



**UNIVERSITY OF CAPE TOWN ADVANCED SCHOOL FOR LEGAL STUDIES-  
FACULTY OF LAW**

**THE SADC PROTOCOL ON TRADE IN SERVICES: A  
REVIEW OF THE PROTOCOL IN LIGHT OF THE  
GATS AND OTHER SADC PROTOCOLS AND WHAT  
IT MEANS FOR TRADE IN SERVICES IN THE  
REGION**

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**LLM Dissertation**

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Research dissertation/ research paper presented for the approval of Senate in fulfillment of part of the requirements for the degree of Masters of Law in approved courses and a minor dissertation/ research paper. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of degree of Masters of Law dissertations including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation/ research paper conforms to those regulations.

Signed by candidate

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## **DEDICATION**

For my lovely mother Clotilda Bagadzi Ngubula.

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## **ABBREVIATIONS AND ACRONYMS**

AEC	African Economic Community
AU	African Union
BIT	Bilateral Investment Treaty
CARIFORUM	Caribbean Forum
CET	Common External Tariff
COMESA	Common Market for East and Southern Africa
CM	Common Market
CMT	Committee of Ministers of Trade
CU	Customs Union
DSB	Dispute Settlement Body
EAC	East African Community
EPA	Economic Partnership Agreement
EU	European Union
EPA	Economic Partnership Agreement
FIP	SADC Protocol on Finance and Investment
FTA	Free Trade Area
FMP	SADC Protocol on the Facilitation of Movement of Persons
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services

LDCs	Least Developed Countries
MFN	Most Favoured Nation
NAFTA	North American Free Trade Agreement
REC	Regional Economic Community
TCM	Protocol on Transport, Communications and Meteorology
TiS	Trade in Services
TNF-Services	Trade Negotiating Forum-Services
SACU	Southern African Customs Union
SADC	Southern African Development Community
SADCC	Southern African Development Coordination Conference
US	United States
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation

## CHAPTER I

### ABSTRACT

In 1995 the General Agreement on Trade in Services (GATS) came into force.<sup>1</sup> This is the World Trade Organization's (WTO) legal instrument aimed at regulating multilateral trade in services (TiS). GATS was negotiated in light of the increase in TiS in the world and the need to regulate this area of trade.<sup>2</sup> Prior to GATS coming into force, only trade in goods was regulated at the multilateral level through the General Agreement on Trade and Tariffs (GATT).

There are many benefits that come along with TiS and there is a need for developing countries to open up their service markets. Liberalised TiS in developing countries can bring about technological advancement, it enhances competition, it creates employment and it enhances productivity.<sup>3</sup> Opening up the services sector brings about more service suppliers into the economy. The increase in service suppliers means that there will be competition and competition eliminates inefficiency and gives consumers access to a variety of services at low prices. The service areas that SADC countries have comparative advantage in such as tourism and transport are labour intensive, the opening of such sectors will therefore be employment creating across the region.<sup>4</sup> In more technologically complex service areas (like telecommunications) the liberalisation of such sectors allows those countries that trade in such services to spill-over the technical know-how to other countries in the region.

Among some of the provisions of GATS that regulate TiS are provisions that define services, identify services areas and modes of trading in services.<sup>5</sup> GATS provides for member states to accord treatment no less favourable than that they give to their services and

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<sup>1</sup>General Agreement on Trade in Service 1995.

<sup>2</sup> Rudolf Adlung et.al 'The GATS: Key Features and Sectors' in Bernard Hoekman, AadityaMattoo and Philip **English** (eds) *Development, trade and the WTO:A Handbook* (2002) 259 at page 260.

<sup>3</sup>AadityaMattoo et.al 'Measuring Services Trade Liberalisation and Its Impact on Economic Growth: An Illustration' (2006) 21 1 *Journal of Economic Integration* 68 at page 69-70.

<sup>4</sup> James Hodge 'Liberalization of Trade in Services in Developing Countries' Sectors' in Bernard Hoekman, AadityaMattoo and Philip **English** (eds) *Development, trade and the WTO* (2002) 221 at page 224.

<sup>5</sup>GATS (note 1) at Article I.

service suppliers to services and service suppliers that come from other members (MFN treatment).<sup>6</sup> Services from members are also to be afforded national treatment when traded in the territory of another member.<sup>7</sup> The national treatment afforded to services differs from that in GATT in that unlike in GATT national treatment under GATS only comes about as a result of specific commitments made by each member.<sup>8</sup>

There are some exceptions to the general rules of GATS. One such exception allows for the establishment of a preferential trade agreements to regulate TiS in a region.<sup>9</sup> In terms of Article V member states can enter into preferential trade agreements to regulate their TiS. The preferential trade agreements established in terms of Article V allow the parties thereto to extend more favourable conditions to the services and service suppliers from the countries that are member states without extending them to the rest of the WTO members.<sup>10</sup> In order to satisfy Article V it must be shown that the agreement in question covers a substantial number of sectors and that it eliminates or provides for the substantial elimination of discrimination.<sup>11</sup> There is some flexibility that is however afforded to preferential agreements entered into by developing countries in so far as the elimination of discrimination is concerned.<sup>12</sup>

SADC is a Regional Economic Community that was established in 1992 in terms of the SADC Treaty.<sup>13</sup> The SADC treaty provides for the regulation of trade.<sup>14</sup> It also provides for the concluding of Protocols when the need arises.<sup>15</sup> In light of the provisions of the treaty and of GATS Article V, SADC recently concluded the SADC Protocol on Trade in Services (SADC TiS Protocol).<sup>16</sup> The Protocol is aimed at liberalising substantial TiS in the Southern African region while at the same time ensuring that the treaty remains consistent with other Protocols that precede it.<sup>17</sup>

In light of the provisions of GATS the paper will carry out an analysis of the SADC TiS Protocol. The paper will consider the requirements that GATS places on preferential

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<sup>6</sup>GATS (note 1) at Article II(1).

<sup>7</sup>GATS (note 1) at Article XVII.

<sup>8</sup> Sherry M. Stephenson et. al 'Regional Liberalisation of Trade in Services: Experience in the Americas' in Bernard Hoekman, AadityaMattoo and Philip **English** (eds) *Development, trade and the WTO* (2002) 337 at page 337.

<sup>9</sup>GATS (note 1) at Article V.

<sup>10</sup>GATS (note 1) at Article V (1).

<sup>11</sup> Ibid.

<sup>12</sup>GATS (note 1) at Article V (3)(a).

<sup>13</sup>The Treaty of the Southern African Development Community 1992.

<sup>14</sup>The SADC Treaty (note 13) at Article 21 (3) (c).

<sup>15</sup> The SADC Treaty (note 13) at Article 22 (1).

<sup>16</sup>SADC Protocol on Trade in Services of 2012.

<sup>17</sup> SADC TiS Protocol (note 16) at Article 2.

agreements and assess how far the SADC TiS Protocol goes in satisfying the requirements. This paper will contend that while the Protocol is a necessity, as it stands it may fail to ensure substantial elimination of discrimination and will not ensure substantial coverage once it comes into force.<sup>18</sup> The Protocol permits the establishment of further preferential trade agreements on services within the region.<sup>19</sup> It will be argued that the creation of other preferential trade agreements on services within the region could be potentially trade distorting. Finally, it will be argued that the Protocol may fall short of extending the benefits of TiS to least developed countries since it has replicated most of the objectives of GATS and in doing that has failed to set objectives unique to the region. The Protocol should have taken advantage of its flexibility and make more favourable conditions to address the needs of least developed countries.

## **OBJECTIVES OF THE PAPER**

The paper aims at addressing the following issues:

1. Whether the SADC TiS Protocol satisfies the requirements of Article V GATS for a preferential trade agreement on TiS.
2. The institutional challenges that stand in the way for the implementation of the Protocol.
3. The compatibility of the TiS Protocol with related SADC Protocols.

## **METHODOLOGY**

The study will be conducted by way of literature review and interviews. The literature to be reviewed will be relevant SADC Legal texts (The SADC treaty, the SADC trade Protocol, The SADC TiS Protocol and the SADC Protocol on Free Movement of Persons) and GATS. Secondary literature material to be used will be books, articles and relevant websites.

## **SCOPE**

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<sup>18</sup> SADC TiS Protocol (note 16) at Article 16. The protocol only aims at liberalizing 6 of 12 service sectors and Heng Wang 'The Interpretation of GATS Disciplines of on Economic Integration: GATS Commitments as Threshold?' (2012) 46 *Journal of World Trade* 397 at page 407- 409.

<sup>19</sup> SADC TiS Protocol (note 16) at Article 4.

The paper will be a consideration of the extent to which the TiS Protocol complies with GATS requirements and the extent to which it will meet the goal of liberalising TiS in the SADC region in terms of GATS and the SADC Treaty.

## **THE STRUCTURE OF THE PAPER**

### **Chapter 1- INTRODUCTION**

This chapter shall contain the background, scope, research question and methodology of the study. It will also contain a synopsis of each chapter and what the paper is going to conclude.

### **Chapter 2-CONCEPTUAL UNDERSTANDING OF TiS**

In this chapter TiS will be explained. In doing this the modes of supply and the categories of TiS will also be outlined. The chapter will also describe the core principles as enshrined in GATS which is the governing legal text for TiS in the WTO. The chapter will also outline the exceptions to the general rule in the GATS and the conditions that have to be satisfied in order to qualify for such exceptions. Particular attention will be given to Article V of the GATS which is an exception to the general principles of the GATS that preferential trade agreements in TiS are based on.

### **Chapter 3- CORE PROVISIONS OF THE SADC PROTOCOL ON TiS**

This chapter will look at the SADC TiS Protocol. The objectives of the Protocol will be outlined. This will be followed by an assessment of the provisions thereof. The assessment will weigh the provisions against GATS provisions of preferential trade agreements to see whether the Protocol is GATS compliant. The chapter will also outline the sectors that the agreement seeks to cover and the benefits that it extends to state parties.

### **Chapter 4- CHALLENGES AND RECOMMENDATIONS**

This chapter will look at the structure of SADC as an institution and assess its capacity to ensure that the Protocol gives benefits to member states. The chapter will also look at the challenges that are presented to the Protocol by existing Protocols. The challenges that are presented by the Protocol itself will also be outlined. Based on the assessment of the challenges that the Protocol presents, the chapter will make the following recommendations:

More service sectors be liberalised to fulfil the substantially all trade requirement.

The Protocol be harmonised with other Protocols in SADC.

The Protocol be made more specific by giving definition to some of the terms used in it.

More specific provisions be made for LDCs seeing as they constitute more than half of the countries in the region.<sup>20</sup>

## **Chapter 5 – CONCLUSION**

The chapter will conclude the paper by giving a summary of the case that the thesis has made as regards the SADC TiS Protocol.

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<sup>20</sup> Least Developed Countries: About LDCs. Available at <http://www.unohrrls.org/en/ldc/25/> [Accessed 31 August 2013].

## CHAPTER II

### TRADE IN SERVICES- A CONCEPTUAL UNDERSTANDING

#### Introduction

This chapter will give a conceptual understanding of TiS based on GATS. GATS provisions that define TiS will be expounded upon. The Chapter will also outline the rationale for TiS and the justification for the arguments that call for the liberalisation of this trade sector. In doing this the chapter will state the benefits that come along with a liberalised service sector paying particular attention to the context of developing countries. The chapter will then proceed to expound on key provisions of GATS placing an emphasis on those provisions that pertain to the formation of economic integration and the requirements that have to be met to comply with these provisions.

#### 2.1 GATS and the WTO

The WTO was founded in 1994 through the Marrakesh Agreement.<sup>21</sup> The Marrakesh Agreement has several documents annexed to it. One such annexure is the GATS.<sup>22</sup> The GATS is the WTO legal text that governs TiS among WTO members. The GATS came into force in 1995.<sup>23</sup> This was as a result of negotiations and trade-offs that had to take place between developing countries, the European Union and the United State of America prior to and during the Uruguay Round.<sup>24</sup> The decision to finally conclude the GATS was informed by the fact that even though the different GATT members had different stances regarding TiS, they all saw the need to regulate TiS as it became a growing area of international trade alongside trade in goods.<sup>25</sup> Just as trading in goods was being regulated by rules and principles pronounced in the GATT, the GATT members found it necessary to establish rules and principles that would ensure that trade distorting practices were done away with and

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<sup>21</sup> Marrakesh Agreement establishing the World Trade Organization of 1994 at Article I.

<sup>22</sup> GATS (note 1).

<sup>23</sup> Ibid.

<sup>24</sup> Juan A. Marchetti and Petros C. Mavroidis 'The Genesis of the GATS (General Agreement on Trade in Services)' (2011) 22 3 *European Journal of International Law* 689 at page 713.

<sup>25</sup> Juan A. Marchetti and Petros C. Mavroidis (note 24) at page 721.

efforts were made towards fully liberalising TiS.<sup>26</sup> Prior to the formulation of the GATS there was no multilateral agreement that regulated TiS.<sup>27</sup> What existed were bilateral agreements between countries to regulate TiS.<sup>28</sup> Due to the fact that there were a lot of trade-offs that had to take place in order for the agreement to be completed the resulting agreement is a complex agreement which is not without its controversies and difficulties in so far as its provisions and their interpretation is concerned.<sup>29</sup>

## 2.2 What are services?

Services are defined to be any service from any sector except those services that are supplied in the exercise of governmental authority.<sup>30</sup> In terms of this definition even if a service area falls within one of the service sectors that the WTO has identified, if such service is made available in the exercise of governmental authority on a non-commercial or non-competitive basis then it is not considered a service for purposes of the agreement.<sup>31</sup> There are twelve service sectors which are further divided into subsectors that the WTO identifies. These service sectors are Business, Communication, Construction and Engineering, Distribution, Education, Environment, Financial, Health, Tourism and Travel, Recreation, Cultural and Sporting, Transport and “other”.<sup>32</sup> The agreement further identifies four modes in which trade in services can be supplied. The first mode entails the supply of a service from the territory of one member into another member’s territory (this is also referred to as Mode 1 and cross-border supply).<sup>33</sup> The second mode entails the supply of a service in the territory of a member to consumers from any other member (this is also referred to as Mode 2 and Consumption abroad).<sup>34</sup> The third mode of supply involves the supply of a service by a service supplier from a member through commercial presence in the territory of another member (this is also referred to as Mode 3 and commercial presence) the last mode of service

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<sup>26</sup> Juan A. Marchetti and Petros C. Mavroidis (note 24) at page 692.

<sup>27</sup> Juan A. Marchetti and Petros C. Mavroidis (note 24) at page 690.

<sup>28</sup> Ibid.

<sup>29</sup> Juan A. Marchetti and Petros C. Mavroidis (note 24) at page 721.

<sup>30</sup> GATS (note 1) at Article I (3) (b).

<sup>31</sup> GATS (note 1) at Article I (3) (c).

<sup>32</sup> Guide to reading the GATS schedules of specific commitments and the list of article II (MFN) exemptions. Available at [http://www.wto.org/english/tratop\\_e/serv\\_e/guide1\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/guide1_e.htm) [Accessed 31 August 2013].

<sup>33</sup> GATS (note 1) at Article I(2)(a).

<sup>34</sup> GATS (note 1) at Article I(2)(b).

supply entails the movement of natural persons from a member to the territory of another member to supply services (this is also referred to as Mode 4 and movement of persons).<sup>35</sup>

## 2.3 The importance of TiS

Even before the regulation of TiS through the GATS came about, services were already being used and were serving and continue to serve various important purposes. There are a plethora of benefits that come from services; some direct and some indirect.<sup>36</sup> Some derive from services in and of themselves while others come about as a result of a combination of services and goods or a combination of two or more services. At least three services are deemed to be 'essential services' due to the fact that they play a facilitative role for trade in other services and for trade in goods and the use thereof has the effect of liberalising trade in other services and goods.<sup>37</sup> These service sectors are transport, telecommunications and financial services.<sup>38</sup>

### 2.3.1 Indirect benefits of TiS

The indirect benefits that come with services stem from those services that serve as either inputs to production or inputs to other services.<sup>39</sup> As already alluded to, there are three so-called essential services (it is not exclusively these three though) that serve as inputs namely; transport, communication and finance. These have shown themselves to have a strong influence on trade volumes for goods.<sup>40</sup> In so far as transport services are concerned, an efficient transport system is instrumental for getting goods to various ports and inland destinations to be used in production of goods or for consumption by consumers. When it comes to communication it has also been shown that good internet connection increases the amount of goods exports.<sup>41</sup> Financial services also have the effect of increasing goods exports, this they do through the provisions of credit to different sectors allowing them to

<sup>35</sup> GATS (note 1) at Article I(2)(c) and (d).

<sup>36</sup> James Hodge 'Liberalization of Trade in Services in Developing Countries' Sectors' in Bernard Hoekman, AadityaMattoo and Philip English (eds) *Development, trade and the WTO* (2002) 221 at page 222.

<sup>37</sup> Norah Dihel et.al 'South-South service trade' (2008) *OECD Trade Policy Working Paper No. 391* page 40 and Alan V. Deardorff 'International Provision of Trade Services, Trade, and Fragmentation' (2001) 9 2 *Review of International Economics* 233at page 234.

<sup>38</sup> Ibid.

<sup>39</sup> AadityaMattoo 'Developing Countries in the New Round of GATS negotiations: Towards a Pro-Active Role' (2000) 23 4 *The World Economy* 471 at page 472.

<sup>40</sup> Norah Dihel et.al (note 37) at page 63-65.

<sup>41</sup> Ibid.

produce and distribute their goods.<sup>42</sup> An open financial services sector is also helpful to investors as it provides them with the means to finance their investments.<sup>43</sup> A closed financial service sector however does not facilitate investment or the exploitation of comparative advantage and can have the effect of stifling development particularly in so far as industrialisation is concerned.<sup>44</sup> By extending financial support to the manufacturing industry, financial institutions enable manufacturers to have the requisite capital to inject into their businesses and to produce competitive goods. The level of liberalisation of the financial service sectors therefore has the effect of either lowering the cost of goods or keeping it higher; the more liberalised the so called essential services are, the more likely that production cost and related cost will be lowered leading to low goods prices. Some services also serve as inputs into the provision or production of other services.<sup>45</sup> The tourism industry is highly dependent for its efficiency on the communications and transport industry.<sup>46</sup> In order to deliver quality services to consumers the tourism industry needs an efficient transport system that will get consumers to their destinations while the communication services serve as an important advertising and booking tools.

