Rules of Origin for Services in Economic Integration Agreements: A case study of SADC

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Abstract

The origin of services is increasingly relevant against the backdrop of technological innovation and global value chains. Rules of origin for trade in services are especially important in Economic Integration Agreements, which are proliferating in response to the changes in global trade and production. The Southern African Development Community commenced the Protocol on Trade in Services negotiations in April 2012 with the objective of creating an integrated regional market for services. This study examines the current and dominant approaches to the formulation of rules of origin for trade in services in twenty five (25) Economic Integration Agreements with the purpose of making recommendations, to develop further, the definition of "substantial business operations" for the SADC Protocol on Trade in Services. It concludes, first, that the type best suited for SADC is a rule of origin designed to address broader socio-economic goals in the region. Second, the criteria used to define substantial business operations in the Mainland-Hong Kong, China CEPA provides a basis which SADC can consider as a key determinant of origin, in order to prevent free-riders from benefiting from the trade preferences under the SADC Protocol on Trade in Services. Lastly, the effectiveness of rules of origin will depend on domestic regulation and regional monitoring, evaluation and enforcement mechanisms to support and regulate investments in the services sectors.

Keywords: Denial of benefits, rules of origin for services

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CHAPTER 1: INTRODUCTION

1.1 Background

In a globalised world, questions around the origin of services and service suppliers are pertinent for the compilation of trade data and statistics as Central banks around the world seek to monitor all international monetary transactions and measure the activities of foreign affiliates in their territories. The origin determination of services and service suppliers are also important to establish which country or legal system has jurisdiction over a transaction; to collect taxes; to prevent fraud and money laundering; to ensure quality of services rendered and to protect consumers. These questions are also pertinent in terms of the rules of international trade so that governments involved in trade policy-making and negotiations are better able to manage these transactions.

For example, a life insurance policy sold by an Indian national over the telephone to a South African consumer working for a wholly-owned British subsidiary of a Dutch insurance company operating a call centre in the Philippines. Where would the service or service supplier originate from? For the consumer, the origin of the life insurance policy may not matter because he or she received a competitive deal. However, how should the various countries mentioned in this fictitious transaction measure and regulate the activities of the different parties involved?

The Southern African Development Community (SADC) commenced preferential services negotiations under the Protocol on Trade in Services (SADC Protocol) in April 2012. To date, a total of eleven initial offers and one revised offer have been tabled in most of the six priority sectors (Communication, Construction, Energy-related, Financial, Tourism and Transport services). The negotiations are ongoing and were scheduled to conclude in August 2015. Rules determining the origin of services form an integral part of preferential trade agreements because signatories to the agreement want to ensure that the benefits of the agreement accrue to the services and service suppliers that legitimately belong to the preferential trade arrangement. Unlike in the case of goods, it is the rules of origin in services trade that primarily determines the extent of market access opportunities and their ultimate economic effects (Das & Ratna, 2011). Rules of origin for trade in goods is traditionally a very well developed trade policy instrument, however this is not the case for services.

Trade in services has distinct features as compared to those in goods: services are intangible, non-storable and they mostly involve a simultaneous action between the service provider and the service consumer. For services trade to occur, the means of transporting the services often have to be allowed to cross national boundaries, with the result of making international transaction in services more complex conceptually than international transactions in goods (Das & Ratna, 2011).To this end, the delivery of trade in services is defined according to four modalities. These four modes of supply are explained further below.

Origin rules were first introduced to gather statistics, to enable governments to determine the provenance of goods entering and leaving their territory, and to enable the analysis of sources of demand and supply (Kingston, 1994). Now some fifty years after the first discussion on origin in the General Agreement on Tariffs and Trade (GATT), rules of origin have evolved into a secondary trade policy instrument (Kingston, 1994), which are or should be merely definitional in character, but which today transcends definitional purposes and is more often than not meant to reinforce or at least support broader policy goals well beyond customs law (Zampetti & Sauvé, 2006). Traditionally, the trajectory of trade policy has subscribed to the belief that origin rules were used to determine the origin of a good (Hoekman, 1993). There are a growing number of studies that have since explored origin rules for trade in services (Zampetti & Sauvé, 2006; Fink & Nikomborirak, 2007; Wang, 2010; Das & Ratna, 2011; Vilavong, 2011). In this context, it is important to distinguish between non-preferential and preferential rules of origin. Non-preferential rules of origin are used for statistical purposes, and thus in areas such as trade remedies. Preferential rules determine origin, and hence are critical in determination of access to preferences in Economic Integration Agreements.

Conceptually, little is understood about rules of origin for trade in services from an African perspective, particularly in SADC as this is the first intra-regional preferential market access negotiations on services in SADC. Further, the current preferential market access negotiations on services under the Economic Partnership Agreement between the European Union and some SADC Member States (Botswana, Lesotho, Mozambique and Swaziland) render the determination of regional rules of origin for services crucial. As part of the built-in-agenda of the SADC Protocol, SADC Member States are required, under the Protocol to develop further, the definition of 'substantial business operations' which is typically referred to as a rule of origin for juridical persons or companies. The origin of services and service suppliers is increasingly relevant against the backdrop of technological advancements and

global value chains because physical proximity between a consumer and a supplier are in many cases no longer necessary. For example, the increase in cross-border transactions over telecommunication and satellite networks has made services origin rules relevant in terms of the production of goods or delivery of services in an increasingly internationally fragmented market. This study examines the importance of origin rules for services in SADC and the current and dominant approaches of origin rules in twenty five Economic Integration Agreements, with the purpose of making recommendations for suitable criteria for the ongoing negotiations on the Protocol in the region. The criteria relates to the definition of the specific rules for origin determination.

1.2 Conceptual Framework

Formerly operating under the GATT (1947), the Marrakesh Agreement (WTO Agreement) established the World Trade Organisation (WTO) on 1 January 1995. The Preamble to the WTO Agreement resolves "to develop an integrated, more viable and durable multilateral trading system" through "expanding the production of and trade in goods and services". The rules-based system upon which the WTO operates is reflected in its systematic approach to administering international trade agreements. The WTO covers a wide range of trade-related agreements, namely goods, intellectual property, services and trade-related investment measures.

To achieve the objectives of "raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand", the WTO Agreement seeks to enter "into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations" (WTO Agreement, 1995). Intrinsic to WTO agreements, are a number of basic principles governing the multilateral trading system such as the principle of non-discrimination, more open and predictable trade, transparency and special treatment for less developed members. The principle of non-discrimination forms an important part of multilateral trade and is codified in the agreements administered by the WTO. The Most-favoured-nation (MFN) principle ensures non-discrimination amongst trading partners by requiring WTO Members to accord any

favourable treatment it offers to one country, to all other WTO members immediately and unconditionally. The MFN principle is important for multilateral trade to ensure that all members have equal access to international markets. In addition to the MFN principle, National Treatment is also a principle and further manifestation of non-discrimination in the WTO. National Treatment refers to the equal treatment of foreigners and locals. The WTO is also an important regulator and ensures enforcement of agreed rules through its Dispute Settlement Understanding.

The WTO serves as a platform for multilateral trade negotiations; and at the same time recognises that trade liberalisation is pursued through the formation of regional or preferential trade agreements. Hence, the WTO rules provide conditional exceptions in which WTO Members may derogate from their MFN obligations. For trade in services, Members pursue preferential liberalisation through the formation of GATS Article V Economic Integration Agreements (EIA). EIAs are typically referred to as regional trade agreements (RTAs), although countries do not necessarily belong to the same geographical region (WTO, 2013).

In recent years, there has been an increase in the conclusion of 'comprehensive preferential agreements' including investment, intellectual property, competition and services as relevant focus areas in the trade negotiating agenda. As of January 2014, 117 Regional Trade Agreements (RTAs) with a trade in services component had been notified to the WTO. Services trade represents about one-fifth of world trade as measured by the balance of payments and about one-third, based on commercial presence and establishment (Latrille & Lee, 2012). The realm of preferential trade to deepen and quicken the pace of market opening in services markets (Sauvé & Shingal, 2011, p.6) was influenced by the failure of the Doha Development Agenda (DDA). Sauvé & Shingal (2011) found that in the agreements notified to the WTO since 2000, preferential access accorded to countries in services trade has resulted in what at first sight could be likened to a significant dilution of MFN access privileges (p.6). The findings by Marchetti & Roy (2008) show a significant margin of preference between DDA offers in the WTO and preferential services commitments in the cross-border supply of services and establishment of commercial presence. Hence, countries are more willing to open up their markets in a preferential trade agreement (PTA) to a smaller number of members than in a multilateral setting comprising 160 members (as of June 2014).

Within the regional context, SADC launched the preferential market access on trade in services negotiations in April 2012. The SADC Protocol on Trade in Services (the Protocol) was subsequently adopted by the Council of Ministers of Trade in August 2012. The Protocol sets out the framework for the liberalisation of trade in services between SADC Member States. The objectives of the Protocol are to progressively liberalise intra-regional trade in services, create a single market for trade in services, enhance economic growth and development and improve the capacity and competitiveness of the services sectors of SADC State Parties (Article 2 of the SADC Protocol, 2012). The first phase entails the negotiations on schedules of commitments in six priority sectors: Communication, Construction, Energy-related, Financial, Tourism and Transport Services. There is an in-built agenda in the Protocol that subjects some areas to further negotiation after adoption of the Protocol (which has already occurred) or after entry into force (once two-thirds of Member States ratify). One such area that is subject to further negotiation after adoption of the Protocol is the term 'substantial business operations' which defines an important aspect how the origin of a service is to be determined.

1.3 Research problem

There are currently two services negotiations that involve SADC Members. The first is the SADC Protocol on Trade in Services negotiations that is intra-regional and involve all fifteen SADC Member States. The second is the SADC-European Union Economic Partnership Agreement (EPA) negotiations involving four SADC Member States i.e. Botswana, Lesotho, Mozambique and Swaziland and the European Union comprising of 27 Member States. Other SADC Member States involved in EPA negotiations that cover services include Madagascar, Mauritius, the Seychelles, Zambia and Zimbabwe under the Eastern and Southern African group. Furthermore, the impending Tripartite Free Trade Agreement (TFTA) negotiations on trade in services are scheduled to commence in 2015 and this will involve 26 Member States from three Regional Economic Communities i.e. COMESA, EAC and SADC. There is also discourse about a Continental FTA and some SADC Members also belong to COMESA or EAC in which they are negotiating or have negotiated preferential trade agreements on services. Therefore, it is within this context that services rules of origin matter, as a determination of the nationality of a service and service supplier will have to be made to

establish who is eligible for trade preferences (Vilavong, 2011) foreseen under such agreements. In addition, rules of origin will play a role in preventing free-riding. It is important to prevent free-riding in preferential trade agreements to ensure that non-Member countries do not benefit from the preferences negotiated between Member countries and take advantage of the bargaining efforts of those Member countries.

The study aims at providing a broader understanding of the importance and application of rules of origin for services in existing EIAs. This is the first study of this nature that delves specifically into potential services origin rules for the SADC region. Hence the purpose is to examine different typologies of origin rules for services, and to determine whether any current or dominant approaches in existing EIAs may be applicable in the SADC context. This would serve to inform whether suitable criteria for SADC for the "substantial business operations" definition can be developed, as per the SADC Protocol in-built agenda. With the proliferation of EIAs, services origin rules are increasingly relevant in the trade policy domain. Other studies in this literary domain include case studies in ASEAN (Fink & Nikomborirak, 2007); Laos (Vilavong, 2011); China (Wang, 2010); and perspectives from the Indian experience (Das & Ratna, 2011). This study was conducted for two main reasons. Firstly, conceptually, little is known about services origin rules in the region mainly because SADC Members have only recently commenced their first preferential market access negotiations on services; and there are no studies about it in the SADC regional context. It is likely that it did not garner much attention in the past because traditionally, the focus has always been on determining the origin of trade in goods. The objectives and goals of this study are to understand more comprehensively how services origin rules can support the objectives of the Protocol for "an integrated regional market for services" in light of the ongoing and future negotiations that are both intra-regional and inter-regional. Secondly, since the Protocol was adopted by the Council of Ministers of Trade in August 2012, the definition of 'substantial business operations' is subject to further negotiations. Hence, as this could transpire at any time due to its relevance and legal mandate under the Protocol, a study that theorises the different criteria undertaken in other EIAs would serve as an important starting point.

The research aims to understand the following:

1. The importance for SADC to consider services rules of origin;
2. The current and dominant approaches in the setting of services rules of origin in EIAs; and
3. Which current and dominant approaches are better suited for SADC?

1.4 Justification for the research

This study is important from a trade policy point of view because it examines, in theory the current and dominant approaches adopted in the EIAs notified to the WTO from 2009 to 2013. The Preamble to the Protocol states "an integrated regional market for services, complemented by cooperative mechanisms, will create new opportunities for a dynamic business sector, and strengthen the Region's services capacity, its efficiency, and competitiveness and expand the Region's services exports". It is with this in mind that an examination of the types of services origin rules is made to understand how the design of origin rules in SADC could support intra-regional services trade and investment. Furthermore, the design and kind of SADC services origin rules will have implications for trade policy, other ongoing and future preferential trade negotiations and domestic regulation in each SADC Member State.

1.5 Methodology

The research herein is a qualitative study that takes a deductive approach to case study design. The data corpus presented in the case study is a wide range of literature which includes both primary and secondary sources. The thematic analysis approach (Boyatzis, 1998) which entails a six (6) phase process (Braun and Clarke, 2006) was used to analyse the data set which includes twenty five (25) EIAs, one interview and two questionnaires. The thematic analysis approach informed the analytical insights, themes and ideas as it allowed the study to be informed by the use of a theoretical framework.

