

**An analysis of the level of liberalisation in South Africa's
Transport Sector**

A Dissertation

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ABSTRACT

The transport sector is critical to the performance of various sectors of the economy both trade in goods and services hinges on an efficient and reliable transport services sector. South Africa has undertaken limited commitments under the General Agreement on Trade in Services (GATS) of the World Trade Organisation (WTO) in the transport sector. South Africa's transport sector in general is controlled by the government through state owned firms. The transport sector is competitive relative to Africa, however, relative to developed economies, the transport sector lags behind in terms of efficiency and cost (DBSA, 2012). Inefficiencies result in increased transaction costs and impede the overall competitiveness and economic performance of the country.

The transport sector and other services sectors in general are mainly governed by domestic legislation. Barriers to trade in services may be located in laws and regulations of individual economies often referred to as behind the border measures such as license, technical, educational, registration and local ownership requirements and as such are more difficult to address than barriers to goods. (Hartzenberg, 2012). To identify these measures it is important to undertake an assessment of the legislation governing sector. This study analyses both vertical and horizontal legislation governing the sector.

This study aims to assess the level of liberalisation of South Africa's transport sector to gauge the presence of trade restrictive measures in the sector that would limit access, establishment and or operation by foreign service suppliers. This is done through an analysis of domestic legislation governing the transport sector and its related sub-sectors. This effectively entails a comparison between actual commitments as reflected in South Africa's GATS schedule of specific commitments and applied policy as reflected in legislation.

Data from such a study provides valuable technical information to trade negotiators regarding the policy space available allowing them to develop and formulate informed negotiating positions. The methodology employed in this study is adapted from the World Bank's Regulatory Assessment of Services, Trade and Investment (RASTI) and has been adapted for purposes of this study.

A country, prior to engaging in a services negotiation should conduct an assessment of the level of liberalisation of each service sector to gauge its competitive strengths and weaknesses. Such an assessment entails an assessment of the country's regulation to determine if such regulation is overly burdensome to the extent that it inhibits competition and trade in services in an economy. Once such an assessment is concluded, a large number of countries have found that domestic regulatory reforms are necessary for effective participation in services negotiations. (Molinuevo & Sáez, 2014). The importance for such assessments often referred to as audits, have been confirmed as the most effective way of ensuring that regulations are not restrictive of trade. (Molinuevo & Sáez, 2014). Moreover, periodic regulatory audits serve the purpose of identifying discriminatory measures and minimising discriminatory effects that have the effect of increasing costs and discriminating against foreign service suppliers.

A comparison of the liberalisation of South Africa's transport sector in terms of the actual commitments (as reflected in the GATS services schedule) against the applied domestic regulation is an important exercise in view of the discussions at the WTO level about the liberalisation of services and at a regional level in view of South Africa's regional and continental aspirations to promote regional integration. The transport sector has been identified as a priority sector in the Southern African Development Community (SADC) and the Tripartite Free Trade Area (TFTA) involving, COMESA, EAC and SADC.

In the TFTA negotiations, even though the first phase focused on trade in goods, the second phase will address trade in services, including transport services. Negotiations in SADC based on the Protocol on Trade in Services are ongoing and will include transport services. A study of this nature is important for undertaking and formulating negotiating positions for trade in services and may be replicated across various service sectors.

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LIST OF ACRONYMS

CPC	Central Product Classification
DOT	Department of Transport
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
MFN	Most Favoured Nation
MOU	Memorandum of Understanding
NFLS	National Freight Logistics Strategy
NT	National Treatment
PRASA	Passenger Rail Agency of South Africa
REC	Regional Economic Community
RASTI	Regulatory Assessment on Services Trade and Investment
SANRAL	South African National Roads Agency
SACU	Southern African Customs Union
SADC	Southern African Development Community
TFTA	COMESA-EAC-SADC Tripartite Free Trade Area
TRP	Trade Review Policy
UN	United Nations
WTO	World Trade Organisation

GLOSSARY

Behind the border measures- domestic laws and regulation as well as particular practices/measures in the implementation or administration of such laws and regulations (Molinuevo & Sáez, 2014).

Co-ordination Problems- concerns the development of measures for purposes of ensuring uniformity or generally accepted standards to maintain a degree of order. For example drivers in South Africa will drive on the left hand side of the road (Molinuevo & Sáez, 2014).

De jure- existing or holding a specified position by legal right.

De facto- existing or holding a specified position in fact but not necessarily by legal right.

Distributional justice- measures that redistribute wealth and income through laws, fiscal policy or social benefits (Molinuevo & Sáez, 2014).

Externalities- an effect of an activity which may be positive or negative and has an impact on the cost of a good or service but that cost is not reflected. For example in air freight traffic results in a certain amount of pollution and damage to the environment (Molinuevo & Sáez, 2014).

Horizontal legislation- legislation having an economy wide impact applicable to various sectors

Information Asymmetries- a situation in which various parties to a transaction do not have the same information at their disposal resulting on some parties having an advantage over other parties. Policy makers need to address this situation to ensure that access to information for example around licensing requirements is accessible to all (Molinuevo & Sáez, 2014).

Tripartite Free Trade Area (TFTA)- an agreement between three regional economic communities in Africa comprising of the Southern African Development Community (SADC), the East African Community (EAC) and the Common Market for Eastern and Southern Africa (COMESA), known as the TFTA.

Market Access – under GATS Article XVI each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule. Accordingly, a member may not maintain limitations on the number of service suppliers, on the total value of service

transactions, on the total number of service operations, on the total number of natural persons that may be employed and on the participation of foreign capital. A member may not maintain measures which restrict or require specific types of legal entity through which a service supplier may supply a service (GATS, 1994).

Most Favoured Nation (MFN)- under GATS Article II, each member shall accord, immediately and unconditionally, to services and service suppliers treatment no less favourable than it accords to like services and service suppliers of any other member (GATS, 1994).

Monopoly- when a single company or person is the sole supplier of a good or service

National Treatment (NT)- under GATS Article XVII each member shall accord to services and service suppliers of any other Member state treatment no less favourable than that it accords to its own like services and service suppliers (GATS, 1994).

Public good- a good or service that can be used by the general public and cannot be used by one individual or group of individuals (Molinuevo & Sáez, 2014).

Vertical legislation- legislation having only sector specific application.

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CHAPTER 1- INTRODUCTION

Transport is critical to the performance of various sectors of the economy and is an enabler of trade, facilitating linkages at each point of the trading environment and the manufacturing value chain. Both trade in goods and services hinges on an efficient and reliable transport services sector. Liberalised services markets allow for greater investment, competition, reduced transaction costs, efficiency, higher quality transportation, distribution and logistics services thereby facilitating greater participation in global trade, as opposed to closed services markets (Limao & Venables, 2001). Efficient transport services allows for a country to achieve economic competitiveness.

Globally, domestic markets in the transport services sector are often protected through barriers in the form of state-owned or controlled firms and subsidies on domestic industry (Naudé, 1999). South Africa's domestic transport sector is highly regulated and also mainly controlled by state owned companies or agencies. The National Department of Transport is mandated to develop and implement transport policy in South Africa. However, legislation governing the sector, is fragmented and located in several other government departments and levels of government such as provincial and municipal governments.

South Africa, relative to the rest of Africa and other developing countries has a well –developed, multi-modal transport network comprising of roads, rail, ports, air and the pipelines sector (DBSA, 2012). The transport sector is characterised by state ownership, limited private sector participation and independent regulatory bodies (Naudé, 1999). The regulatory framework places greater emphasis on safety and standards regulation but lacks economic regulation addressing price, access or revenue regulation (Teljeur, 2003). According to the NFLS, the port and rail sectors lack regulation addressing access to networks and the use of infrastructure. The Department of Transport acknowledges that “the current monopolistic nature of the industries has led to abuse of power by the entities that manage and run operations on the infrastructure” (DOT, n.d).

Transport sectors in general, globally, are natural monopolies and South Africa's transport sector is no exception. The rail, ports and pipelines sectors in South Africa are controlled by the State owned corporation, Transnet, which holds a monopoly over these sectors while the South African National Roads Agency Limited (SANRAL) is responsible for the finance, management and maintenance of the national road network in SA.

The government recognises the urgency to improve South Africa's transport services as a key national and regional priority. In terms of regional economic arrangements, South Africa is a member of the Southern African Customs Union (SACU), the Southern African Development Community (SADC) and is a member to the negotiations for the establishment of the Tripartite Free Trade Area (TFTA). As a member of these organisations, South Africa has undertaken regional commitments which have legal implications and a direct impact on future services negotiations.

SADC member states in August 2012 adopted the SADC Trade in Services Protocol. Article 4, refers to MFN treatment in terms of which, each member will accord the same treatment as services and service suppliers from their individual states to the services and suppliers of services emanating from other member states (SADC, 2012). The trade in services negotiation in SADC (which has started but is not yet finalized) and the TFTA (which is yet to begin) requires extensive preparations by individual member states and as a collective. Future service sector negotiations require an in-depth understanding of various service sectors particularly the legislation governing the various sectors.

SADC member states also signed the Protocol on Transport Communications and Meteorology (TCM) in 1996. The Protocol entered into force on 6 July 1998. The Protocol aims to develop efficient, cost-effective and fully integrated infrastructure and operations, which best meet the needs of customers and promote economic and social development while being environmentally and economically sustainable (SADC, 1996). In particular, the Protocol focuses on the elimination of impediments to the movement of persons, goods and services in and through the sector. It covers several areas these are, road transport and infrastructure, integrated transport; railways; maritime and inland waterway transport and civil aviation.

The Preamble of the Protocol recognises the primacy of the rules and instruments of the World Trade Organisation and the General Agreement on Trade in Services. It also acknowledges that regional and domestic policies are horizontally and vertically interactive and requires extensive co-ordination (Mashayekhi, et al, 2011). The Protocol broadly recognises the importance of private sector investment and public –private partnerships and the importance of competition. Market access, however is only discussed in relation to road transport. Article 5.3 states that “members shall progressively liberalise their market access policies in respect of the cross border carriage of goods” (SADC, 1996). The article continues to state that this liberalisation shall be undertaken in a phased and sequenced manner.

The importance of the transport sector and transport services is highlighted in several regional legal instruments. These are, the SADC Protocol on Trade in Services, the SADC Protocol on Transport, Communications and Meteorology, SADC Protocol on Trade and the SACU Memorandum of Understanding on Road Transportation. The various protocols contain articles requiring member states to undertake liberalisation. The following articles are highlighted:

- Article 16(2) of the Protocol on Trade in Services, provides that state parties shall negotiate the liberalisation of the six priority services sectors (communication, construction, energy-related, financial, tourism and transport services);
- Article 5.3 of the SADC TCM Protocol states that member states shall progressively introduce measures to liberalise their market access policies in respect of cross-border carriage of goods;
- Article 9.2 of the SADC TCM Protocol in respect of the civil aviation policy states that members agree to the gradual liberalisation of intra-regional air transport for SADC airlines;
- Article 23 (2) of the SADC Protocol on Trade addresses trade in services in terms of which member states will adopt policies and implement measures in accordance with WTO GATS, with a view to liberalizing their services sector.