A liberalised service sector is also indirectly beneficial since it allows for the presence of foreign service providers, particularly if mode 3 and mode 4 have no limitations placed on them. The presence of foreign service providers fosters an environment where there can be an exchange of knowledge and expertise in different sectors such as the manufacturing industry, such exchange can lead to technological spill-overs into the host country.<sup>47</sup> Technological spill-overs are particularly important in developing countries where different industries and service sectors are either in their infant stages or do not have the technical know-how to run efficiently.

TiS is also employment creating; some services are human capital intensive while others are physical capital intensive.<sup>48</sup> A liberalised service sectors therefore has the potential to create employment for both the skilled and unskilled labour force through the increase in

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<sup>42</sup> Ibid.

<sup>43</sup> Hildegunn Kyvik Nordås 'The Impact of Service Trade Liberalisation on Trade in Non-Agricultural Products' (2008) *OECD Trade Policy Working Paper No. 811* at page 14.

<sup>44</sup> Hildegunn Kyvik Nordås (note 43) at page 10.

<sup>45</sup> Greg McGuire 'Trade in Services- Market Access Opportunities and the Benefits of Liberalisation for Developing Economies' (2002) *UNCTAD/ITCD/TAB/20 20021* at page 7.

<sup>46</sup> Alan V. Deardorff 'International Provision of Trade Services, Trade, and Fragmentation' (2001) 9 *2 Review of International Economics* 233 at page 234.

<sup>47</sup> James Hodge (note 36) at page 224.

<sup>48</sup> Ibid.

the number of service providers in a country particularly where the service providers establish commercial presence in the territory.

### 2.3.2 Direct benefits of TiS

A liberalised services sector opens up the market for different providers. Once different providers are at liberty to provide their services in a given economy there is competition among them.<sup>49</sup> In order to gain a niche in a given market the services provided need to be of good quality and be affordable. The need to gain this niche leads to service providers providing quality services at cheap prices. Consumers in the end then get a variety of good quality services to choose from. Competition apart from giving consumers cheap goods also promotes efficiency.<sup>50</sup> Services also have a positive impact on Agriculture as they can help improve productivity through the promotion of efficiency in the sector.<sup>51</sup> This is particularly important for developing countries whose economies are largely based on agricultural production.

### 2.4 The General Agreement on Trade in Services (GATS)

The creation of GATS during the Uruguay round brought about a multilateral regulatory framework for TiS. There were however some areas that were left for negotiations in later rounds.<sup>52</sup> In the current Doha Round there are some service related areas that form the subject of negotiations and they seek to address those issues that were left for negotiation and those that have arisen out of the agreement itself.<sup>53</sup> The issues that were left out for future negotiation are emergency safeguards, subsidies, government procurement and domestic regulation.<sup>54</sup> The agreement embraces some of the principles that are in the GATT which governs trade in goods but it also differs significantly from GATT in light of the fact that the

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<sup>49</sup>Ibid.

<sup>50</sup>Greg McGuire (note 45) at page 27.

<sup>51</sup>Greg McGuire (note 45) at page 9 and 28.

<sup>52</sup> Juan A. Marchetti and Petros C. Mavroidis (note 24) at page 713.

<sup>53</sup>Dumeng Bezzola & Andreas Freitag 'The General Agreement on Trade of Services (GATS) Regionalism, Loopholes and Trade Barriers' at page 7. Available at [http://www.modelwto.org/media/chairs/chairpaper\\_gats\\_dumeng\\_bezzola\\_\(10-609-634\)\\_&\\_andreas\\_freitag\\_\(09-611-013\).pdf](http://www.modelwto.org/media/chairs/chairpaper_gats_dumeng_bezzola_(10-609-634)_&_andreas_freitag_(09-611-013).pdf) [Accessed 31 August 2013].

<sup>54</sup>Pierre Sauvé 'Completing the GATS Framework: Addressing Uruguay Round Leftovers' (2002) 57 *3 Aussenwirtschaft* 302 at page 302.

barriers that have to be eliminated to liberalise these areas of trade are different.<sup>55</sup> An example of a provision that is contained in both GATS and GATT is the MFN principle; the principle is however couched differently in GATS from what it is in the GATT as shall be shown in a subsequent paragraph.<sup>56</sup> Given the outstanding issues that still need to be negotiated GATS does not provide for the broad elimination of barriers nor wide sweeping liberalisation.<sup>57</sup>

#### 2.4.1 The Objectives of GATS

GATS seeks to establish a multilateral framework of rules and principles that will inform the progressive liberalisation of TiS among the WTO members for economic growth purposes.<sup>58</sup> This is to be achieved through the promotion of transparency and the interests of participating members.<sup>59</sup> It is perceived that transparency will avail the required information that WTO members will need in order for them to trade effectively in foreign markets and it will also ensure that none of the WTO members carry out any practices that limit the rights that they have agreed to extend to other WTO members in the Agreement.<sup>60</sup> The interests of participating members are to be promoted through various provisions that allow members to limit the extent of liberalisation taking into account the state of their service sectors.<sup>61</sup> The agreement also seeks promote the interests of developing countries in TiS and to remain cognisant of the needs of least developed countries while in the process of liberalising TiS.<sup>62</sup>

#### 2.4.2 The structure of GATS

The agreement is divided into six broad parts. The first part deals with the scope of the agreement and it defines key terms in the agreement. The second part outlines the general

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<sup>55</sup> Markus Krajewski 'Service Liberalisation in Regional Trade Agreements: Lessons of GATS 'Unfinished Business'' in Lorand Bartels and Federico Ortino (eds) *Regional Trade Agreements and the WTO Legal System* (2006)175 at page 178.

<sup>56</sup> Ryan Teksten 'A Comparative Analysis of GATS and GATT: A Trade in Services Departure from GATT's MFN Principle and the Effect On National Treatment And Market Access' 2010 at page 3. Available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.24.2818&rep=rep1&type=pdf> [Accessed 31 August 2013].

<sup>57</sup> Ryan Teksten (note 56) at page 2.

<sup>58</sup> GATS (note 1) preamble.

<sup>59</sup> Ibid.

<sup>60</sup> GATS (note 1) at Article III.

<sup>61</sup> GATS (note 1) at the Preamble.

<sup>62</sup> Ibid.

obligations that members undertake and disciplines that inform the agreement. Specific commitments made by members are governed by the provisions in part three. Part four has provisions aimed at advancing progressive liberalisation. The fifth part has institutional provisions and lastly the sixth section contains final provisions which are mainly annexes dealing with specific service sectors.

### **2.4.3 Relevant provisions for present purposes**

The GATS provisions that are relevant for present purposes are the Most Favoured Nation principle (MFN), the National Treatment provision, the Market Access provision and the Economic Integration provision. What follows is an elaboration of each one of them.

#### **2.4.3.1 Most favoured Nation (MFN)**

The MFN obligation in GATS obliges members to accord the same treatment they accord to the services and service suppliers of one member to the like services and service suppliers of the rest of the WTO members.<sup>63</sup> In so far as GATS provides for similar treatment to service suppliers, its MFN obligation differs from the GATT MFN obligation which only provides for similar treatment to goods and not to suppliers.<sup>64</sup> The MFN obligation in GATS applies generally to all service and service suppliers except if a member has listed exemptions to the MFN obligation in its Schedule of commitments.<sup>65</sup> The GATS MFN obligation however differs in some respects to the one in GATT. Under GATS members are allowed to maintain measures that do not extend similar treatment to all members provided such measures meet certain conditions stipulated in the Annex on Article II Exemptions.<sup>66</sup> In exercising their right to place exemptions on the MFN obligation members are expected to be transparent about the exemptions that they place on this obligation.<sup>67</sup>

#### **2.4.3.2 National Treatment**

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<sup>63</sup>GATS (note 1) at Article II.

<sup>64</sup>Ryan Teksten (note 56) at page 6.

<sup>65</sup>GATS (note 1) at article XX (1) (b).

<sup>66</sup>GATS (note 1) at Article II(2).

<sup>67</sup>GATS (note 1) at Article III.

This is yet another provision that has a GATT equivalent. The national treatment principle in GATS requires members to give services and service suppliers from all other members treatment that is similar to that which they give to their own services and service suppliers.<sup>68</sup> The GATS provision differs from its GATT equivalent as it only requires national treatment to be afforded to those services that have been listed in the member's schedule of commitments regarding its service industry.<sup>69</sup>

#### **2.4.3.3 Market Access**

GATS requires that members afford other members access to their markets through the four modes of supply in terms that are no less favourable than those that they committed to in their schedules of concessions on services.<sup>70</sup> In its schedule of commitments a member is to stipulate the extent to which it is prepared to grant market access to services and service suppliers from WTO members. Once a member has made such stipulation then it is obliged to extend that treatment to all the services and service suppliers. In affording market access to members in terms of the commitments made in sectors, members are prohibited from doing the following; limiting the number of foreign service suppliers, limiting the total value of transactions that can be conducted, limiting the total number of service operations or the total quality of service output, limiting the number of natural persons that can be employed in a particular sector or who are needed for a related area of that service sector, maintaining any measures that require that specific legal entities be incorporated in order to be able to provide services and placing limitations on the participation of foreign capital.<sup>71</sup>

#### **2.4.3.4 Article V- Economic Integration**

The MFN obligation also has a further exception to it in the form of Article V. Through this provision GATS allows members to enter into preferential trade agreements that seek to liberalise TiS among the members thereto without extending the benefits of such agreement to the rest of the WTO members.<sup>72</sup> This is on condition that the agreement does not raise the

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<sup>68</sup>GATS (note 1) at Article XVII (1).

<sup>69</sup>Ibid.

<sup>70</sup>GATS (note 1) at Article XVI (1).

<sup>71</sup>GATS (note 1) at Article XVI (2).

<sup>72</sup>GATS (note 1) at Article V (1).

barriers to trade to a position higher than what they were before for the rest of the WTO members who are not party to such agreement.<sup>73</sup> Unlike its GATT equivalent, Article V does not distinguish between a Custom Union (CU) and a Free Trade Area (FTA). This is due to the fact that TiS differs from trade in goods in that barriers to services come in the form of domestic regulations and there cannot be a Common External Tariff (CET) for services and quotas play no or a very small role in TiS.<sup>74</sup> Article V is important for present purposes as it underpins the completion of the SADC Protocol on TiS. The rationale behind permitting the conclusion of preferential trade agreements in relation to TiS is in many respects similar to that relating to allowing them in trade in goods. Preferential trade agreements in TiS are informed by the view that such agreements are building blocks towards achieving full liberalisation at a multilateral level.<sup>75</sup> The agreements are expected to liberalise trade among the parties thereto and not to raise the overall barriers to TiS for non-members to levels higher than they were before the conclusion of the agreement.<sup>76</sup>

In terms of Article V members can enter into a preferential agreement that liberalises trade in services only among parties to that agreement provided that the agreement meets two conditions; it has substantial sectoral coverage and it provides for the absence or elimination of substantially all discrimination.<sup>77</sup>

#### 2.4.3.4.1 Substantial Sectoral Coverage

The meaning of substantial sectoral coverage is an important meaning as it informs whether or not a preferential trade agreement succeeds in liberalising trade among members in a way that is above the commitments that are made in their WTO schedules of commitments.<sup>78</sup> Substantial sectoral coverage is to be understood in terms of the sectors that are covered, the modes and the volume of trade affected.<sup>79</sup> It is also a condition for substantial coverage that there is no *priori* exclusion of any mode of supply.<sup>80</sup> Interpreting what substantial sectoral coverage is no easy task. The GATT equivalent of Article V, Article XXIV, has an

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<sup>73</sup>GATS (note 1) at Article V(1)(a) and (b).

<sup>74</sup> MD. R. Islam et.al 'Preferential Trade Agreements and the Scope of GATT Article XXIV, GATS Article V and the Enabling Clause: An Appraisal of GATT/WTO Jurisprudence' (2009) 4 *Netherland International Law Review* 1 at page 24

<sup>75</sup>Ibid.

<sup>76</sup>GATS (note 1) at Article V(4).

<sup>77</sup> GATS (note 1) at Article V (1) (a) and (b)

<sup>78</sup>GATS (note 1) at Article V (1).

<sup>79</sup>GATS (note 1) at Article V 1(a) footnote.

<sup>80</sup>Ibid.

Understanding on its interpretation.<sup>81</sup> This gives guidelines on how to interpret this provision. GATS' Article V is however without such agreement and leaves much ambiguity. The matter is further complicated by the fact that unlike goods, it is difficult to determine the value and volumes of services traded or to measure the volumes of trade in a particular service sector.<sup>82</sup> The WTO's Dispute Settlement Body (DSB) has also not made a decision whose sole purpose was to determine what 'substantial sectoral coverage' means.

Given the fact that GATS does not define what 'substantial coverage' is and there have been no judicial decisions made to interpret this provision the next step towards understanding what the provision requires is to use the Vienna Convention on the Law of Treaties (VLCT) to aid in interpreting as well as to look at those Dispute Settlement Body (DSB) decisions that have given guidelines on how to interpret WTO legal texts.<sup>83</sup> The provisions of the VLCT can be used to interpret an international body's treaty.<sup>84</sup> The WTO is an International body and it is therefore appropriate that the VLCT be used to interpret GATS which is a treaty of an international body.

The VLCT offers a number of guidelines interpret treaty provisions. The starting point is that treaties are to be interpreted in good faith according to the ordinary meaning of the words used in their context and as per the treaty's object and purpose.<sup>85</sup> To give the necessary context when interpreting additional reliance is to be placed on the preamble and annexes of such treaty, agreements made relating to the treaty, any subsequent agreement between the parties on interpretation, subsequent practice and any special meaning given if it is established that the parties intended to establish such meaning.<sup>86</sup>

In determining the 'ordinary meaning' of a word per the VLCT cognisance may be taken of the dictionary meaning of a word.<sup>87</sup> The dictionary meaning will not itself always constitute the decisive meaning of the word but it may serve as a starting point.<sup>88</sup> The Appellate body in the *China Audiovisual* case held that the meaning of the words of a treaty

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<sup>81</sup>Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994.

<sup>82</sup>DumengBezzola&Andreas Freitag (note 53) at page 14.

<sup>83</sup>The Vienna Convention on the Law of Treaties (VCLT) of 1969.

<sup>84</sup>VCLT (note 83) at Article 5.

<sup>85</sup>VCLT (note 83) at Article 31 (1).

<sup>86</sup>VCLT (note 83) at Article 31(2).

<sup>87</sup>Munin Nellie 'The Interpretation of GATS Footnotes: Between a Rock (Form) and a Hard Place (Substance)' (2011) 456 *Journal of World Trade* 1209 at page 1219.

<sup>88</sup> United States –Measures Affecting the Cross-Border Supply of Gambling and Betting Services WT/DS285/AB/R 2005 1 at para 166.

can also be ascertained by looking at the context and object of the treaty in question.<sup>89</sup> The starting point in understanding the meaning of ‘substantial sectoral coverage’ is therefore to look at the definition of the word ‘substantial’. The oxford dictionary defines substantial as:

‘of considerable importance, size or worth.’<sup>90</sup>

The same dictionary also defines considerable as:

‘notably large in size, amount, or extent.’<sup>91</sup>

Since the dictionary meaning of a word is not always the conclusive meaning of a word in a treaty, it is important in this context to consider the purpose of GATS in order to ascertain the meaning of ‘substantial sectoral coverage’. The object and purpose of GATS is to progressively liberalise TiS through the measures and principles that it stipulates. ‘Substantial sectoral coverage’ can therefore be understood, in light of the dictionary meaning and the purpose of the GATS, to mean that a notably large size of sectors must be covered by the economic integration in order for the obligation to be met. When a notably large number of sectors are covered then this is a step towards opening up the service sector since it means the members to the economic integration have to make commitments in those sectors that are covered by the agreement. This interpretation is also plausible when one considers that the agreements are meant to be building blocks towards a liberalised multilateral system.<sup>92</sup> For the ‘substantial sectoral coverage’ requirement to mean a considerable size of sectors ensures that the agreements that are entered into are not narrow agreements that are limited to just the commitments that the members have already made at the multilateral level. A considerable size ensures that members go beyond their commitments as per GATS.<sup>93</sup>

Having established that the word ‘substantial’ when considered in light of the ordinary meaning of the word and the object and purpose of GATS means a considerable size, and in this context therefore a considerable size of sectors, it still remains to be

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<sup>89</sup> *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* WT/DS363/AB/R 2009 at para 348.

<sup>90</sup> Definition of **substantial** in English. Available at <http://oxforddictionaries.com/definition/english/substantial?q=substantial> [Accessed 31 August 2013].

<sup>91</sup> Definition of **considerable** in English. Available at <http://oxforddictionaries.com/definition/english/considerable?q=considerable> [Accessed 31 August 2013]

<sup>92</sup> Edwin Kessie ‘Trade Liberalisation under ECOWAS: Prospects, Challenges and WTO Compatibility’ (2001) *African Yearbook of International Law* 31 at page 51.

<sup>93</sup> *Ibid.*

established what a considerable size would be, or at least what it would not be when we consider the sectors that GATS has.

The VLCT states that subsequent practice by members to a treaty may also be used in order to aid interpretation.<sup>94</sup> To count as ‘subsequent practice’ the act in question must not be an isolated case but it must be shown that it is reoccurring and consistent practice by the parties to the agreement.<sup>95</sup> The fact that some state parties participated in a certain practice while those that did not participate did not raise an objection to such practice also points towards a particular act being a ‘subsequent practice’.<sup>96</sup> In this context a consideration of the practice of WTO members in concluding preferential trade agreements under the GATS can be of assistance in determining subsequent practice. The East African Community (EAC) has thus far made commitments in seven out of the twelve sectors.<sup>97</sup> The EAC treaty provides for the continued progressive liberalisation of services through rounds of negotiations.<sup>98</sup> Commentators have argued that this is substantial sectoral coverage since it covers seven sectors and provides for the continued negotiation towards liberalisation in other sectors.<sup>99</sup> China has entered into a number of preferential trade agreements with other WTO members. The agreement that covers the least number of sectors covers eight sectors while the one that covers the most covers all twelve sectors.<sup>100</sup> In those agreements where not all sectors are covered there is a commitment to continue to negotiate towards expanding coverage to those uncovered sectors in future.<sup>101</sup> In the CARIFORUM EU-EPA in order to comply with Article V of GATS the CARIFORUM countries raised their sectoral coverage so that all of them were either at 65% sectoral coverage or more.<sup>102</sup> The trend therefore points towards that the parties’ practice in so far as ‘substantial sectoral coverage’ is concerned is to liberalise more than half the sectors immediately and then commit to working towards liberalisation of the rest of the factors in given time frames. When consideration is given to what was said in the *Canada Autos* case one is also inclined to regard the requirement as needing more than

<sup>94</sup> VCLT (note 83) at Article 31(3)(c).