1.6 Delimitations and scope of study

The following boundaries have been identified in the study.

a. Due to the small sample size, these findings cannot be generalised based on this study alone; or be applicable or imposed on other regions and Economic Integration Agreements.

b. The lack of statistical data on trade in services in the SADC region renders it difficult to illustrate the economic implications of adopting restrictive or liberal rules of origin for services in the SADC region.

c. The study attempts to divorce from the political incongruities in the SADC region and rather focuses solely on the analytical and economic considerations associated with services origin rules.

d. The Economic Integration Agreements were sourced from the WTO RTA Information System. The database found 31 EIAs notified to the WTO during this period using the 'denial of benefit' topic to refine the search. When cross-referenced without refining the search, it was found that there are other agreements containing denial of benefit provisions that were not picked up by the database. For purposes of the present research, the EIAs analysed are those using the refined search tool on the WTO RTA Information System.

e. The study was conducted between October 2013 and August 2014 before or during which time the researcher and interviewees were in different capacities involved in the SADC trade in services negotiations which may cause bias towards the findings.

1.7 Structure of the study

Chapter 2 reviews the literature on services origin rules. The chapter discusses the basic economics of origin rules for services and examines the theories on the current and dominant approaches of services origin rules in EIAs.

Chapter 3 describes the qualitative research method and design used in the study to determine the current and dominant approaches of services origin rules in EIAs. This chapter includes the techniques used for data collection and sampling and outlines the thematic analysis approach.

Chapter 4 presents the key findings based on the data collected from the EIAs, and interview and questionnaires respectively. The results are organised in themes in relation to the research questions.

Chapter 5 analyses the results presented in the previous chapter, aligning the output of the data analysis with the literature presented in Chapter 2. Finally, Chapter 6 concludes the study and makes recommendations for possible further research.

CHAPTER 2: LITERATURE REVIEW

2.1 Introduction

This chapter presents a literature review on services origin rules. The first part of the chapter provides the context and scope for reviewing the literature, followed by a discussion on the basic economics of origin rules and trade policy in services. The next part of the chapter provides an examination of existing theories on the current and dominant approaches of services origin rules in Economic Integration Agreements. The next part of the chapter provides a brief discussion on the policy and economic considerations for SADC. Finally, the chapter will conclude by substantiating the significance of the study and showing a clear linkage between existing theory and what the present research attempts to do.

2.2 Context

Rules of origin play an important role in the traditional trade policy landscape (Hoekman, 1993; Das & Ratna, 2006; Sauvé & Shingal, 2011). Traditionally, the trajectory of trade policy has subscribed to the belief that origin rules were used to determine the origin of a good (Hoekman, 1993). There are a growing number of studies that have since explored origin rules for trade in services (Das and Ratna, 2006; Fink & Nikomborirak, 2007; Wang, 2010; Vilavong, 2011). The context for reviewing the literature is to provide a critical summary of the available evidence on services origin rules and to identify studies that illuminated if, why and which services origin rules are most commonly applied in Economic Integration Agreements (EIAs). Using the thematic analysis approach, the existing theories and findings of the present research will conclude by making recommendations for criteria of origin determination to achieve the objectives of the SADC Protocol on Trade in Services. The scope of the literature extends to an evaluation of origin rules for services only, not trade in goods. Three guiding questions that will shape the study are:

i. Is it important for SADC to consider services rules of origin and if so, why?

ii. What are the current and dominant approaches in the setting of services rules of origin in Economic Integration Agreements?

iii. Which of the current and dominant approaches of services Rules of Origin are better suited for the SADC region? Why?

2.3 The basic economics of rules of origin and trade policy considerations in services

There is a growing body of research in the trade policy domain to suggest that the proliferation of preferential trade liberalisation and rule-making in services has heightened the importance of services trade in general (Sauvé & Shingal, 2011, p.3). An important question in the design of preferential trade agreements covering services is to what extent non-members benefit from the trade preferences that are negotiated among members (Fink & Nikomborirak, 2007). The proliferation of preferential trade and investment agreements has made it increasingly difficult to ignore the debate that has ensued over the design, economic effects and legal considerations arising from origin rules for services (Zampetti & Sauvé, 2006; Vilavong, 2011). Congruent with this line of thought, in an analysis of services rules in RTAs, Latrille & Lee (2012) found a steady increase in the amount of RTAs with a services component notified to the WTO from 1995 – 2010, and with it the dominance of two main families of services rules of origin. They are GATS-inspired and NAFTA-inspired services rules of origin.

In a study that set out to determine the economic and policy considerations of rules of origin, Hoekman (1993) explains their necessity for defending acquired rights under preferential agreements and also found that origin rules always have a protectionist effect and they exist to enforce discrimination. Zampetti & Sauvé (2006) take it a step further by asserting the *raison d'être* behind preferential liberalisation is the quest for positive discrimination; granting to one's preferred partner what one may not be willing or prepared to accord to third country partners (Sauvé & Shingal, 2011, p.10). Several studies confirm the view that services origin rules matter because they are used to determine the nationality of services and services suppliers to be eligible for trade preferences (Vilavong, 2011) with a view to extending or denying the benefits foreseen under such agreements (Zampetti & Sauvé (2006). However, Das & Ratna (2011) argue that the purpose of rules of origin is not to deny the preferential market access, rather only prevent trade deflection taking place whereby the non-RTA members can gain market access. More generally, Hoekman (1993) explains that origin rules are necessary to determine which government has jurisdiction to tax, regulate or administer laws; and to collect statistics on trade and investment flows. Komuro (2004) further considers promoting the regional industry, pursuing anti-free-riding and investment-inviting purposes as policy-oriented justifications for rules of origin.

To date there has been some variance on the definition of origin determination for services. Some studies have argued that a rule of origin is the criterion used to determine the national origin of producers (Hoekman, 1993) or the origin of a service (Zampetti & Sauvé, 2006). Studies by Fink & Nikomborirak (2007) and Das & Ratna (2011) refutes this exposition by stating that due to the inherent characteristics of services, the focus on services origin rules in trade agreements has been on delineating the origin of a service supplier.

2.4 Modes of Supply

Services are a diverse group of economic activities distinct from manufacturing, mining and agriculture; and are characterised as intangible, non-storable, and requiring simultaneous production and consumption (Marchetti, 2009). Conceptually, the WTO (2010) concurs that services cover a wide range of intangible and heterogeneous products and activities. The generalisability of much published research supports the notion that due to their intangible nature, trade in services are inherently subject to more constraints than trade in goods (Fink & Mattoo, 2004; Marchetti, 2009; WTO, 2010). For the purposes of the GATS, trade in services is defined as the supply of a service through the following modes:

(a) Mode 1 or cross-border trade, i.e. from the territory of one Member into the territory of any other Member;

(b) Mode 2 or consumption abroad, i.e. in the territory of one Member to the service consumer of any other Member;

(c) Mode 3 or commercial presence of foreign suppliers, i.e. by a service supplier of one Member, through commercial presence in the territory of any other Member; and

(d) Mode 4 or temporary presence of natural persons, i.e. by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

2.5 The impact of Rules of Origin on Domestic Regulation

A growing number of research recognises that the interaction between producers and consumers implies that a definition of trade in services must go beyond our traditional understanding of trade, to encompass provider and consumer mobility across national borders (Fink & Mattoo, 2004; Marchetti, 2009; Vilavong, 2011). Border measures, particularly

tariffs, are almost impossible to apply to trade in services. The very currency of services negotiations consists of domestic regulation (Sauvé & Shingal, 2011, p.10). Domestic regulation refers to the measures that Members take to regulate the supply of services in their territory. GATS Article VI.4 prescribes five elements that fall under domestic regulation negotiations. They are licensing requirements and procedures, qualification requirements and procedures and technical standards. However several studies confirm the view that domestic regulation can act as a very significant restriction and curtail market access granted to foreign services suppliers in trade agreements (Fink & Mattoo, 2004; Chaitoo, 2008; Marchetti, 2009). Some of the barriers to trade in services may take the form of outright prohibitions, quantitative limitations on services, the number of service suppliers, local content requirements, foreign equity limitations, discriminatory taxation and subsidisation (Marchetti, 2009) and a variety of domestic regulations, such as technical standards, licensing and qualification requirements (Fink & Mattoo, 2004). Together with the quantitative restrictions found in GATS Article XVI and the non-discrimination principle of National Treatment found in GATS Article XVII, domestic regulation serves to discipline the more blurred forms of protection that remain barriers to trade in services.

2.6 The impact and implications of Information Technology on rules of origin

Fink & Nikomborirak (2007) and Marchetti (2009) found that due to the inherent characteristics of services, many services require the physical proximity between the supplier and consumer of the service to make trade possible, and therefore call for the movement of one or the other. This argument is compounded by the rise of services as the new frontier for technological innovation and advancement. Hoekman (1993) and Das & Ratna (2011) found that technological changes have augmented the tradability of many services and international sourcing of services has been expanding rapidly. Marchetti (2009) and Das & Ratna (2011) concur that as recent technological changes have greatly enhanced the tradability of services, the need for physical presence is lessened thereby progressively breaking down the need for simultaneity in production and consumption. Fink & Nikomborirak (2007) suggest that in view of the rapid growth of cross-border trade in services, the imposition of trade barriers may well be conceivable in future. The typology of rules of origin for services is important in this instance as the decisive criterion is the territory from which the service is supplied, and the territory into which the service is supplied.

2.7 Rules of origin in the GATS and SADC Protocol on Trade in Services

With reference to the determination of rules of origin in an EIA, GATS Article V:6 reads:

> "A service supplier of any other Member that is a juridical person constituted under the laws of a party to an agreement referred to in paragraph 1 shall be entitled to treatment granted under such agreement, provided that it engages in substantive business operations in the territory of the parties to such agreement."

GATS Article V.3(b) further reads:

> "Notwithstanding paragraph 6, in the case of an agreement of the type referred to in paragraph 1 involving only developing countries, more favourable treatment may be granted to juridical persons owned or controlled by natural persons of the parties to such an agreement."

In line with these GATS requirements, Article 22 of the SADC Protocol on Trade in Services reads:

> "In accordance with the definitions set out in Article 1 and subject to prior notification and consultation, a State Party may deny the benefits of this Protocol to a service supplier of another State Party, where the State Party establishes that the service is being provided by an enterprise that is owned or controlled by persons of a non-State Party and that has no substantial business operations in the economy of a State Party."

In turn, Article 1 of the SADC Protocol on Trade in Services defines:

> "SADC juridical person" means a legal entity set up in accordance with the laws of a State Party, and engaged in "substantial business operations" in the territory of that State Party or any other State Party"

"Substantial business operations" means, inter alia, operations carried out by an entity incorporated in and licensed by a State Party to provide services, and shall be further developed through negotiations after adoption of this Protocol. The results of such

negotiations shall be annexed to this Protocol." This study attempts to give meaning and content to the last-mentioned incomplete definition.

2.8 Current and dominant approaches

A number of studies have reported commonalities with the typology of rules of origin for services, particularly in the way such rules are drafted. Fink & Nikomborirak (2007); Vilavong (2011); and Latrille & Lee (2012) concur that rules of origin for services are reflected as *denial of benefits* clauses and are typically found in services and/or investment chapters of EIAs, in particular under the definition of 'juridical person', 'companies' and 'denial of benefit' or 'extension of benefit' clauses.

2.8.1 Common criteria for defining rules of origin in EIAs

Hoekman (1993) examined the criteria used by some countries to determine the origin of services and established that in practice, most countries determined origin through the legal or economic relationship. The criteria used to determine the origin of a service supplier include the following: (i) place of incorporation; (ii) nationality of control; (iii) nationality of ownership; (iv) principal place of business; (v) location of headquarters or centre of management/decision making; (vi) origin of value added; and (vii) origin of material and/or intangible inputs. Hoekman (1993) argues that a glaring limitation to such criterion according origin merely through place of incorporation are those companies incorporating in a country purely for tax avoidance or related purposes but do not conduct business or do not have assets in that country. The author explains further the anomalies associated with establishing the nationality of an entity by employing an ownership, substantial interest or control test. The author illustrates his argument with an example of a firm incorporated in a country signatory to a preferential agreement but controlled in a non-signatory country selling products that embody mostly inputs sourced from another signatory country. The author argues origin criteria for services must therefore be based on nationality or value added. A nationality-based origin rule such as location of incorporation is perhaps the simplest and most transparent procedure, and can be used to determine the origin of both products and providers. Value-added refers to the value and enhancement of a product or service before it is supplied to the consumer. While the author acknowledges that a value-added criteria of

origin determination will be complex to implement, the inherent nature and characteristics of services renders this exposition unsatisfactory.

A more recent study by Fink & Nikomborirak (2007) examined existing trade agreements, in particular the 2003 China-Hong Kong Closer Economic Partnership Agreement (CEPA), which currently has the most detailed rules of origin. The key criteria for rules of origin in services for companies (juristic persons) include (i) incorporation; (ii) substantive business operations; (iii) domestic ownership and control; and (iv) domestic employment. Criteria for individual service suppliers (natural persons) include: (i) nationality; (ii) residency; and (iii) centre of economic interest. Similarly, Das & Ratna (2011) examined different RTAs and listed origin criteria according to the mode of supply of the service. In the study, the criteria used to determine the origin of a service provider in modes 1 and 3, which are companies and juridical persons corroborate with the findings by Fink & Nikomborirak (2007). In their examination of RTAs, Das & Ratna (2011) were unable to make a determination of rules of origin in mode 2 due to the nature of services trade transactions. However, the criteria used to determine the origin of a service provider in mode 4, which are natural persons only extended to: (i) nationality; and (ii) residency and not 'centre of economic interest' as found in the study by Fink & Nikomborirak (2007).