It is important to note that the treatment extended by one member state to another is a product of a negotiated obligation and is not an automatic commitment.

The SACU Memorandum of Understanding on Road Transportation represents the SACU members' objective to maintain and facilitate effective road transportation and equitable shares in road transportation between their respective territories. The MoU bears testament to the prioritization of the transport services albeit in the road transport sector only (SACU, 1998).

The global context of this study is contained in South Africa's regional integration aspirations and the objectives of the WTO. The WTO negotiations aim to create a credible and reliable system of international trade rules, ensure fair and equitable treatment of all WTO members, eliminate barriers to trade and promote global economic growth and development through progressive liberalisation (Bossche, 2005). Barriers to trade in services are located in laws and regulation which have a direct impact on the supply of services and the provision of services, affecting market access and operation (Mattoo & Sauvé, 2003). While laws and regulations may be carefully designed to avoid becoming trade barriers, the administration and implementation of laws can also be as much of an obstacle to services trade (Molinuevo & Sáez, 2013).

Article XIX (1), of the GATS and Article 2, of the SADC Protocol on Trade in Services provides that Members will enter into successive rounds of negotiations to attain progressively higher levels of liberalisation (SADC, 2012). The purpose of these negotiations would be to reduce or eliminate measures that adversely affect trade in services or impede market access. Practically, within the context of trade in services, this means that countries would have to amend or reformulate laws and regulations to ensure the removal of trade restrictive measures.

In preparation for such negotiation a sector by sector analysis of legislation governing the transport sector is necessary. This study focuses exclusively on South Africa's transport sector and involves a study of the legislation governing the sector both horizontal and service level, to determine the level of liberalisation of the sector. The study can provide a possible approach to the type of sectoral assessments that should be conducted at a domestic policy and regulatory level to prepare for trade in services negotiations at a regional and or international level.

Problem Statement

The objective of this study is to provide an analysis of the level of liberalisation in South Africa's transport sector through a comparison of actual commitments as reflected in the GATS schedule and applied domestic regulation governing the transport services sector. In the GATS negotiations, members make specific commitments in individual services sectors that are in turn reflected in each member's national schedule of specific commitments. During this process, members also have the right to attach conditions and or limitations to the commitments and specify exemptions.

The focal research question requires an understanding of South Africa's commitments at the WTO and how they are implemented through national legislation. The focal research question is premised on the trade theory that closed services markets are characterised by monopolies, subsidies, lack of competition, limited product and service availability in terms of both quality and product thus leaving consumers with little to no choices. The limitations that characterise an uncompetitive market, create market distortions and is contrary to the principle of free trade. Practically, the liberalisation of trade in services entails improved market access to foreign service providers and the elimination of discriminatory measures against foreign service suppliers. The granting of market access is not an automatic process it requires the amendment of regulation, which is usually a lengthy process to ensure administrative justice in administering domestic regulation.

Trade in services is largely governed by domestic regulation which controls market access, establishment and operation (Molinuevo & Sáez, 2014). Barriers to trade in services, often referred to as behind the border measures, are therefore located in domestic laws and regulations governing the sector (Hartzenberg, 2012). However, it should not be construed that regulation is intended to impede trade in services, governments also use domestic regulation to pursue legitimate public policy objectives. In some instances though domestic regulation can be used to place a disproportionate burden on foreign service suppliers, effectively discriminating against foreign service suppliers (Janda, 2003).

A method to determine the level of liberalisation is through a country's national schedule which provides an indication of the commitments made in a particular sector. However a WTO Member's national schedule of specific commitments does not provide a comprehensive view of applied policies and practices and neither does it indicate the source of laws from which specific measures emanate (Hoekman & Mattoo, 2012). The manner in which GATS commitments are reflected only make it possible to compare levels of commitment across sectors and not how those commitments relate to actual policies (Hoekman & Mattoo, 2011). Consequently, there may be a difference between actual commitments as contained in the national schedule and applied measures as contained in the regulatory framework of a country. The purpose of this study is to capture these differences with particular reference to South Africa's commitments in the transport sector and a comparison of applied policy through an analysis of the domestic regulation governing the transport sector and its sub-sectors. The data and analysis from this study will provide an indication of the available policy space to make informed decisions and positions to the regional, SADC and TFTA negotiations and future WTO negotiations.

A country, prior to engaging in a services negotiation should conduct an assessment of the level of liberalisation of each service sector to gauge its competitive strengths and weaknesses. Such an assessment entails an assessment of the country's regulation to determine if such regulation is overly burdensome to the extent that it inhibits competition and trade in services in an economy (Mattoo & Sauvé, 2003). An assessment of this nature provides an indication of the domestic regulatory reforms necessary for effective participation in services negotiations (Molinuevo & Sáez, 2014). The importance for such assessments often referred to as audits, have been confirmed as the most effective way of ensuring that regulations are not restrictive of trade (Molinuevo & Sáez, 2014). Moreover, periodic regulatory audits serve the purpose of identifying discriminatory measures and minimising discriminatory effects that have the effect of increasing costs and discriminating against foreign service suppliers.

Due to the intensive nature of the task research assistance is required to enable member states to make informed decisions to determine in which sectors offers should be made (Disenyana & Khumalo, 2009). Moreover Disenyana & Khumalo (2009), suggests member states' negotiating strategy, is based on negotiations by mode and that data collection and publication is needed to

inform assessments and strategies going forward. This study will therefore contribute to an aspect of the body of knowledge required to develop South African positions for future negotiations and establishes the policy space available in the transport sector.

This study requires an understanding of the basic premise that barriers for trade in services are different to that of trade in goods where the latter involves negotiations on the reduction or removal of tariff duties, the former involves negotiations on the reduction or elimination of measures having an adverse effect on trade in service. Barriers to trade in goods are explicit and may be found in published tariff schedules, whereas barriers to trade in services, are implicit making the task of services liberalisation a complex process because barriers to trade in services may be located in national laws and regulations of individual economies. Barriers embedded in regulation and laws are more difficult to detect and are often referred to as behind the border measures such as license, technical, educational, registration and local ownership requirements and are more difficult to address than barriers to goods (Hartzenberg, 2012). Addressing these issues therefore requires a substantial amount of resources, expertise, timing and the relevant forum to undertake liberalisation (UNCTAD, 2009). Liberalisation in the service sector does not automatically grant market access to foreign service suppliers as it may require the amendment of laws and policies and the introduction of new appropriate laws reflecting the evolving trading environment (Mattoo & Stern, 2008)

While national laws are not unequivocally barriers in themselves and are generally intended to address market failures or public interest, trade restrictive measures contained in national regulation does become problematic when it becomes an impediment to trade and competition effectively creating market distortions. Distortions in the transport services market, creates inefficiencies and is tantamount to a tax on the economy which has an enormous multiplier effect at all levels of the economy, essentially increasing the costs for goods and services. Costs emanating from inefficiencies in the transport sector are ubiquitous and have an enormous spillover effect.

Legislation governing the transport sector in South Africa is fragmented and policy pertaining to transport services is cross-cutting, located across multiple government departments and levels of

government. Furthermore, the sector is governed by horizontal (economy wide) and service level (sector –specific) legislation. This study will consider both sector specific legislation and horizontal legislation to gain an in-depth understanding of the dynamics in the sector. The efficient functioning of international trade and transport substantially depends on the existence of a legal framework that responds adequately to the changing dynamics of commerce effectively reducing transaction costs. Addressing the legal framework in a manner that responds to the changing dynamics of transport services will reduce transaction costs. Identifying the presence of trade restrictive measures, contained in the legislation will enhance the functioning and effectiveness of the transport sector.

A study of this nature will contribute to an aspect of the body of knowledge required to develop South African positions for future negotiations and establishes the policy space available in the transport sector. An in-depth analysis of the legislation governing the South African transport sector will provide invaluable technical information to developing South African positions for future trade in services negotiations. This study was conducted between October 2013 and July 2014 and laws and regulations in force over this time period were assessed.

Transport services are defined as set out in the WTO Services Sectoral Classification List and UN Provisional CPC and refers to the range of services. The transport sector comprises of a number of sub-sectors and these are:

- Maritime transport services
- Air transport services
- Rail Transport Services
- Pipeline transport
- Internal Waterways
- Space Transport
- Road Transport Services
- Services Auxiliary to all Modes of Transport
- Other transport services not included elsewhere

For purposes of this research paper the maritime, air, rail, pipeline and road transport sub-sectors and relevant horizontal legislation will be analysed. Sub-sectors excluded are, internal waterways because of the absence of navigable internal waterways in South Africa; services auxiliary to all modes of transport because it is not regulated through sector-specific legislation unlike the other transport sub-sectors; space transport; and, other transport services not included elsewhere also do not have sector specific legislation.

The study was conducted through an analysis of South Africa's commitments under the GATS schedule of specific commitments to determine which sectors were liberalised. Both horizontal and vertical legislation governing the sector was analysed employing a methodology developed by the World Bank, namely the Regulatory Assessment on Services Trade and Investment (RASTI). The study analyses approximately thirty three pieces of legislation governing the transport sector and its related sub-sectors. Core legislation governing each sub-sector was selected as well as legislation having an economy wide impact. This approach provides a sense of the policy space available however, does not take into account the real challenges of traders and the private sector experienced in their day to day operations. These challenges may range from insufficient information regarding license applications, incomplete information about the process or delays regarding the processing of license applications. These issues while extremely relevant goes beyond the scope of this study.

The methodology required a case by case analysis of the various legislation to determine whether legislation contained measures that may restrict trade in transport services. The objective of the analysis is to determine the presence of trade restrictive measures that would impede access, establishment and operation of foreign service supplier companies. Furthermore, evidence collected from the analysis of legislation was then compared to information contained in the WTO and World Bank Integrated- Trade Intelligence Portal (I-TIP) trade in services data base to verify findings. The I-TIP database provides a general sense about trade restrictive measures of individual member states but does not indicate in which laws these measures are contained in, neither does the database categorise the restrictive measure.

The RASTI methodology categorises restrictive measures into qualitative and quantitative measures which are defined in detail and provides greater depth of information regarding the nature of the measure and the rationale for the measure. The RASTI methodology therefore augments the information contained in the World Bank and WTO I- TIP database.

The methodology applied is not without limitation. The study maps regulations governing the various transport sub-sectors, however this alone does not provide an indicator of trade barriers. Regulatory mapping does not take into account trade barriers emanating from the actual way in which laws are implemented and administered which also have the effect of increasing transaction costs. Restrictions in general tend to emanate from administrative practices which may include failure to publicly disclose requirements or ambiguous requirements, and the discriminatory application of regulations (Molinuevo & Sáez, 2014).

The liberalisation of the transport sector may attract significant investment into the South African economy and at the same time improve competitiveness and efficiency in the transport sector. This study however, is not advocating for the wholesale liberalisation of the transport sector but maintains that any services negotiations requires technical preparation and the negotiations themselves must have clear milestones. Scrutiny of domestic regulation is a time consuming, laborious process which requires technical capacity. This study maintains that the World Bank's RASTI methodology be employed in the assessment of various other service sectors to identify the presence of trade restrictive measures.