<sup>95</sup> Munin Nellie (note 87) at page 1224.

<sup>96</sup> Ibid.

<sup>97</sup> JB Cronje ‘Is the Liberalisation of Trade in Services in the East African Community compliance with WTO law’ (2011) Stellenbosch tralac 1 at page 10.

<sup>98</sup> Protocol on the Establishment of the East African Community Common Market at Article 23(2).

<sup>99</sup> JB Cronje (note 97).

<sup>100</sup> Heng Wang ‘The Interpretation of GATS Disciplines of on Economic Integration: GATS Commitments as a Threshold?’ (2012) 46 *Journal of World Trade* 397 at page 404-406.

<sup>101</sup> Heng Wang (note 100) at page 405.

<sup>102</sup> Allyson Francis, Heidi Ullrich ‘Analysis of Economic Partnership Agreements: Trade in Services Case Study of the CARIFORUM-EU Agreement’ in Regine Qualmann (Editor) *How to Ensure Development Friendly Economic Partnership Agreements - Lessons across Regions Services - Investment - Other Trade Dimensions* (2009) 65 at page 90.

half the sectors.<sup>103</sup> It was held in that case that the purpose of Article V is to ensure ambitious liberalisation of TiS and that this cannot be done by allowing narrow preferential trade agreements which only cover a few sectors.<sup>104</sup>

#### **2.4.3.4.2 Absence or Elimination of substantially all discrimination**

The second requirement placed on TiS preferential agreements is that they must provide for the absence or elimination of substantially all discrimination.<sup>105</sup> This is to be done by eliminating existing measures that are discriminatory or prohibiting new or more from coming to be.<sup>106</sup> The elimination is expected to occur within a reasonable time.<sup>107</sup> The discrimination that is meant to be eliminated here is only with regard to the sectors that are covered by the agreement. So member states will not be obliged to remove discriminatory measures unless such measures relate to a sector that either has commitments at WTO or at regional level. The absence or elimination of discrimination is meant to be conducted with regards to national treatment on those sectors where commitments have been made.<sup>108</sup> In *Canada autos* it was held that the fulfilment of the absence or elimination of substantially all discrimination requirement would come in the form of having no discrimination between all service suppliers of the members of the agreement that is, having all service suppliers from the members be subjected to the same treatment throughout the region.<sup>109</sup> The assessment of whether this requirement is satisfied may be a broad exercise which takes into account the wider process of economic integration or trade liberalisation.<sup>110</sup> So in this assessment the level of trade in goods liberalisation may be considered (wider process of integration) and it may inform whether or not the agreement is fulfilled.<sup>111</sup>

In the event that developing countries are members to a preferential trade agreement under Article V, there is some flexibility that they are given when it comes to the two requirements for a valid agreement.<sup>112</sup> The flexibility is particularly with regard to the

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<sup>103</sup> *Canada-Certain Measures Affecting the Automotive Industry* WT/DS142/R(2000).

<sup>104</sup> *Canada-Certain Measures Affecting the Automotive Industry* (note 80) at para 10.271.

<sup>105</sup> GATS (note 1) at Article V(1)(b).

<sup>106</sup> GATS (note 1) at Article V(1)(b)(i) and (ii).

<sup>107</sup> GATS (note 1) at Article V(1).

<sup>108</sup> Heng Wang (note 100) at page 412.

<sup>109</sup> *Canada-Certain Measures Affecting the Automotive Industry* (note 80) at para 10.270.

<sup>110</sup> GATS (note 1) at Article V (2).

<sup>111</sup> Heng Wang (note 100) at page 420.

<sup>112</sup> GATS (note 1) at Article V (3) (a).

absence or elimination of substantial all discrimination.<sup>113</sup> Members are to be afforded flexibility in light of their levels of development.<sup>114</sup> Although this provision says that it affords flexibility with regards to the requirements the fact that it highlights the second requirement (removal of discriminatory measures) over the first (substantial sectoral coverage) points to the fact that the flexibility given to developing countries in that area is with reference to the second requirement. As a result of the wording of the two provisions and in light of the purpose of the GATS and Article V it is argued that Article V (3) (a) does not afford flexibility with regards to the substantial sectoral coverage requirement for developing countries. To allow developing countries to liberalise fewer sectors than a substantial number of sectors would defeat the purpose of the GATS of progressive liberalisation. It would further go against the purpose of Article V as it would defeat the point behind it of increasing trade volumes at a regional level as a step towards liberalisation at a multilateral level. The benefits that developing countries stand to gain from liberalised TiS also point towards the fact that the flexibility to be accorded is only in relation to the second requirement; allowing flexibility *vis-a-vis* the first requirement would only limit the benefits that developing countries can garner from TiS.

## 2.5 Conclusion

TiS as understood through the lens of the GATS comes with many benefits. A liberalised services sector offers members an opportunity to gain income from an alternative source than goods. Most economies in Southern Africa are based on Agricultural goods or single commodities. They however cannot trade competitively in agricultural products at a multilateral level due to the fact that developed countries heavily subsidise their agriculture sectors and primary goods are subject to market determinants that fluctuate from time to time.<sup>115</sup> For those whose economies are based on single products there is a need to diversify their economies. TiS presents itself as an alternative for developing countries to trade in or at least to merge it with efforts in Agriculture and trading in single commodities. The benefits that come along with TiS also have the long-term effect of advancing development as they can assist with infrastructure development and bringing about technology. The GATS

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<sup>113</sup> Ibid.

<sup>114</sup> Ibid.

<sup>115</sup> Oxfam 'Rigged Rules and Double Standards: trade, globalisation, and the fight against poverty. Summary' 2002 at page 10-11. Available at [http://www.cbnrm.net/pdf/oxfam\\_001\\_tradesummary.pdf](http://www.cbnrm.net/pdf/oxfam_001_tradesummary.pdf) [Accessed 31 August 2013]

framework allows for members to enter into regional agreements for in relation to services. Developing countries can enter into such trade agreements. The preferential trade agreements can however be beneficial only if there is substantial liberalisation.

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## CHAPTER III

### SADC AND THE SADC PROTOCOL ON TiS

#### Introduction

This chapter gives a historical overview of SADC and its legal framework on trade. It will then go on to outline the provisions of the newly concluded SADC Protocol on TiS. The chapter will also consider the extent to which the Protocol's provisions will encourage the opening up of TiS by considering whether the Protocol is compliant with Article V of the GATS which is the Article that authorises WTO members to conclude economic integration agreements like the SADC TiS Protocol. Beyond compliance with Article V of the GATS the chapter will also assess whether other provisions in the Protocol will facilitate the liberalisation of TiS in the region as envisaged by the Protocol. The chapter will conclude that the Protocol fails to satisfy the requirement of having substantial sectoral coverage. It will further be argued that the Protocol does not provide for the absence or elimination of substantially all discrimination but that this does not mean it does not comply with Article V of the GATS. The chapter will argue that the Protocol encourages the conclusion of other economic integration agreements and that in doing so it fails to take into account the wider process of integration among SADC countries, something which Article V of the GATS requires economic integration agreements into account.

#### 3.1 Historical Overview of SADC

##### 3.1.1 From SADCC to SADC

The Southern African Development Community (SADC) is a Regional Economic Community (REC) in Southern Africa. The treaty establishing it came into force in 1992.<sup>116</sup> SADC came out of what was known as the Southern African Development Coordination Conference (SADCC). SADCC was formed by what were formerly known as the frontline

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<sup>116</sup> The SADC Treaty (note 13).

states.<sup>117</sup> These were states that were committed to making efforts to bring an end to apartheid in South Africa. The main aim of SADCC was to isolate South Africa through reducing the dependence of Southern African countries on it in an effort to force the then apartheid regime out of power.<sup>118</sup> Once it became apparent that South Africa's apartheid regime would cease power there was a need to reformulate SADCC to address other needs in the region.<sup>119</sup> The answer to this need came in the form of transforming SADCC into SADC.<sup>120</sup> SADC is made up of fifteen countries namely, Angola, Botswana, the Democratic Republic of Congo, Lesotho, Malawi, Madagascar, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.<sup>121</sup> Of these fifteen member states ten are classified as least developed countries and the remaining five are classified as developing countries.<sup>122</sup> The region is home to 257.7 million people.<sup>123</sup> All but one of the SADC countries are members of the WTO. The Seychelles is the one SADC member that is yet to become a member of the WTO.<sup>124</sup> As of now it has observer status at the WTO and has made progress in its accession negotiations.<sup>125</sup> SADC is recognized as part of continent wide efforts to establish the African Economic Community (AEC). It is recognized as a REC that will attain economic integration in Southern Africa and ultimately incorporate Southern African states into the African Economic Community as envisaged by the AEC treaty.<sup>126</sup>

### 3.1.2 Objectives of SADC

While SADC has come to be known as a REC, this can be misleading as SADC's mandate as stipulated in its treaty objectives points to that it aims at addressing not just economic related

<sup>117</sup>M. Evans 'The front-Line States, South Africa and Southern African Security: Military Prospects and Perspective' (1984) *Zambezia* XII.1 page 1.

<sup>118</sup> Ibid.

<sup>119</sup> Ibid.

<sup>120</sup> The SADC Treaty (note 13).

<sup>121</sup> Ibid.

<sup>122</sup> UN list of Least Developed Countries. Available at <http://unctad.org/en/Pages/ALDC/Least%20Developed%20Countries/UN-list-of-Least-Developed-Countries.aspx> [Accessed 31 August 2013].

<sup>123</sup> SOUTHERN AFRICAN DEVELOPMENT COMMUNITY (SADC): Overview. Available at <http://www.housingfinanceafrica.org/wp-content/uploads/2012/10/SOUTHERN-AFRICAN-DEVELOPMENT-COMMUNITY.pdf> [Accessed 31 August 2013].

<sup>124</sup> Progress made in Seychelles' membership negotiations. Available at [http://www.wto.org/english/news\\_e/news12\\_e/acc\\_syc\\_11jul12\\_e.htm](http://www.wto.org/english/news_e/news12_e/acc_syc_11jul12_e.htm) [Accessed 31 August 2013].

<sup>125</sup> Ibid.

<sup>126</sup> Treaty Establishing the African Economic Community (1991) at Article 4(2)(a) and (b).

issues but socio and political issues as well.<sup>127</sup> For present purposes the objectives of importance are those that deal with the economic development mandate that the member states have set for themselves. To this end SADC aims at *inter alia*, promoting economic growth and socio economic development in order to improve the living standards of people in the region.<sup>128</sup> The member states have also undertaken to utilise the resources found in the region for the benefit of the entire region while promoting self sustainability of member states.<sup>129</sup> SADC also aims at progressively freeing trade in goods and services through the removal of obstacles that stand in the way of free trade in the region.<sup>130</sup>

### 3.2. SADC and Trade

One of the areas that the member states have agreed to cooperate in is the area of trade.<sup>131</sup> There is an integrated committee that is established by the treaty and one of the areas that this committee is mandated with overseeing is trade.<sup>132</sup> The SADC treaty further makes provision for the conclusion of Protocols in areas where they have undertaken to cooperate if there is a need for such Protocol.<sup>133</sup> Once a Protocol has been concluded it is open to the member states to sign and ratify it and to, if the law of a state requires, domestication in order to give it the force of law in that state. In light of the commitment to cooperate in trade, SADC members concluded the SADC Protocol on Trade in 1996.<sup>134</sup> This Protocol aims at liberalising trade in goods and services in SADC through the creation of a Free Trade Area in the region.<sup>135</sup> The provisions of this Protocol largely address liberalisation of trade in goods as opposed to trade in services. The Trade Protocol provides for the elimination of barriers to trade in goods in the region.<sup>136</sup> National treatment and most favoured nation principles are also applicable to goods coming from other SADC member states into a SADC member state.<sup>137</sup>

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<sup>127</sup> The SADC Treaty (note 13) at Article 5.

<sup>128</sup> The SADC Treaty (note 13) at Article 5(1) (a).

<sup>129</sup> The SADC Treaty (note 13) at Article 5(1) (f).

<sup>130</sup> The SADC Treaty (note 13) at Article 5(2) (d).

<sup>131</sup> The SADC Treaty (note 13) at Article 21(3) (c).

<sup>132</sup> The SADC Treaty (note 13) at Article 12(2) (i).

<sup>133</sup> The SADC Treaty (note 13) at Article 22.

<sup>134</sup> Southern African Development Community (SADC) Protocol on Trade (1996).

<sup>135</sup> SADC Protocol on Trade (note 134) at Article 2 (5).

<sup>136</sup> SADC Protocol on Trade (note 134) at Article 3.

<sup>137</sup> SADC Protocol on Trade (note 134) at Article 11 and Article 28.

### 3. 3 SADC Protocol on TiS

In recent years TiS has gained more attention in international trade mainly because of the benefits, direct and indirect, that can be garnered from trade therein. Although there is a multilateral framework in the form of GATS there are still some issues that GATS has left unresolved as regards TiS. Due to this increased attention that services have received and the unresolved issues, WTO members have resorted to entering into regional agreements to regulate TiS.<sup>138</sup> The areas that were left unresolved and reserved for future rounds of negotiations include investment policies, immigration policies, regulatory policies emergency safeguards, subsidies, government procurement and domestic regulation<sup>139</sup> Regional trade agreements exist between developed countries (referred to as north-north agreements), developing countries (referred to as south-south agreements) and some between developed and developing countries (referred to as north-south agreements).<sup>140</sup> The Free Trade Area agreement between the US and Australia is an example of a north-north trade agreement.<sup>141</sup> All the RECs in Africa are examples of regional trade agreements between developing countries (south-south agreements) as all the countries that are members to these RECs are classified as either developing or least developed countries.<sup>142</sup> NAFTA is an example of a trade agreement between developed and developing countries; its members are Canada, the United States (developed) and Mexico (developing).<sup>143</sup> Different approaches are taken in this liberalization process; some agreements follow the positive list approach while others follow a negative list approach. In the positive list approach members will indicate which service sectors are liberalized while in the negative list approach all services areas considered to be liberalized unless the contrary is indicated in a member's schedule of commitments.<sup>144</sup> SADC

<sup>138</sup>J. Anthony VanDuzer 'A Critical Look at the Prospects for Robust Rules for Services in Preferential Trading Agreements' (2012) 39 1 *Legal Issues of Economic Integration* 29 at page 30.

<sup>139</sup>Rupa Chanda 'GATS and its implications for developing countries: Key issues and concerns' (2002) *DESA Discussion Paper No. 251* at page 3 and Pierre Sauvé 'Completing the GATS Framework: Addressing Uruguay Round Leftovers' (2002) 57 3 *Aussenwirtschaft* 302 at page 302.

<sup>140</sup>Rudolf Adlung & Sébastien Miroudot 'Poison in the Wine? Tracing GATS-Minus Commitments in Regional Trade Agreements' (2012) 46 5 *Journal of World Trade* 1035 at page 1071.

<sup>141</sup>Australia-United States Free Trade Agreement. Available at <http://www.dfat.gov.au/fta/ausfta/> [Accessed 31 August 2013].

<sup>142</sup>Examples include SADC, COMESA, EAC and beyond the Africa RECs another example is Association of South Eastern Asian Nations; 'South Eastern Asian Nations: Overview'. Available at <http://www.asean.org/asean/about-asean/overview> [Accessed 31 August 2013]

<sup>143</sup>North American Free Trade Area. Available at <http://www.ustr.gov/trade-agreements/free-trade-agreements/north-american-free-trade-agreement-nafta> [Accessed 31 August 2013].

<sup>144</sup>Rupa Chanda (note 139) at page 5 and 7.

is made up of developing and least developed countries. Intra-SADC trade agreements therefore fall into the category of south-south agreements.

SADC has also responded to the need to regulate TiS in the region. In 2012 the SADC TiS Protocol was concluded.<sup>145</sup> The Protocol was concluded on the basis of Article 22 of the SADC Treaty which permits the conclusion of Protocols as the need arises and Article V of the GATS which permits regional economic integration agreements in the context of TiS. To date the Protocol has not yet come into force since the requisite number of members has not signed it yet.<sup>146</sup> In this Protocol the SADC members seek to progressively liberalize TiS through the removal of discriminatory measures between state parties. It is hoped that through such liberalisation there will be economic growth in the region and that such economic growth will lead to the improvement of the livelihoods of the people of the region.<sup>147</sup> The Protocol takes the positive list approach to liberalization of sectors; it specifies the sectors that will be negotiated and liberalised.

### **3.3.1 The Provisions of the Protocol**

The Protocol is modelled closely on GATS. There are some provisions that mirror those of GATS. The Protocol is divided into six parts. Part one covers the definitions, objectives and scope, the second part stipulates the general obligations, the third part is entitled trade in services and it has the main principles that will govern TiS, the fourth part covers matters related to TiS such as business practices while the fifth part covers institutional arrangements and dispute settlement provisions. Part six covers final provisions.

### **3.3.2 Definitions, objectives and scope**

In this part of the agreement the Protocol's objectives are stipulated. Apart from aiming at liberalising TiS so as to advance economic growth and development, it is also the objective of the Protocol to ensure that it is not couched in such a way that it finds itself in conflict with

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<sup>145</sup> SADC TiS Protocol (note 16).

<sup>146</sup> The countries that have signed the Protocol thus far are The Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, The Republic of the Seychelles, Swaziland, United Republic of Tanzania and Republic of Zambia.

