted under an investment project approved by the Government; and (ii) work authorization granted under the discretionary powers of the Minister of Labor. Further, the foreign doctor must apply for registration with the Mozambican Medical Association or Mozambique Nurses Association, and prove an academic certificate in Medicine or Nurses, obtain a certificate of

equivalence issued by the Ministry of Education, and favorable opinion from the Ministry of Health and Mozambican Medical Association or Mozambique Nurses Association.

For the business services, the main legal challenges to overcome before the ratification of the Protocol in Mozambique are the lack of rules to mutual recognition of legal professional qualifications, and standards or criteria for authorization, licensing, or certification to supply services in Mozambique. The legal framework violates market access and national treatment principles. The rules to supply business services violate the objectives of the protocol to enhance the competitiveness of services and progressively liberalise trade in services.

These are the main examples of legal barriers and restrictions to liberalise services in the country for business and professional services such as Accountancy services, Advertising services, Architectural, and Engineering services, Computer and related services, and Legal services.

For communication services, Mozambique has one of the most expensive internet charges on the continent. In addition, other services as signal cross-borders, roaming, services in areas without coverage, broadcasting are very expensive and unaffordable for most of the population.

There is a restriction on cross-border supply of services in the telecom mobile services (mobile money), services such as Mpesa, Conta Móvel, E-mola, IZI, as well as other similar services do not work in Mozambique. The mobile financial services are limited to the Mozambique territory, which means that a citizen can not benefit from this service or other similar services abroad, even around the SADC region.

A foreigner service provider is not allowed to establish a branch as the primary form of commercial presence to supply communications services in Mozambique, and there is no automatic recognition of a foreign licence to supply communications services within the country.

Regarding the supply of finance service cross-border, Mozambican firms need to justify their payment to the Bank of Mozambique and obtain authorization to make foreign payments. There are also limitations on cross-border transfers by customers (e.g. for services payments or for depositing money abroad). Services payments abroad are subject to registration at the Commercial Bank which will intermediate the operation.

The physical entry and exit of foreign notes and coins in the national territory are limited and need special authorization from the Central Bank. There are restrictions on the free use of foreign currency in domestic transactions in Mozambique.

Regarding the supply of finance service through the presence of natural person foreigner who is going to occupy a management and supervisory body, or an essential function in the bank, must

demonstrate that he/she possesses the necessary suitability requirements for the exercise of the respective functions, namely suitability, professional qualification, independence, and availability. The Bank of Mozambique has discretionary power to decide on a case-by-case basis on the authorization of a foreign employee to fill an essential function in a bank operating in Mozambique.

In Mozambique, the supply of tourism services is managed and controlled by a wide range of government bodies. The Ministry of Culture and Tourism (MICTUR) is a responsible entity, under the direct control of the Minister's office. The tourism services in Mozambique need to improve the efficiency and scope of license procedures by revising and simplifying license application requirements.

For the supply of tourism service through the presence of natural persons in Mozambique, it is necessary to reduce access barriers for higher-value markets ensuring affordable and convenient air access, improving road and transport access to tourism nodes, and lowering visa costs for high-value leisure visitors. There is a lack of competition and protection of aviation transport services. The air transport sector in Mozambique is regulated by the Mozambique Civil Aviation Institute (IACM), endowed with administrative, financial, and patrimony autonomy, under the tutelage of the Ministry of Transport and Communication. However, the regulatory authority is not independent of the sector ministry.

For the supply of air transport through the cross-border mode, there are limitations on payments abroad via credit card. Mozambique has adopted a domestic protectionist policy with respect to air transport. The company Linhas Aéreas de Moçambique, S.A. – *LAM* operates on a quasi-monopoly basis. There are no legal provisions or regulatory requirements that impose conditions on the setting of prices, fees, or rates.

The government controls the flag carrier (Linhas Aéreas de Moçambique, S.A – *LAM*), which operates on a de facto monopoly basis.

In conclusion, the protectionism of domestic services and intensity of regulation present in many services activities contribute to the complexities of liberalisation of international service transactions in Mozambique.

5.2 Recommendations

Services in Mozambique can be utilised as an engine of economic growth. However, the country must be able to address all legal and regulatory challenges that we have identified to implement the AfCFTA Protocol on Trade in services, such as:

- Provide effective market access with a view to boosting intra-African trade in services.
- Accord immediately and unconditionally to services and service suppliers of any other State Party treatment no less favourable than that it accords to like services and service suppliers of any Third Party (MFN). In addition, present an MFN exemption list annexed to the Protocol. The MFN exemption list shall be reviewed regularly, with a view to determining which MFN exemptions can be eliminated.
- Ensure transparency, independence, and impartiality in all processes of supply of services.
- Improve the judicial, arbitral, or administrative tribunals and procedures for the prompt review of, and where justified, appropriate remedies for administrative decisions affecting trade in services.
- Review the standards or criteria for the authorisation, licensing, or certification of services suppliers and professional services. In addition, recognise the education or experience obtained, requirements met, or licenses or certifications granted in another State Party to promote the movement of persons among the AU Member States.
- Do not engage in anti-competitive practices by preventing monopolies and exclusive service suppliers, for instance in air transport.
- The Bank of Mozambique must avoid applying restrictions on international transfers and payments.
- Promote market access, according to services and service suppliers of any other State Party treatment no less favourable than that provided for under the terms, limitations, and conditions agreed and specified in its Schedule.
- Observe the principle of national treatment by accord to services and service suppliers of any other State Party treatment no less favourable than that it accords to its own like services and service suppliers.

Therefore, we recommend the country move ahead in a process of updating the legal framework and harmonize under the AfCFTA Protocol on Trade in Services and best international practices. In addition, Mozambique must invest in capacity building and training of all stakeholders in the

trade area, including the private sector, and strength the institutional capacity. Technical assistance and capacity building can be provided through continental support programs. Mozambique's legal framework must enhance the competitiveness of services, promote sustainable development, foster domestic and foreign investment, and progressively liberalise trade in services.

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