CHAPTER 2- LITERATURE REVIEW

The purpose of the literature review is to explore the views and theories of various authors in relation to the research problem which is to determine the level of liberalisation of transport services in South Africa. In doing so, the review defines and contextualises the objective of the study, firstly through a discussion on the importance of the transport service sector in any economy. Secondly, the review will discuss the nature of the information required to prepare for service sector negotiation. Thirdly the review will provide the context regarding the nature of South Africa's transport sector. The review will fourthly, discuss South Africa's transport sector commitments under the GATS which will provide a sense of the policy space available. Fifthly, the review will consider literature on barriers to trade in services in as they are often located in regulation and lastly, the review will cover the rights of WTO Members to regulate as provided for in the GATS.

The transport sector covers physical infrastructure such as airports, ports, railway and road networks and include soft infrastructure such as air and port traffic control systems. Transport systems composed of infrastructures, modes and terminals are so embedded in the socio-economic life of individuals, institutions and corporations that they are often invisible to the consumer and taken for granted (OECD, 2007).

A country's international competitiveness can be improved through improvements in transport infrastructure and transport services productivity which will effectively lower transport costs. Sourdin and Korinek (2011) argue that an increase in efficiency in transport services and logistics results in an increase in trade particularly in exports.

The transport services sector is essential to the functioning of an economy and is inextricably linked to trade, economic growth and development. Cattaneo (2011) and Mashayekhi et al (2011) both emphasise the critical role of services to manufacturing output growth and trade, stating that it is often overlooked in trade and development policy, even though it plays a key role in the transformation of international trade and investment patterns (Stephenson, 2012). The development of industrial and trade capacity is inherently dependent on an efficient services

sector. Moreover, an efficient services sector determines a firm's competitiveness in terms of access to low cost, reliable and high quality inputs such as electricity, energy, telecommunications, transport, logistics and the overall effectiveness of public governance and institutions influencing the locational decisions of firms (Stephenson, 2012).

The purpose of the study is to assess the level of liberalization of the South African transport sector, which requires an analysis of the legislation governing the sector to determine the trade restricting measures. The global context of this study is contained in the objectives of the WTO and its negotiations which aim to create a credible and reliable system of international trade rules, ensure fair and equitable treatment of all WTO members, eliminate barriers to trade and promote global economic growth and development through progressive liberalisation (Bossche, 2005).

The study is also relevant within the context of South Africa's priority, to promote regional economic integration and trade through increased market access through SADC and TFTA. Transport services are amongst the six priority service sectors identified by the SADC Protocol on Trade in Services. In this regard, South Africa as a member of SADC is required to liberalise the prioritized sectors which includes transport as articulated in article 16 (2) of the SADC Protocol on Trade in Services. The objective of the SADC Protocol on Transport, Communication and Meteorology is to establish systems in the transport, communication and meteorology sectors to develop fully integrated infrastructure that would support the economic development of the region. Whilst negotiations are ongoing at a regional level it is important to note that the treatment extended by one member state to another is a product of a negotiated obligation and is not an automatic commitment.

This study will contribute to an aspect of the body of knowledge required to develop South African positions for future negotiations and establishes the policy space available in the transport sector. Services sectors are highly regulated and an assessment of this nature is crucial, not only for the transport sector but for the services sectors in general to obtain information about domestic regulation pertaining to the sectors which ultimately has an impact on market access and MFN, two very important concepts in the WTO, that underpins the aim and objective of the

WTO, to promote the liberalisation of trade both in goods and in services. Sauvé & Mattoo, (2003), Hoekman & Mattoo, (2011), Molinuevo & Sáez, (2014) address the issue of lack of information and information discrepancies between actual commitments undertaken at the WTO and applied regulations.

A comparison of the liberalisation of South Africa's transport sector in terms of the actual commitments (as reflected in the WTO services schedule) against the applied (as reflected in the domestic regulation) is an important exercise in view of the discussions at the WTO level about the further liberalisation of services and also at a regional level in view of South Africa's regional and continental aspirations to promote regional integration. A study of this nature will reveal the difference between actual commitments as contained in the national schedule and applied as contained in the regulatory framework of a country.

UNCTAD, (2011) maintains that liberalizing trade in services is likely to have a positive effect on economies as it allows for competition, efficiency and foreign direct investment. Increased investments in the services sector can assist with economic diversification, production, increase accessibility to supply into global value chains and improve overall trade in goods and services. The liberalisation of the transport sector, may attract significant investment into the South African economy and at the same time improve competitiveness and efficiency in the transport sector. Hoekman and Mattoo (2008), similarly maintain that all countries should move towards service liberalisation because liberalisation and the introduction of competition increases the efficiency of domestic services markets, while monopolies and uncompetitive behavior by vested interests tend to impede reform.

While the importance of services cannot be overstated, both Cattaneo, (2011) and Cassim, (2005), point to the increasing pressure on developing countries to liberalise their services sector. Both Cattaneo and Cassim caution that in determining the level of liberalisation developing country governments and policy makers must pay attention to the timing and sequence thereof to allow for orderly adjustments. (Cassim et al, 2005). Cattaneo and Cassim support the cautious policy stance taken by the South African government and other African governments regarding

the liberalisation of trade in services to preserve the policy space to pursue domestic development objectives (Cattaneo, 2011).

Sauvé (2012), on the other hand maintains that in view of the changing dynamics of the global trading environment and the imperative to industrialise may require a re-think on a cautious policy stance with regard to the liberalisation of trade in services (Sauvé et al, 2012). More open services markets allow for more efficient and higher quality transportation, distribution and logistics services thereby facilitating greater participation in global trade (Stephenson, 2012). Efficient functioning transport and infrastructure services reduce the average times needed to import and export thus reducing transaction costs while promoting efficiency and reliability. Efficient transport services complemented by physical infrastructure, reliable telecommunications and energy supplies allows for a country to achieve economic competitiveness.

Closed services markets are characterised by monopolies, subsidies, a lack of competition, limited product and service availability in terms of both quality and product thus leaving consumers with little to no choices. The limitations that characterise an uncompetitive market, create market distortions, is tantamount to a tax on the economy and is contrary to the principle of free trade. Practically, the liberalisation of trade in services entails improved market access to foreign service suppliers and the elimination of discriminatory measures against foreign service suppliers, ensuring administrative justice in administering domestic regulation and ensuring that monopolies do not abuse their dominant positions.

Successful liberalisation requires regulatory reform, the introduction of competition, thereby improving market access allowing for the entry of new firms. Appropriately designed domestic regulations can help reform at the national level and provide meaningful market access at both regional and international levels (UNCTAD, 2009).

Having contextualized the importance of efficient transport services and considering the merits or de-merits of services liberalisation, this study however, is not advocating for the wholesale liberalisation of the transport sector but maintains that any services negotiations requires

technical preparation and negotiations and the process of liberalisation must be well-informed, sequenced and have clear milestones. Liberalisation entails a process whereby the restrictions on competition are removed and the sector is opened to competition. This process must be accompanied by putting the appropriate regulatory framework in place. On sequencing, policy makers and scholars seem to agree that creating the necessary regulatory capacity is a precondition for liberalization and not vice versa. In other words, liberalization entails (to varying degrees of design and implementation) the unbundling of the incumbent through formal or functional separation of operation and ownership; opening of the market to competition and allowing third party access to essential facilities; the creation of capacitated independent authorities to enforce sector-specific regulation and competition in a non-discriminatory manner; and the setting of universal service obligations and standards in accordance with legitimate policy objectives.

Scrutiny of domestic regulation is a time consuming, laborious process which requires technical capacity. This study applies the World Bank's RASTI methodology and maintains that this methodology be employed in the assessment of various other service sectors. The methodology allows for the detailed analysis of domestic legislation governing the transport sector and its related sub-sectors to determine the presence of trade restrictive measures.

Disenyana & Khumalo, (2009) emphasise the critical role of the transport sector in the southern African region but express concern over the lack of information, capacity, statistics and skills for effective participation, necessary for future negotiations. Disenyana & Khumalo, (2009) confirm that research assistance is required to enable member states to make informed decisions about in which sectors offers should be made.

In preparation for such negotiation a sector by sector analysis would become a valuable source of information. This study however, will focus exclusively on the transport sector. An assessment of the transport services sector and its related sub-sectors is necessary to collect valuable information to assist with future services negotiations both regionally and multilaterally. The study can provide a possible approach to the type of sectoral assessments that should be

conducted at a domestic policy level to prepare for services negotiations at a regional and an international level.

State of play on WTO Trade in services negotiations

During the Uruguay Round concluded in 1993, South Africa made commitments in various services sectors including the transport services sector. These offers relate to passenger transportation, freight transportation and the maintenance and repair of road transport equipment (SA GATS schedule, 1994). These commitments are legally binding and were made on a MFN basis applicable to all WTO member states. (Kruger, 2009). South Africa, however also has included road transportation in its list of MFN exemptions and these apply to Botswana, Lesotho, Swaziland, Malawi, Zimbabwe and other sub-Saharan African countries. The exemption is to be applied for an indefinite duration of time to support economic development in the region, to develop integrated road transport systems and to ensure an efficient distribution network in the event of natural disasters. The MFN exemption restricts cabotage to South African registered vehicles and operators. In addition, regional bilateral or plurilateral agreements that provide for the transport rights of passengers or freight to or from South Africa and between third countries, are to be reserved for the road transport operators of the contracting parties to existing and future agreements.

It is important to note that South Africa, during this period negotiated as a developed country under the previous political dispensation and undertook commitments that may be unsuitable for the national policy objectives of a democratic developing South Africa. In general however, the Uruguay Round though successful only delivered on modest trade commitments from WTO members. These commitments were not improved upon ever since. South Africa has made offers under the Doha Round, however these are only initial offers, are not legally binding and are subject to the conclusion of the negotiations. In general however, negotiations on transport services have been the least successful in the GATS negotiation (Janda, 2003).

According to Disenyana and Khumalo (1999), horizontal commitments undertaken by South Africa impose limitations both on national treatment and market access. Limitations on national treatment apply to commercial presence and the presence of natural persons while limitations on market access apply only to the presence of natural persons. The extent of the limitation

regarding commercial presence “is a restriction in terms of local borrowing by South African registered companies with a non-resident shareholding of 25% or more” (Disenyana & Khumalo, 2009 p.39-40).

With the impasse of the Doha development round, discussions about the liberalisation of services have become prominent at the WTO placing increasing pressure on South Africa and other African countries to engage in plurilateral discussions.

Domestic regulation and barriers to trade in services

The concept of barriers to trade in services is best understood in relation to barriers to trade in goods. Services unlike goods, are intangible in nature and requires proximity for certain modes of supply between the services supplier and the consumer/end-user. Moreover, as a result of the intangible nature of services, the measurement and quantification thereof is difficult unlike the measurement and quantification of trade in goods. The liberalisation of trade in goods largely addresses the lowering or removal of tariffs, quotas and other restrictions, whereas barriers to services manifest in domestic regulation, governing specific sectors. At times, the domestic regulation may discriminate against foreign service providers, for example through the imposition of a license requirement or through the limitation of the number of foreign service providers.