<sup>147</sup> SADC TiS Protocol (note 16) at Article 2(2).

other SADC Protocols.<sup>148</sup> The Protocol is also aimed and ensuring that the liberalisation process fully preserves the right of member states to continue to regulate and enhance the capacity and competitiveness of their service sectors.<sup>149</sup> Services are defined as any services in any sectors except those that are supplied in the exercise of governmental authority.<sup>150</sup> This definition is similar to that in GATS.<sup>151</sup> Just like in GATS TiS under SADC is to be construed through the four modes of supply.<sup>152</sup>

### 3.3.3 General obligations

Once the Protocol comes into force member states are expected to give services and service suppliers from other SADC member states treatment that is no less favourable than that extended to like services and service suppliers of any other states in the region or third country.<sup>153</sup> This is the MFN obligation. The MFN obligation that is placed on SADC member states come with exceptions thereto; members are allowed to negotiate and conclude other preferential agreements on TiS with other SADC members or with third countries.<sup>154</sup> This is allowed on condition that the countries negotiating such agreements allow other SADC states to negotiate the preferences that will be granted in such agreements on a reciprocal basis.<sup>155</sup> Members are also allowed to maintain any preferential trade agreement on TiS that they were party to prior to the entering into force of the Protocol as long as such agreement is listed in the country's list of exemptions.<sup>156</sup> Each state party is allowed to regulate its service industry taking into account its own unique circumstances and level of development provided that such regulations do not impair the country's rights and obligations under the Protocol.<sup>157</sup> The domestic regulation is expected to be done in a manner that is transparent and member states are expected to, where this is not contrary to their constitutional structures, avail impartial judicial, arbitral or administrative tribunals or procedure where services suppliers can bring their disputes for resolution.<sup>158</sup> The Committee of Ministers responsible for trade is expected

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<sup>148</sup> SADC TiS Protocol (note 16) at Article 2 (4).

<sup>149</sup> SADC TiS Protocol (note 16) at Article 2(5).

<sup>150</sup> SADC TiS Protocol (note 16) at Article 2 (5) (a).

<sup>151</sup> SADC TiS Protocol (note 16) at Article I (3) (b).

<sup>152</sup> SADC TiS Protocol (note 16) at Article 3(2) and GATS (note 1) at Article I(2).

<sup>153</sup> SADC TiS Protocol (note 16) at Article 4.

<sup>154</sup> SADC TiS Protocol (note 16) at Article 4 (3).

<sup>155</sup> Ibid.

<sup>156</sup> SADC TiS Protocol (note 16) at Article 4 (4).

<sup>157</sup> SADC TiS Protocol (note 16) at Article 5.

<sup>158</sup> SADC TiS Protocol (note 16) at Article 6.

to assist in the regulation process by seeing to it that qualification requirements and procedures allow for effective market access for service providers.<sup>159</sup>

Two years after the entry into force of the Protocol the Trade Negotiating Forum-Services (TNF-Services) is expected to facilitate the negotiation process that will effect mutual recognition of requirements, qualifications, licenses and other regulations that service suppliers will be expected to meet in order for them to supply services in the member states.<sup>160</sup> The agreement that will arise from this negotiation process is expected to comply with the recognition provisions under GATS.<sup>161</sup> In facilitating the mutual recognition process LDCs are to be given technical assistance in accordance with the Protocol.<sup>162</sup> Members are also expected to be transparent by making their regulations known through publication.<sup>163</sup>

### 3.3.4 TiS provisions

In this part the Protocol outlines the requirements to be fulfilled to facilitate TiS. SADC member states are to give services and service providers from other SADC members market access.<sup>164</sup> Such market access shall take into account the granting country's level of development and any limitations it has stipulated in its list of commitments.<sup>165</sup> The liberalized services from other SADC member states are also to be treated in the same manner as services that are from the territory that they are being traded in. Such national treatment shall take into account the level of development and the limitations that have been stipulated in the lists of commitments.<sup>166</sup> Since the level of development in a country is to be taken into account when granting market access, some countries may have to give less market access to foreign services in order to protect infant industries or they may opt to give more market access in order to help develop a particular service sector.

The Protocol identifies six service areas as the initial priority areas for progressive liberalization. These areas are communication, construction, energy related, financial,

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<sup>159</sup> SADC TiS Protocol (note 16) at Article 6(4).

<sup>160</sup> SADC TiS Protocol (note 16) at Article 7(1).

<sup>161</sup> SADC TiS Protocol (note 16) at Article 7(2).

<sup>162</sup> SADC TiS Protocol (note 16) at Article 7(3).

<sup>163</sup> SADC TiS Protocol (note 16) at Article 7(4).

<sup>164</sup> SADC TiS Protocol (note 16) at Article 14.

<sup>165</sup> Ibid.

<sup>166</sup> SADC TiS Protocol (note 16) at Article 15.

tourism and transport services.<sup>167</sup> These areas are similar to the sectors identified by the WTO with the exception of the energy related sector. While this is not identified as a service sector by the WTO it can fall under the 'other services' category. Countries are to negotiate the liberalization of these sectors in a period of three years and make commitments therein.<sup>168</sup> Thereafter the negotiation of the rest of the service areas shall take place in three year rounds. These negotiations are to be conducted in conformity with the principle of asymmetry taking into account the circumstances of individual countries.<sup>169</sup> The principle of asymmetry dictates that in liberalizing trade, countries should not be required to make similar commitments but instead that each country's circumstances be considered and that each country be allowed to make commitments on the basis of the progress it has made in development.

### **3.3.5 Matters related to trade**

The provisions under this part of the Protocol address issues relating to the promotion of trade and investment, business practices, transfers, labour market integration agreements, denial of benefits and waiver of obligations.<sup>170</sup>

### **3.3.6 Institutional Arrangements and Dispute Settlement Provisions**

In so far as institutional arrangements are concerned the Committee of Ministers of Trade responsible for trade matters (CMT), the committee of senior officials and the Trade Negotiation Forum for services (TNF-Services) are to be the institutions responsible for seeing to the implementation of the Protocol.<sup>171</sup> Their responsibilities will entail directing implementation and supervising the work of any committees or sub committees that will be established. The CMT is to oversee the entire process; the committee of senior officials is to report to the CMT while the TNF-Services will conduct negotiations, reviews, research and monitor the liberalization process and report to the Committee of Senior officials.<sup>172</sup> In so far

<sup>167</sup> SADC TiS Protocol (note 16) at Article 16 (2).

<sup>168</sup> SADC TiS Protocol (note 16) at Article 16(3).

<sup>169</sup> SADC TiS Protocol (note 16) at Article 16(4).

<sup>170</sup> SADC TiS Protocol (note 16) at Part 4.

<sup>171</sup> SADC TiS Protocol (note 16) at Article 24(1).

<sup>172</sup> SADC TiS Protocol (note 16) at Article 24.

as dispute resolution is concerned the Protocol provides for this under Annex 1 thereto.<sup>173</sup> This Annex allows for the use of various dispute resolution mechanisms; state parties can consult, use good office and go for conciliation and mediation.<sup>174</sup> Annex 1 also provides for the establishment of a panel if it is so requested by an aggrieved party to deal with a dispute.<sup>175</sup>

The final provisions allow for the development of annexes if the need arises.<sup>176</sup> There is provision made for the amendment of the Protocol.<sup>177</sup> The Protocol is open for ratification in accordance with the domestic laws of the members and it is to enter into force thirty days after it has been ratified by two thirds of the member states.<sup>178</sup> Member states are also given the option of withdrawing from the Protocol provided they give a twelve month written notice.<sup>179</sup>

### **3.4 Levels of commitments by SADC members under the GATS**

Before a consideration of whether or not the Protocol will succeed in liberalizing trade in the region it is necessary to consider the commitments that SADC members have made at the multilateral level thus far. In order for the Protocol to succeed in liberalizing trade in services it has to be shown that it will succeed in getting SADC countries to make commitments beyond the commitments they have made under the GATS. If the Protocol will just allow the status quo to stand then it will not open up TiS in SADC.

In their schedules of commitment WTO members are to indicate the sectors or sub sectors that they are making commitments in.<sup>180</sup> The schedule will also indicate whether market access is granted for each mode of supply or the extent to which market access will be granted for each mode of supply in relation to a listed sector or subsector.<sup>181</sup> The schedule will also indicate whether national treatment will be granted to the services listed through any

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<sup>173</sup>SADC Protocol on Trade in Services Annex 1 Concerning the Settlement of Disputes between the State Parties (2012).

<sup>174</sup> SADC Protocol on Trade in Services Annex 1 (note 173) at Article 3, 4 and 5.

<sup>175</sup> SADC Protocol on Trade in Services Annex 1 (note 173) at Article 6.

<sup>176</sup> SADC TiS Protocol (note 16) at Article 26.

<sup>177</sup> SADC TiS Protocol (note 16) at Article 29.

<sup>178</sup> SADC TiS Protocol (note 16) at Article 29.

<sup>179</sup> SADC TiS Protocol (note 16) at Article 32.

<sup>180</sup> Peter Egger and Rainer Lanz 'The Determinants of GATS Commitment Coverage' (2008) *The World Economy* 1666 at page 1673.

<sup>181</sup> Ibid.

of the modes of supply.<sup>182</sup> If market access or national treatment is not to be granted through any of the modes then the schedule will indicate this by stating that market access or national treatment is 'unbound' for that mode. If there are no limitations placed then the schedule will indicate this by stating that there are 'none'.<sup>183</sup> Sometimes there may be partial limitations placed on a particular mode for both market access and national treatment and this will also be indicated in the schedule.

Angola has made commitments in three sectors at WTO level namely financial services, tourism and the recreational, cultural and sporting services.<sup>184</sup> Under the financial services sector three subsectors are listed and there are no limitations placed on national treatment for all the four modes. There are limitations placed on market access for all the financial service.<sup>185</sup> For tourism services and recreational, cultural and sporting services there are limitations that are placed on both market access and national treatment.<sup>186</sup> Botswana has made commitments in the following sectors; professional services, communications, tourism and travel related, business services, real estate service, research and development services and computer and related services.<sup>187</sup> There are some twenty three subsectors identified in Botswana's schedule of commitments and most sectors have limitations placed on their market access and national treatment.<sup>188</sup> The Democratic Republic of Congo has commitments under tourism and travel related services.<sup>189</sup> For the most part there are no limitations on national treatment but market access has limitations mostly for mode 3 and 4 for all the listed sub-sectors.<sup>190</sup> Lesotho has listed more than sixty subsectors in its schedule of commitments.<sup>191</sup> For the most part the commitments are unbound for mode 4 for both national treatment and market access.<sup>192</sup> Madagascar has listed three subsectors and in all of them mode four of supply is unbound for both market access and national

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<sup>182</sup> Ibid.

<sup>183</sup> Ibid.

<sup>184</sup> COMMUNICATION FROM ANGOLA

General Agreement on Trade in Services - Schedule of Specific Commitments. Available at [http://www.esf.be/pdfs/GATS%20UR%20Commitments/Angola%20UR%20SC%2015%20\(2\).pdf](http://www.esf.be/pdfs/GATS%20UR%20Commitments/Angola%20UR%20SC%2015%20(2).pdf) [Accessed 31 August 2013].

<sup>185</sup> Ibid.

<sup>186</sup> Ibid.

<sup>187</sup> BOTSWANA Draft converted Schedule of Specific Commitments. Available at <http://www.unctadxi.org/sections/DITC/SADC/docs/Country%20Doc/DCSBotswana.pdf> [Accessed 31 August 2013].

<sup>188</sup> Ibid.

<sup>189</sup> World Trade Organisation S/DCS/W/COG.

<sup>190</sup> Ibid.

<sup>191</sup> World Trade Organisation S/DCS/W/LSO.

<sup>192</sup> Ibid.

treatment.<sup>193</sup> Malawi has listed ten subsectors in its schedule, for all these subsectors there is a limit placed on mode 4 with regards to national treatment and market access, the rest of the modes have no limitations placed on them for both national treatment and market access.<sup>194</sup> The Mauritius schedule lists twenty four sub sectors.<sup>195</sup> Most of these subsectors have limits placed on their market access and national treatment for mode 4.<sup>196</sup> Most of the sectors have no limitations placed on national treatment for mode 1, 2 and three.<sup>197</sup> For most services there are no market access limitations except for mode 4.<sup>198</sup> Madagascar's schedule lists business services and there are limitations placed on both market access and national treatment for all the subsectors listed.<sup>199</sup> Mozambique has only made commitments with regards to financial services.<sup>200</sup> There are no limitations placed on national treatment but there is a limit placed on mode three and four in so far as market access is concerned.<sup>201</sup> Namibia has only made commitments under two service sectors; other services and tourism and related services.<sup>202</sup> There are no limits on the National treatment and market access of these services.<sup>203</sup> South African has listed more than fifty subsectors and most of these sectors have a limit in so far as mode four of supply is concerned.<sup>204</sup> Swaziland has listed nine subsectors in its schedule of commitments.<sup>205</sup> There is no national treatment limitations placed on any of these sub sectors but there are some limitations on market access.<sup>206</sup> Tanzania has made commitments in one service area and one subsector thereof; tourism and travel related services.<sup>207</sup> Zambia has listed nine subsectors in its schedule of commitments.<sup>208</sup> In all these subsectors that have been listed there is a limit placed on the market access and national treatment on mode 4 of supplying those services.<sup>209</sup> Zimbabwe has listed seventeen subsectors in its schedule.<sup>210</sup> There are limitations on market access and national treatment in some subsectors.<sup>211</sup>

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<sup>193</sup>World Trade Organisation S/DCS/W/MDG.

<sup>194</sup>World Trade Organisation S/DCS/W/MWI.

<sup>195</sup>World Trade Organisation S/DCS/W/MUS.

<sup>196</sup> Ibid.

<sup>197</sup> Ibid.

<sup>198</sup> Ibid.

<sup>199</sup> Ibid.

<sup>200</sup>World Trade Organisation S/DCS/W/MOZ.

<sup>201</sup> Ibid.

<sup>202</sup>World Trade Organisation S/DCS/W/NAM.

<sup>203</sup> Ibid.

<sup>204</sup>World Trade Organisation S/DCS/W/ZAF.

<sup>205</sup>World Trade Organisation S/DCS/W/SWZ.

<sup>206</sup> Ibid.

<sup>207</sup>World Trade Organisation S/DCS/W/TZA.

<sup>208</sup>World Trade Organisation S/DCS/W/ZMB.

<sup>209</sup> Ibid.

<sup>210</sup>World Trade Organisation S/DCS/W/ZWE.

<sup>211</sup> Ibid.

The schedules of commitment of most SADC member states do not list a lot of subsectors. Those that do have a lot of subsectors listed (Lesotho and South Africa) place limitations on most of the subsectors under both market access and national treatment. Most of the schedules also limit mode four of supply in almost all the subsectors listed. To succeed in liberalising TiS in the region the Protocol therefore needs to require the members to remove restrictions on mode 4 and to require them to also make more sectoral commitments. Given that there are few sectors that are listed there is room for SADC members to make meaningful commitments at regional level without going against their multilateral obligation of not raising the barriers to trade for third parties to levels higher than what they currently are.

### **3.5 The Protocol and Article V of the GATS**

As already stated GATS allows its members to enter into economic integration agreements that will liberalize trade as between the members to that agreement without extending the benefits to all other WTO members. This is however only allowed on condition that such agreements have substantial sectoral coverage and they provide for the absence or elimination of substantially all discrimination between the parties to that agreement.

#### **3.5.1 Substantial sectoral coverage**

The SADC TiS Protocol does not provide for the immediate liberalization of any service sector. It instead provides for the negotiation of the six priority sectors that it has identified namely; communication, construction, energy-related, financial, tourism and transport services.<sup>212</sup> The selected priority areas cover the three essential services; transport communication and financial service. This is understandable given the levels of development in the region and the need for services that play a facilitative role. It is also appropriate that the tourism sector has been identified as a priority area since almost all SADC members have comparative advantage in this area and it also has an employment creating aspect.<sup>213</sup> The construction sector and energy sector are also areas that need to be given priority since

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<sup>212</sup> SADC TiS Protocol (Note 16) at Article 16 (2).

<sup>213</sup> ManengaNdulo et.al 'State of Trade in Services and Service Trade Reform in Southern Africa' (2005) *NEPRU Research Report No. 31* at page 79.

development is highly dependent on the availability of infrastructure and these two are necessary for the development of infrastructure. The energy sector also requires attention since the energy sector in the region has been struggling to cater for the region's energy needs recently.<sup>214</sup> The Protocol has taken a positive list instead of a negative list approach to liberalisation. The positive list approach may not be the most beneficial as it tends to be less transparent and therefore do not necessarily encourage deeper integration.<sup>215</sup> Most developing countries have taken a negative list approach to their commitments in the economic integration agreements under GATS and this has proven to be more beneficial to liberalisation.<sup>216</sup> It may have been more beneficial for SADC to take the negative list approach but since GATS does not prescribe any of the approaches SADC was at liberty to choose the positive list approach.

Subsequent to negotiating these priority areas the Protocol envisages more rounds to negotiate the liberalization of other service sectors. The round of negotiations for the priority areas is to be completed in three years after the entry into force of the Protocol.<sup>217</sup> The Protocol is silent on how long the subsequent rounds of negotiations on other service areas are expected to be. The Protocol is also silent on how many service areas are to be the subject of a round. The rounds of negotiation on the liberalization of more service areas are to occur in successive rounds as opposed to concurrent rounds.<sup>218</sup> At the end of negotiations the list of commitments made by state parties will become part of the Protocol.<sup>219</sup> This by implication means that parties are obliged to make commitments beyond their GATS commitments since if it were otherwise then there would be no need for a separate list of commitments.

In assessing compliance with Article V of GATS consideration is to be given to the relationship of the agreement to the wider process of economic integration or trade liberalization among the countries in the region.<sup>220</sup> In this context then what will be of relevance are the commitments that SADC member states have made under the GATS, the state of liberalization of trade in goods and the level of integration that the region has reached

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<sup>214</sup>LekopanyeMooketsi 'SADC Energy Ministers Tackle Power Crisis'. Available at <http://www.mmegi.bw/index.php?sid=4&aid=39&dir=2008/February/Thursday28> [Accessed 21 August 2013]

<sup>215</sup> Nicolette Cattaneo 'Trade integration, production networks and the services sector: Implications for regional trade agreements in Eastern and Southern Africa' (2008) *Occasional Paper 94 SAIIA 1* at page 23.

<sup>216</sup>Ibid.

<sup>217</sup> SADC TiS Protocol (Note 16) at Article 16(1).

<sup>218</sup> SADC TiS Protocol (Note 16) at Article 16 (1).

<sup>219</sup> SADC TiS Protocol (Note 16) at Article 16(5).