Recent evidence suggests the dominance of one approach in the origin determination for services over other approaches. Latrille & Lee (2012) sampled services rules in 80 agreements notified to the WTO from 1995 – 2010 and found few significant variations in the rules of origin for services. The authors reported that almost 80% of the agreements sampled use the GATS notion of "substantive business operations", and to a lesser extent terminology such as "substantive business activities" or "continuous business activities". This study also found that agreements involving the European Union use their own terminology and jurisprudence which combines the notions of 'establishment' and 'substantive business operations'. The authors found that the remaining 20% of the sample are either silent on rules of origin (India-Singapore, Pakistan-Malaysia), or deviate from the "substantive business operations" requirement. Latrille & Lee (2012) explain that with the latter deviation, the rule of origin is encapsulated in the definition of "companies" rather than the 'denial of benefit' clause (Caricom) or the words "substantive business operations" is not used at all (Australia-

New Zealand). The study also revealed that a few agreements have specific rules of origin for maritime transport. The present research delves deeper into services origin rules than Latrille & Lee (2012) and covers more recent agreements notified to the WTO.

2.8.2 Liberal versus Restrictive Rules of Origin

According to Hoekman (1993), the typology of rules of origin may be preferential or non-preferential. More recent studies refer to the typology as liberal or restrictive rules of origin (Fink & Nikomborirak, 2007; Das & Ratna, 2011). Fink & Nikomborirak (2007) and Vilavong (2011) define liberal and restrictive rules of origin. Liberal rules of origin enables service providers from non-member countries to benefit from improved market access negotiated under an FTA. However such a rule still falls short of MFN treatment, because service providers from non-members need to be established in at least one FTA member country first. However, if entry conditions in at least one member country are liberal, a non-restrictive rule of origin will *de facto* afford broad market access within the FTA territory to service providers from non-FTA countries. By contrast, if restrictive rules of origin are chosen, only a subset of service providers established in an FTA area benefits from liberalisation commitments undertaken by member countries. This difference in treatment has both economic and bargaining implications (Vilavong, 2011). In other words, even though a liberal rule of origin does not fully eliminate discrimination against non-member countries, there is flexibility as it enlarges the pool of foreign suppliers competing for access in the domestic market. Conversely, a restrictive rule of origin may be employed by governments who wish to develop their domestic service industry before exposing their service industry to global competition (Fink & Nikomborirak, 2007).

2.9 Policy and economic considerations for SADC

In an analysis of the economic effects of preferential versus MFN liberalisation in services, Mattoo & Fink (2004) found that a liberal rule of origin is in economic terms more desirable as it enlarges the pool of foreign suppliers competing for access to the domestic market and will attract new FDI. Furthermore, the study reveals that while preferential liberalisation in services brings about static welfare gains, MFN liberalisation yields greater welfare gains. However, Mattoo & Fink (2004) argue that if an FTA is specifically designed by policy-makers to develop infant domestic service industries and which cannot immediately be

exposed to global competition, a restrictive rule of origin is suitable. The authors argue that a restrictive rule of origin would in effect offer a firm first-mover advantage to potentially second-best service providers from within an RTA territory, to the exclusion of the first-best providers from outside the RTA territory.

Das & Ratna (2011) suggest that origin determination for services rules must go beyond the denial of benefits perspective in terms of restrictiveness if they are to have broader developmental effects. The authors refute the exposition by Mattoo & Fink (2004) that trade and investment diversion in services origin determination is based solely on efficiency of the service provider. According to Das & Ratna (2011), domestic service providers could sustain their business operations due to enhanced efficiency within the liberalised RTA framework. Furthermore, the authors argue that instead of viewing rules of origin as restrictive, it should be viewed from a developmental perspective where the infant service suppliers are exposed first to limited competition under the RTA so that they can be better prepared to face the global competition at a later stage. The authors suggest that RTAs with a broad developmental perspective could benefit from having restrictive rules of origin for services. As the sample size employed in the research by Das & Ratna (2011) was small, the findings are not definitive and cannot be generalised. However, both studies by Fink & Mattoo (2004) and Das & Ratna (2011) concur that restrictive rules of origin can play an important role in developing the capacity and ensuring sustainability of smaller firms in an RTA.

One study has drawn attention to the paradox that the misuse of origin rules of services may transform them into a trade policy instrument per se instead of simply acting as a device to support a trade policy instrument (Wang, 2010). In an earlier study, Komuro (2004) found that the strictness of FTA origin criteria flows from their policy-oriented character. Das & Ratna (2011) refute prior literature that states that the purpose of rules of origin is to deny market access. The authors argue that if policymakers seek to protect the vulnerable and sensitive industry from external competition under an RTA, rather than building trade-restrictive rules of origin, the best option is not to offer market access in those sectors. The present research will attempt to contribute to this discussion from a SADC perspective on whether trade policy-makers and negotiators in the region can consider this.

2.10 Significance of the research

The SADC Regional Indicative Strategic Development Plan (RISDP) sets out the region's priority intervention areas, and maps out the goals and targets which include trade, economic liberalisation and development. The RISDP specifically sets goals for technology transfer and innovation, employment, human development in terms of high level and critical skills development as well as promoting value addition by encouraging the creation of new industries including services, and encouraging manufactured exports and services.

Regionally, preferential market access negotiations in SADC commenced in April 2012. The SADC Protocol on Trade in Services (Protocol) is the first intra-regional preferential services agreement and sets out the framework for the liberalisation of trade in services between SADC Member States. The objectives of the Protocol are to progressively liberalise intra-regional trade in services, create a single market for trade in services, enhance economic growth and development and improve the capacity and competitiveness of the services sectors of SADC State Parties.

Origin rules for services are one such instrument in which signatories may defend their rights under a preferential services agreement. Origin rules for services have proved to be increasingly relevant in the management of trade policy in preferential trade agreements and therefore can be used as an instrument of trade policy to address the priority intervention areas set out in the RISDP. The context for reviewing the literature is to set out the best approach to take to develop disciplines for services origin rules to achieve the objectives of the SADC Protocol on Trade in Services.

The origin determination for services is important for the SADC services negotiations due to the concurrent services negotiations on the Economic Partnership Agreements between the European Union and other regional configurations which some SADC Members belong to including other negotiations taking place on the continent (COMESA, TFTA, CFTA, EAC and other EPA configurations).

CHAPTER 3: AIM AND OBJECTIVES OF STUDY

3.1 Introduction

The purpose of this chapter is to describe the methodology to be used in determining a suitable model for services origin rules in the SADC region. The Protocol states in Article 1 that the definition of 'substantial business operations' is subject to further negotiation after adoption of the Protocol. As the Protocol has been adopted, certain definitions need interpretation. The purpose of the study is to examine different types of origin rules for services, with a view to making recommendations for suitable criteria for SADC. The first part describes the research methodology followed by the research design of the study. The next part of this chapter outlines the techniques used for data collection and sampling. Thereafter this chapter seeks to draw on the thematic analysis approach to qualitatively analyse the data as specified by Boyatzis (1998) and Braun and Clarke (2006). In conclusion, the potential limitations and validity of the design and methods of the research will be presented.

3.2 Research methodology

The research herein is a qualitative case study of typologies of multiple case studies (Yin, 2003) to determine a suitable model for the development of services origin rules in the SADC region. The study is qualitative as it produces findings arrived from real-world settings where the phenomenon of interest unfold naturally (Patton, 2001). The study involves analysing and interpreting the data set that tests the three research questions in order to discover meaningful patterns descriptive of a particular phenomenon (Auerbach & Silverstein, 2003). Qualitative methods are appropriate for this type of study because the theoretical framework and methods match what the study seeks to answer (Braun & Clarke, 2006). This is the first study of this nature that delves specifically into potential services origin rules in the SADC region. Others have included case studies on services origin rules in ASEAN (Fink & Nikomborirak, 2007); Laos (Vilavong, 2011); and India (Das & Ratna, 2011). The case study approach is particularly well suited to new areas of research or research areas for which existing theory seems inadequate (Eisenhardt, 1989). As there are no known studies about this topic in the SADC region, case study is an ideal methodology when a holistic, in-depth investigation is needed (Feagin, Orum, & Sjoberg, 1991).

The study investigates the phenomenon of rules of origin for services in its real life context by using multiple sources of evidence. The research is a collective case study as it involves studying multiple cases simultaneously or sequentially in an attempt to generate a broader appreciation of a particular issue (Stake, 1995). The limitations to case study methodology are the potential for bias and subjectivity of the researcher, as well as the difficulty in summarising case studies due to the properties of the reality studied, not the research method (Merriam, 2009).

3.3 Research Design

The research takes a deductive approach to case study design. This is an ideal approach as the qualitative multiple case study will focus on interpretation rather than quantification; has an emphasis on subjectivity rather than objectivity and is geared towards process rather than outcome (Kohlbacher, 2006). The thematic analysis employed in the research converges to a specific conclusion by using existing theory and the full data set to test the hypothesis (Wilson, 2010). Thereafter, the research makes recommendations for suitable services origin rules for the SADC region in the context of the existing rules contained in the Protocol. Ideas, patterns and theories are required to explore suitable services origin rules in the SADC context, which makes a deductive line of inquiry essential for the study.

3.4 Data gathering

3.4.1 Data collection

The essence of case study methodology is triangulation, the combination of different levels of techniques, methods, strategies, or theories (Johansson, 2003). The data corpus presented in the case study is a wide range of literature which includes both primary and secondary sources. Interviews, questionnaires, EIAs, the GATS legal text, SADC Protocol on Trade in Services, NAFTA and Hong Kong – China Closer Economic Partnership Agreement have been explored as key primary sources. Relevant books, journal articles, publications of recognised international organisations and Internet-based research have been widely utilised as secondary sources of data.

3.4.2 Data collection methods

(i) Documentation Review

On documentation review, the primary source of data originated from rules of origin provisions contained in EIAs. All EIAs used in the research were sourced from the WTO Regional Trade Agreement Information System which is a database of all RTAs notified to the WTO. The research was limited to EIAs that entered into force from 2009 – 2013 with 'denial of benefit' provisions. In order to determine current approaches and keep the study relevant, the analysis of EIAs was limited to a five-year period. There are thirty one (31) EIAs entered into force from 2009 – 2013 that were notified to the WTO. Of these thirty one (31), seven (7) were in Spanish and one (1) could not be located. Furthermore, two agreements were repeatedly referred to in the interview, questionnaires and publications. The North American Free Trade Agreement (NAFTA) and the Mainland and Hong Kong Closer Economic Partnership Agreement (CEPA) have been included in the analysis. The research therefore examined a total of twenty five (25) EIAs containing denial of benefit clauses. The EIAs are listed below in Table 1. Other primary sources of data include the GATS, SADC Protocol on Trade in Services, NAFTA and the Hong Kong – China Closer Economic Partnership Agreement.

Table 1: List of EIAs in the data set

No.	RTA Name	Coverage	Type	Date of Entry into Force	Status	Located
1	Australia – Chile	Services	EIA	06 Mar 2009	In force	Yes
2	Canada – Peru	Services	EIA	01 Aug 2009	In force	Yes
3	Chile – Colombia	Services	EIA	08 May 2009	In force	No
4	Colombia – Northern Triangle	Services	EIA	12 Nov 2009	In force	No
5	EU – Albania	Services	EIA	01 Apr 2009	In force	Yes
6	Japan – Vietnam	Services	EIA	01 Oct 2009	In force	Yes
7	Pakistan – China	Services	EIA	10 Oct 2009	In force	Yes
8	Panama – Guatemala	Services	EIA	20 Jun 2009	In force	No
9	Panama – Honduras	Services	EIA	09 Jan 2009	In force	No
10	Panama – Nicaragua	Services	EIA	21 Nov 2009	In force	No
11	Peru – Chile	Services	EIA	01 Mar 2009	In force	No
12	Peru – Singapore	Services	EIA	01 Aug 2009	In force	Yes
13	US – Oman	Services	EIA	01 Jan 2009	In force	Yes
14	US – Peru	Services	EIA	01 Feb 2009	In force	Yes
15	Chile – China	Services	EIA	01 Aug 2010	In force	Yes
16	Chile – Guatemala	Services	EIA	23 Mar 2010	In force	No
17	EU – Montenegro	Services	EIA	01 May 2010	In force	No
18	New Zealand – Malaysia	Services	EIA	01 Aug 2010	In force	Yes
19	Peru – China	Services	EIA	01 Mar 2010	In force	Yes
20	Canada – Colombia	Services	EIA	15 Aug 2011	In force	Yes
21	China – Costa Rica	Services	EIA	01 Aug 2011	In force	Yes
22	EU – Korea	Services	EIA	01 Jul 2011	In force	Yes
23	Hong Kong, China – New Zealand	Services	EIA	01 Jan 2011	In force	Yes
24	India – Japan	Services	EIA	01 Aug 2011	In force	Yes
25	India – Malaysia	Services	EIA	01 Jul 2011	In force	Yes
26	Peru – Korea	Services	EIA	01 Aug 2011	In force	Yes
27	Japan – Peru	Services	EIA	01 Mar 2012	In force	Yes
28	Panama – Peru	Services	EIA	01 May 2012	In force	Yes
29	Canada – Panama	Services	EIA	01 Apr 2013	In force	Yes
30	Costa Rica – Singapore	Services	EIA	01 Jul 2013	In force	Yes
31	Malaysia – Australia	Services	EIA	01 Jan 2013	In force	Yes
32	North American Free Trade Agreement	Services	EIA	01 Jan 1994	In force	Yes
33	China – Hong Kong, China	Services	EIA	29 Jun 2003	In force	Yes

Source: WTO (2014)

(ii) Interviews and Questionnaires

The study herein employs interviews and questionnaires to collect data. As this study is exploratory, semi-structured interviews were conducted or questionnaires were developed to obtain the necessary data. All respondents expressly consented (Annex B Sample Consent Form) to their participation in the research study, were informed of the purpose of the research and that it will be published. Please refer to Annex A for the questions put forward to the respondents in the interview and questionnaire. The main focus of the interview and questionnaires was to gain insight into the respondents' perspectives of which best approach to take to achieve the objectives of the SADC Protocol. The interview was recorded and transcribed. During the interview and interaction with the documents, certain patterns, categories and themes emerged.