Barriers to trade in services are located in laws and regulations of individual economies making the task of services liberalisation a complex process. These barriers are often referred to as behind the border measures and may take the form of licenses, technical, qualification, registration and local ownership requirements (Hartzenberg, 2012). The identification of these barriers/restrictions requires an audit of legislation governing the various service sectors, which requires technical expertise and is time consuming. Cassim (2005), CUTS (2008) UNCTAD (2011) and Disenyana & Khumalo, (2009) confirm that such a task requires a substantial amount of resources, expertise, time and the relevant forum to undertake liberalisation (UNCTAD, 2009).

According to Kox & Nordas, (2007), barriers or restrictions in the services sector can broadly be divided into two main groups namely those discriminating against foreign suppliers (market access and national treatment) and those protecting the incumbent against all new suppliers (domestic regulation on entry, nature and scope of operations). According to Hoekman & Braga, (1997), there are four types of barriers: a) quantitative restriction type barriers; b) price based barriers; c) licensing or certification requirements; d) discriminatory access to distribution networks. For purposes of this study and in terms of the selected methodological approach, the World Bank's RASTI approach to barriers into entry and operation barriers has been adopted. The RASTI categorization differentiates between quantitative and qualitative measures and lists specific measures. A table of these specific measures can be found in Chapter 4, figure 3.

Liberalization of the transport services sector will not deliver anticipated benefits if it is not supported by an appropriate domestic regulatory framework which is able to respond adequately to the changing dynamics of commerce. Complex and fragmented legal frameworks have the effect of increasing transaction costs and creates uncertainty and unpredictability (Disenyana & Khumalo, 2009).

While the above authors argue that barriers to trade in services are located in national laws and regulations, it is equally important to acknowledge that domestic regulation is enacted with the intention to achieve national policy objectives, to fulfill public policy objectives and to protect consumers. However, domestic regulation should preferably not be applied so as to discriminate against foreign service providers or as a trade restriction especially if there are less restrictive equally effective alternative measures available (CUTS International, 2008).

The GATS Preamble and in a number of its Articles recognises the fundamental "right of member states to regulate" and the importance of such regulation within those economies. Moreover, the GATS recognises the right of member states to introduce new regulations on the supply of services within their territories to meet national policy objectives. Within the context of the above discourse and according to Mattoo and Sauv e, (2003) the objective of the GATS is progressive liberalisation and not deregulation. Mattoo and Sauv e also caution that the terms liberalisation and deregulation should not be used interchangeably as it would be incorrect to

equate regulation with trade restrictions (Mattoo & Sauvé, 2003). It would seem that carefully crafted measures would be required to maintain the balance between a member state's right to regulate and to ensure that the measures in place do not place a disproportionate burden on foreign service suppliers. Barring certain exceptions set out in Article XIV and XIV bis of the GATS, members of the WTO are free to maintain or introduce measures necessary to protect public morals or maintain public order, protect human, animal or plant life or health, or protect their security interests.

The right of WTO members to regulate and introduce new regulations is contained in Article VI.4 of the GATS in so far as it meets national policy objectives. The right to regulate for developing countries is also recognised in the preamble of GATS, taking into account the asymmetries in the development of services regulation between developed and developing countries. WTO members also agreed at the Hong Kong Ministerial (2005) to develop disciplines on domestic regulation to ensure that domestic regulation is supportive of liberalisation of services markets. The development of these disciplines remains an ongoing process.

Mattoo & Sauvé (2003), and others acknowledge that the GATS recognises “the right of Members to regulate, and to introduce new regulations on, the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right” (Mattoo & Sauvé, 2003, p1).

Domestic markets in the transport services sector are often protected through barriers in the form of state-owned firms, regulation, subsidies in favour of domestic industry and competition policy (Naudé, 1999). While the domestic regulatory environment may be a barrier to trade in services, countries also use domestic regulation to pursue legitimate public policy objectives to ensure equitable access and maintain safety, security and environmental standards. On the other hand domestic regulation can be used to place a disproportionate burden on foreign service suppliers, effectively discriminating against foreign service suppliers in favour of domestic service suppliers (Janda, 2003).

The impact of domestic regulation on services trade

Various authors employed different methodologies to determine the impact of domestic regulation on services trade. Nicoletti et al (2003a,b) being the first to undertake an empirical study to determine the impact of domestic regulation on services trade and found that domestic regulation has a large negative effect on services exports. Nicoletti's approach was criticized by Kox and Lejour (2005) for two reasons. Firstly, because the analysis was conducted on total services trade including travel and transport and secondly, because the indicator for domestic regulation used did not capture relevant regulation to services trade and included regulation for sectors that do not trade in services.

The estimate gravity equation employed by Kox and Lejour (2005), improved on the study by Nicoletti et al (2003) where they found that the overall level of regulation in an exporting country and the lack of similarity between the exporting and importing country in the spheres of barriers to competition, trade and investment have a negative impact on service exports. Schweltnus (2008), points out that the method employed by Kox and Lejour (2005) is unpersuasive because the indicator devised did not effectively capture the regulatory variations in the different countries and assumed for example that licensing requirements are homogeneously applied across countries when in fact the application of a licensing requirement can differ substantially from one country to the next.

Walsh (2006), Kimura and Lee (2005) and Kox and Nordas (2007) found a robust negative correlation between the level of domestic regulation and services trade and between regulatory heterogeneity and services trade. However the methodologies employed did not address the problematic indicator of regulatory heterogeneity. It is not the intention of this literature review to provide an in depth critique of the methods employed to determine the impact of domestic regulation on trade in services but to place into context the significance of the domestic regulation as a barrier to trade in services. The flaws of the various methodologies employed by the authors mentioned above, does not invalidate the claim that specific domestic regulations may act as barriers to trade in services. For purposes of this research this widely acknowledged claim is sufficient to conduct and assessment of South Africa's actual transport services sector

commitments (as reflected in the GATS) to South Africa's applied regulation on transport services sector.

As companies seek to expand market access, industry and private sector will increasingly place pressure on governments to give attention to regulatory barriers which pose a significant challenge to the business operations of industry and private sector.

In terms of the WTO rules, GATS Article XIX (1) states that Members will enter into successive rounds of negotiations to attain progressively higher levels of liberalisation. The purpose of these negotiations would be to reduce or eliminate measures that adversely affect trade in services or impede market access. Article XIX (2), moreover states that the process shall take into account the level of development of individual members and with due respect to national policy objectives. Developing countries will be allowed flexibility in opening fewer sectors, liberalizing fewer types of transactions and taking their developmental needs into consideration (GATS Article XIX).

Services negotiations serve a dual purpose, to increase market access through liberalisation but also to increase transparency. GATS Article III requires member states to publish relevant laws and regulations, providing notification of new laws or amendments and administer and update such measures (Kruger, 2011). This requirement supports the promotion of transparency which in the course of daily business activity aims to create certainty, predictability and a conducive trading environment within which private sector can operate optimally (Disenyana & Khumalo, 2009).

A lack of transparency, complex and obscure legal frameworks creates uncertainty which has the overall effect of increasing transaction costs and transport costs. Limao and Venables (2001) have found a highly elastic relationship between trade volumes and transport costs. Moreover, policy measures also affect transport costs and the performance of the transport sector. Negotiations on the possible elimination or reduction of market access barriers and discriminatory measures (see GATS Article XIX(1)) contained in the commitments on MFN, MFN exemptions, market access and national treatment requires a complementary review of

existing domestic rules governing the entry requirements and operation of suppliers to ascertain the level of liberalisation in a service sector even where full market access and national treatment have been granted. The review would also assist in establishing the legitimacy of these requirements or confirming their protectionist effect (Adlung & Roy, 2005).

South Africa's transport sector

The transport sector is a highly regulated sector in SA and is characterised by the existence of natural monopolies. The rail, ports and pipelines sectors in South Africa are controlled by the State owned corporation, Transnet, which holds a monopoly over these sectors. SANRAL, also a state owned company, is responsible for the road network in SA and reports to the Department of Transport (DOT) while Transnet reports to the Department of Public Enterprises (DPE). The operating mandates for Transnet and PRASA are developed by both DOT and DPE. Currently, passenger rail derives a subsidy from the State, while Transnet operates its divisions on a commercial basis which cannot be sustained in the long term. The wide scale reform of the rail sector, requires substantial capital investments both from state subsidies or through public-private partnerships (DBSA, 2012).

It is important to consider the GATS rules on monopolies in view of the nature of the transport sector in South Africa. GATS Article VIII addresses monopolies and exclusive service suppliers. It requires that members with monopoly providers act consistently with their Most Favoured Nation commitment and its specific commitments, these being:

- market access commitments to avoid non-discriminatory limitations on entry or on service production levels, except where specified otherwise;
- national treatment commitments to avoid discrimination against foreign suppliers except where specified otherwise;
- where a monopoly supplier competes in the supply of a service outside the scope of its monopoly rights and subject to specific commitments, the members ensure that the supplier does not abuse its monopoly position to act in a manner inconsistent with such commitments.

Transport services defined

The GATS Services Sectoral Classification list (MTN.GNS/W/120) covers a range of service sectors and sub-sectors covered under the GATS. It defines transport services as contained in Table 1.

Table 1- GATS Services Sectoral Classification list (MTN.GNS/W/120)

11	TRANSPORT SERVICES		
A.	Maritime Transport Services		
a.	Passenger transportation		7211
b.	Freight transportation		7212
c.	Rental of vessels with crew		7213
d.	Maintenance and repair of vessels		8868**
e.	Pushing and towing services		7214
f.	Supporting services for maritime transport		745**
B.	Internal Waterways Transport		
a.	Passenger transportation		7221
b.	Freight transportation		7222
c.	Rental of vessels with crew		7223
d.	Maintenance and repair of vessels		8868**
e.	Pushing and towing services		7224
f.	Supporting services for internal waterway Transport		745**
C.	Air Transport Services		
a.	Passenger transportation		731
b.	Freight transportation		732
c.	Rental of aircraft with crew		734
d.	Maintenance and repair of aircraft		8868**
e.	Supporting services for air transport		746
D.	Space Transport		733
E.	Rail Transport Services		
a.	Passenger transportation		7111
b.	Freight transportation		7112
c.	Pushing and towing services		7113
d.	Maintenance and repair of rail transport equipment		8868**
e.	Supporting services for rail transport services		743

F.	Road Transport Services		
a.	Passenger transportation		7121+7122
b.	Freight transportation		7123
c.	Rental of commercial vehicles with operator		7124
d.	Maintenance and repair of road transport equipment		6112+8867
e.	Supporting services for road transport services		744
G.	Pipeline Transport		
a.	Transportation of fuels		7131
b.	Transportation of other goods		7139
H.	Services auxiliary to all modes of transport		
a.	Cargo-handling services		741
b.	Storage and warehouse services		742
c.	Freight transport agency services		748
d.	Other		749
I.	Other Transport Services		
12	OTHER SERVICES NOT INCLUDED ELSEWHERE	95+97+98+99	

Source: WTO, 1991

Research pertaining to the level of liberalisation of the South African transport sector is limited, particularly an assessment of the legislation governing the transport sector. The WTO's Trade Policy Review of SACU (2009) provides a general overview of the South African transport sector. However, it does not provide specific information about barriers located in the legislation governing the transport sector and its related sub-sectors.