<sup>220</sup>GATS (note 1) at Article V (2).

as required in its treaty. The economic integration provision of the GATS calls for flexibility to be afforded to those agreements where developing countries are parties thereto.<sup>221</sup>

Substantial sectoral coverage as explained in chapter II requires that at least more than half of the service sectors be covered. Based on the interpretation of the word ‘substantial’ and on subsequent practice by WTO members, once the negotiation process for the first priority areas is completed and member states have made commitments under these sectors there will be no substantial sectoral coverage in the region. It may be that more sectors will be liberalized by subsequent rounds to bring the number of sectors to a figure that is higher than six. Understood in its proper context and purpose, the liberalization of substantial sectors however needs to occur at the time of entry into force of the agreement or within a reasonable time after entry into force.<sup>222</sup> Substantial sectoral coverage should also cover more than just six sectors to be substantial; subsequent practice by WTO members has indicated that half the sectors does not amount to substantial. As the agreement stands, once it has obtained the requisite two third ratification by member states and has entered into force there will be no substantial sectoral coverage. Three years after the completion of negotiations regarding the six priority sectors there will still be no substantial sectoral coverage as required by the GATS. There are a total of twelve sectors under the GATS. To liberalize only six will not suffice as ‘substantial sectoral coverage’. The coverage is supposed to be ambitious and not narrow otherwise it would defeat the purpose of Article V and the GATS as a whole.

It has been argued that when it comes to developing countries Article V provides for them to be afforded flexibility and that such flexibility is to be understood to mean that they can liberalize fewer sectors and therefore not comply with the requirement of substantial sectoral coverage.<sup>223</sup> Proceeding on this argument then the Protocol would be exempt from complying with the requirement of substantial sectoral coverage. This argument is however not in line with Article V. While Article V does give developing countries flexibility, the flexibility is *particularly* (emphasis mine) for the requirement of ensuring the absence or elimination of discrimination requirement not the number of sectors to covered.<sup>224</sup> The SADC agreement still needs to meet the requirement of substantial sectoral coverage and as it stands it will not do so once it enters into force nor will it do so within a reasonable time since three

<sup>221</sup>GATS (note 1) at Article V (3) (a).

<sup>222</sup> Luis Abugattas ‘Swimming in the Spaghetti Bowl: Challenges for Developing Countries under the New Regionalism’ (2004) *Policy Issues in International Trade and Commodities Study Series* No. 27 UNCTAD 1 at page 18.

<sup>223</sup>Luis Abugattas (note 222) at page 17.

<sup>224</sup> Ibid.

years after entering into force and at the conclusion of the first round of negotiation there will only be six sectors liberalized. Although a new round of negotiations will begin at the end of the conclusion of the initial round, there is no time period given for its conclusion. This state of affairs therefore makes it difficult to conclude that at the entry into force of the Protocol or after a reasonable time there will be substantial sectoral coverage. The Protocol therefore fails at meeting the substantial sectoral coverage requirement.

### **3.5.2 Absence or elimination of substantially all discrimination**

The requirement for the absence or elimination of substantially all discrimination in the sectors covered is to be fulfilled through the elimination of existing discrimination measures and or prohibition of new or more discriminatory measures. When it comes to TiS discriminatory measures come in the form of regulations that are placed on service and service suppliers. Other discriminatory measures may come in the form of restrictions on movement of persons and capital, technical standards, licensing of qualification requirements and sometimes tariffs.<sup>225</sup> There may be regulations that deny services and service suppliers the benefits and treatment that are given to domestic service suppliers.

#### **3.5.2.1 Regulations**

The objectives make it clear to SADC members that the Protocol aims at liberalising trade in the region while retaining the member's ability to regulate services at a domestic level.<sup>226</sup> The SADC TiS Protocol gives member states the right to maintain or introduce new regulations to regulate the service sector on condition that such regulations do not impair any rights and obligations that the members have under the Protocol.<sup>227</sup> The Protocol also allows for flexibility to be given to states, depending on their levels of development in so far as complying with this requirement is concerned.<sup>228</sup> Special measures are to be established to ensure the flexibility.<sup>229</sup> The provisions of the Protocol do not necessarily provide for the absence or elimination of discriminatory regulations. What the Protocol does is to allow for them to be maintained under reasonable circumstances; they are to be maintained if they do

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<sup>225</sup> Aaditya Mattoo and Carsten Fink 'Regional Agreements and Trade in Services: Policy Issues' (2002) *World Bank Policy Research Working Paper 28521* at page 6.

<sup>226</sup> SADC TiS Protocol (Note 16) at Article 2(5).

<sup>227</sup> SADC TiS Protocol (Note 16) at Article 5.

<sup>228</sup> Ibid.

<sup>229</sup> Ibid.

not impair obligations under the Protocol and if by reason of size, structure, vulnerability and level of development a country there is a need to maintain such measures.<sup>230</sup> It will be for the TNF-Services to decide whether a country's regulations are protectionist or they seek to protect a legitimate interest.

### **3.5.2.2 Restrictions of movement of persons and capital**

The Protocol allows member states to maintain their laws, regulations and requirements regarding stay and work, labour conditions and the establishment of natural persons as long as such measures do not operate to nullify benefits that are meant to accrue to other member states in terms of the Protocol or any specific commitments that will be made under the Protocol.<sup>231</sup> The Protocol therefore places a limit on the limits that SADC members can maintain on movement. Once there are commitments that member states have made in any service sector that will be liberalized in terms of Mode 4 they will have to discontinue applying any measures which will operate to restrict movement of persons. With regards to the movement of capital the Protocol calls for member states to abstain from applying restrictions that prevent the movement of capital in and out of their territories.<sup>232</sup> The Protocol also makes it a market access violation for states to limit the participation of foreign capital.<sup>233</sup>

### **3.5.2.3 Recognition of requirements, qualifications, licenses and other regulations**

This is yet another area that countries can use to discriminate services from other countries and thereby denying them access to their markets. Meaningful integration and therefore liberalization of TiS can only occur if differences between the standards that countries apply are addressed. When it comes to removing these barriers there are two practices that economic integration agreements can use; harmonization or mutual recognition.<sup>234</sup> Harmonization entails synchronizing and establishing mutually accepted standards while mutual recognition entails accepting the standards and qualifications and of other countries as is and not requiring that they be modified to be similar to those of other countries.<sup>235</sup> A number of factors go into informing which one can serve a region best. If there are fundamental differences in the mandatory quality standards then there will be a need to

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<sup>230</sup> Ibid.

<sup>231</sup> SADC TiS Protocol (Note 16) at Article 17.

<sup>232</sup> SADC TiS Protocol (note 16) at Article 20 (1).

<sup>233</sup> SADC TiS Protocol (note 16) at Article 14 (e).

<sup>234</sup> AadityaMattoo and Carsten Fink (note 225) at page 22.

<sup>235</sup> Ibid.

harmonize while if the differences are narrow then mutual recognition will be the appropriate step.<sup>236</sup> Another determining factor is the level that national standards are at. If the national standards are not optimal then the best option is for countries to opt for international harmonization so that they can improve their standards based on the standards from other members who have sound regulatory frameworks.<sup>237</sup> The SADC Protocol provides for mutual recognition. In terms of the Protocol the TNF-Services is to negotiate an agreement that will enable the mutual recognition of requirements, qualifications, licenses and other regulations.<sup>238</sup> The mutual recognition process is to take into account WTO requirements and any other relevant processes and mechanisms under other SADC Protocols. SADC Protocols that will be relevant in this process are the Protocol on the Development of Tourism in the Southern African Development Community, Finance and investment Protocol and the SADC Protocol on Trade. Some LDCs in SADC still need technical assistance with setting up standards and so it will be impossible to recognize their standards or qualification since in some instances they may not even exist.

#### **3.5.2.4 Is the requirement fulfilled?**

The requirement of the absence or elimination of discrimination is to be applied with flexibility when the economic integration agreement has developing country members.<sup>239</sup> Furthermore GATS calls for the facilitation of the increased participation of developing countries. The SADC Protocol does not provide for the absence or elimination of all discrimination; members are still allowed to maintain and introduce new regulations. SADC has also opted for mutual recognition instead of harmonization.<sup>240</sup> Given the levels of development in some countries this will not be beneficial in the long run as it will mean either one of two things; either that there are no standards to recognize in some countries due to the fact that those countries do not have the technical expertise to formulate the standards or due to the fact the standards that do exist are not at a level to be recognized and used at an international level. The provisions on the free movement of persons seek to eliminate the discrimination of Foreign Service suppliers by requiring that countries not maintain measures that will restrict their movement to come and supply services in their territories once those

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<sup>236</sup> AadityaMattoo and Carsten Fink (note 225) at page 22 to 23.

<sup>237</sup> Ibid.

<sup>238</sup> SADC TiS Protocol (note 16) at Article 7 (1).

<sup>239</sup> SADC TiS Protocol (note 16) at Article V (3) (b).

<sup>240</sup> SADC TiS Protocol (note 16) at Article

countries have made commitments that require supply through mode three or four.<sup>241</sup> Countries may however respond by not making commitments that will require that they relax their immigration requirements. The TiS Protocol gives its members flexibility in complying with this requirement. This is in keeping with Article V of GATS.<sup>242</sup> It is also in keeping with the GATS' objective of facilitating the increased participation of developing countries. The flexibility is an incentive to draw developing countries to participate in the liberalization process while at the same time ensuring that they retain the ability to regulate and influence policy at domestic level.

### **3.5.3 The relationship of the agreement to the wider process of economic integration or trade liberalization in SADC**

When evaluating whether or not an economic integration agreement provides for the absence or elimination of substantially all discrimination, consideration may be given to the relationship of the agreement to the wider process of economic integration or trade liberalization in the region.<sup>243</sup> The Protocol comes at a time when TiS had been given little attention in SADC's legal instruments. Trade in goods is provided for at length in the trade Protocol. Thus far SADC has established a Free Trade in Area in the region and as of 2008 there were not tariff barriers in 85% of the goods traded in SADC.<sup>244</sup> Considering the level of liberalisation that has been achieved with goods, it is only appropriate that attention be given to TiS. Since its will only be once the Protocol is ratified that the region will have a legal framework that deals with TiS it is appropriate that there are still some discriminatory measures that members will be allowed to maintain as they ease into the liberalization process. The infant industry argument would seem to be the rationale behind the protectionist stance that the Protocol has taken in so far as the elimination of discriminatory measures is concerned.<sup>245</sup> This argument holds that start up industries in developing countries often need to be protected against established foreign manufacturers and established competition until such a time when they can attain the same level as similar industries in developed

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<sup>241</sup> SADC TiS Protocol (note 16) at Article 17.

<sup>242</sup> Developing countries are given flexibility when it comes to complying with this requirement per Article V (3) (a) of GATS.

<sup>243</sup> SADC TiS Protocol (note 16) at Article V (2).

<sup>244</sup> Free Trade Area. Available at <http://www.sadc.int/about-sadc/integration-milestones/free-trade-area/>

[Accessed 31 August 2013]

<sup>245</sup> AadityaMattoo and Carsten Fink (note 225) at page 16.

countries.<sup>246</sup> Regional trade agreements in developing countries are usually expected to liberalize trade while at the same time affording the requisite protection needed by industries in order to ensure that liberalization is gradual and there is no overwhelming exposure to competition.<sup>247</sup> This may explain the stance that SADC has taken in the Protocol in so far the elimination of discriminatory measures is concerned. In so far as substantial sectoral coverage is concerned, despite the fact that the Protocol fails to satisfy this requirement, the sectors that have been identified as priority sectors for the first negotiation round indicate a good stance of the Protocol on trade liberalization. The initial six priority sectors include the three essential services. These services will play a facilitative role in the continued efforts of liberalization of both services and good. The fact that in applying the Protocol members are expected to avoid measures that contradict other Protocols and to uphold their obligations under other SADC Protocols indicates that the Protocol has a relationship with other Protocols that are aimed at bringing wider economic integration in the SADC region.

#### **3.5.4 Article V (3) (b)**

This provision permits the granting of favourable treatment to juridical person owned or controlled by natural person from the members to the agreement if such agreement is only between developing countries.<sup>248</sup> SADC is an agreement made up of only developing countries; the TiS Protocol is therefore permitted to grant favourable treatment to juridical persons owned by natural persons from the region. The Protocol defines SADC juridical person as a legal entity that is incorporated in terms of the laws of any member states and carries out substantial business operations in the territory of a member state.<sup>249</sup> The Protocol provides for the denial of its benefits from those service suppliers or services supplied by enterprises owned or controlled by persons from third party states.<sup>250</sup> This provision gives preference to services and services providers from SADC juridical persons by allowing for the denial of benefits from non-SADC juridical persons.<sup>251</sup> The Protocol has therefore succeeded in taking advantage of this provision of GATS.

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<sup>246</sup> Infant Industry Argument. Available at [http://www.investorwords.com/7353/infant\\_industry\\_argument.html](http://www.investorwords.com/7353/infant_industry_argument.html) [Accessed 31st August 2013].

<sup>247</sup> Aaditya Mattoo and Carsten Fink (note 225) at page 16.

<sup>248</sup> SADC TiS Protocol (Note 16) at Article V (3) (b).

<sup>249</sup> SADC TiS Protocol (Note 16) at Article 1.

<sup>250</sup> SADC TiS Protocol (Note 16) at Article 22.

<sup>251</sup> Ibid.

### 3.6 Other provisions of the Protocol and liberalization of TiS

#### 3.6.1 MFN Treatment

The Protocol calls for member states to extend most favoured nation treatment to services and services suppliers from other SADC members. The same provision however goes on to permit members to negotiate preferential trade agreements on services with other SADC members to the exclusion of others.<sup>252</sup> Member states are also allowed to negotiate to enter into preferential trade agreements with third party states and they are further also allowed to maintain any other preferential trade agreement that they may have become party to prior to the adoption of the Protocol.<sup>253</sup> All this can be done on the condition that SADC members are given the opportunity to negotiate the conditions of those preferences on a reciprocal basis.<sup>254</sup> The Protocol is silent on what will happen if the negotiations are unsuccessful. The only obligation is to negotiate. Since the only obligation is to negotiate on a reciprocal basis if negotiations are unsuccessful then the members that want to enter into new agreements can proceed to enter into a new agreement since there is only an obligation to negotiate.

One of the problems that has been identified as stifling progress in regional integration efforts in Africa is the fact that African states are members to multiple RECs.<sup>255</sup> As it stands most SADC members are already members of more than one regional economic community.<sup>256</sup> The Common Market of East and Southern Africa (COMESA) has the membership of the following SADC member states; Angola, the DRC, Kingdom of Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, Swaziland, Tanzania, Zambia and Zimbabwe.<sup>257</sup> Tanzania is also a member of the East African Community (EAC).<sup>258</sup> Botswana, Namibia, Lesotho, South Africa and Swaziland belong to the Southern African Customs Union (SACU).<sup>259</sup> This comes with differing commitments and levels of progress in the objectives of these communities. SACU, as can be discerned from its name, is a customs union (CU) in Southern Africa. The CU has set up a CET that is applicable among its members. This has proven to be an obstacle in so far as negotiating and setting up a SADC

<sup>252</sup> SADC TiS Protocol (Note 16) at Article 4(2).

<sup>253</sup> SADC TiS Protocol (Note 16) at Article 4(3) and (4).

<sup>254</sup> *Ibid.*

<sup>255</sup> Luis Abugattas (note 222) at page 14-15.

<sup>256</sup> Some SADC countries are part of COMESA and EAC.

<sup>257</sup> COMESA Treaty at its Preamble.

<sup>258</sup> Treaty Establishing East African Community at its Preamble.

<sup>259</sup> What is SACU? Available at <http://www.sacu.int/main.php?id=471> [Accessed 31 August 2013].

CU concerned as those countries that are SACU members already apply a certain CET and cannot apply two CET at once. Tanzania is as part of the EAC also applies the EAC CET since that community's custom union is also in force.<sup>260</sup> The CU's membership shows how multiple membership to RECs can cause members to implement duplicating or conflicting programmes to the detriment of progress in other RECs that they are party to.<sup>261</sup> Multiple membership to RECs also leads to failure of countries to pay contributions to the RECs they are members of and thus compromising the functioning of such RECs.<sup>262</sup> Multiple membership to RECs has also caused low programme implementation due to the multiplicity of commitments that have to be met while countries have insufficient resources.<sup>263</sup> Over commitment compromises the ability of countries to negotiate effectively in the regional blocs since they always have to balance the competing interests of the blocs they are members to.<sup>264</sup> The multiplicity of membership also stretches the already limited resources that SADC members have. By allowing members to negotiate to enter into further agreements within the region and beyond the Protocol fails to guard against the negative effects of multiple membership and puts the liberalization of services in SADC at the risk of failing.

### 3. 6. 2 Transparency

SADC members have an obligation to be transparent about certain issues as regards their service industries. They are to do this through publishing and availing information on the laws, regulations, administrative rulings of general application and any other procedures that affect trade in services.<sup>265</sup> States are also to make known any measures of general application and any requirements that service suppliers need to meet.<sup>266</sup> The transparency requirement will enable service suppliers to know the conditions that they have to meet in foreign countries in order to trade there. This will help facilitate trade therein and ensure that countries are not involved in trade distorting practices.

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<sup>260</sup>Mutai HK 'Regional trade integration strategies under SADC and the EAC: A comparative analysis' (2011)*SADC Law Journal* 4 81 at page 82

<sup>261</sup>Economic Commission for Africa 'The Case for Rationalization: The Inefficiency and Ineffectiveness of the Regional Economic Communities' in *Assessing Regional Integration in Africa II Rationalizing Regional Economic Communities* (2006)1 at page 51- 52.

<sup>262</sup> Ibid.

<sup>263</sup> Ibid.

<sup>264</sup>Luis Abugattas (note 222) at page 18.

<sup>265</sup> SADC TiS Protocol (note 16) at Article 8.

<sup>266</sup> SADC TiS Protocol (note 16) at Article 9(1) and (2).

### 3. 6. 3 Subsidies article

SADC members are allowed to subsidise services if this is in line with their development programs.<sup>267</sup> The CMT is given the power to review all subsidies related to TiS and can negotiate to ensure that subsidies are not provided in a way that is trade distorting.<sup>268</sup> The provision of subsidies will be beneficial for TiS as it can be used to develop infant industries in countries where the service sector is not sufficiently developed.

### 3. 6. 4 Business practices

SADC members have undertaken to do away with anticompetitive conduct.<sup>269</sup> To achieve this, the members have undertaken to apply their competition laws in a way that will not amount to anti competitive conduct or abusive of their market position.<sup>270</sup> They have also undertaken to cooperate in offering technical assistance to each other and to use such assistance to ensure that their arrangements comply with other SADC arrangements.<sup>271</sup>

## 3.7 Conclusion

The basis of the SADC TiS Protocol is Article V of the GATS. This provision places two requirements on economic integration such as the present Protocol under consideration. Once the SADC TiS Protocol comes into force it will only meet one of these requirements; the requirement for the absence or elimination of substantially all discrimination. This is not to say that the Protocol provides for the elimination of substantial discrimination; in light of the flexibility afforded developing countries when it comes to this requirement, the SADC TiS Protocol is not required to strictly comply with this requirement. The first requirement (substantial sectoral coverage) will however not be met since the Protocol will initially only liberalise six sectors and will not have liberalised more than that number in a reasonable time after the Protocol comes into force. Beyond GATS V requirements there are other provisions that are aimed at liberalising trade. The MFN provisions in the Protocol may result in more trade distorting practices as SADC members will still be able to enter into further trade

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<sup>267</sup> SADC TiS Protocol (note 16) at Article 11 (1).