(iii) Selection criteria

There was a need for purposeful sampling in this study due to the highly specialised and technical nature of trade in services and origin rules for services. Determining adequate sample size in qualitative research according to Sandelowski (1995) is ultimately a matter of judgment and experience in evaluating the quality of the information collected against the uses to which it will be put, the particular research method and purposeful sampling strategy employed, and the research product intended. The size of the sample in the present study is sufficient to deliver credible results. According to Onwuegbuzie & Leech (2007) sample sizes in qualitative research should not be too large that it is difficult to extract thick, rich data. The interview and questionnaires were open-ended and directed to five (5) experts in the field who are directly involved in: trade policy-making, trade negotiations and trade in services. One (1) expert declined to be interviewed as they were unavailable; and one (1) expert did not return the questionnaire, despite follow-ups. The selection criteria for the respondents were: at least seven (7) years experience in their field of work. The data analysis methods that were employed include: (i) Emphasis on the authenticity of multiple perspectives; and (ii) Respondents were encouraged to elaborate on their responses through follow up questions during the interview and open-ended questions in the questionnaires.

Table 2: Profile of respondents

Type of Respondent	Number of years of experience	Method of data collection	Affiliation
Trade Policy Expert	16	Interview	South Africa
Trade Policy Expert	9	Questionnaire	SADC Secretariat
Trade Policy Expert	18	Questionnaire	WTO Secretariat

The three trade policy experts (respondents) who participated in the research have forty three (43) years of trade policy experience combined and represent diverse backgrounds. Trade policy expert A participated in an interview and represents South Africa in the WTO and SADC trade in services negotiations. Trade policy expert B responded to the questionnaire and represents the SADC Secretariat in the current trade in services negotiations. Trade policy expert C responded to the questionnaire and represents the WTO Secretariat and has regional experience from working in the SADC trade in services negotiations. Great care was taken by the researcher to code, theme, review and refine the data set to ensure that the thematic analysis approach based on the work of Boyatzis (1998) and Braun & Clarke (2006) is systematically presented.

3.5 Data analysis and interpretation

A systematic review of information is required for interpreting qualitative data (Kohn, 1997). As such, the data collection and analysis took place concurrently (Baxter & Jack, 1998). The thematic analysis approach was used to qualitatively analyse the data in order to reduce the amount of data available from the EIAs, interview, questionnaires and publications on services rules of origin. The thematic analysis approach based on the work of Boyatzis (1998) and Braun & Clarke (2006) was chosen because it allowed the study to be informed by the use of a theoretical framework where themes were identified, analysed and patterns reported on. Thematic analysis supports the deductive approach to case study design as existing agreements, theory and prior research are coded, themed, reviewed and refined before writing

the analysis (Boyatzis, 1998). The following phases of thematic analysis in Table 3 outlined by Braun and Clarke (2006) was employed during the proposed study on the EIAs, interview, questionnaires and documentation review.

Table 3: Thematic analysis

No.	Phase	Description of the process
1	**Familiarising yourself with the data**	Repeated reading of the data, search for meanings and patterns, take notes, mark ideas for coding, transcribe verbal data
2	**Generating initial codes**	Generate initial list of ideas, identify interesting aspects in the data items, code all data extracts, code as many themes/patterns as possible
3	**Searching for themes**	Sorting different codes into potential themes, collating relevant coded data extracts within identified themes, use tables, collect themes/sub-themes
4	**Reviewing themes**	Refine themes, create/separate/merge themes where applicable, identify coherent patterns, create thematic analysis further review and refine table
5	**Defining and naming themes**	Refine thematic table, define and further refine themes that will be presented for the analysis, organise data into coherent and consistent account
6	**Producing the report**	Final analysis and write-up of the report; provide concise, coherent, logical, non-repetitive, and interesting account of the story the data tell within and across themes, respond and make an argument in relation to your research question

Source: Braun and Clarke (2006)

The researcher analysed the data to address the research questions:

1. Is it important for SADC to consider services rules of origin and if so, why?
2. What are the current and dominant approaches in the setting of services rules of origin in Economic Integration Agreements?
3. Which of the current and dominant approaches of services Rules of Origin are better suited for the SADC region? Why?

By organising the analysis in this way, the researcher was able to ensure that all the questions were adequately addressed in the data collection and analysis; but also to ensure validity of the findings. The purpose of the interview and questionnaires were to provide clarity to some of the issues; to provide context and address the main SADC concerns in this regard. Due to the high volume of information arising from the EIAs, the data was coded separately from the interview and questionnaires data to ensure that all relevant content was systematically coded and presented. The process involved reading all EIAs and documents and coding all data extracts first. Through a series of patterns and commonalities in the wording of the EIA provisions, initial themes were identified. Themes were also identified from the interview and questionnaires by grouping similar ideas and concepts together. The identification of the main themes was also informed by the literature review. The initial themes that were identified in relation to the content references were entered into two Excel spread sheets for easy handling and consolidation. The themes were crosschecked to ensure nothing of importance was left out. The relevant extracts of the provisions in the EIAs were coded and accorded initial themes; whereas the interview and questionnaire data were coded according to the broader focus area and theme. As the initial themes were subsequently refined, Table 4 depicts the final themes in relation to the research questions.

3.6 Validity and reliability

3.6.1 External validity

External validity is a concern only for analysis of multiple cases (Kohn, 1997). Yin (2003) noted in case study analysis and its small number of cases, that external validity refers to the ability to generalise results to some broader theory. However, generalising results is a holistic

fallacy (Kohn, 1997) that can be averted through using different methods. This is important because the findings of the proposed research are intended to be applicable to the SADC context only. The data collection methodology covers a broad range of EIAs globally; however, the interview and questionnaires provide answers as to how and why a particular model for services origin rules may be adopted in the SADC region. This study exhibits a certain *sui generis* and is contextual to the properties and dimensions of the SADC region only, through a multiple case study analysis.

3.6.2 Internal validity

Due to the specialisation and highly technical subject matter of services origin rules, a particular threat to internal validity is the selection bias with the respondents in the interviews and questionnaires. This selection has been made to include only experts that are closely involved with trade policy-making and trade negotiations. Such experts understand the trade policy landscape within which services suppliers operate and are therefore well suited to respond to questions on this subject matter. While the results could be subjective, the selection bias is mitigated by the diversity of the respondents whose expertise emanate from their work in South Africa, the SADC Secretariat and the WTO Secretariat.

3.6.3 Reliability

To ensure trustworthiness, the following steps were taken into consideration in the implementation of this study. During the interview, every care was taken to ensure that points were made clear through follow up questions. The study also uses the theory of triangulation between responses and with the literature, to ensure the trustworthiness of the findings. The coding data captured in the Excel spread sheets will be stored in a secure place for a reasonable period of time after publication and would be made available upon request.

3.6.4 Research Limitations

The following have been identified as research limitations:

a. A limitation of the study is the small sample size. Further, the same method was not used for all the respondents because there were follow-up questions in the interview,

and not for the questionnaires. These findings therefore cannot be generalised based on this study alone. Furthermore, the study is conducted in the SADC context only and the conclusions and recommendations may not be applicable to or imposed on other economic integration agreements.

b. The lack of data on trade in services in the SADC region renders it difficult to illustrate the economic implications of adopting restrictive or liberal rules of origin for services in the SADC region. Initiatives are underway to improve the collection and dissemination of services statistics in the region and this will serve as a useful basis to conduct further research on this issue.

c. In as much as trade policy is an economic issue, it is also largely influenced by political economy issues. The study is divorced from the political incongruities in the SADC region, but rather focuses solely on the analytical and economic considerations associated with services origin rules. This is due to the concurrent services negotiations on the Economic Partnership Agreements between the European Union and other regional configurations which some SADC Members belong to; and the SADC Protocol on Trade in Services.

d. The Economic Integration Agreements (EIAs) were sourced from the WTO RTA Information System. The database allowed the user to choose certain topics covered in the agreements which helps to narrow down the search. In the present study, 'denial of benefits' was ticked to refine the search for services agreements notified to the WTO as GATS Article V. Economic Integration Agreements from 2009 – 2013. The database found 31 EIAs notified to the WTO during this period using the 'denial of benefit' topic to refine the search. When cross-referenced without refining the search, it was found that there are other agreements containing denial of benefit provisions that were not picked up by the database. For purposes of the present research, the EIAs analysed are those using the refined search tool on the WTO RTA Information System.

3.7 Conclusion

The research herein is a qualitative study that takes a deductive approach to case study design. Thematic analysis (Boyatzis, 1998) which entails a six (6) phase process (Braun and Clarke, 2006) is suitable for the theoretical framework and data set of the study. This chapter has explained the research methodology and design, and described the data management and analysis of the data set involved in the study. Chapter 4 presents the results of the study.

CHAPTER 4: RESULTS OF THE STUDY

4.1 Introduction

The purpose of the study was to explore, through case study, the dominant approaches to the formulation of rules of origin criteria in EIAs, with a view to making recommendations for suitable services origin criteria for the SADC region to achieve the objectives of the Protocol on Trade in Services. The purpose of this chapter is to present the results of the research. The data set included a thematic analysis of twenty five (25) EIAs, one interview and two questionnaires. The first part of the chapter presents the results of the research which are organised in themes in relation to the research questions. The chapter will conclude with an overview of the key results of the study. Three guiding questions that shaped the study are:

1. Is it important for SADC to consider services rules of origin and if so, why?
2. What are the current and dominant approaches in the setting of services rules of origin in Economic Integration Agreements?
3. Which of the current and dominant approaches of services Rules of Origin are better suited for the SADC region? Why?

Initial themes emerged from the data analysis. The initial themes from the EIAs, interview and questionnaire data were subsequently refined. When both sources were read *en masse*, some themes were closely related that they merged while others became sub-themes of a broader focus area in the research. After further reviewing and refinement, themes and sub-themes were identified for the analysis in relation to the research question. Table 4 below shows ten (10) main themes that have been identified from the data set consisting of 1 interview, two questionnaires and the twenty five (25) EIAs reviewed.

Table 4: Final Themes in relation to the research questions

Research Question	Theme	Sub-theme
Is it important for SADC to consider services rules of origin and if so, why?	Nature of SADC Protocol	SADC Mandate Securing integrity and value of preferences Built-in negotiating agenda
	Trade policy management	Free riding Regional Integration National development objectives
What are the current and dominant approaches in the setting of services origin rules in EIAs?	General definitions and procedural requirements	Discretionary power to deny benefits Obligation to notify and consult Procedural requirements such as timeframes To whom can the benefits be denied
	Substantial business operations	Real and continuous link
	Ownership and/or control	
	Diplomatic relations	
	Violation and circumvention	
Which of the current and dominant approaches of services rules of origin are better suited for SADC? Why?	Substantial business operations	
	Investment to support skills development, technology transfer, job creation	
	Domestic regulation	Mutual Recognition Agreements Monitoring, evaluation and enforcement

4.1.1 Findings on the question relating to the importance of services rules of origin for SADC

Two main themes and a number of subthemes (as illustrated in Table 5 below) are identified in considering the importance of rules of origin on trade in services for SADC namely the matters relating to the nature of the Protocol and those relating to the management of trade policy.

Table 5: Themes and sub-themes relating to the importance of services rules of origin for SADC

Main theme	Nature of the SADC Protocol	Trade Policy Management
Sub-theme	Mandate to negotiate under the Protocol	National development objectives
	Securing the integrity and value of preferences	Regional Integration
	Built in negotiating agenda	Free riding

a. Nature of the SADC Protocol

The nature of preferential trade agreements (PTA) require rules of origin in order to ensure that the benefits of the agreement are extended and limited to those that belong to the agreement. In the case of SADC, Members want to create an integrated market for services which will strengthen the region's services capacity, efficiency and competitiveness as part of a broader integration process. In analysing the interview and questionnaire data, these recurring objectives led to the identification of a key theme due to the preferential nature of the SADC Protocol.

A sub-theme relating to the preferential nature of the Protocol is for it to secure the integrity and commercial value of preferences. According to trade policy expert C, rules of origin are important in any preferential trade agreement especially where SADC commitments are better than GATS commitments or preferences granted under other preferential trade agreements. In such a case the origin of a service or service supplier will arise as the rights under the SADC Protocol will only be accorded to those being of SADC origin. According to trade policy expert B, rules of origin seek to avoid misuse and abuse of preferences by non-SADC services suppliers. In addition, Article 22 of the Protocol contains the 'denial of benefits' provision which grants a State Party the right to deny the benefits of this Protocol to a service supplier of another State Party if it is established that the service is being provided by a non-State Party and that has no substantial business operations in the economy of the State Party.