The transport sector in South Africa is a highly regulated sector and is in need of reform. (NFLS, no date). The 1996 White paper on National Transport Policy set the general framework to develop transport networks and infrastructure. The Department of Transport develops, coordinates and implements transport policies. It has established several public entities in charge of transport services. These are: South African National Roads Agency Ltd (SANRAL); Cross

Border Road Transport Agency (CBRTA); Passenger Rail Agency of South Africa (PRASA); South African Civil Aviation Authority; Airports Company South Africa Ltd (ACSA); Air Traffic and Navigation Services Company Ltd; and the South Africa Maritime Safety Authority (DBSA, 2012).

Transport services and its sub-sectors are highly regulated and the role of the State remains substantial. Transnet is a State owned enterprise comprising of five companies which controls South Africa's freight infrastructure in rail, ports and pipelines and effectively holds a monopoly in different subsectors. The cost of transport services in South Africa are high and inefficiencies in the sector promote rent seeking behavior driving the cost of services above the marginal cost (DBSA, 2012). The development of a national freight logistics strategy attempted to reduce transport costs by promoting efficiency in the freight system through better integration of ports, airports and land transport. The strategy was therefore developed in response to the lack of co-ordination and the resulting market failure.

Naudé (1999), focusses on the South African transport sector and maintains that liberalisation of tariffs in goods must be complemented by liberalisation in the services sector without which market distortions would persist and have an overall negative impact on all downstream activity. Naudé, therefore argues that South Africa should carefully scrutinise its multilateral liberalisation strategy for trade in services to ensure that the manufacturing sector is supported by an efficient (qualitative and quantitative) transport services sector. Moreover, South Africa's GATS strategy should be framed within the context of increasing exports of manufactured goods and that of transport services.

Naudé (1999) maintains that the transport services sector is uncompetitive because it is dominated by state owned corporations such as Transnet. On this basis it is argued that the transport sector requires restructuring, de-regulation and liberalisation to increase South Africa's exports to the SADC market. Naudé's argument for increased competitiveness is based on the volume of trade in goods between South Africa and the region and does not consider actual legislation governing the sector to ascertain actual trade restrictive measures neither does it

provide information pertaining to trade in transport services resulting in a disjuncture between the data presented and the argument constructed.

The WTO and World Bank I-TIP database on restrictiveness on trade in services, however does provide information regarding the restrictiveness in specific service sectors, to the extent that a specific measure may be listed on the database. The challenge however, regarding the database is the absence of reference to the source of legislation from where the measure emanates.

CHAPTER 3- RESEARCH METHODOLOGY

3.1 Introduction

The purpose of this chapter is to describe the methodological approach used in the process of determining the objective of the study. The chapter firstly, describes the research methodology and indicates the data classification used which is then followed by a discussion on the research design. The research design elaborates on the mapping process adopted for undertaking the analysis of the legislation. Thirdly, the chapter sets out the requirements as defined in the GATS which serves as a benchmark to determine the level of liberalisation. Fourthly, the chapter contains a brief discussion on the data collection and analysis which is then fifthly, followed by a discussion on data limitations, data validity and reliability. The chapter concludes with recommendations for future research.

3.2 Research Methodology

This study aims to determine the level of liberalisation of the South African transport sector adapted from the World Bank's Regulatory Assessment on Services Trade and Investment (RASTI). It is a qualitative approach which examined the following:

- Laws and regulations applicable to the transport sector/sub-sector
- Restrictions on access to and operation in the transport sector/sub-sector
- Quantitative and qualitative measures which may or may not be discriminatory against foreign service suppliers

The methodology entailed an examination of legislation on a case by case basis, per sub-sector, to identify the presence of trade restrictive measures. Legislation examined includes both sector specific legislation (service level) and non-sector specific (horizontal) legislation. The study relies on primary data, that is the service level sector specific legislation and horizontal legislation, as well as desktop research. Data collected from the analysis of the legislation will allow for a comparison of South Africa's actual GATS commitments and applied policy through the study of national laws which serves as the foundation of this dissertation.

The case study method will be used and is relevant because this area of research requires an in-depth analysis and assessment of the transport service sector in South Africa and an analysis of South Africa's commitments as reflected in the GATS service schedule. The case study approach is relevant to research requiring multiple case studies, in this case the transport sector has a number of sub-sectors that would need to be undertaken simultaneously.

The research methodology employed for this dissertation, is that of a descriptive/analytical qualitative case study which will provide a detailed account of the level of liberalisation of the South African transport sector through a comparison of the liberalisation of South Africa's transport sector in terms of the actual commitments (as reflected in the WTO services schedule) against the applied domestic regulation. This area of research is important to obtain precise information about the level of liberalisation of the transport sector in South Africa, in view of the discussions at the WTO level and at a regional level in view of South Africa's regional and continental aspirations to promote regional integration for increased trade in goods and services.

Case study is defined by Yin as an "in-depth, empirical inquiry that investigates a contemporary phenomenon within its real life context" (Yin, 1994. P13.) Merriam defines case study as "an examination of a specific phenomenon, such as a program, an event, a process, an institution, or a social group" (Merriam, 1988, p.9). Stake on the other hand define case study as a "process and product of inquiry about a case" (Denzin & Lincoln, p 436). The variety of definitions for a case study points to the quagmire faced by both critics and advocates of the case study approach which has generated much debate.

The main objective of the case study method is to gain an in-depth understanding of a specific context with the emphasis on process rather than outcomes, in context rather than a specific variable and in discovery rather than confirmation. This definition is confirmed by Gerring (2004), in a paper where he argues that for methodological purposes a case study is best defined as an in-depth study of a single unit where the researcher aims to explain features of a larger class of similar phenomenon. According to Merriam, case study is a qualitative inquiry commonly used when it is impossible to control all of the variables that are of interest to the

researcher. Moreover its unique strength is its “ability to deal with a full body of evidence ranging from documents, artefacts, interviews and observations” (Merriam, 1988, p 8).

Merriam (1988), Yin (1991, 1994), Stake (1995) and Denzin & Lincoln (2002), maintain that four factors determine a case study approach. These are the “nature of the research question, the desired end product, the amount of control a researcher has over the variables under investigation and the identification of a bounded system as the focus of investigation” (Merriam, 1988, p 8).

Critics of the case study approach have correctly argued that the study of a particular aspect of a subject does not offer grounds for reliability or generality of findings. Hamel (1993), observed that the case study is viewed with circumspection owing to its lack of representativeness because it is a study of a single unit. Furthermore, it lacks “rigour in the collection, construction and analysis of the empirical materials” and does not control bias of the researcher. Shields (2007), on the other hand argues that the strengths of the case study approach is that it accounts for and includes differences-“ideologically, epistemologically, methodologically and most importantly humanly” (Shields 2007, p. 12). Moreover, the case study approach includes paradoxes and does not eliminate or simplify what cannot be discounted or simplified (Shields, 2007).

In view of the limitations of the case study approach, consideration was given to the employment of grounded theory for this dissertation. Grounded theory was first developed by Glaser and Strauss (1965,1967) and is best defined by Strauss and Corbin (1990, p24) as “a qualitative research method that uses a systematised set of procedures to develop and inductively derive grounded theory about a phenomenon”.

It is a qualitative research methodology in which substantive theory is derived through an ongoing process of continually reviewing the data, refining questions, and re- evaluating these changes. The resulting substantive theory is a theory that is applicable to a specific situation. Grounded theory involves a process where “...data collection, analysis, and theory stand in close relationship to each other...One begins with an area of study and what is relevant to that area is allowed to emerge” (Strauss & Corbin, 1998, p. 12). It is a method where theory emerges from the data collected.

The employment of grounded theory as an approach was discounted as a methodological approach due to the nature of the research question. The use of open coding, development of concepts and the overwhelming element of subjectivity in this approach made the grounded theory methodology an unsuitable for purposes of this research.

Rowley (2002), maintains that the case study methodology is underpinned by the positivist and deductive approach which provides a firmer foundation for structuring data collection and analysis unlike grounded theory (underpinned by the inductive approach) which involves the formulation of theory derived from observable data. Grounded theory requires the formulation of questions, insights and propositions after data has been collected while the case study requires the definition of questions and propositions in advance of the data collection.

In view of the merits and de-merits of the case study approach, it is important to state that the purpose of this research is not to make generalisations about the level of liberalisation of the South African transport sector or any other service sector for that matter, however it is to explore and analyse the status quo of South Africa's transport sector commitments undertaken at the WTO to establish whether such commitments are reflected in domestic regulation pertaining to the transport sector. The research question, variables, data and parameters of the study justifies the use of a case study approach. The research design supports a factual analysis of domestic regulation governing South Africa's transport sector.

The nature of the data used in this study, played a determining role in the selection of the methodological approach. The case study approach is ideally suited to this research question as it uses a particular case, to gain a broader understanding of a phenomenon. In this instance, the focus of the research question is the South African transport sector and the domestic regulatory environment. The nature of the study and the research design justifies the case study approach as the most suitable to undertake a comparison of South Africa's WTO commitments in the transport sector, and the actual regulatory status quo. The research methodology and research design will allow for a comparison of actual GATS commitments with applied domestic regulation which will serve as the foundation of this dissertation.

3.3 Research design

For purposes of this research, data was collected from legislation governing the transport sector and its related sub-sectors. This research employs a regulatory mapping process, proposed by the World Bank's International Trade Department, the regulatory assessment on services trade and investment (RASTI). The regulatory mapping method captures the formal measures and applied practices that have a restrictive impact on trade and investment services in the transport sector. However for purposes of this study, only the formal measures indicated in legislation were analysed.

This study relies on the World Bank's RASTI methodology to assess the level of liberalisation of South Africa's transport sector. Legislation in general is static and requires an analysis to determine if there are any restrictive measures such as discriminatory licensing conditions, performance requirements, foreign equity ceilings or other measures considered to be restrictions.

The GATS has various provisions relevant to the criteria in the mapping process. The mapping process presented in Figure 1 provides the criteria for the analysis (Sáez & Molinuevo, 2013)

- Sectoral level- requires categorisation of the measure, horizontal/vertical, identification of the sub-sector and the service.
- Modes of supply affected- requires categorisation of the mode of supply affected as defined in the GATS Agreement Article I, where mode 1 refers to the cross border supply of services, mode 2 refers to the consumption of services abroad, mode 3 refers to the commercial presence of foreign service suppliers and mode 4 refers to the presence of natural persons and the foreign supply of services.
- Stage of supply affected- requires identification of the stage at which the measure affects supply of the service, i.e access, establishment or operation. For example, granting a license based on criteria that a minimum capital amount is invested affects establishment of the operation. This indicator refers to Articles XVI and XVII of the GATS agreement relating to market access and national treatment respectively which can affect access and establishment of foreign service suppliers. Article XVI provides that each Member shall

accord services and service suppliers of any other Member treatment no less favourable than that provided for in its services schedule. A member may not maintain limitations on the number of service suppliers, on the total value of service transactions, on the total number of service operations, on the total number of natural persons that may be employed and on the participation of foreign capital. A member may not maintain measures which restrict or require specific types of legal entity through which a service supplier may supply a service (GATS, 1994). Article XVII provides that each Member shall accord services and service suppliers of any other Member treatment no less favourable than it accords to its own like services and service suppliers in the sectors in its schedule (GATS, 1994).