<sup>268</sup> SADC TiS Protocol (note 16) at Article 11 (2).

<sup>269</sup> SADC TiS Protocol (note 16) at Article 19 (1).

<sup>270</sup> SADC TiS Protocol (note 16) at Article 19 (2).

<sup>271</sup> SADC TiS Protocol (note 16) at Article 19 (5).

agreements in relation to their services. The free movement provisions are also not likely to result in countries removing the restrictions they have placed on their mode 4 commitments at the GATS level. The levels of commitments at multilateral level by SADC members are either low or have restrictions placed on their market access and national treatment obligations. This leaves room for further liberalisation at a regional level.

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## CHAPTER IV

### CHALLENGES AND RECOMMENDATIONS

#### Introduction

This chapter will outline the challenges that the Protocol will face once it enters into force. The chapter will indicate that some of the challenges that the Protocol will face will emanate from the structure of SADC and the capacity of its institutions to implement the Protocol. Recommendations will be made regarding each of the institutional challenges. SADC Protocols that relate to some service areas or are related to TiS and the TiS Protocol will be explored and it will also be shown that some of them will also present challenges to the implementation of the Protocol and recommendations will be made as to how best each Protocol can work with the TiS Protocol. The chapter will also indicate that some of the challenges to the implementation of the Protocol will arise from the Protocol itself and recommendations will also be made on how best to address these challenges. The chapter will also look at the legislation that governs the six priority services in some SADC countries to see whether they will promote trade in those services once the Protocol is in force.

#### 4.1 The SADC Secretariat and TiS

SADC has twelve institutions. One of these institutions is the Secretariat. The Secretariat is the institution that is relevant for present purposes as it is the executive institution and is therefore responsible for seeing to the implementation and management of the regional body's programmes.<sup>272</sup> The Secretariat also coordinates SADC programmes, develops capacity, coordination and harmonises policies of member state policies and devises appropriate strategies aimed at, among other things, generating income and investment in the region.<sup>273</sup> The duties to be fulfilled by the Secretariat are divided under three groupings.<sup>274</sup> Under these three groupings there are different directorates for specific sectors and areas. The

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<sup>272</sup> The SADC Treaty (note 13) at Article 14.

<sup>273</sup> Ibid.

<sup>274</sup> SADC Directorates and Units. Available at <http://www.sadc.int/sadc-secretariat/directorates/> [Accessed 31 August 2013]

three groupings are the Executive Secretary, the Deputy Executive Secretary Regional Integration and Deputy Executive Secretary Finance and Administration.<sup>275</sup>

#### 4.1.1 The Deputy Executive Secretary Regional Integration

This Deputy Secretariat manages regional integration efforts and matters related thereto. Under the Deputy Executive Secretary Regional Integration there are five Directorates. Of these five, four are important and relevant for TiS purposes. These Directorates are; the Directorate on Trade, Industry and Finance, the Directorate on Infrastructure and Services and the Directorate Policy, Planning and Resource Mobilisation. The Deputy Executive Secretary finance's Directorates are mainly aimed at the day to day running of the Secretariat. It does however house the Legal Unit which is relevant for present purposes as this is the unit that guides in the application and interpretation of SADC legal instruments.<sup>276</sup> The Directorate of Trade, Industry and Investment is tasked with coordinating the process of removing barriers to trade, liberalising trade, establishing a free trade area (FTA), a custom union (CU) and a monetary union in the region.<sup>277</sup> This Directorate is also responsible for the implementation of the SADC Trade Protocol. The Directorate on Infrastructure and Services is responsible for improving the quality of infrastructure and increasing trade and maximising the competitiveness of the region.<sup>278</sup> The Policy, Planning and Resource Mobilisation Unit is responsible for coordinating all the planning and monitoring and evaluating all the Secretariat's functions.<sup>279</sup> The unit is tasked with monitoring the implementation of the Regional Indicative Strategic Development Plan (RISDP).<sup>280</sup> The RISDP was drawn up in an effort to re-align SADC's priorities so as to focus them on SADC challenges and formulate approaches to address them. Intervention areas are identified in this development plan and one such area is the area of trade (the liberalisation of both TiS and trade in goods are set as a

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<sup>275</sup>Ibid.

<sup>276</sup>SADC Legal Affairs. Available at <http://www.sadc.int/sadc-secretariat/directorates/office-deputy-executive-secretary-finance-administration/legal-affairs/> [Accessed 31 August 2013].

<sup>277</sup>SADC Trade Industry Finance and Investment. Available at <http://www.sadc.int/sadc-secretariat/directorates/office-deputy-executive-secretary-regional-integration/trade-industry-finance-investment/> [Accessed 31 August 2013].

<sup>278</sup>SADC Infrastructure and Services. Available at <http://www.sadc.int/sadc-secretariat/directorates/office-deputy-executive-secretary-regional-integration/infrastructure-services/> [Accessed 31 August 2013].

<sup>279</sup>SADC Policy Planning and Resource Mobilisation. Available at <http://www.sadc.int/sadc-secretariat/directorates/office-deputy-executive-secretary-regional-integration/policy-planning-resource-mobilisation/> [Accessed 31 August 2013].

<sup>280</sup>Ibid.

priority).<sup>281</sup> The intervention endeavours in the area of trade are to facilitate trade, financial liberalisation, competition, investment and economic diversification.<sup>282</sup>

Once the SADC TiS Protocol is in force it will be the responsibility of the Deputy Secretary Regional integration since this is the grouping that is mandated with seeing to the facilitation of trade and services related issues. So far the Deputy Secretary has focused on the implementation of the Trade Protocol. This Protocol aims at liberalising trade in SADC with particular emphasis on the liberalisation of trade in goods. The directorate has managed to establish a Free Trade Area (FTA) in the region as envisaged by the Trade Protocol.<sup>283</sup> In terms of the RISDP, SADC had also contemplated the establishment of a Custom Union (CU) in the region by the year 2010.<sup>284</sup> The directorate was also expected to see to the establishment of a Common Market (CM) in the region by the year 2015.<sup>285</sup> The RISDP is currently under review due to failure to meet the time frames that were set therein.<sup>286</sup> SADC failed to establish a CU mainly due to the issue of multiplicity of membership to other RTAs by SADC members. The membership of some SADC member states to SACU has particularly been a stumbling block when it came to efforts to establish the envisaged SADC CU. This is due to the fact that legally and technically countries cannot be members to more than one CU as they cannot apply two different external tariffs.<sup>287</sup> While a CU is not particularly relevant for TiS since services are not subject to tariffs or quotas, in the context of SADC the failure to establish the custom union at the time set has implications for TiS. If the CU had been established in 2010 as contemplated then SADC would be on its way to establishing a CM by 2015. The key characteristics of a common market are that it allows for the free movement of persons, capital and services.<sup>288</sup> A CM would facilitate trading in services through mode 4 of supply. The free movement of capital that comes along with a CM would also assist in the liberalisation of TiS as it would coincide with efforts to liberalise financial services.

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<sup>281</sup>SADC Secretariat 'Southern African Development Community Indicative Strategic Development Plan' 2001 (RISDP).

<sup>282</sup>SADC RISDP (note 281) at page 41.

<sup>283</sup>SADC Free Trade Area. Available at <http://www.sadc.int/about-sadc/integration-milestones/free-trade-area/> [Accessed 31 August 2013].

<sup>284</sup>SADC RISDP (note 281) at page 67.

<sup>285</sup>Ibid.

<sup>286</sup> Mr Alfred Ndabeni from the SADC Secretariat in the Directorate: Trade, Industry, Finance and Investment indicated that due to failure to reach targets the RISDP is currently under review.

<sup>287</sup> Peter Draper et. al 'SACU, Regional Integration and the Overlap Issue in Southern Africa: From Spaghetti to Cannelloni?' (2007) *Trade Policy no. 15 SAIIA1* at page 20.

<sup>288</sup>SADC RISDP (note 281) at page 24.

The failure of the Secretariat to implement the RISPD and other constraints that it has had when it comes to implementing policies and targets that have been set is due to a number of factors which need to be addressed failing which they will have a negative impact on the implementation of the TiS Protocol once it is in force. There are at least three issues that have affected the functioning of the SADC Secretariat; there is a lack of personnel, there are financial constraints and the sovereignty of SADC member states continues to stand in the way of the implementation of some policies.

SADC is not sufficiently staffed to carry out its mandate.<sup>289</sup> SADC recently went through a restructuring program which saw the scaling down of the number of personnel at the Secretariat.<sup>290</sup> The Directorate of Trade, Industry and Investment does not have an adequate amount of personnel with the requisite skills to carry out its mandate.<sup>291</sup> The lack of skills means that delivery is affected and the desired results cannot be met. The most logical solution to this problem would be to employ more personnel in order to enhance the Secretariat's capacity to coordinate and implement not just the TiS Protocol but other Protocols and policies. The recent restructuring however speaks to the fact that SADC does not have adequate funds to employ more personnel with the necessary skills to implement its policies. Most member states if not all are not in a financial position that would allow them to make a contribution greater than what they are currently contributing.<sup>292</sup> This therefore means that the secretariat's capacity to effectively implement and monitor the Protocol will be curtailed by want of the requisite expertise.

SADC states also still exist as sovereign states. Since SADC members exist as sovereign states the Secretariat cannot dictate to them what they should or should not do. The sovereignty of SADC members has affected the implementation of the RISDP. The Secretariat could not instruct the SADC members that are SACU members to relinquish their membership with SACU in order to give way for the formation of the SADC CU.<sup>293</sup>

## Recommendations

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<sup>289</sup> Mr Alfred Ndabeni (note 286).

<sup>290</sup> Ibid.

<sup>291</sup> Ibid.

<sup>292</sup> Ibid.

<sup>293</sup> Mr Alfred Ndabeni (note 286).

The secretariat needs to be staffed with experts who have the requisite knowledge needed to carry out the liberalisation mandate. This will require SADC members to contribute more towards the running of the secretariat. While this may be a financial strain for some countries, the benefits that will come from having an efficiently run secretariat will in pay off for SADC's economies. The SADC secretariat should also commit to on-going training of its personnel so as to equip them with the requisite expertise. In so far as the membership of some SADC members to SACU has stood in the way of the implementation of the SADC CU a possible solution is for SADC to enter into negotiations with SACU to subsume SACU into SADC since all SACU members are SADC members. This would then create one CU and the members thereof will be subject to one CET and SADC can move on towards establishing a CM something that is beneficial for TiS.<sup>294</sup>

#### 4.2 The TiS Protocol and other SADC Protocols

The Secretariat is already implementing and coordinating some Protocols that have been concluded by SADC members. The TiS Protocol has to be implemented in a way that is not in conflict with these Protocols. There is a commitment to ensure that the Protocol does not conflict with other Protocols.<sup>295</sup> Some of the service sectors that the TiS Protocol has identified as initial priority areas for liberalisation of TiS have already been the subject of Protocols and agreements that seek to advance cooperation and harmonisation of those sectors in the region. The initial priority service areas that are already the subject of some SADC Protocols are the communication, energy, tourism and transport services. These Protocols may have a positive effect on the liberalisation of trade of the service sectors that they seek to regulate.<sup>296</sup> This is highly dependent on whether such Protocols are in force and whether they have been ratified by all member states. If the treaties are not yet in force then they will serve little purpose for TiS liberalisation. For the most part the treaties that have been concluded regarding specific service sectors have been aimed at developing those sectors and setting up infrastructure and institutions to govern them.<sup>297</sup> Most of them did not

<sup>294</sup> Peter Draper et. al (note 287) at page 20.

<sup>295</sup> SADC TiS Protocol (note 16) at Article 2(4).

<sup>296</sup> NkululekoKhumalo 'Analysis of the Economic Partnership Agreements Process: Trade in Services Negotiations in the SADC-EU EPA' in RegineQualmann (Editor) *How to Ensure Development Friendly Economic Partnership Agreements - Lessons Across Regions Services - Investment - Other Trade Dimensions*(2009)141 at page 154.

<sup>297</sup> NkululekoKhumalo (Note 296) at page 155.

seek to liberalise trade in that service and any trade liberalisation that may have occurred as a result of the Protocols has been purely incidental.<sup>298</sup>

There are six existing SADC Protocols that will have a bearing on the operation of the TiS Protocol once it comes into force and on services in general. These Protocols are of two types; those that deal with specific service areas (particularly the six initial priority areas) and those that regulate areas that have a bearing on TiS. For the energy sector there is the SADC Protocol on Energy, for the tourism sector there is the SADC Protocol on the Development of Tourism, for the transport and communication sectors there is the SADC Protocol on Transport, Communication and Meteorology and for financial services there is the SADC Protocol on Finance and Investment. The other Protocols that are relevant to the Protocol on TiS are the SADC Protocol on the Facilitation of Free Movement of Persons and the SADC Protocol on Education and Training. What follows is an assessment of each Protocol and how it relates or will relate with the TiS Protocol.

#### **4.2.1 Protocol on the Development of Tourism in the Southern African Development Community<sup>299</sup>**

This Protocol entered into force in 2002 and has been ratified by ten of the SADC member states.<sup>300</sup> This Protocol aims at developing the tourism sector and harmonising the standard of tourism in the region.<sup>301</sup> This is to be done in an effort to *inter alia* promote socio and economic development, promote the region as a tourist destination, to create a favourable investment environment and to improve the tourism service's infrastructure. To these ends the Protocol calls for the removal of visa restrictions, the harmonisation of immigration procedure and the establishment of a tourism UNIVISA aimed at ensuring easy movement of international tourists in the region as well as promote the entire region as a single tourist destination.<sup>302</sup> The piloting of the UNIVISA initiative is still to occur in the countries that have been selected.<sup>303</sup> This Protocol is not aimed at liberalising trade in tourism but the fact

<sup>298</sup>Ibid.

<sup>299</sup>Protocol on the Development of Tourism in the Southern African Development Community of 1998.

<sup>300</sup>SADC TREATY AND PROTOCOLS STATUS OF PROTOCOLS IN FORCE JULY 27, 2011. Available at [http://tis.sadc.int/files/5113/3162/1668/STATUS\\_OF\\_SIGNATURE\\_RATIFICATION\\_OF\\_PROTOCOLS\\_REVISSED-24-11-2011.pdf](http://tis.sadc.int/files/5113/3162/1668/STATUS_OF_SIGNATURE_RATIFICATION_OF_PROTOCOLS_REVISSED-24-11-2011.pdf) [Accessed 31 August 2013].

<sup>301</sup>Protocol on the Development of Tourism (note 299) at Article 2.

<sup>302</sup>Protocol on the Development of Tourism (note 299) at Article 5(1) (c).

<sup>303</sup>Media Statement on the Meeting of SADC Ministries Responsible for Tourism, Grand Baie, Mauritius, 29 March, 2012. Available at

that it aims at harmonising policies between member states as well as creating a conducive environment for investment creates an enabling environment for liberalisation efforts.

While the Protocol envisages reforms that will harmonise tourism policies in the region and improve the tourism industry the challenge faced by this service sector is that it is highly dependent on other service sectors or Protocols which are also still in the process of harmonisation. A lot of coordination is therefore needed. The Protocols whose harmonisations are important to the tourism sector are the Transport and Communication Protocol and the Facilitation of Free Movement of Persons Protocol.

Most SADC members have listed some tourism sub sectors at the multilateral level. They have however for the most part left those subsectors unbound for both market access and national treatment in all the four modes of supply. In order for there to be beneficial trade in these services more commitments will be needed at a regional level and SADC members will have to provide market access and national treatment to service and service providers from within the region.

## **Recommendations**

The four SADC members that have not ratified the Protocol should ratify and domesticate the Protocol on the Development of Tourism so as to make it legally binding on them. SADC members should also move towards implementing the UNIVISA in order to allow for easy movement of tourists in the region. The UNIVISA was already contemplated and was meant to be implemented before the 2010 Soccer World Cup held in South Africa; SADC members had hoped that through the UNIVISA they would promote the entire region as a tourist destination for all the people that came to South Africa for the world cup.<sup>304</sup> The UNIVISA was however not implemented ahead of the world cup. Given that some ground work was laid prior to the world cup and while the time frame set for the implementation of the UNIVISA was unrealistic, three years post the world cup the UNIVISA should be implemented. One of the issues that stood in the way of the implementation of the UNIVISA is the signing and implementation of the Protocol on the free movement of persons. SADC

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[http://www.sadc.int/files/7113/5298/2123/20120329 -  
\\_Tourism\\_Ministers\\_Meeting\\_Mauritius.pdf](http://www.sadc.int/files/7113/5298/2123/20120329_-_Tourism_Ministers_Meeting_Mauritius.pdf)[Accessed 31 August 2013]

<sup>304</sup>SADC Secretariat 'SADC Infrastructure Development Status Report for Council and Summit' (2009) *SADC Secretariat* 1 at page 33.

members should therefore work towards harmonisation of the tourism Protocol with the other Protocols that are related to it.

#### **4.2.2 Protocol on Energy in the Southern African Development Community<sup>305</sup>**

This Protocol entered into force in 1998. It has been ratified by twelve of the members.<sup>306</sup> The Protocol is aimed at harmonising and standardising national and regional policies on energy, fostering cooperation in the development of the sector as well as developing of personnel.<sup>307</sup>

As already highlighted, this is not a sector that the WTO expressly identifies as a service area. It can nonetheless be categorised under the twelfth group namely, other services. The TiS Protocol and the SADC Protocol on Energy do not define what ‘Energy’ is. It is therefore hard to give content as to what the sector is about. The Energy Protocol however gives some guidance as it identifies what it terms ‘sub—sectors’ in the energy sector. These sub-sectors are; wood-fuel, petroleum and natural gas, electricity, coal, new and renewable energy sources, energy efficiency and conservation and others. The Protocol also makes it clear that these sub-sectors are not exclusive and can be extended when necessary.<sup>308</sup> The institutional arrangements that the Protocol had contemplated and set up in order to implement it have been inoperative due to lack of funding and personnel as well as the restructuring process at SADC.<sup>309</sup> Despite the fact that Annex One of the Protocol makes energy trade a priority to be considered and calls for private sector involvement and the promotion of trading in electricity the sector still remains dominated by governments.<sup>310</sup>

### **Recommendations**

<sup>305</sup> Protocol on Energy in the Southern African Development Community of 1996.