The results show that it is important for SADC to consider services origin rules due to the in-built negotiating mandate provided for in the SADC Protocol. In particular, the term 'substantial business operations' "shall be further developed through negotiations after adoption of this Protocol. The results of such negotiations shall be annexed to this Protocol."

b. Trade policy management

One of the requirements for establishing a GATS Article V agreement is to allow third party suppliers the benefits under the agreement provided they are juridical persons constituted under the laws of a party and it engages in substantive business operations in the territory of the parties. Notwithstanding this, GATS Article V also provides that in an agreement involving only developing countries, more favourable treatment may be granted to juridical persons owned or controlled by natural persons of the parties to such an agreement.

The results show that rules of origin in preferential trade agreements are important as a trade policy management tool to achieve national development objectives and more regionally integrated markets. Origin rules can also be used to manage free-riding by non-Members of a

preferential trade agreement. A key theme identified to encapsulate these ideas is trade policy management.

According to trade policy expert A, depending on the type of rules of origin, it can be used to achieve national and regional development objectives. One such way is to create an enabling environment for companies to invest in the region and increase foreign direct investment. Hence, in terms of trade policy going forward, as the region strengthens its integration in goods and services and the COMESA-EAC-SADC Tripartite FTA and eventually the Continental Free Trade Agreement, the issue of services will obviously become more important and much greater attention will be focused on it.

A common view amongst trade policy experts A and B was that rules of origin for services would help to prevent free riders i.e. non-SADC service suppliers from benefiting under a preferential trade agreement. According to trade policy expert A, there is no fool proof mechanism from preventing third country service providers (non-Members) from entering a PTA signatory Member's market to provide services. The purpose is not to prevent it; rather to manage it. Rules of origin will be one of the tools that will be used to avoid circumvention. In other words, rules of origin is a trade policy tool that can be administered to prevent third country service providers from benefiting from the preferential market access negotiated in EIAs.

Trade policy expert A said "it would serve at least some fundamental purpose in ensuring that there are concrete and tangible efforts to not just use a SADC country as a PO Box platform in order to gain the benefits of preferential market access into the economically significant markets in SADC like South Africa and other faster growing countries like Angola, Mozambique and Zambia." In other words, under the guise of a State Party, a shell company is a third country supplier who seeks to benefit under a preferential market access agreement but who do not make meaningful socio-economic contributions in the host country.

Trade policy expert C who had a different view, argued that "the existing origin rules, together with Art V:6 of the GATS make investment in economic areas constituting services PTAs attractive, as third country suppliers could benefit from the treatment granted under the PTA, with regard to Mode 3 and 4. With regard to Mode 1, the ownership situation of a foreign investor would be irrelevant. Preferential liberalization in professional services would allow for greater movement of natural persons from Member States through Mode 4, but would also benefit third country suppliers in case Contract Service Supply would be permitted within the preferential trade agreement."

A contractual service supplier refers to a natural person who is an employee of a juridical person with no commercial presence in the territory he/she enters to temporarily perform a service in terms of a contract between his or her employer and a service consumer in the territory of the other Party.

4.2 Key findings relating to the question on the current and dominant approaches in the formulation of rules of origin for trade in services in EIAs

The current and dominant approaches adopted in the formulation of rules of origin on trade in services in EIAs, from which the main themes and sub-themes were derived are presented below. The five main themes (as illustrated in table 4) relate to the substance of certain relevant provisions in EIAs: (a) general provisions defining the intended potential beneficiaries of an agreement and the procedural requirements to be followed in order to deny such beneficiaries the benefits under an EIA; (b) provisions requiring persons of another EIA Party to conduct substantial business operations in order to qualify for the beneficiary treatment offered by the EIA; (c) provisions defining persons in terms of certain ownership and control criteria in order to qualify for the beneficiary treatment under the EIA; (d) provisions demanding diplomatic relations between the contracting parties that could be invoked to deny beneficiary treatment; and (e) provisions that may be invoked to deny beneficiary treatment in order to prevent the violation and circumvention of state actions taken outside the scope of an EIA. Given the absence in the EIAs of origin rules applicable to Mode 1, the respondents consider the origin of the service to be the place from which the service is provided.

4.2.1 General definitions and procedural requirements

This theme was identified due to the similarities found in the provisions of the EIAs under review. First and foremost it is essential to determine who qualifies for the potential benefits under an EIA and then to determine the procedures that must be followed to disqualify a beneficiary. This relates to another important sub-theme in that the potential benefits of an EIA are not offered to any other State Party but to persons (whether natural or juristic) of another Party. Qualifying provisions defining the potential beneficiaries of an EIA whether they are natural persons, legal persons, service suppliers, investors etc. differ between EIAs. Sub-themes emerged because parallels were drawn from the procedures that need to be followed before a Party to an EIA can deny the benefits of the agreement to a qualifying beneficiary of another Party to the EIA.

a. Who qualifies for benefits and the discretionary power to deny benefits

Benefits are not denied to any other State party but to persons (whether natural or juristic) of any other Party. All the EIAs under review (depending on the EIA Chapter involved) allow denial of benefits against juridical persons, services suppliers, services providers, investors or enterprises of the other Party. This necessitates a determination of the definition of the person in concern whether it is a 'juridical person', 'enterprise', 'service supplier', 'service provider', or 'investor' including both natural and juridical persons.

Figure 1 shows there are twenty one (21) EIAs under review that uses permissive language such as "A party may deny the benefits of this Chapter to …" This non-obligatory language provides signatories to the EIA with the discretion to invoke the denial of benefits clause. The only exception to this is the obligatory language contained in the Canada-Panama EIA which states that "The benefits of this Chapter shall be denied to a service provider of the other Party…" Two EIAs use positive references to extend the benefits of the EIA by stating that "… juridical persons established under the laws of one side will be entitled to preferential treatments…" (CEPA) and "… shall only extend the benefits of this Agreement …" (EU-Korea). Only one (1) EIA, EU-Albania is silent on this, most likely because at the time of entry into force, Albania was seeking candidature to become a Member of the European Union.

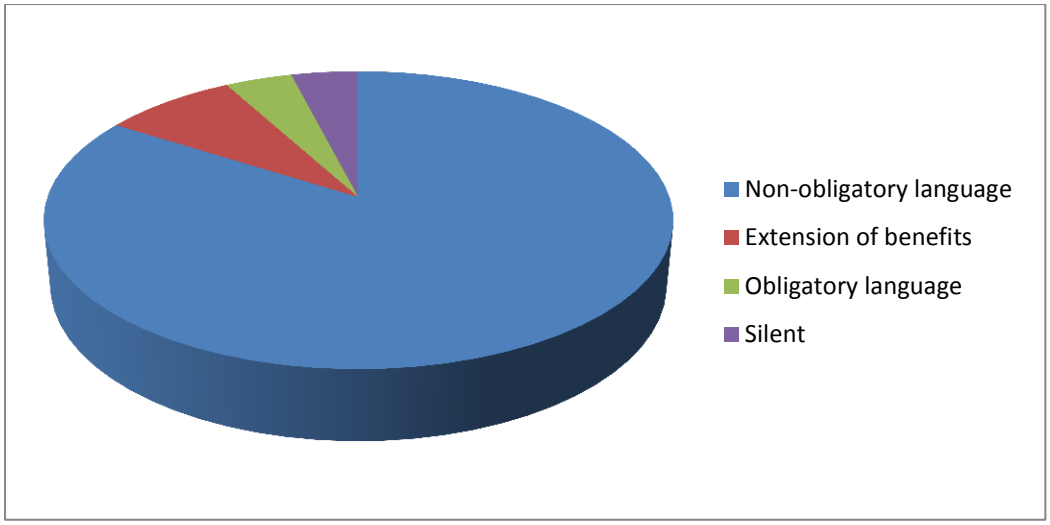

Figure 1. Denial and Extension of Benefits

b. Obligation to notify and consult clauses

Figure 2 shows seventeen (17) EIAs under review contain provisions that require prior notification and consultation before a Party is permitted to deny benefits of the Agreement. This means that the denying party must notify, usually in writing, the other Party prior to denying the benefits of the agreement. In these EIAs, the obligation to notify is accompanied by an obligation to consult the other Party before a decision on denial can be made. Two EIAs under review only require prior notification (Canada-Peru and Hong Kong, China-New Zealand) whereas the rest of the EIAs are silent on the issue.

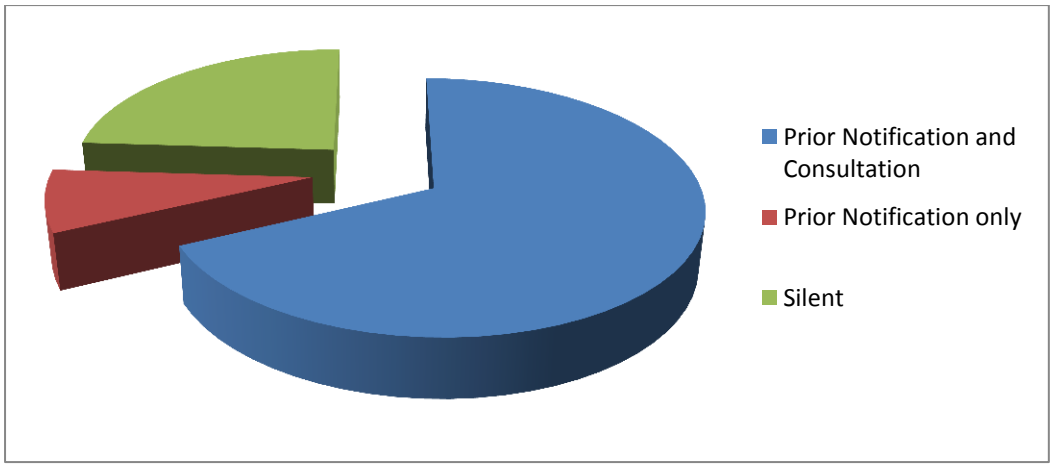

Figure 2. Prior Notification and Consultation

c. Prescriptive time periods for notification and consultation

Figure 3 shows only two (2) EIAs prescribe specific timeframes within which a Party must notify the other Party after a decision to deny benefits has been taken or timeframes within which a Party must enter into consultation with any affected Party. The Hong Kong, China-New Zealand EIA states that, "subject to prior notification wherever possible, but in any event within 10 working days of the decision" a Party is required to notify the other Party. In addition, a Party that has denied benefits shall enter into consultations if requested by the other Party within 30 days following the receipt of the request. In the case of the Malaysia-New Zealand EIA, it states that a Party shall enter into consultations within 30 days following notification if requested by the other Party. In the case of the Peru-Singapore and US-Peru EIAs reference is made to general dispute settlement provisions in those agreements on the procedures to be followed when a Party decides to deny benefits.

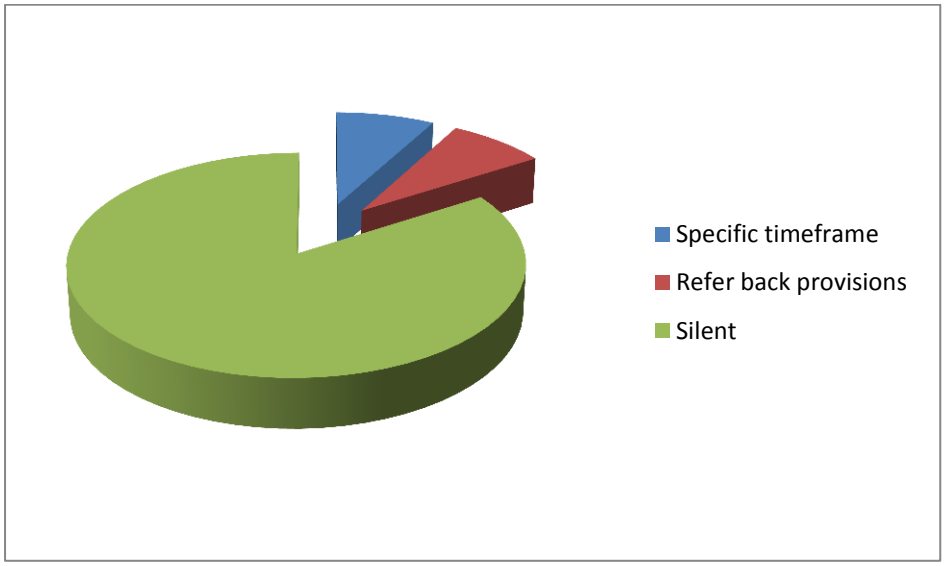

Figure 3. Timeframes for consultation on the denial of benefits

4.2.2 Substantial business operations clauses

The results in figure 4 show that the current and dominant requirement found in most EIAs on juridical persons to qualify for beneficiary treatment under an EIA reflects the Article V:6 GATS requirement of "substantial business operations". The results found that twenty one (21) of the twenty five (25) EIAs analysed impose a "substantial business operation" requirement on juridical persons to qualify for beneficiary treatment under the agreement.

There are some slight variations where reference is made to similar terms including "substantial business activities" or "real and continuous link with the economy" as opposed to the term used in the GATS.

a. The definition of substantial business operations

The EU-Albania and EU-Korea EIAs define a juridical person as having substantial business operations if it has its "registered office or central administration or principal place of business" in the territory of the Party. The EIAs between Canada-Peru, Canada-Panama and Canada-Columbia provide a juridical person will be regarded as having substantial business operations in the territory of the Party under whose law it is "constituted or organized". There is only one EIA in the data set that has extensively defined the requirement on substantial business operations. The Mainland-Hong Kong, China CEPA defines in comprehensive detail the specific criteria to determine substantive business operations in Hong Kong.