- Nature of the measure- requires categorisation of the measure as either quantitative or qualitative. Quantitative measures may be numerical restrictions, economic needs test, or foreign equity ceilings while qualitative measures may be discriminatory measures, performance requirements or nationality/residency requirements for service providers. Article XVII addressing national treatment is relevant in terms of identifying the nature of the measure. A list of qualitative and quantitative measures is indicated in figure 3.
- Origin of the measure- requires differentiation of the measure as either a legal/regulatory instrument or administrative practice. For purposes of this analysis all the measures are legal measures because the study is based exclusively on the assessment of legislation.
- Impact- requires an assessment of the measure in terms of its impact as being formally discriminatory, de facto discriminatory, discriminatory or non-discriminatory application. For example, safety standard requirements may be provided for in legislation however this is considered to be non-discriminatory unless a higher standard applies to foreign service suppliers and a lower standard for domestic suppliers. A measure imposing specific license conditions on foreign service suppliers for example may be categorised as discriminatory. The impact indicator of the methodology relates to the national treatment limitation set out in the GATS agreement contained in Articles XVI and XVII.
- Purpose of the regulation- requires an assessment of the functional purpose of the regulation and to determine if the measure is to address market failures. Identifying the purpose of the legislation assists in assessing whether the legislation is discriminatory or non-discriminatory. In terms of this indicator, the researcher must consider whether the

purpose of the regulation meets the requirements of article VI of the GATS agreement. GATS Article VI on domestic regulation, regulates the administration of measures affecting trade in services. It also provides that licensing, qualification requirements /procedures and technical standards should not constitute unnecessary barriers. These requirements must be based on objective and transparent criteria and should not be more burdensome than necessary to ensure quality. The requirements should not in themselves constitute a restriction on trade. In other words, the purpose for which regulation is made becomes very important in considering whether the requirements of GATS Article VI are met.

- Monopoly/competition or non-economic policies- legislation may have been developed to address market failures such as monopoly, externalities or coordination deficits or legislation may have been developed to address non-economic policies such as distributional justice or matters of public interest.

Figure 1: Graphic representation of mapping process

Sectoral Level		Modes of supply affected	
Horizontal Sectoral Service		1. Cross-border trade 2. Consumption abroad 3. Establishment 4. Presence of individual services supplier	
Stage of the supply affected		Nature of the Measure	
Access / Establishment Operation		Quantitative Qualitative	
Origin of the measure		Impact	
Legal or regulatory instrument Administrative practices		Formally discriminatory De facto discriminatory Discriminatory application Non-discriminatory	
Purpose of the regulation			
Market failures		Non-economic Policies	
<ul style="list-style-type: none"> • Monopoly / competition • Public goods • Externalities • Information asymmetries • Coordination deficits 		<ul style="list-style-type: none"> • Distributional justice • Regulatory failure • Public interest 	

Source: World Bank 2014

In attempting to answer the research question, consideration was given to the use of the weighted indicator system developed and published by the World Bank in the Doing Business reports which assess various countries in terms of restrictiveness. Schweltnus (2007) maintains that the

indicators published in the World Bank reports do not address regulations in the services sector but rather regulations in the manufacturing sector. Furthermore, the weightings and indicators are premised on a subjective methodology. Schweltnus (2007) criticises the methodology of the weighted indicator system stating that, “instead of summarising objective regulatory measures, it assembles individual perceptions on the regulatory environment into an indicator” (Schweltnus (2007, p15). Hardin & Holmes (1997) also outline the limitations of the weighted indicator system stating that it indicates the relative degree of restriction and does not indicate the actual restriction, secondly it does not differentiate between the various types of restrictions and allocates an equal weighting regardless of their economic impact.

The World Bank’s Logistics Performance Index (LPI) also provides rankings and weightings for processes relating to the transport and logistics sectors for various countries across the world. While the LPI is fairly popular and commonly cited, the rankings and weightings are as argued by Schweltnus (2007), premised on a subjective methodology. The allocated weighting and ranking themselves do not unpack the actual impediment or restriction.

In view of the subjectivity regarding the weighted system and the various critiques and flaws of the system, a systematic analysis of domestic regulation governing the transport sector provides a richer context which is more appropriate, reliable and firmer in maintaining the validity of the study. Triangulation is used to maintain the validity of the study through 1) constructing an analysis of the various domestic regulation, 2) conducting an analysis of the GATS services schedule and 3) by cross-checking the information obtained with the databases that record such information.

3.4 Data collection

Yin (1994) lists six sources of evidence for data collection in a qualitative case study methodology: documentation, archival records, interviews, direct observation, participant observation, and physical artefacts and not all need to be used. For purposes of this study the following documents have been used:

- South Africa's GATS schedule of specific commitments (GATS/SC/78)
- Domestic regulation governing the transport sector
- WTO note on Domestic regulation
- General Agreement on Trade in Services
- Various other sources of information for legal and interpretative analyses from the World Bank, WTO, UNCTAD, OECD and SADC.
- WTO/World Bank I- TIP database containing information about trade in services restrictions.

Table 2, contains a list of 33 sources of legislation governing the various transport sub-sectors as well as horizontal legislation. Vertical legislation was selected based on the relevance to a particular sub-sector while horizontal legislation was selected based on its relevance to trade in services in terms of allowing market access, entry and operation of foreign companies. Legislation was retrieved using Lexis Nexis a database of South African regulation; the Parliamentary Monitoring Group transport committee reports; the Department of Transport Annual reports, the Annual reports of the transport regulatory authorities responsible for a particular sub-sector, the WTO Trade Policy Review Report of SACU (2009); the GATS; South Africa's GATS Schedule of Specific Commitments and the World Bank and WTO I-TIP database on trade in services.

Table 2- List of Legislation Reviewed

#	Name of Legislation
1	National Land Transport Act No.5 of 2009
2	Cross-Border Road Transport Act No.4 of 1998
3	South African National Roads Agency Limited and National Roads Act No.7 of 1998
4	National Road Traffic Act No.93 of 1996
5	Road Traffic Act No.29 of 1989
6	National Railway Safety Regulator Act No.16 of 2002
7	Merchant Shipping Act No.57 of 1951
8	Shipping Laws Amendment Act No.57 of 1998
9	Shipping General Amendment Act No.23 of 1997
10	Merchant Shipping Regulations (Small Vessel Safety), 2002
11	Merchant Shipping (Licensing of Vessels) Regulations, 2002
12	Merchant Shipping (Ship Identification Number) Regulations, 2004
13	Amendment of Tonnage Regulation, 1986
14	Merchant Shipping (Notification of Building Vessels) Regulations, 2002
15	Ship Registration Regulation, 2002
16	Registration of Ships Act No.58 of 1998
17	National Ports Act No.12 of 2005
18	Marine Traffic Act No.2 of 1981
19	Carriage of Goods by Sea Act No.1 of 1986
20	Gas Act No.48 of 2001
21	Petroleum Pipelines Act No.60 of 2003
22	Aviation Laws Amendment Act No.98 of 1996
23	Aviation Laws Amendment Act No. 82 of 1997
24	Carriage by Air Act No.17 of 1946 as amended
28	International Air Services Act No.60 of 1993
29	South African Airways Act No. 5 of 2007
30	Companies Act No.71 of 2008
31	Competition Act No.98 of 1998
32	Broad Based Black Economic Empowerment Amendment Act No.46 of 2013
33	Broad Based Black Economic Empowerment Code 1019 of 2013
34	Promotion and Protection of Investment Bill Notice 1087 of 2013
35	Employment Services Act No.4 of 2014
36	Immigration Act No.13 of 2002

Source: Author's list of legislation analysed.

3.5 Data classification

Transport services are classified and defined by both the WTO and the UN Provisional Central Product Classification (CPC). Services are classified and defined in Table 3 below, as contained in the WTO Services Sectoral Classification List (MTN.GNS/W/120). The GATT Secretariat in 1991, produced a note, in consultation with members, setting out the classification of service sectors. The purpose of the list was to enable members to undertake specific commitments. The list in its entirety identifies twelve sectors and also relevant subsectors. The transport sector therefore has nine sub-sectors as reflected below. This study will be limited to road, rail, air, pipeline and maritime transport subsectors. Inland waterways have been excluded as it has no relevance in the South African context due to an absence of navigable rivers in South Africa. The auxiliary sub-sector albeit an important sub-sector to trade in services is largely regulated by horizontal measures, found in domestic regulation that has economy wide application and the same applies to space transport.

Table 3-Definition of Transport Services (MTN.GNS/W/120)

11.	<u>TRANSPORT SERVICES</u>	Corresponding CPC
A.	<u>Maritime Transport Services</u>	
a.	Passenger transportation	7211
b.	Freight transportation	7212
c.	Rental of vessels with crew	7213
d.	Maintenance and repair of vessels	8868**
e.	Pushing and towing services	7214
f.	Supporting services for maritime transport	745**
B.	<u>Internal Waterways Transport</u>	
a.	Passenger transportation	7221
b.	Freight transportation	7222
c.	Rental of vessels with crew	7223
d.	Maintenance and repair of vessels	8868**
e.	Pushing and towing services	7224
f.	Supporting services for internal waterway	745**

	transport	
C.	<u>Air Transport Services</u>	
a.	Passenger transportation	731
b.	Freight transportation	732
c.	Rental of aircraft with crew	734
d.	Maintenance and repair of aircraft	8868**
e.	Supporting services for air transport	746
D.	<u>Space Transport</u>	733
E.	<u>Rail Transport Services</u>	
a.	Passenger transportation	7111
b.	Freight transportation	7112
c.	Pushing and towing services	7113
d.	Maintenance and repair of rail transport equipment	8868**
e.	Supporting services for rail transport services	743
F.	<u>Road Transport Services</u>	
a.	Passenger transportation	7121+7122
b.	Freight transportation	7123
c.	Rental of commercial vehicles with operator	7124
d.	Maintenance and repair of road transport equipment	6112+8867
e.	Supporting services for road transport services	744
G.	<u>Pipeline Transport</u>	
a.	Transportation of fuels	7131
b.	Transportation of other goods	7139
H.	<u>Services auxiliary to all modes of transport</u>	
a.	Cargo-handling services	741
b.	Storage and warehouse services	742
c.	Freight transport agency services	748
d.	Other	
I.	<u>Other Transport Services</u>	

Source: World Trade Organisation, 1991

The UN Provisional CPC on the other hand contains ten categories of service sectors, with transport services listed under category six. Table 4 below captures the description and codes for

the transport sector and related sub-sectors under the UN Provisional CPC. It is also important to note there are various versions of the UN CPC, in particular the provisional version of 1991 which is used for WTO trade negotiations. The later versions contain amendments and additional listings which do not however, make earlier versions incorrect, however it is worth noting that the UN Provisional CPC is employed in this study. It is evident that the UN CPC contains greater detail than the WTO Services Sectoral Classification list.