<sup>306</sup> SADC TREATY AND PROTOCOLS STATUS OF PROTOCOLS IN FORCE JULY 27, 2011. Available at [http://tis.sadc.int/files/5113/3162/1668/STATUS\\_OF\\_SIGNATURE\\_RATIFICATION\\_OF\\_PROTOCOLS\\_REVISSED-24-11-2011.pdf](http://tis.sadc.int/files/5113/3162/1668/STATUS_OF_SIGNATURE_RATIFICATION_OF_PROTOCOLS_REVISSED-24-11-2011.pdf) [Accessed 31 August 2013].

<sup>307</sup> Protocol on Energy (note 305) at Article 3.

<sup>308</sup> Energy Protocol Annex 1 Guidelines for Cooperation.

<sup>309</sup> Jennifer Hawkins ‘Assessment of the linkages between the SADC Protocol on Trade in Services and Other SADC Protocols and Legal Instruments 2012’ (2012) *Southern African Development community (SADC) Secretariat* 1 at page 47.

<sup>310</sup> UNCTAD ‘Towards SADC Services Liberalization : Balancing Multiple Imperatives’ (2009)

Since the energy sector is not one of the listed service areas at WTO level SADC members have not made any commitments at the multilateral level relating to this service sector.<sup>311</sup> This therefore presents SADC members with an opportunity to liberalise the sector without being constrained by the commitment that they have made at the multilateral level. SADC members must allow non-state actors to trade in the energy sector so as to introduce competition. There is also a need to employ personnel at the secretariat to implement the Protocol. SADC must also define the energy services so that it is clear as to what services fall under this category. By defining energy related services SADC will also be making a contribution at the multilateral level on this issue since it also remains undefined at WTO level.<sup>312</sup> The definition of what 'energy' is also essential as it will determine how far countries go with their commitments. This is an issue that needs to be addressed in both Protocols before the TiS Protocol comes into force.

#### **4.2.3 Protocol on Transport, Communications and Meteorology (TCM Protocol)<sup>313</sup>**

This legal instrument came into force in 1998 and has been ratified by twelve member states.<sup>314</sup> The general objective of this Protocol is to establish systems for these three sectors that will result in integrated infrastructure and operations which will meet the needs of the region and its people in the best way possible.<sup>315</sup> For the transport sector the Protocol aims at promoting a transport system that is efficient and establishes cooperation between the different modes of transport so as to support development in the region.<sup>316</sup> The Protocol further seeks to preserve and improve the transport infrastructure in the region.<sup>317</sup> Members are also obliged to afford landlocked countries unimpeded access to ports and the right of freedom of transit of goods and persons.<sup>318</sup> The Protocol also established Development Corridors aimed at enhancing and promoting trade in the region by providing a conducive environment for the transportation of goods from manufacturers to key areas where they are

<sup>311</sup>Jennifer Hawkins (note 309) at page 35.

<sup>312</sup>Jennifer Hawkins (note 309) at page 32.

<sup>313</sup>Protocol on Transport, Communications and Meteorology in the Southern African Development Community Region of 1996 (TCM).

<sup>314</sup>SADC TREATY AND PROTOCOLS STATUS OF PROTOCOLS IN FORCE JULY 27, 2011. Available at [http://tis.sadc.int/files/5113/3162/1668/STATUS\\_OF\\_SIGNATURE\\_RATIFICATION\\_OF\\_PROTOCOLS\\_REVISSED-24-11-2011.pdf](http://tis.sadc.int/files/5113/3162/1668/STATUS_OF_SIGNATURE_RATIFICATION_OF_PROTOCOLS_REVISSED-24-11-2011.pdf) [Accessed 31 August 2013].

<sup>315</sup>TCM (note 313) at Article 2.3.

<sup>316</sup>TCM (note 313) at Article 3.1.

<sup>317</sup>Ibid.

<sup>318</sup>TCM (note 313) at Article 3.2.2 (a) and (b).

competitive markets for them to be traded within the region.<sup>319</sup> When it comes to road transport the Protocol calls on the members to progressively work towards giving market access to international transport providers for across the border transportation of goods.<sup>320</sup> Member states that are in a position to implement the Protocol ahead of others are permitted to conclude bilateral agreements aimed at granting market access to international service providers.<sup>321</sup> For communication services the Protocol identifies two areas to be integrated; telecommunication services and postal services. For telecommunication services the Protocol seeks to develop a network that will ensure the provision of high quality and effective services that will respond to the needs of commerce and industry in the region which have been growing over the years<sup>322</sup>. It also seeks to enhance interconnectivity in the region. To achieve this goal a harmonised regional telecommunication policy was to be set up.<sup>323</sup>

Since this Protocol came into force it has on the one hand brought about major transformation into the communications service sectors in those SADC countries that have sought to implement it and on the other has been unable to bring about significant reform in those countries where the sector still remains largely state led.<sup>324</sup> In a small number of countries the Protocol has managed to introduce new actors into the telecommunication service sector which was previously exclusively state owned.<sup>325</sup> The number of countries in the region that have opened up to allow non-state actors to trade in the telecommunications industry is however small; some countries still place restrictions on private ownership of fixed line and some countries' infrastructure still remains undeveloped.<sup>326</sup> Those countries that place restrictions on their fixed lines are Botswana, Malawi, Namibia, Swaziland and Zambia.<sup>327</sup> The underdevelopment stems from the fact that in order to develop the telecommunications infrastructures in these countries, there will have to make huge capital investments.<sup>328</sup> Most of these countries are however not in a position to make such huge capital investments because there are more pressing needs that they must attend to.<sup>329</sup>

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<sup>319</sup>SADC RISDP (note 281) at page 31.

<sup>320</sup>Protocol on Transport (note 313) at Article 5.3.1.

<sup>321</sup>TCM (note 313) at Article 5.3.4.

<sup>322</sup>TCM (note 313) at Article 10.1.

<sup>323</sup>TCM (note 313) at Article 11.2.

<sup>324</sup>UNCTAD (note 310) at page 50.

<sup>325</sup>SADC RISDP (note 281) at page 51.

<sup>326</sup>UNCTAD (note 310) at page 50.

<sup>327</sup>UNCTAD (note 310) at page 44.

<sup>328</sup>Ibid.

<sup>329</sup>Ibid.

The implementation of the Protocol in so far as the transport sector is concerned has also not been attained at targeted times.<sup>330</sup> The provisions of the Protocol on transport are also in some respects in conflict with the TiS Protocol. As stated above the Protocol binds member states to liberalise their road transport sector by providing marked access to international providers. By doing this the Protocol opens up the transport sector to actors beyond the SADC region. The TiS Protocol seeks to give preference in so far as market access is concerned to SADC transport providers. The fact that these Protocols seek to provide market access to different groups of providers may be problematic once the Protocols are being implemented as some international providers may demand the same treatment in terms of the TCM as that accorded SADC providers through the TiS Protocol. In order to stay in line with Article V of the GATS and the TiS Protocol SADC members would have to provide market access for the transport sector to providers from SADC *only* (emphasis mine). The TCM Protocol however will require them to provide market access to non-SADC providers as well. In terms of the GATS any agreement that is formulated in terms of its Article V should not result in raising the level of barriers to trade for countries that are not party to such agreement to levels higher than what they were prior to the conclusion of the agreement.<sup>331</sup> Once the TiS Protocol comes into force and its read together with the TCM they will have the effect of raising barriers to trade in transport services for providers who are from states that are non-members to the TiS. The fact that the TCM Protocol also allows member states to enter into unqualified bilateral agreements regarding transport services is also problematic.<sup>332</sup> It contributes to the many bilateral agreements that SADC members are party to which have and can continue to fragment the sector as well as the region and may end up frustrate harmonisation efforts.

## Recommendations

In so far as the communication sector is concerned it is recommended that those countries that have not opened up the sector to non-state actors should do so. This will introduce competition in the sector and will allow investors to invest and make the necessary capital contributions in order to improve the working of the telecommunication sector. The best way to achieve the interconnectivity that is envisaged by the Protocol is for each SADC member

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<sup>330</sup> SADC RISDP (note 281) at page 31 and Jennifer Hawkins (note 309) at page 38.

<sup>331</sup> GATS (note 1) at Article V (4).

<sup>332</sup> TCM (note 313) at Article 5.3.4.

to have efficient and effective communications system with the necessary infrastructure. The opening up of the service sector to investors will help achieve this. By introducing more actors the sector will also cause the services of the telecommunications sector to be more accessible to consumers and cheap. With regard to the transport service sector it is recommended that the Protocol be amended to prevent member states from entering into bilateral agreements which will only operate to fragment the region and frustrate harmonisation efforts since the Protocol does not contemplate the eventual demise of these bilateral agreements once all SADC members have attained the same level of development. SADC members should pursue just one transport harmonisation policy. Most SADC countries do not have commitments in both the transport and communication sector under the GATS; the market access that has been granted to international suppliers of transport through the TCM therefore does not bind the SADC members at multilateral level. Should these provisions be amended in order to give preference to SADC providers over international providers SADC members will not be in violation of their commitments under GATS.

#### 4.2.4 SADC Protocol on Finance and Investment (FIP)<sup>333</sup>

This Protocol came into force in 2010 and has been ratified by nine member states.<sup>334</sup> The FIP is aimed at harmonising the finance and investment policies of the SADC member states so that they are in line with SADC objectives.<sup>335</sup> This is to be done to enhance trade in the region and to create a favourable environment for investment.<sup>336</sup>

The implementation of the FIP has not been without its challenges. While there has been liberalisation of the finance sector, this has not occurred as a collective effort.<sup>337</sup> Most countries have either unilaterally liberalised their financial service sector or they are party to other agreements that are aimed at harmonising the sector with non-SADC members.<sup>338</sup> This has the effect of frustrating efforts towards harmonisation in the SADC region.<sup>339</sup> Unlike the TCM Protocol, the FIP does not grant market access to service providers. The TiS Protocol

<sup>333</sup>SADC Protocol on Finance and Investment of 2006.

<sup>334</sup> SADC TREATY AND PROTOCOLS STATUS OF PROTOCOLS IN FORCE JULY 27, 2011. Available at [http://tis.sadc.int/files/5113/3162/1668/STATUS\\_OF\\_SIGNATURE\\_RATIFICATION\\_OF\\_PROTOCOLS\\_REVISSED-24-11-2011.pdf](http://tis.sadc.int/files/5113/3162/1668/STATUS_OF_SIGNATURE_RATIFICATION_OF_PROTOCOLS_REVISSED-24-11-2011.pdf) [Accessed 31 August 2013].

<sup>335</sup>FIP (note 333) at Article 2.

<sup>336</sup> Ibid.

<sup>337</sup> Jennifer Hawkins (note 309) at page 38.

<sup>338</sup> Ibid.

<sup>339</sup> Ibid.

will therefore operate to compliment it in so far as it obliges member states to grant market access to foreign service suppliers from within the region.<sup>340</sup> The Protocols are also complimentary in so far as investment is concerned; the FIP Protocol focuses on creating an environment that will attract foreign investors to come and trade while the TiS Protocol will allow foreign investors who trade in service to come and invest in other countries particularly in terms of mode 3 of supply.<sup>341</sup> A challenge that the FIP presents to the TiS Protocol is that it also allows SADC members that are signatories thereto to conclude bilateral investment treaties (BITs).<sup>342</sup> In 2011 SADC members were parties to a total of 211 BITs.<sup>343</sup> For the most part such BITs require that parties thereto extend MFN treatment to each other.<sup>344</sup> Once the TiS Protocol comes into force it will require that MFN treatment be granted to services from SADC members.<sup>345</sup> The position as regards the BITs and MFN is complicated; since most BITs require MFN treatment, it means that any preferences that will be negotiated under the TiS Protocol that affect service areas that are the subject of existing BITs will have to be extended to the countries that are party to the BIT even if the other party is a non-SADC member. The TiS Protocol further states that it shall not prevent the continued existence of preferential agreements that predate it provided that other state parties are given an opportunity to negotiate the preferences of such agreements on a reciprocal basis.<sup>346</sup> When the TiS Protocol comes into force there is an obligation on SADC members to allow other SADC members to negotiate to be part of their BITs. With at least 211 BITs, the process is going to be cumbersome and will take away time and resources which could otherwise be used to implement the TiS Protocol.

## Recommendations

There is a need to consolidate the various harmonisation efforts that SADC members are pursuing regarding financial services.<sup>347</sup> The FIP and the TiS Protocol will need to be amended to curtail the continued proliferation of BITs and where possible some BITs may

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<sup>340</sup>Jennifer Hawkins (note 309) at page 22.

<sup>341</sup>Jennifer Hawkins (note 309) at page 24.

<sup>342</sup>Annex 1 to the FIP at Article 5.

<sup>343</sup>Jennifer Hawkins (note 309) at page 31.

<sup>344</sup>Ibid.

<sup>345</sup>SADC TiS Protocol (note 16) at Article 4(1).

<sup>346</sup>SADC TiS Protocol (note 16) at Article 4(4).

<sup>347</sup>Jennifer Hawkins (note 309) at page 40.

need to be consolidated in order to reduce their numbers and therefore reduce over-commitment by SADC members.

#### 4.2.5 Protocol on Education and Training<sup>348</sup>

This Protocol came into force in 2000 and has been ratified by 11 member states.<sup>349</sup> Through this Protocol the member states seek to co-operate in education and training in order to, among other things, progressively harmonise and standardise the education and training systems in the region.<sup>350</sup> The sub-sector for Cooperation in Education and Training is tasked with promoting policies that will enable skilled persons to apply their skills throughout the region.<sup>351</sup>

This Protocol is indirectly related to all of the initial six service subsectors. The indirect link stems from that, in order for there to be effective liberalisation of the six initial priority services in the region, the education qualifications of foreign service providers will need to either be recognised in the countries where they will be trading their services or there needs to be harmonised standards that service providers will need to meet qualifications wise. Through the Education and Training Protocol member states have undertaken to cooperate in making tertiary education credits transferable from one institution to another in the region.<sup>352</sup> The Protocol mainly addresses access to tertiary education and does not address the issue of mutual recognition of qualifications from within the region by other institutions beyond the tertiary institutions. The TiS Protocol however contemplates a situation where the qualifications of skilled personnel in the region will be recognised across the region so as to allow such personnel to use their skills in the different service areas that will be liberalised over time.<sup>353</sup> It is hoped that over the year as efforts are made to have universities recognise courses from other institutions in the region this will translate into recognition of qualifications across the region and therefore allow skilled personnel to provide their services across the region through mode 3 and 4 without having to go through a process of having

<sup>348</sup> Protocol on Education and Training in the Southern African Development Community (SADC) of 1997.

<sup>349</sup> SADC TREATY AND PROTOCOLS STATUS OF PROTOCOLS IN FORCE JULY 27, 2011. Available at [http://tis.sadc.int/files/5113/3162/1668/STATUS\\_OF\\_SIGNATURE\\_RATIFICATION\\_OF\\_PROTOCOLS\\_REVISED-24-11-2011.pdf](http://tis.sadc.int/files/5113/3162/1668/STATUS_OF_SIGNATURE_RATIFICATION_OF_PROTOCOLS_REVISED-24-11-2011.pdf) [Accessed 31 August 2013].

<sup>350</sup> Protocol on Education (348) at Article 3(k).

<sup>351</sup> Protocol on Education (348) at Article 11 (g).

<sup>352</sup> Protocol on Education (348) at Article 7 (A)(3).

<sup>353</sup> SADC TiS Protocol (note 16) at Article (7)(1).

their skills checked to establish whether they are duly qualified to provide the services they want to provide.

## Recommendations

The implementation of this Protocol is important for all the service sectors. The secretariat needs to hasten the process of recognising the qualifications from institutions in the region in all countries so that skilled personnel can immediately use their skills in foreign countries to work in various service sectors. This need to happen ahead of the TiS Protocol coming into force and it also needs to coincide with the coming into force of the Protocol on the Free Movement of Persons so that when the TiS Protocol comes into force there is free movement of skilled personnel.

### 4.2.6 Protocol on the Facilitation of Movement of Persons (FMP)<sup>354</sup>

This Protocol is not yet in force.<sup>355</sup> The Protocol is aimed at developing policies that will see to the progressive elimination of obstacles to the free movement of SADC persons in the region.<sup>356</sup> Through the Protocol persons in the region are to be given free movement so that they can establish themselves in the territory of other states other than their own, so that they can seek employment and so that they enter into the territory of other member states for a period of 90 days without a visa.<sup>357</sup>

The free movement of persons is important to TiS. In order to supply some services proximity is required between the consumer and the supplier.<sup>358</sup> For some services the provider needs to establish themselves in the territory of another country or the service consumer must be physically present in the territory of another state. Most SADC countries have made no commitment at WTO level regarding market access or MFN treatment vis-à-vis mode 4 of supply. Those that have made such commitments have placed limits allowing

<sup>354</sup>SADC Protocol on the Facilitation of Movement of Persons of 2005.

<sup>355</sup> SADC TREATY AND PROTOCOLS STATUS OF PROTOCOLS IN FORCE JULY 27, 2011. Available at [http://tis.sadc.int/files/5113/3162/1668/STATUS\\_OF\\_SIGNATURE\\_RATIFICATION\\_OF\\_PROTOCOLS\\_REVISSED-24-11-2011.pdf](http://tis.sadc.int/files/5113/3162/1668/STATUS_OF_SIGNATURE_RATIFICATION_OF_PROTOCOLS_REVISSED-24-11-2011.pdf) [Accessed 31 August 2013].

<sup>356</sup>FMP (note 354) at Article 2.

<sup>357</sup>FMP (note 354) at Article 2 and 3.