With the exception of the legal services sector, the Mainland-Hong Kong, China CEPA requires most Mainland Chinese service suppliers to fit the following criteria:

- Be incorporated in the Hong Kong Special Administrative Region, and have a valid business license;
- Follow the same scope of intended business in Mainland China that it does in Hong Kong;
- Have been incorporated and engaged in "substantial business operations" in Hong Kong for a minimum of 3 - 5 years;
- Paid profits tax in accordance with Hong Kong law;
- Own or rent premises in Hong Kong consistent with its operations;
- Employ Hong Kong residents and people from the Mainland staying in Hong Kong on a One Way Permit amounting to more than 50 percent of the staff.

b. Varied definitions of substantial business operations

The results in Figure 4 show that the EU-Korea EIA requires juridical persons from the EU to conduct "substantial business operations" in Korea but it requires juridical persons from Korea operating in the EU to have an "effective and continuous link with the economy" of a Member of the EU. The EU-Korea EIA specifically states that this term is "equivalent to the concept of substantive business operations provided for in paragraph 6 of Article V of the GATS". One (1) other EIA in the data set uses the concept of "real and continuous link with the economy" (EU-Albania).

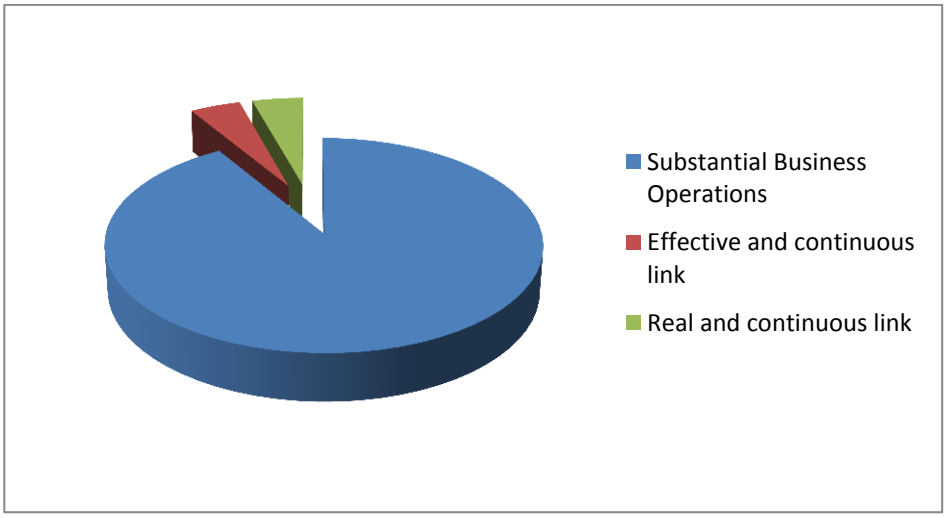

Figure 4. Rules of Origin Criteria

4.2.3 Ownership and control

The figure 5 shows that twenty four (24) of the twenty five (25) EIAs analysed have provisions setting ownership and/or control criteria for service suppliers and/or investors and to a lesser extent for juridical persons or financial institutions in order to qualify for the beneficiary treatment offered by the EIA. Restrictions may apply to service suppliers or investors who are 'juridical persons' or 'enterprises' that are owned and/or controlled by persons of the exporting EIA Member. This is usually in the form of an equity share in the enterprise or voting rights controlled by domestic shareholders and provided that such enterprises have substantial business operations in the territory of the exporting EIA Member. In other words, most EIAs combine these two main requirements in denial of benefit clauses.

The only one EIA under review that does not use the ownership or control requirement is the Mainland-Hong Kong, China CEPA. Rather, the CEPA uses a comprehensive substantial business operations test to ensure that juridical persons are organised under the applicable laws of the Mainland of the Hong Kong Special Administrative Region. However, the CEPA does state that "From the day the "CEPA" comes into effect, where more than 50% of the equity interest of a Hong Kong service supplier has been owned for at least one year since a merger or acquisition by a service supplier other than one from either side, the service supplier which has been acquired or merged will be regarded as a Hong Kong service supplier". Overall, the result shows almost all EIAs have ownership and control criteria.

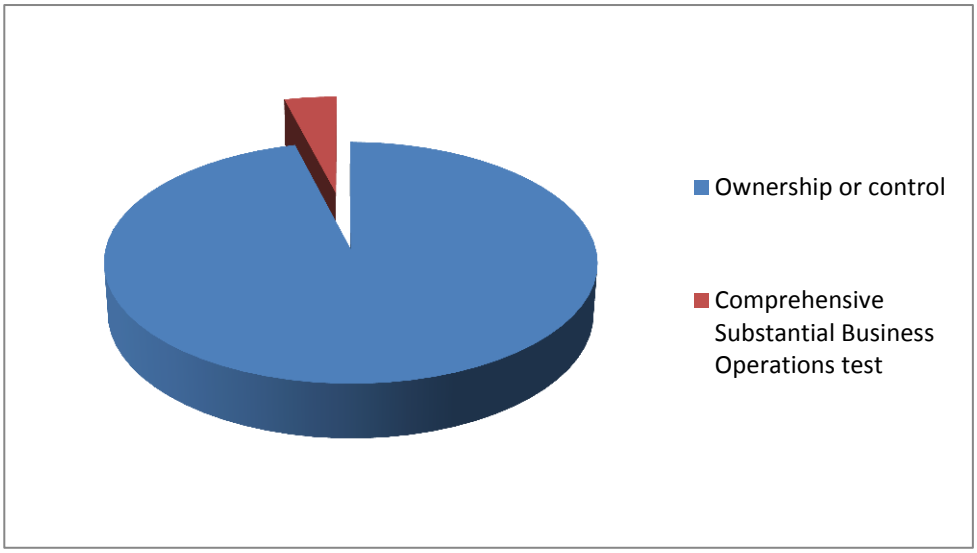

Figure 5. What test is applied?

a. How is the term defined in the different EIAs

Figure 6 shows only eight (8) EIAs under review specifically define ownership and/or control of a juridical person. The definition provided in the GATS has been replicated in the following EIAs: Japan-Vietnam, China-Pakistan, Peru-China, Canada-Colombia, India-Malaysia, Costa Rica-China, Japan-Peru and EU-Korea. In all cases it states that a juridical person is owned by persons of a Member if more than 50 per cent of the equity interest in it is beneficially owned by persons of that Member. On the other hand, a juridical person is controlled by persons of a Member if such persons have the power to name a majority of its directors or otherwise to legally direct its actions. A juridical person is affiliated with another

person when it controls, or is controlled by that other person; or when it and the other person are both controlled by the same person.

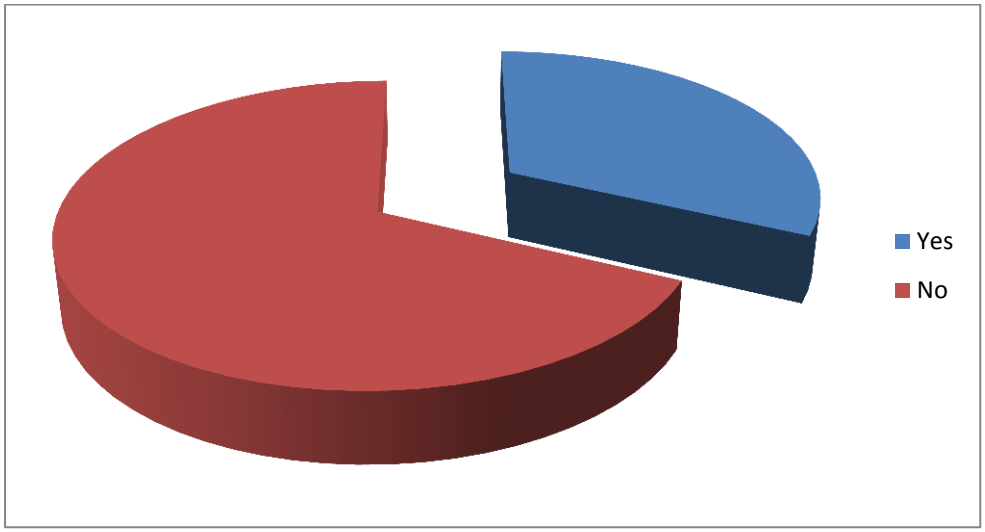

Figure 6. Is the term defined?

4.2.4 Diplomatic relations

While not widely used, it is worth mentioning that the results found a suspensive condition in some EIAs whereby Parties may deny the benefits of the agreement on the basis of maintaining diplomatic relations. Figure 7 shows that in the provisions of seven (7) of the twenty five (25) EIAs analysed; a Party may deny the benefits of the EIA to any other Party if the service supplier or investor is owned or controlled by persons of a non-Party with which the denying Party does not maintain diplomatic relations. In other words, where a country to an EIA has only consular relations with a non-Party and not diplomatic relations, the benefits of the EIA can be denied. It also allows a contracting Party to deny benefits if it suspends diplomatic relations with any other contracting Party.

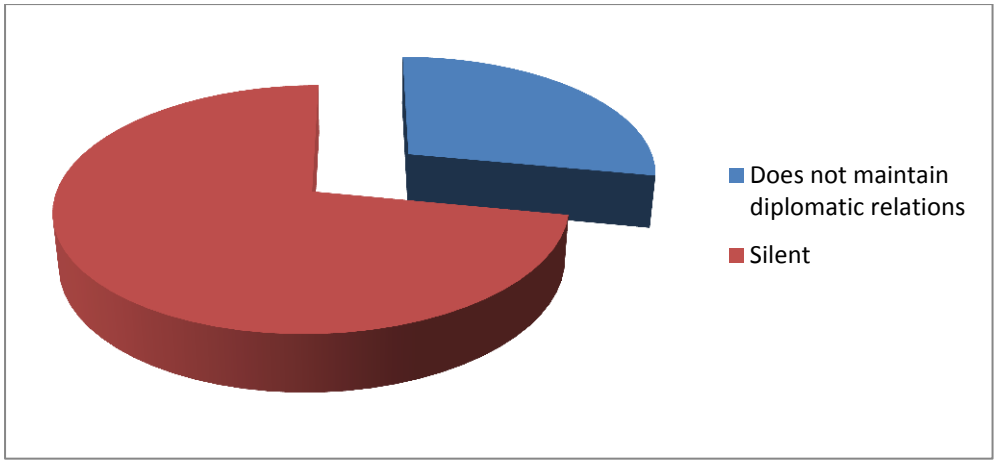

Figure 7. Diplomatic Relations

4.2.5 Violation and circumvention

The results show that ten (10) EIAs under review contain an anti-circumvention clause. In particular, it includes EIAs to which Canada, US, Japan or India is a party. This provision relates to cases where countries have imposed sanctions against a third country or has no relations or suspended relations with a third country. That country must then deny the benefits of the EIA, because if it does not, the sanctions/measures would be violated and circumvented. It means that an EIA Member may deny the benefits to an enterprise, investor, juridical person or service supplier of another participating EIA Member, if it can establish that the enterprise is owned or controlled by a national belonging to a country not confined to the EIA (except in the case of the Indian EIAs). Further, the denying Party must have adopted or maintains measures with respect to the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of the EIA were accorded to such an enterprise.

4.2.6 Findings on the question on which of the current and dominant approaches are better suited for SADC

Three broad themes emerged from the analysis of the data set in relation to the research question: Which of the current and dominant approaches of services Rules of Origin are better suited for the SADC, and why?

a. Substantial business operations

The results found that the development of criteria on substantial business operations is a suitable requirement to determine rules of origin for SADC. Trade policy expert C said "the scope of these negotiations suggests they will focus on thresholds of economic activity to clarify the term substantive business operations. To the extent that genuine preferences are extended, the question arises whether those preferences would encourage companies to engage in a greater amount of business operations in a SADC Member State than otherwise to avail themselves of the benefits. I do not believe that this question will be answerable in abstract, without knowledge of the scope of preferences, and the additional volume of business activity required. What is more, it would be extremely hard to monitor and to enforce such a standard. And finally, requiring a high level of business activity in one Member to qualify for preferences granted by another Member State is also economically somewhat circular: a company that wants to do more business under a preferential regime would be prevented to do so because it is not already conducting substantive business. In my view, the original objective of the clause, to avoid that companies do jurisdiction shopping to avail themselves of the best possible treatment under PTAs, is adequately served by the substantive business operations (or real and continuous link) criterion. Should SADC decide – in spite of the text of the Services Protocol – to go down a ownership and control route, this would of course also only have an effect to the extent that genuine preferences are granted".

One view is that a liberal rule of origin whereby third party suppliers are able to access the market through having substantial business operations is the preferred approach for SADC.

b. Investment to support skills development, technology transfer and job creation

The results found that conditions on foreign investment should form part of the substantial business operations criteria to ensure that there is local value-add for the development of local skills, employment and transfer of technology. Trade policy expert A has argued that "services origin rules are important to ensure that foreign investment in the services sectors lead to substantial advancements in job creation, skills development and technology transfer so that the growth of the services sector in SADC takes place in a sustainable manner and is entrenched. In terms of practical enforcement, it would at least initially have to be at the discretion of the national governments in terms of them ensuring that the investment is suitably conditioned by stipulations that address issues such as transfer of skills and technology. We can end up with a situation where some SADC countries will or will not have conditionalities. The onus would be on SADC Members ensuring that the extent to which we apply these rules of origin will depend on how rigorously the exporting country applies it. This will not be cast in stone, it will have flexibility. We would want to minimise market disruptions to our local economy because another important aspect is that double edged sword i.e. while we want to use rules of origin against countries coming in, we do not want our own companies to be affected and these rules to be used against us. We would need to balance this. Formal rules on these have not been used in the region, except for the WTO. Only GATS rules hence this is new territory for us".