Table 4- Transport Sector and its sub-sectors

Division 71	Land Transport Services
711	Transport Services by Railway
7111	Passenger transportation
71111	Interurban passenger transportation
71112	Urban and suburban passenger transportation
7112	Freight transportation
71121	Transportation of bulk frozen or refrigerated goods
71122	Transportation of bulk liquid or gases
71123	Transportation of containerised freight
71124	Mail transportation
71129	Transportation of other freight
7113	Pushing or towing services
712	Other land transport services
7121	Other scheduled passenger transportation
71211	Urban and suburban regular transportation
71212	Urban and suburban special transportation
71213	Interurban regular transportation
71214	Interurban special transportation
71219	Other scheduled passenger transportation n.e.c
7122	Other non-scheduled passenger transportation
71221	Taxi services

71222	Rental services of passenger cars with operator
71223	Rental services of buses and coaches with operator
71224	Passenger transportation by man or animal drawn vehicles
71229	Other non-scheduled passenger transportation n.e.c
7123	Freight transportation
71231	Transportation of frozen or refrigerated goods
71232	Transportation of bulk liquids or gases
71233	Transportation of containerised freight
71234	Transportation of furniture
71235	Mail transportation
71236	Freight transportation by man or animal drawn vehicles
71239	Transportation of other freight
7124	Rental services of commercial freight vehicles
713	Transport services via pipeline
7131	Transportation of petroleum and natural gas
7139	Transportation of other goods

Division 72 Water Transport Services	
721	Transport services by seagoing vessels
7211	Passenger transportation
72111	Passenger transportation by ferries
72119	Other passenger transportation
7212	Freight transportation
72121	Transportation of frozen or refrigerated goods
72122	Transportation of bulk liquids or gases
72123	Transportation of containerised freight
72129	Transportation of other freight
7213	Rental services of seagoing vessels with operator
7214	Towing and pushing services

722	Transport services by non-seagoing vessels
7221	Passenger transportation
72211	Passenger transportation by ferries
72219	Other passenger transportation
7222	Freight transportation
72221	Transportation of frozen or refrigerated goods
72222	Transportation of bulk liquids or gases
72229	Transportation of other freight
7223	Rental services of non- seagoing vessels with operator
7224	Towing and pushing services
Division 73	Air Transport Services
731	Passenger transportation by air
7311	Scheduled passenger transportation by air
7312	Non- Scheduled passenger transportation by air
732	Freight transportation by air
7321	Mail transportation by air
7322	Transportation of containerised freight by air
7329	Transportation of other freight by air
733	Transportation via space
7330	Transportation via space
734	Rental services of aircraft with operator
7340	Rental services of aircraft with operator

Division 74	Supporting and Auxiliary Transport Services
741	Cargo handling services
7411	Container handling services
7419	Other cargo handling services
742	Storage and warehousing services
7421	Storage services of frozen or refrigerated goods

7422	Bulk storage services of liquids or gases
7429	Other storage or warehousing services
743	Supporting services for railway transport
7430	Supporting services for railway transport
744	Supporting services for road transport
7441	Bus station services
7442	Highway, bridge and tunnel operation services
7443	Parking services
7449	Other supporting services for road transport
7451	Port and waterway operation services (excl. cargo handling)
7452	Pilotage and berthing services
7453	Navigation aid services
7454	Vessel salvage and refloating services
7459	Other supporting services for water transport
746	Supporting services for air transport
7461	Air operation services (excl. cargo handling)
7462	Air traffic control services
7469	Other supporting services for air transport
747	Travel agency, tour operator and tourist guide services
7471	Travel agency and tour operator services
7472	Tourist guide services
7480	Freight transport agency services
7490	Other supporting and auxiliary transport services
6112	Maintenance and repair services of motor vehicles

Source: United Nations Provisional Central Product Classification, 1991

The WTO Services Sectoral Classification list is regarded as an abbreviated list of the UN Provisional CPC. It is not legally prescribed that a member must use a specific classification,

however, it is recommended by the WTO Secretariat that the WTO list (MTN.GNS/W/120) is used for purposes of classification of sectors and sub-sectors for GATS negotiations and scheduling. It is important to note that there are technical inadequacies of the CPC, errors and duplicate listings in the UN CPC. The UN CPC contains greater detail and distinguishes almost six hundred sectors as compared to the WTO (MTN.GNS/W/120) which is an aggregated list and is in many respects outdated. The greater detail contained in the UN CPC, in the case of disputes allows for less ambiguity because of specific and targeted commitments. Evident from the lists provided above and below is the lack of concordance on the classification of transport services on both the WTO (MTN.GNS/W/120) and the UN CPC lists.

3.6 Data validity and reliability

Data validity and reliability are maintained through the use of the case study methodology. Whilst a number of authors have criticised the case study approach for the risk of generalisation, in this instance, generalisation has been prevented as the findings of this research have relevance and application only to the South African transport sector. The researcher is acutely aware of the inimitable characteristic of each service sector in a single economy and the regulations governing each sector.

To safeguard internal validity, in terms of the sourcing of legislation regulating the transport sector a number of sources were utilised. These were the Lexis Nexis database of regulation; the Parliamentary Monitoring Group transport committee reports; the Annual Department of Transport reports, the Annual reports of the transport regulatory authorities responsible for a particular sub-sector, the WTO Trade Policy Review Report of SACU (2009); the GATS; South Africa's GATS Schedule of Specific Commitments and the World Bank and WTO I-TIP database on trade in services.

To ensure data validity and reliability, triangulation was utilised to check and establish the validity of the study. Mathison (1998, p13) defines triangulation as, "an important methodological issue in naturalistic and qualitative approaches to evaluation [in order to] control bias and establish valid propositions..." Triangulation is a method to improve the validity, reliability or evaluation of findings. These are critical factors to determine whether the research does in fact measure or prove what it intended to measure (Joppe (2000), p1). However, as

suggested by Patton (2002) the purpose of triangulation is often misconstrued to mean that a researcher should use multiple perspectives to ensure consistency across data sources and that inconsistent data should not be construed as weakness of the data. Patton (2002) argues that in the event inconsistencies are found these should be viewed as an opportunity to uncover deeper meaning in the data.

Figure 2: Triangulation method for data validity



Source: Author's diagram

For purposes of this study, the diagram above, provides an indication of the triangulation methodology employed. This entails using South Africa's commitments as contained in its services schedule, which will provide an assessment of the actual commitments. An assessment of domestic regulation will provide an assessment of the formal measures. Data from both of the aforementioned processes will be compared to verify information contained in the WTO/World Bank I- TIP database. Juxtaposing information from these sources will provide information regarding the policy space available in the South African transport sector.

3.7 Data Limitations

This study entails the collection of information from domestic regulation applied on a sector by sector basis. This information is not available on a single database. Whilst limitations to foreign ownership and other restrictions are recorded on the WTO and World Bank I- TIP database, the database provides an indication of the sub-sector as a whole and does not indicate wherein the restriction lies in the specific legislation/regulation. This research paper will therefore address the specific regulation wherein the restriction lies. Both horizontal and vertical regulation was analysed to provide an accurate account of the trade restrictive measures.

- In terms of schedules 4 and 5 of the South African Constitution Act 108 of 1996, the transport sector is regulated concurrently between the National and Provincial levels of government and local government has certain exclusive areas of responsibility. For purposes of this study only National laws will be considered and not provincial or municipal laws. This research therefore excludes provincial and municipal laws even though Article 1 of the GATS provides that the Agreement applies to all measures by Members affecting trade in service. These measures include measures taken by central, regional, or local governments and authorities and by non-governmental bodies.
- For purposes of this paper, while SADC, SACU and other international agreements could have been considered in greater detail, the core focus of this study is to assess the level of liberalisation of national legislation relevant to the transport sector and its related sub-sector. While the inclusion of international agreements would broaden the scope of the paper, South Africa has not undertaken trade in services commitments in terms of any other international agreements apart from the GATS.
- Services are intangible in nature consequently, trade in services data and the restrictiveness of a particular sector has been difficult to quantify in general.
- To determine the level of liberalisation of South Africa's transport sector, South Africa's schedule of commitments will be analysed to determine in which sectors commitments have or have not been made. Furthermore, domestic regulation governing the transport sector will be analysed to determine restrictions in the form of market access and national treatment restrictions and behind the border regulations such as licences, fees, prohibitions and various other restrictions.

- For purposes of this research paper maritime transport; air transport; rail transport; pipeline transport and road transport sub-sectors and their relevant legislation will be analysed. Sub-sectors excluded are, internal waterways because of the absence of navigable internal waterways in South Africa, services auxiliary to all modes of transport is excluded because it is not addressed in specific legislation unlike the other transport sectors; space transport and other transport services not classified elsewhere also do not have sector specific legislation.
- The study considers the impact of legislation in terms of the four modes of supply for trade in services. These are: mode 1, cross border trade; mode 2, consumption abroad; mode 3, commercial presence and mode 4 temporary movement of natural persons. However, in the analysis of the data mode 1 and 2 were only considered as cross border trade because from a practical point of view, it is difficult to distinguish between measures affecting one or the other mode of supply.
- The study maps regulations governing the various transport sub-sectors, however this alone does not provide an indicator of trade barriers. Regulatory mapping does not take into account trade barriers emanating from the actual way in which laws are administered which also has the effect of increasing transaction costs. Restrictions in general tend to emanate from administrative practices which may include, failure to publicly disclose requirements or ambiguous requirements, the discriminatory application of regulations (Molinuevo & Sáez, 2014).
- Furthermore, the study does not quantify the costs and benefits of the regulations mapped, but does provide policy makers with a sense of the policy space available and the location of trade restrictive measures. More importantly the assessment of the legislation governing the transport sector allows for the identification of de jure or formal discriminatory measures present in the legislation.
- The World Bank's RASTI methodology also has limitations in that regulatory processes cannot be measured precisely owing to a lack of trade data and the analysis is vulnerable to the interpretation of analyst. A specific limitation to the South African transport sector is that legislation is fragmented, antiquated, cross-cutting and located across various government Departments and levels of government. Some legislation is dated and does

not cater for the current dynamic trading environment and was developed to suit a particular timeframe, no longer relevant today.

3.8. Future research

A general limitation to this study pertains to the collection of data or evidence regarding actual applied practices. This study is limited to the policy space contained in the legislation which may differ significantly from the actual implementation and administration. Future research is required in undertaking a cost-benefit analysis to determine the actual costs of the measures or impediments as well as the actual experience of the private sector in terms of restrictions faced in the sector. The regulatory environment does not capture issues of delays or irregularities around actual practices. A regulatory audit should be augmented by a survey of the actual experiences of the private sector.