<sup>358</sup>AadityaMattoo and Carsten Fink (note 225) at page 6.

only highly skilled personnel.<sup>359</sup> The challenge in SADC regarding the free movement of persons is the fact that the Protocol that is meant to facilitate movement is not yet in force. Some countries have no incentive to sign and ratify the Protocol as they already have some bilateral arrangements that allow persons to move between their countries.<sup>360</sup> As it stands all but one country have visa restrictions relating to some SADC member states.<sup>361</sup> These restrictions prevent proper utilisation of skilled personnel and also operate to frustrate consumption of tourism services.<sup>362</sup> Restrictions on the free movement of skilled personnel also stem from the fact that there is still no system in place in SADC to recognise the qualifications from different institutions in the region in other countries.<sup>363</sup> SADC countries are also cautious about allowing foreign unskilled persons to come and work for service providers in their countries since SADC countries have high unemployment rates for their unskilled labour force.<sup>364</sup>

When the Protocol comes into force its signatories will be obliged to work towards harmonisation of their laws while still having the power to regulate movement in their countries on condition that such regulation does not frustrate the objectives of the Protocol.<sup>365</sup> While it is important for countries to be able to regulate, it is highly likely that with such ability countries will continue to apply hidden restrictions that will prevent free movement of persons in the region.<sup>366</sup> The Protocol also states that from time to time model laws that will be produced and these will be open for adoption by SADC members.<sup>367</sup> Such model laws, if adopted will assist in harmonisation and will therefore make movement in the region easy for service suppliers and consumers.

## Recommendations

SADC member states need to ratify the Protocol. The coming into force of this Protocol however will not automatically result in the free movement of persons in SADC. The

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<sup>359</sup> Albert Makochehanwa 'Increasing Temporary Movement of Natural Persons in the SADC Region: What should be Done?' (2009) *Report Prepared for University of Mauritius for the Service Sector Development in SADC and ESA Region Project* 1 at page 8.

<sup>360</sup> Albert Makochehanwa (note 359) at page 12-13.

<sup>361</sup> Albert Makochehanwa (note 359) at page 36.

<sup>362</sup> *Ibid.*

<sup>363</sup> Albert Makochehanwa (note 359) at page 29.

<sup>364</sup> Albert Makochehanwa (note 359) at page 11.

<sup>365</sup> FMP (Note 354) at Article 7

<sup>366</sup> Albert Makochehanwa (note 359) at page 37.

<sup>367</sup> FMP (Note 354) at Article 7.

Protocol still gives SADC members a lot of flexibility in so far as regulation is concerned. The Protocol therefore needs to be amended in order to give states less regulatory powers and instead encourage harmonisation. The coming into force of this Protocol will also be of importance to the implementation of the UNIVISA for tourism purposes. The bilateral agreements within the region that hamper the implementation of the Protocol also need to be done away with so that the region can pursue only one harmonisation effort.

The Protocols that have been assessed above will all have an impact on the operation of the TiS Protocol. Some of their provisions are however in conflict with the TiS Protocol. Steps should be taken to ensure that these conflicts are addressed. Some Protocols will have a positive impact on TiS, these Protocols have however not been signed by SADC member states and are therefore not in force. SADC members should take steps to ratify and domesticate these Protocols. Some Protocols have been signed but implementation has been happening at a slow pace. The failure to implement is sometimes due to the fact that there are more pressing national needs or it can be that the states do not have the technical capacity to implement.

### **4.3 Challenges Arising from the TiS Protocol**

#### **4.3.1 The Developing and Least Developed Countries Distinction**

SADC member states fall into two categories when categorised in terms of levels of development; developed and least developed countries (LDCs). The LDCs form the bulk of SADC member states. Both developed and LDCs face various challenges. For present purposes the challenges that are relevant are trade challenges. The challenges that LDCs face in so far as trade is concerned are the fact that their economies are not diversified and they trade mainly in primary goods.<sup>368</sup> There is a need to diversify these economies and to reduce their over reliance on single commodities and to transform their primary goods exports into finished goods. Increased trading in services presents itself as an avenue through which LDC can diversify their economies. By liberalising their service sectors, particularly the three so-called 'essential services', LDCs can increase their productive capacity.<sup>369</sup> The essential

<sup>368</sup> Stefan DeVlyder 'The Least Developed Countries and World Trade' Second Edition(2007) 63.

<sup>369</sup> Ibid.

services will also enable LDC's to transform their primary goods into finished goods which can be traded competitively at regional and international level.<sup>370</sup> As it currently stands, once the Protocol on TiS is in force it will apply the principle of variable geometry to liberalization allowing each country to liberalise in accordance with its own level of development. Given the fact that there are only two kinds of countries in the region; developed and LDCs it is suggested that these two categories be used to set targets and timelines for countries to liberalise their service sectors. If countries, particularly LDCs, are going to make gains from TiS then they need to make greater commitments as opposed to being protectionist in their approaches to liberalisation. The distinction between the countries should therefore be used to promote liberalisation while at the same time being used to offer the necessary technical assistance. The continued use of the principle of variable geometry will only operate to allow countries to apply protectionist measures to the detriment of their own service sectors and the service sectors in the whole region. To build trading capacity of SADC members at a regional level a more deliberate approach is needed in the way that countries are treated.

#### **4.3.2 The Number of Service Sectors Liberalised**

The meaning of 'substantial sectoral coverage' is not yet settled. However, as argued above, the number of service sectors liberalised in SADC does not amount to substantially sectoral coverage. In fact it would seem that when the Protocol was set up much reliance was placed on the ambiguous nature of the provision in Article V of the GATS.<sup>371</sup> It seems the idea was to come up with a Protocol on TiS in terms of Article V so that the region would have a preferential agreement in place to allow them to liberalise some services in the region. There was no commitment however to ensuring that substantial trade was liberalised. The contested meaning of the provision under Article V of GATS was in fact relied upon in order to liberalise the number of sectors liberalised. The tourism sector is already for the most part liberalised by most SADC members at the multilateral stage. Its inclusion in the initial six priority areas further sheds doubt on whether there will be substantial sectoral coverage in the liberalisation process seeing as that service sector is already highly liberalised at WTO level. The TiS Protocol must therefore list more service sectors be liberalised to fulfil the substantially sectoral coverage requirement. It has been shown that in order for liberalisation

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<sup>370</sup>Stefan DeVlylder (note 368) at page 33.

<sup>371</sup> Mr Alfred Ndabeni (note 286).

to have an impact on an economy, especially for developing and LDCs it must not be moderate but it must be of a significant volumes.<sup>372</sup>

#### **4.3.3 Maintenance of existing Preferential Trade agreements and the ability to enter into new ones**

In terms of the TiSProtocol SADC members have a qualified right to either negotiate other agreements or maintain pre-existing agreements that relate to liberalisation of specific service sectors.<sup>373</sup> The qualification for entering into or maintaining these agreements is that the agreements should not operate to impede or frustrate the objectives of the TiSProtocol and other SADC members who are not party to such agreements should be afforded an opportunity to negotiate the terms of such agreements on a reciprocal basis.<sup>374</sup> The Protocol is silent on what should happen in the event that the negotiations are unsuccessful, nor is there a provision that mandates parties to the agreement to negotiate in good faith. The position in the TiSProtocol differs significantly from that in the SADC Protocol on Trade in that in terms of that Protocol, although members are allowed to enter into and maintain pre-existing agreements, the pre-existing agreements are subject to review and their existence may come to an end after such review.<sup>375</sup> These pre-existing agreements can also only be maintained if they are not in conflict with the Trade Protocol.<sup>376</sup> The TiS Protocol has no equivalent provisions. The provision on the obligation to negotiate on a reciprocal basis can also only bind SADC members that are signatories to the TiSProtocol. In the event that the agreement is between a SADC member and a non-SADC member then the non-SADC member will be under no obligation to negotiate the terms of the agreement on a reciprocal basis with SADC members since they will not be parties to the TiSProtocol. The TiSProtocol makes no provision on how to proceed in such cases. It has been argued that, what these provisions entail in actual practice is that what is required of countries that are parties to these agreements or who enter into these agreements is that they should make sure that when they negotiate the agreements they do so in a manner that ensures that the agreements are not in conflict with the SADC Protocol.<sup>377</sup> It is not clear what would warrant such an interpretation

<sup>372</sup>Nora Dihel et.al 'South-South Service Trade' (2008) [OECD Trade Policy Papers](#) 39 at page 67.

<sup>373</sup> SADC TiS Protocol (note 16) at Article 4(2) and (3).

<sup>374</sup> SADC TiS Protocol (note 16) at Article 4(4).

<sup>375</sup> SADC Protocol on Trade (note 134) at Article 27.

<sup>376</sup> SADC Protocol on Trade (note 134) at Article 28.

<sup>377</sup> Ndabeni (note 286).

of the provisions except that it is argued that generally SADC members are expected to ensure that they negotiate agreements that will not be in conflict with their obligations and commitments under the Protocol. Assuming that it is the case that what is expected of SADC members in so far as the obligation to negotiate on a ‘reciprocal basis’ is concerned is to ensure that they do not negotiate agreements that negate their obligations under the SADC treaty and the TiS Protocol, the Protocol still does not guard against the continued fragmentation of the region by multiple bilateral agreements that have been entered or will be entered into by SADC members. Split membership of SADC countries has come at a cost to the region because it has caused SADC members to stretch out their already limited resources. The TiS Protocol unfortunately will also fail to guard against this.

#### **4.4 Some SADC members’ legislation on the six priority services**

What follows is a consideration of the domestic legislation of some SADC members on the initial priority areas. The section will consider legislation from different SADC members (instead of just focusing on one) in order to show that the Protocol’s implementation will potentially face challenges in several SADC countries. The focus on different SADC countries is aimed at highlighting the fact that most countries in the region will need to reform their domestic legislation in order to make way for the effective implementation of the Protocol.

##### **4.4.1 Energy Services**

The energy legislation that will be considered is that of Malawi. The energy sector in Malawi is regulated by the Energy Regulation Act.<sup>378</sup> The Act created an Energy Regulatory Authority which is charged with among other things granting licenses to persons who wish to make energy undertakings.<sup>379</sup> The act does not define persons and it is therefore silent on whether or not foreign persons can apply for such licences. Malawi has signed and ratified the SADC energy Protocol. In so far as the Malawian Act does not discriminate between foreign persons and local persons when it comes to the granting of licences this is positive as it means that energy service suppliers from the rest of the SADC countries can apply for and

<sup>378</sup>The Energy Regulation Act of 2004.

<sup>379</sup>The Energy Regulation Act (note 278) at s 9(1) (a).

obtain licences to trade in energy related services. The Malawian position holds for most SADC countries who also allow foreign energy suppliers to supply.<sup>380</sup>

#### 4.4.2 Financial services

In Namibia there are a number of statutes that address financial services. The main piece of legislation is the Banking Institutions Act.<sup>381</sup> In terms of this Act in order to run a bank in Namibia one needs to incorporate a public company in terms of the Namibian Companies Act.<sup>382</sup> Namibia has not opened up any of its financial services at the multilateral level. The process of having to incorporate a public company in Namibia may prove to be cumbersome for some service providers who seek to trade in banking services in Namibia. Given that Namibia has not opened up its financial services at the multilateral level, there is room for it to make commitments at SADC level. The domestic regulations however may stand in the way but since developing countries are allowed flexibility when it comes to removal of discriminatory measures, financial institutions will still need to make incorporate companies in Namibia before they can trade in Namibia.

#### 4.4.3 Construction Services

In Zambia the construction industry is governed by the National Council for Construction Act.<sup>383</sup> This Act created a Council that is in charge of regulating the construction industry in Zambia.<sup>384</sup> In terms of this Act foreign architects and engineers have to be registered with the relevant regulatory bodies of those professions in Zambia before they can carry out any work in Zambia.<sup>385</sup> The Act also requires that preference be given local companies when it comes to the awarding of tenders.<sup>386</sup> Foreign companies can only be awarded tenders if there is no local company that can do the job required and this is subject to approval by the council.<sup>387</sup> The Act further states that foreign companies can only be awarded tenders if they

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<sup>380</sup>UNCTAD (note 310) at table 6.

<sup>381</sup>The Banking Institutions Act of 1998.

<sup>382</sup> The Banking Institutions Act (note 381) at s 9.

<sup>383</sup>The National Council for Construction Act, 2003.

<sup>384</sup> Note 383 at s5.

<sup>385</sup> Note 383 at s2.

<sup>386</sup>Note 383 at 23(1).

<sup>387</sup>Ibid.

undertake to be in partnership with local construction companies.<sup>388</sup> In its schedule of commitments on services at WTO level Zambia has listed Construction related and Engineering services.<sup>389</sup> There are no market access or national treatment limitations placed on mode 1, 2 and 3.<sup>390</sup> The only limitation that exist are those in relation to mode 4 wherein market access and national treatment are unbound except for skilled labour; they are allowed on condition that the company bringing them provides for training of Zambians so they can acquire the specialised skill.<sup>391</sup> When one considers Zambia's schedule of commitments it gives the impression that the construction service sector is open but domestic regulations are restrictive; the requirements regarding the awarding of tenders to foreign participants and the requirements for registration of foreign skilled person are restrictive measures. Zambia therefore needs to reform its legislation so as grant foreign suppliers market access and national treatment. However in light of the fact that Zambia is a developing country and there is flexibility afforded to it in so far as removal of discriminatory barriers is concerned the reform may not occur and foreign suppliers will continue to be discriminated against.

#### 4.4.5 Tourism

The tourism legislation to be considered is that of Lesotho. There are two Acts that govern tourism in Lesotho; The Tourism Act<sup>392</sup> and the Tourism Amendment Act.<sup>393</sup> One of the objectives of the Act is to promote the efficiency of the Lesotho tourism sector and to make it internationally competitive.<sup>394</sup> The Act also creates a corporation whose duties will among others include assisting international organisations, governments, companies, corporations or any persons with funds if they seek to do carry out a project that is in line with the mandate of the of the corporation.<sup>395</sup> Lesotho has ratified the SADC tourism Protocol and it has listed four subsectors under the tourism service sector in its services schedule. All these sub sectors are unbound in mode 1, 2 and 3 for both market access and national treatment.<sup>396</sup> Market access for Mode 4 is only given only to senior executives while national treatment remains

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<sup>388</sup> Note 383 at s24.

<sup>389</sup> World Trade Organization S/DCS/W/ZMB.

<sup>390</sup> World Trade Organization S/DCS/W/ZMB.

<sup>391</sup> World Trade Organization S/DCS/W/ZMB.

<sup>392</sup> The Tourism Act 2002.

<sup>393</sup> The Tourism (Amendment) Act 2006.

<sup>394</sup> The Tourism Act (note 392) at s 4(1)(g).

<sup>395</sup> The Tourism Act (note 392) at s 5(1) (q).

<sup>396</sup> World Trade Organisation S/DCS/W/LSO.

unbound for all other subsectors in so far as mode four is concerned.<sup>397</sup> In its commitments in the SADC TiSProtocol there will be room for Lesotho to grant market access and national treatment to SADC members since the sector remains largely unbound.

#### **4.4.6 Communications**

In Botswana communications services are governed by the Communications Regulatory Authority Act.<sup>398</sup> The Act has created Botswana Communications Regulation Authority. This authority now regulates telecommunications, broadcasting and postal services. In terms of this Act any person can apply for a license for any of the three sub service sectors.<sup>399</sup> Prior to this Act each of these three areas were regulated separately but now, all the area of communication are integrated making the communication industry in line with the SADC Protocol on Transport, Communications and Meteorology. There is no specified discrimination on foreign service suppliers as the Act does not make a distinction between local and international service suppliers. Botswana has not made any commitments at a multilateral level on communications. This will be an area where SADC service providers can trade freely once the TiSProtocol is in force and Botswana makes commitments therein.

#### **4.5 Conclusion**

There are various challenges that the TiSProtocol will face once it enters into force. Some of the challenges stem from SADC, other SADC Protocols and the TiSProtocol itself. In order for the Protocol to be effective in liberalising trade in services there will need to be reforms at the SADC secretariat particularly the employing of experts in the field of TiS so they can give guidance to the implementation of the Protocol. The TiSProtocol also needs to require states to be more intentional about their commitments to the liberalisation process by setting realistic time frames for developed and LDCs to liberalise various service sectors. SADC members also need to show more political will towards harmonisation efforts by ratifying and domesticating SADC treaties so as to ease the process of liberalisation. To achieve the objective of liberalising TiS in the region the Protocol must also encourage significant

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<sup>397</sup> Ibid.

<sup>398</sup> Communications Regulatory Authority Act, 2012

<sup>399</sup> Note 398 at s 31.

liberalisation instead of allowing member states to continue to apply protectionist measures in their trade and trade related policies.

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## CHAPTER V

### CONCLUSION

The aim of this paper has been to make an assessment of the SADC TiS Protocol; to investigate whether it will succeed in liberalising TiS in the region once it comes into force and whether it complies with GATS as that is the provision on whose basis it was concluded. In doing this a number of legislations have been considered; WTO legal texts (particularly GATS), SADC Protocols and legislation from some SADC member states. SADC's institutional make up was considered as SADC'S institutions are responsible for advancing the regional agenda and seeing to the implementation of the Protocol.

There is no doubt as to the necessity of the SADC TiS Protocol. The Protocol however has to meet certain requirements as stipulated by the GATS. There are two requirements as regards concluding an agreement such as the TiS Protocol at WTO level; the agreement must have substantial sectoral coverage and it must eliminate or provide for the substantial elimination of discrimination. The TiS Protocol does not satisfy the first requirement; the Protocol only provides for six priority areas out of twelve possible sectors. Based on the interpretation of the word substantial, practice by other WTO members and an interpretation based on some decisions of the DSB it is argued that the Protocol fails to satisfy this requirement. Since there is flexibility afforded developing countries in so far as the second requirement is concerned the Protocol complies with this provision.

The Protocol will also only yield results if countries can address domestic regulations. As it currently stands, the Protocol will allow its members to maintain their domestic regulations. Some of the domestic legislation from some SADC members that has been consulted indicates that there are regulations which are highly discriminatory that those countries maintain. These will likely continue to operate even when the Protocol is in force and will hamper the opening up of the service sectors concerned consequently defeating the purpose of the Protocol.

The Protocol also follows the letter of the GATS too closely at the expense of making more region specific provisions. The Protocol has failed to make provisions that are specific

to both developing and LDCs. Such provisions would be beneficial as they would be tailor made to enhance and build the capacity of these countries in so far as trade is concerned.

The agreement has also not guarded against the increase of preferential agreements in SADC despite the fact that the region has experienced the negative effects of the multiplicity of membership to RECs. It continues to allow members to enter into further agreements in relation to trade. Such commitment will compromise the ability of SADC members to make commitments in the context of this Protocol as they may end up making greater commitments in other Protocols or their capacity to negotiate preferences in the context of The SADC TiS Protocol may be compromised.

The Protocol is a welcome development in the SADC region. The way it is couched however casts a doubt as to whether it will results in opening up TiS in the region for the benefit of SADC member states.

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