One view is that an applicable rule of origin for SADC is to have conditions that ensure that technology transfer and skills development are guaranteed as a result of investment.

c. Domestic Regulation

A recurring theme in response to determining suitable origin rules for SADC has been the role of domestic regulation. The sub-themes identified relate to the formation of appropriate regional regulatory frameworks and monitoring, evaluation and enforcement (implementation) mechanisms in SADC.

i. Regulatory frameworks

According to trade policy expert A, one possible way for enhancing mobility of service providers would be through the conclusion of Mutual Recognition Agreements which could be done by professional associations or commercial bodies themselves as they are best placed to evaluate the suitability of a service supplier. Many of the EIAs under review provide for adoption of mutual recognition agreements. A Mutual Recognition Agreement is an international agreement between two or more countries who agree to recognise and accord accreditation to each other's academic degree programmes or conformity assessments. However, a discussion on mutual recognition agreements falls outside the scope of this study and was not analysed.

The SADC Protocol provides for the conclusion of Mutual Recognition Agreements. Article 7 provides the mandate to negotiate an agreement providing for the criteria such as licensing, operation and certification for service suppliers in State Parties on the mutual recognition of requirements, qualifications, licences and other regulations.

Trade policy expert B said that "thorough involvement of sector regulatory authorities and the Registrar of Companies in the Member States is one such way in which to develop origin rules. The model must take into account the relevant regulatory frameworks in the Member States and must be flexible enough to accommodate sectoral differences as well as national investment promotion policies". Many of the EIAs under review provide for regulatory coordination and cooperation especially those EIAs involving developing country signatories; however, this aspect went outside the scope of this study, and was not analysed.

ii. Monitoring, Evaluation and Enforcement

The results found that monitoring and evaluation of inward investment derived from EIAs is one way in which services origin in SADC can be measured. According to trade policy expert A, "the success of rules of origin will depend on monitoring and evaluation so this will become a critical aspect in terms of measuring the success of these investments in services

sectors. This will largely be left to the national governments. With foreign investment, large multinationals have a lot of economic and political power and can influence poorer governments and this will have to be looked at. Ideally, there should be a regional regime for monitoring and evaluation so that LDCs are not unfairly prejudiced as we have so often seen in Africa". Essentially, this means that effective monitoring and evaluation mechanisms are needed to ensure that more corporate social responsibility takes place through investment derived from the EIAs.

Further, Trade policy expert B said "It will be important to analyse how "substantial business operations" or a similar standard is enforced for other reasons (e.g. tax), and to assess if the existing enforcement mechanisms are adequate. Creating a new category will always require setting up a new compliance monitoring mechanism."

In other words, the results show that effective monitoring, evaluation and enforcement mechanisms are required under the Protocol for ensuring that benefits accrue to SADC State Parties. The Annex on Dispute Settlement of the SADC Protocol would be applicable insofar as enforcement is related; however there are currently no stand-alone provisions covering monitoring, evaluation and enforcement mechanisms under the Protocol. However Article 18 provides for the development of mechanisms for joint investments; and Article 19 recognises the importance of effective competition frameworks. State Parties undertake to apply their respective competition laws so as to avoid the benefits of this Protocol being undermined or nullified by anticompetitive business conduct.

4.3 Conclusion

The findings depict that ultimately, services origin rules criteria are important to develop in light of the mandate under the SADC Protocol. In addition, substantive business operations are the most commonly applied criterion for determining the origin of services. Chapter 5 discusses the results more comprehensively.

CHAPTER 5: DISCUSSION

The purpose of this chapter is to explain the results of origin determination for services rules in EIAs presented in Chapter 4. The first part of the chapter briefly restates the research problem and methodology. This is followed by a brief explanation of the meaning of the findings. The next part of the chapter summarises the main findings with regard to the research questions, followed by an analytical discussion of the issues. Finally, the chapter considers the strengths and limitations of the present research.

5.1 General overview of the main problem and methodology

This exploratory study is the first to consider services rules of origin in the SADC region. The SADC Protocol on Trade in Services provides the mandate for Member States to further develop, through negotiations the definition of "substantial business operations". In order to achieve the objectives of the Protocol, the study attempts to explore, through case study, the dominant approaches of services origin criteria in EIAs, with a view to making recommendations for suitable services origin criteria for the SADC region. To achieve this, the qualitative study took a deductive approach to case study design. The thematic analysis approach (Boyatzis, 1998) which entails a six (6) phase process (Braun and Clarke, 2006) is employed to analyse the theoretical framework and data set of the study. The data set includes a total of twenty five (25) EIAs containing denial of benefit clauses, two questionnaires, one interview and several publications on services rules of origin. The thematic analysis approach informed the analytical insights, themes and ideas as it allowed the study to be informed by the use of a theoretical framework.

5.2 Summary of the results

The findings in the study are summarised below.

- Rules of origin can be used as a trade policy management tool to achieve national development objectives and more regionally integrated markets.
- Substantive business operations combined with ownership and control measures are the most commonly applied criteria for determining the origin of service in EIAs.

- The origin rules governing the temporary movement of natural persons i.e. Mode 4 are not unduly restrictive because most EIAs apply a nationality and/or permanent resident requirement under the definition of "natural person"
- Facilitating the temporary movement of natural persons providing services in the region can be resolved through SADC Member States' regulatory frameworks in the form of Mutual Recognition Agreements. These agreements would be restricted to regulated professions.
- Origin determination involves balancing various interests and can be used to set conditionalities to support regional development and integration. Criteria supporting regional development such as local value-add could be supported through the substantive business operations approach for the SADC region. The results show that investment could be linked to skills development and technology transfer. However, caution should be made against placing too much emphasis on the objectives rules of origin can achieve. This means that certain objectives could be addressed more effectively through other mechanisms and not necessarily through rules of origin.
- Monitoring, evaluation and enforcement mechanisms of inward investment derived from EIAs is one way in which services origin in SADC can be measured.
- There is a need for further research in light of the ongoing and imminent regional services negotiations to see how EIAs deal with regulatory cooperation and coordination, Mutual Recognition Agreements and Monitoring, Evaluation and Enforcement mechanisms.

5.1 Discussion of the findings

5.1.1 Is it important for SADC to consider services rules of origin and if so, why?

a. Determinants of origin

This study found that the determinants of origin rules for services are important in any preferential trade agreement (PTA) because it determines to what extent third-party suppliers benefit from the trade preferences negotiated. The present findings seem to be consistent with Das & Ratna (2011) who state that origin rules only prevent trade deflection taking place whereby non-RTA members can gain market access. There are currently two services negotiations that involve SADC. The first is the SADC Protocol on Trade in Services negotiations that is intra-regional and involve fifteen SADC Member States. The second is

the SADC-European Union Economic Partnership Agreement (EPA) negotiations involving four SADC Members i.e. Botswana, Lesotho, Mozambique and Swaziland and the EU comprising of 27 Member States. Other SADC Member States involved in EPA negotiations that cover services include Madagascar, Mauritius, the Seychelles, Zambia and Zimbabwe under the Eastern and Southern African group. The respondents sampled in this study were accurate in their agreement about the importance of services origin rules as it will determine the extent of preferences granted to Members to an EIA. In other words, services origin rules matter because it is used to determine the nationality of services and services suppliers to be eligible for trade preferences (Vilavong, 2011).

It is commonplace for agreements to set conditionalities for the determination of the nationality of services and services suppliers. Indeed, positive discrimination in PTAs *vis-à-vis* multilateral agreements is permitted in the context of GATS Article V. Within the regional context, this study found that the mandate to further develop rules of origin criterion is contained in the Protocol. Notwithstanding the importance for SADC to consider services origin rules, the mandate to further develop 'substantial business operations' is provided in Article 1 of the Protocol under the definition of a SADC juridical person. While certain definitions such as SADC juridical person and substantial business operations have already been incorporated in the text of the Protocol, the definition of 'substantial business operations' requires further interpretation in three parts, namely incorporation, licensing and further development of the definition. It is evident that Article 22 of the Protocol read together with the definition of a SADC juridical person and 'substantial business operations' under Article 1 that origin rules apply to the Mode 3 supply of a service.

One finding in this study surmises that no determination of SADC origin vis-à-vis non-SADC origin will have to be made if, at the end of their internal negotiations, SADC Member States do not provide "genuine preferences" but instead schedule commitments better than their GATS commitments, but equal or worse than their applied regimes. Any preference offers legal guarantees and policy certainty to the private party. It also provides an alternative recourse mechanism which will require a party to show that it has legal standing for pre- and post-establishment disputes. This finding was unexpected and suggests that commitments by SADC Members under the Protocol may not be better than SADC Members commitments under the GATS. In refute, Article 16(4) specifies that "State Parties shall not introduce new

and more discriminatory barriers to trade in services." This obligation is limited to the period during the negotiation. If a Member introduces restrictions that limits existing GATS commitments then that would constitute a violation under the GATS. However, if a Member introduces new restrictions without violating existing GATS commitment, but digressing on applied regulatory regimes, then that would constitute a violation of Article 16(4), but will not deliver a GATS-minus result.

Furthermore, the Protocol in terms of Article 16(1) shall be in conformity with GATS Article V. However should a GATS-minus outcome arise in terms of scheduled commitments, the WTO rules will be violated and will result in no meaningful outcome in the negotiations. GATS Article V provides for the formation of Economic Integration Agreements by permitting WTO Members to enter into agreements to further liberalise trade in services, provided that such an agreement has substantial sectoral coverage, in terms of the number of sectors, volume of trade affected and modes of supply. In order to meet this condition, agreements should not provide for the *a priori* exclusion of any mode of supply; it eliminates substantially all discrimination among the parties in the sectors covered through the elimination of existing discriminatory measures; and/or prohibition of new or more discriminatory measures. In addition, the agreement should not raise the overall barriers to trade in services within respective sectors or subsectors compared to the level applicable prior to such an agreement. Furthermore, EIAs are presented to the Committee on Regional Trade Agreements (CRTA), who examine agreements to ensure the transparency of RTAs and allows WTO Members to evaluate an RTA's consistency with WTO rules. Hence, the rules are clear and unambiguous that a GATS Article V agreement shall go over and above existing WTO commitments. Hence, the Protocol must adhere to the WTO rules permitting the formation of a GATS Article V agreement.

b. Trade policy management

Agreeing to the importance of origin rules in services is different from the typology, criterion, effectiveness and application of such rules in a preferential market access agreement. The results show that while there are approaches more favoured over others, there are variations amongst some of the EIAs that use trade policy and trade policy instruments such as rules of origin to promote deeper integration. For example, the Mainland-Hong Kong, China CEPA

has developed comprehensive criteria for granting preferences for services trade to deepen integration in the context of the "one country, two systems" formula. An analysis of the data set in this study found that the relationship between trade policy and services origin rules is particularly strong in PTAs. The management of trade policy was shown to be the nucleus for effective rules of origin in preferential liberalisation which caters to the needs of national policy objectives *vis-à-vis* regional economic integration. One respondent sampled in this study offered a different perspective from the classical arguments of trade bargaining that typically complements trade policy discourse. The study found that services origin rules in SADC should be taken in the wider context of regional integration. In other words, origin rules should not be used as a trade barrier to prevent third country suppliers from entering the EIA market; instead these rules should be used to address broader socio-economic goals, particularly FDI through domestic regulation. These results are consistent with those of Das & Ratna (2011) who found that origin rules support trade policy and play a key developmental role in trade, investment and welfare, at large. Hence, rules of origin that support development is achievable in the context of the SADC Protocol.

5.1.2 Investment to support skills development, technology transfer and job creation

The linkages between trade policy management *vis-à-vis* national objectives and regional integration also play an important role. This study found that services origin rules can be used as a trade policy management tool to ensure that foreign investment in the services sectors lead to substantial advancements in job creation, skills development and technology transfer so that the growth of the services sector in SADC takes place in a sustainable manner and is entrenched. This was supported by one interviewee but not the other data. There are no particular provisions in the data set that requires companies to do skills transfer. A possible explanation for this result is that it would be to SADC Members' advantage to encourage meaningful investment that is linked to economic, social and human development. Meaningful investment refers loosely to investors taking corporate social responsibility seriously, and ensuring that the domestic market develops through the resources, capacity and technology brought into the country.

This view is supported by the SADC Regional Indicative Strategic Development Plan (RISDP) which sets out the region's priority intervention areas for technology transfer and innovation, employment, human development in terms of high level and critical skills development as well as promoting value addition by encouraging the creation of new industries including services, and encouraging manufactured exports and services. Further, the Protocol expands this view by stating in the Preamble that it is "determined to achieve deeper regional integration and sustainable economic growth and development and to meet the challenges of globalisation". The findings by Das & Ratna (2011) concur with this as they argue that the issue of trade and investment diversion in the context of rules of origin pertaining to trade in services liberalisation under an RTA need to be approached from a developmental angle of sustainability rather than merely from an efficiency angle.

While a rule of origin may be specifically designed to address broader objectives such as deeper integration as we have observed in the Mainland-Hong Kong, China CEPA, it is argued that the definition of 'substantial business operations' is limited in scope in terms of what it can achieve.

5.1.3 Denial of benefit clause

The study found that (i) substantial business operations; (ii) incorporation; and (iii) ownership and control are the most commonly applied criteria to deny the benefits of preferential market access under Mode 3 in EIAs. Subject to a few exceptions, all three criteria in the EIAs under review have more often than not left these terms open to interpretation. Insofar as the three criteria in the EIAs are concerned, the findings are consistent with Fink & Nikomborirak (2007); Das & Ratna (2011); and Vilavong (2011), who found that the most frequently used criteria under Mode 3 are substantial business operations, incorporation and ownership and control. Other approaches that are less common in EIAs are the obligation to notify and consult with a non-Party on the denial; and denying the benefits of an EIA on the basis of diplomatic relations. Furthermore, all denial of benefits provisions in the EIAs under review has used permissive language, leaving a denial on the sole discretion of governments.

The SADC Protocol contains all three criteria for services origin rules: (i) substantial business operations; (ii) incorporation; and (iii) ownership and control.

5.1.4 Ownership and control

The origin of a service supplier with respect to investment is defined by the nationality of said entity and expressed in terms of its ownership. The ownership and control criteria in the data set replicate the GATS definition for ownership and control. The definitions in eight (8) of the EIAs under review that defined ownership and control discriminate in some instances, making the chosen rule of origin either liberal or restrictive. Where the definition extended to a Party and non-Party, it was considered a liberal rule of origin as all that is required is that more than 50 per cent of the equity interest is beneficially owned by persons of that Member for trade preferences to be extended. One observation during the analysis is the issue of cumulated ownership and control. As there is no evidence in the EIAs under review that cumulation and value-add was used, consideration may be given to this under the definition of substantial business operations in the SADC context.

Further, while the ownership and control criteria denote nationality on a company of the exporting EIA Member, the other involves the cumulated ownership and control criterion within the EIA Members. This view is supported by Fink & Nikomborirak (2007) who state that the eligibility of preferences would be widened to service providers that are majority owned or effectively controlled by persons from FTA member countries. Conversely, GATS Article V:3(b) contains a discretionary restrictive rule of origin involving only developing countries. It reads:

> Notwithstanding paragraph 6, in the case of an agreement of the type referred to in paragraph 1 involving only developing countries, more favourable treatment may be granted to juridical persons owned or controlled by natural persons of the parties to such an agreement.

In other words, GATS Article V:3(b) grants EIAs involving only developing countries with the right to adopt restrictive rules of origin to grant trade preferences only to companies owned or controlled by natural persons of the parties of an EIA. This interpretation is supported by Mattoo & Fink (2004). Furthermore, it appears that most EIAs under review (24 out of 25) have used ownership and control as a basis to determine substantial business

operation, even though the agreements do not state that substantial business operations are linked to ownership and control. By prescribing that a minimum amount of equity shares or voting rights belong to domestic shareholders, the rule of origin ensures that there is an element of control.

5.1.5 Substantial business operations

One observation made during the analysis of the data set is that the SADC Protocol on Trade in Services is the only agreement in the data set that explicitly states that the definition of substantial business operations is subject to further negotiation. This is interesting as one could argue that the trade negotiators at the time were looking to achieve something more meaningful through rules of origin. Currently, only one EIA in the data set has developed criteria to define substantial business operations. Coincidentally, it is the same EIA that does not use the ownership or control criteria to denominate origin on a service or service supplier. With the exception of the legal services sector, the Mainland-Hong Kong, China CEPA requires most Hong Kong service suppliers to fit the following criteria:

- Be incorporated in the Hong Kong Special Administrative Region, and have a valid business license;
- Follow the same scope of intended business in Mainland China that it does in Hong Kong;
- Have been incorporated and engaged in "substantial business operations" in Hong Kong for a minimum of 3 - 5 years;
- Paid profits tax in accordance with Hong Kong law;
- Own or rent premises in Hong Kong consistent with its operations;
- Employ Hong Kong residents and people from the Mainland staying in Hong Kong on a One Way Permit amounting to more than 50 percent of the staff.

Notwithstanding the historical and economic relationship between Mainland China and Hong Kong China, these restrictive rules of origin have been used to promote deeper integration. As the only existing jurisprudence on this matter, both in the data set and in the realm of services

origin rules, these detailed criteria should be considered within the SADC Protocol as Members seek to define substantial business operations. There are obviously deviations in terms of the way certain criteria might apply in SADC due to the different levels of development of the countries concerned. Given that there are fifteen (15) SADC Members negotiating a services PTA, the variations of each Members regulatory frameworks including the registration and establishment of companies must be taken into account. The criteria prescribing the minimum number of years that a company has engaged in substantial business operations is useful to ensure that there is value and sustenance of a corporate entity. The issue of paying profit tax, otherwise known as income tax is also problematic as many non-SADC countries use Mauritius to set up companies. One respondent in the study commented that particularly in SADC, Mauritius have been positioning themselves as a destination for FDI but where that FDI can be used to have negative impacts on other SADC Members, example for South Africa, the issue is tax evasion. The underlying premise is that using a tax haven like Mauritius for example as the headquarters of a company for channelling investment to the rest of Africa has revenue implications for South Africa. Taxation issues do not fall within the scope of this study.

5.1.6 Balancing interests

In making a determination as to which rule of origin for services would better suit the SADC region, trade policy-makers and trade negotiators should seek to balance the interests between what the rules of origin can do *vis-à-vis* the objectives of the Protocol. While the findings in the study support a developmental approach to the determination of origin rules which is normally reflective of a restrictive rule of origin (Das & Ratna, 2011), the recommended approach for SADC is a different one. The recommended approach for SADC is a variation of a liberal rule of origin that has conditionalities to ensure the rules address broader socio-economic goals. The following reasons are provided to support this:

- The original objective of the rules of origin clause in the Protocol was to prevent companies from doing jurisdictional shopping to avail themselves to the best possible treatment under PTAs and this is adequately served under the substantial business operations criterion currently incorporated in the Protocol.

- As the definition of substantial business operations is subject to further negotiation, the chosen origin rule should not seek to rigidly prevent third country suppliers from entering the EIA market; instead these rules should be used to address broader socio-economic goals, particularly FDI through domestic regulation. Rules of origin for services must be designed to ensure that foreign investment in the services sectors lead to substantial advancements in job creation; skills development and technology transfer so that the growth of the services sector in SADC takes place in a sustainable manner and is entrenched.

5.1.7 Regulatory frameworks

Regulatory coordination and cooperation are important for the development of regional regulatory frameworks. It is recommended that the mobility of service providers is facilitated under Mutual Recognition Agreements. Article 7 of the Protocol provides for "the negotiation of an agreement for the mutual recognition of requirements, qualifications, licences and other regulations, for the purpose of the fulfilment, in whole or in part, by service suppliers of the criteria applied by State Parties for the authorisation, licensing, operation and certification of service suppliers and, in particular, professional services."

5.1.8 Monitoring, Evaluation and Enforcement

The success of rules of origin will depend on the monitoring, evaluation and enforcement mechanisms in place to support and measure investments in the services sectors. Ideally, there should be a regional regime to monitor and evaluate compliance and enforce rules so that vulnerable economies are not unfairly prejudiced. For effective monitoring, evaluation and enforcement, mechanisms are required under the Protocol for measuring the success of investment to ensure that benefits accrue to SADC State Parties. Article 18 provides for the development of mechanisms for joint investments and while this provision could likely be used to encourage a certain type of investment that generates tangible benefits for SADC Member States economies, it does not effectively cover the envisaged effective monitoring, evaluation and enforcement, mechanisms. In addition, Article 24 provides for the institutional

arrangements of the Protocol which cover very broadly the supervision and monitoring of the implementation of the Protocol.

CHAPTER 6: CONCLUSION AND RECOMMENDATIONS

The objectives of this research were to understand more comprehensively, the importance for SADC to consider rules of origin for services and to determine the current and dominant approaches of services origin rules in existing EIAs in order to fulfil the mandate of the SADC Protocol and develop further the definition of substantial business operations. The purpose of this chapter follows the main findings of the study. Using the thematic analysis approach based on the work of Boyatzis (1998) and Braun & Clarke (2006), to code, theme, review and refine the data set, the chapter presents the recommendations and future research possibilities arising from the study. Finally, the chapter ends with a conclusion.

6.1 Recommendations

As mentioned previously, a few broad themes emerged from the analysis of the data set in relation to the research questions. Taking into account the complete data set, the following main recommendations were made.

In making a determination as to which rule of origin for services would better suit the SADC region, trade policy-makers and trade negotiators should seek to balance the interests between what the rules of origin can do *vis-à-vis* the objectives of the Protocol. While the findings in the study support a developmental approach to the determination of origin rules which is normally reflective of a restrictive rule of origin (Das & Ratna, 2011), the recommended approach for SADC is a different one. The recommended approach for SADC is a variation of a liberal rule of origin that has conditionalities to ensure the rules address broader socio-economic goals. The following reasons are provided to support this: (i) The original objective of the rules of origin clause in the Protocol was to prevent companies from doing jurisdictional shopping to avail themselves to the best possible treatment under PTAs and this is adequately served under the substantial business operations criterion currently incorporated in the Protocol; (ii) As the definition of substantial business operations is subject to further negotiation, the chosen origin rule should not seek to rigidly prevent third country suppliers from entering the EIA market; instead these rules should be used to address broader socio-economic goals, particularly FDI through domestic regulation. Domestic regulation can play a role in ensuring that foreign investment in the services sectors lead to substantial

advancements in job creation; skills development and technology transfer so that the growth of the services sector in SADC takes place in a sustainable manner and is entrenched.

Regulatory coordination and cooperation are important for the development of regional regulatory frameworks. It is recommended that the mobility of service providers is facilitated under Mutual Recognition Agreements. Article 7 of the Protocol provides for "the negotiation of an agreement for the mutual recognition of requirements, qualifications, licences and other regulations, for the purpose of the fulfilment, in whole or in part, by service suppliers of the criteria applied by State Parties for the authorisation, licensing, operation and certification of service suppliers and, in particular, professional services."

The success of rules of origin will depend on the monitoring, evaluation and enforcement mechanisms in place to support and measure investments in the services sectors. Ideally, there should be a regional regime to monitor and evaluate compliance and enforce rules so that vulnerable economies are not unfairly prejudiced. For effective monitoring, evaluation and enforcement, mechanisms are required under the Protocol for measuring the success of investment to ensure that benefits accrue to SADC State Parties. The existing provisions in the Protocol under Article 18 on the promotion of trade and investment in services and Article 24 on institutional arrangements are not strong enough to achieve this goal.

6.2 Further research

Further research has been identified as an important element on the way forward for the determination of origin rules for services in SADC and the continent. Notwithstanding the issue of overlapping membership, the presence of regional trade blocs, customs unions, and current and future trade in services negotiations in Africa, there is a need for further research at an Africa-wide level to determine strategic ways to develop and manage origin rules for services and to ensure that there is some congruency in the way such rules are applied. Further, the study stated as a limitation in Chapter 3 that the lack of trade in services statistics in the SADC region renders it difficult to illustrate empirically, the economic implications of adopting restrictive or liberal rules of origin for services in the SADC region. Hence, as

initiatives are underway to improve the collection and dissemination of services statistics in the region, this will serve as a useful basis to conduct further research on this issue.

Other areas for further research include studies that measure the impact, relevance and importance of rules of origin on businesses operating in the region or on their investment decisions. Further studies could also explore possible differences between the types of rules of origin in EIAs involving only developing countries and those involving developing and developed countries. Further research could also be undertaken to explore Mutual Recognition Agreements and other monitoring and implementation mechanisms to give effect to rules of origin.

6.3 Conclusion

The study was set out to explore, through case study, the dominant approaches to the formulation of rules of origin criteria in EIAs and has identified the nature and form of services rules of origin provisions in several agreements, its importance for the development of regional markets and as an instrument of trade policy. The research reported in this thesis revealed that for SADC, a variation of a liberal rule of origin that has conditionalities relating to development are in place to ensure the rules address broader socio-economic goals.

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ANNEX A

Questions posed during Interview and Questionnaires

1. Please provide your name and indicate the number of years of experience you have in trade policy?
2. What is your understanding of rules of origin for services?
3. Is it important for SADC to have origin rules for services? Please elaborate.
4. What function can origin rules for services play in achieving the objectives of preferential liberalisation?
5. Is there a substantive and conceptual gap in the area of origin rules for services? Why?
6. How can a suitable model for services origin rules in SADC be developed?
7. What are the current and dominant approaches of services origin rules in economic integration agreements?
8. Which of the current and dominant approaches of services origin rules in economic integration agreements are applicable to the SADC region? Please elaborate.
9. In practice, how are services origin rules enforced?
10. What should trade negotiators and trade policy makers consider when looking into origin rules for services?

ANNEX B

Consent Form for Participation in a Research Study

University of Cape Town – Graduate School of Business

Rules of Origin for services in Economic Integration Agreements: Lessons for SADC

You are invited to participate in a research study conducted by Vahini Naidu. The purpose of this research is to explore ways to develop origin rules for services in SADC. Your participation will involve answering questions about origin rules for services to understand how such rules may be used in the SADC region.

Risks and discomforts

There are no known risks associated with this research.

Potential benefits

This research will contribute to the trade policy domain surrounding services origin rules and postulate a suitable model for determining such rules in SADC.

Protection of confidentiality

Only the principal researcher will have access to the research results associated with your identity. In the event of publication of this research, no personally identifying information will be disclosed, unless consent is granted. In addition, the principal researcher will do everything she can to protect your privacy.

Voluntary participation

Your participation in this research study is voluntary. You may choose not to participate and you may withdraw your consent to participate at any time.

Contact information

If you have any questions or concerns about this study/or if any problems arise, please contact the principal researcher, Vahini Naidu or the Ethics Committee at the UCT-GSB.

Consent

I have read this consent form and have been given the opportunity to ask questions. I give my consent to participate in this study.

Participant's signature _____ Date: _____

A copy of this consent form should be given to you.