CHAPTER 4- RESULTS OF THE STUDY

The data presented in this chapter addresses the core research question, what is the level of liberalisation of the South African transport services sector? The response to this question is fundamental at a national, regional and multilateral level in view of South Africa’s regional economic integration aspirations and in terms of services negotiations at the WTO. This chapter presents the findings of the data analysis of legislation governing the various transport sub-sectors using the World Bank’s RASTI methodology. This methodology requires an examination of the legislation governing the sector to identify the presence of discriminatory measures that would negatively impact foreign service suppliers in terms of market access, establishment and or operation. The Figure 3 below lists a number of discriminatory measures both of a quantitative and qualitative nature utilized in the examination of the legislation. The findings of the examination are captured in tables 5-10 and have been organised per sub-sector of road, maritime, gas & pipelines, rail, the air sector and horizontal legislation. South Africa’s GATS commitments in the transport sector are also contained in chapter 5.

Figure 3: Measures affecting Trade and Investment in Services, by Stage of Supply

Stage of supply affected	Quantitative	Qualitative
Market access/establishment	<ul style="list-style-type: none"> • Establishment of monopoly • Numerical restrictions • Zoning/geographical restrictions • Foreign equity ceilings • Economic needs tests • Authorization/permit requirements (subject to unspecified requirements) 	<ul style="list-style-type: none"> • Licensing, based on qualifications, education, experience, technical capacity • Nationality/residency requirements for services providers • Track record requirements • Requirement to belong to association (syndication requirements) • Approval of mergers and acquisitions • Restrictions on form of establishment • Prohibition of certain services • Minimum capital requirements
Operations	<ul style="list-style-type: none"> • Numerical restrictions on <ul style="list-style-type: none"> ◦ Transactions ◦ Operations/output ◦ Employees ◦ Repatriation of funds ◦ Duration of license/divestment ◦ Hours of operation • Screen and stage quotas • Performance requirements 	<ul style="list-style-type: none"> • Nationality/residency requirements of managers and directors • Restrictions on land ownership • Discriminatory taxation • Discriminatory access to subsidies • Knowledge transfer requirements • Advertising restrictions • Rules on anticompetitive behavior • Restrictions on distribution channels • Restrictions on pricing • Restrictions on transfer of funds • Restrictions on type of shares foreigners can own • Performance requirements • Need for import permit • Discriminatory access to government contracts

Source: World Bank, 2014

In analysing the legislation the following questions were addressed to determine if the legislation contained any restrictive/discriminatory measures listed in the table above.

- What law is applicable to the sector?
- Is the law of vertical, horizontal or service specific application? Horizontal legislation has an economy wide impact, vertical legislation is sector specific for example the transport sector and service specific legislation focuses on, for example, ports, rail, road and pipelines.
- Which modes of supply does the law affect?
- Does the measure affect access/establishment or operation in the market for the foreign service supplier?
- Is the measure quantitative or qualitative in nature, as defined in Figure 3 above?
- Is the origin of the measure a legal or regulatory instrument or an administrative practice?
- Does the measure aim to address market failure such as monopoly, public goods, externalities, and asymmetric information or co-ordination problems?
- Does the measure aim to address externalities? These are positive or negative consequences emanating from the cost of producing a good or a service (Molinuevo & Sáez, 2014). For example a negative externality may be environmental degradation or pollution as a result of trade in transport services while a positive externality may be a person's education and competency.
- Does the measure aim to address information asymmetries? For example, adopting measures to regulate a profession (i.e. doctors, lawyers etc.) by practitioners of a profession to ensure quality of services as opposed to educating the public to determine what is a good or bad professional or unprofessional doctor or lawyer. Publishing licensing requirements to ensure all parties have the same information at their disposal so as not to disadvantage any particular person or persons.
- Does the measure aim to address co-ordination problems? For example, managing the road networks and traffic flows require all vehicles in South Africa must travel on the left hand side of the road.
- Was the measure intended to address non-economic policies such as distribution justice, regulatory failure or public interest?

The transport sector in South Africa is characterised by natural monopolies. GATS Article VIII, addresses monopolies and exclusive services suppliers established under government legislation. In terms of this provision each Member must act consistently with MFN and specific commitments. Where monopolies compete outside the scope of its monopoly rights, not subject to a specific commitment, a Member must ensure that suppliers do not abuse their dominant position. Members are required to report new monopolies to the Council for Trade in Services (CTS) (Adlung & Mattoo, 2008). The GATS agreement therefore recognises the state owned corporations such as Transnet, the Ports Authority and other state owned corporations and government agencies established in terms of national legislation. Below are the tables presenting the results of the assessment of the legislation governing the transport sector.

Table 5 : South African Legislation regulating the Road Transport Sector

<u>Regulation</u>	<u>Sectoral scope of the measure</u>	<u>Mode of Supply</u>	<u>Stage Affected</u>	<u>Nature of the measure</u>	<u>Origin</u>	<u>Impact</u>	<u>Market failure</u>	<u>Non-economic policies</u>
	1.Horizontal 2. Vertical 3. Service	1. M1 2. M2 3. M3 4. M4	1. Access/ establishment 2. Operation	1. Quantitative 2. Qualitative	1. Legal or regulatory instrument 2. Administrative practice	1. Formally discriminatory 2. De facto discriminatory 3. Non- discriminatory 4. Discriminatory application	1. Monopoly 2.Public Goods 3. Externalities 4.Asymmetric information 5. Co- ordination problems	1. Distribution justice 2. Regulatory failure 3.Public interest
National Land Transport Act No 5. of 2009	Service	M1 M3	Access and Operation	Qualitative: Transport planning is dealt with in Chapter 4 is to be integrated with land development and land use planning; License requirements for road based public transport is addressed (Chapter 6 parts 1 & 2); Tourist operators to renew accreditation every 5 years (Chapter 6 Part 3) to operate tourist transport services. Subsidies (Chapter 5 para 45); Commercial service contracts; Provinces to issue licenses for public transport services; (no distinction made between foreign or domestic applicants). Licenses are required for all operators of public transport. Licensing requirement and access to land must be aligned to national	Legal instrument	Non-discriminatory	Public Goods, Asymmetric information, Co-ordination problems, Externalities-addresses issue of limiting greenhouse gas emissions	Public interest

				development plan. License criteria not stipulated.				
Cross-Border Road Transport Act No.4 of 1998 (Road, passenger taxi transport operators)	Service	M1 M3	Entry & Operation	Qualitative and Quantitative Licenses and permits required. Costs and limitation on duration affecting validity of permit for cabotage, freight, taxi operators providing passenger transport. Cabotage permits are granted for a maximum of 5 years or a fixed number of journeys. Section 31 prohibits general cabotage. Permits to be issued exclusively by the CBRTA; in practice however no criteria developed by CBRTA regarding the denial or acceptance of a permit application. Cabotage permits allowed where it is in public interest/foreign applicant accords SA carrier equal treatment.	Legal instrument and Administrative	Non-discriminatory	Public Goods, Asymmetric information, Co-ordination problems	Public interest - CBRT Act recognises "need to introduce regulated competition" for passenger transport" Also recognises need for progressive liberalisation
South African National Roads Agency Limited and National Roads Act 1998	Service	M1 M3 M4	Access/ Establishment Operation	Qualitative	Legal	Non-discriminatory	Monopoly, Co-ordination problems, Asymmetric information	Public Interest

National Road Traffic Act 93 of 1996, Road Traffic Act No.29 of 1989	Service	M3 M4	Access/ Establishment Operation	Qualitative- measures pertain to issues of roadworthiness, maintenance of vehicles and safety. Recognises international driving licenses	Legal	Non-discriminatory	Co-ordination problems at different spheres of government, Asymmetric information-standard setting	Public Interest
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M1 = Cross Border; M2 = Consumption Abroad; Mode 3 = Commercial Presence; Mode 4= Presence of Natural Persons

Table 5 provides the results of the mapping exercise for the legislation governing the road sector. Legislation assessed was the National Land Transport Act No.5 of 2009, the Cross- Border Road Transport Act No.4 of 1998, the South African National Roads Agency Limited Act and the National Road Traffic Act 93 of 1996 as amended. The legislation analysed are of service level application, affecting access, establishment and operation of foreign service suppliers. All legislation assessed in the road transport sector was found to be non-discriminatory and details of the assessment of each sub-sector are discussed in Chapter 5.

Table 6: South African Legislation regulating the Rail Transport Sector

<u>Regulation</u>	<u>Sectoral scope of the measure</u>	<u>Modes</u>	<u>Stage Affected</u>	<u>Nature of the measure</u>	<u>Origin</u>	<u>Impact</u>	<u>Market failure</u>	<u>Non-economic policies</u>
	1. Horizontal 2. Vertical 3. Service	1. M1 2. M2 3. M3 4. M4	1. Access/ establishment 2. Operation	1. Quantitative 2. Qualitative	1. Legal or regulatory instrument 2. Administrative practice	1. Formally discriminatory 2. De facto discriminatory 3. Non- discriminatory 4. Discriminatory application	1. Monopoly 2. Public Goods 3. Externalities 4. Asymmetric information 5. Co- ordination problems	1. Distribution justice 2. Regulatory failure 3. Public interest
National Land Transport Act No 5. of 2009 (addresses both road and rail transport)	Service	M1 M3	Access Operation	Qualitative Transport planning dealt with in Chapter 4 is to be integrated with land development and land use planning; Subsidies Chapter 5 para 45; Commercial service contracts; Licenses are required for all operators of public transport. Licensing requirement and access to land must be aligned to national development plan. License criteria not stipulated.	Legal instrument	Non- discriminatory	Public Goods, Asymmetric information, Co-ordination problems	Public interest-, maintenance and safety of rail vehicles.

National Land Transport Transition Act, No. 22 of 2000 (addresses both road and rail transport)	Service	M 1 M 3	Access Operation	Qualitative (Licenses are required for the operation of public transport services- this pertains to road transport and not to rail transport. The Act does not address foreign service suppliers but does not discriminate against them. The Act provides for suppliers generally.	Legal instrument	Monopoly (rail transport provided exclusively by the State), Non-discriminatory	Public Goods, Co-ordination & regulation with inter-provincial/ municipal road transport	Public interest
National Railway Safety Regulator Act No.16 of 2002	Service	M1 M 3	Access Operation	Qualitative- requires safety permits and the adoption of safety standards	Legal instrument	Non-discriminatory	Public Goods	Public interest

M1 = Cross Border; M2 = Consumption Abroad; Mode 3 = Commercial Presence; Mode 4= Presence of Natural Persons

Table 6 presents the results of the mapping exercise for legislation governing the rail sector. Legislation assessed includes the National Land Transport Act No.5 of 2009 and the National Railway Safety Regulator Act No.16 of 2002. These Acts were found to be non-discriminatory in nature and are of service level application. These acts were found to be in place to address issues of access to public goods, to address co-ordination problems and asymmetric information and did not differentiate between foreign and domestic service suppliers.

Table 7: South African Legislation regulating the Maritime Transport Sector

<u>Regulation</u>	<u>Sectoral scope of the measure</u>	<u>Modes</u>	<u>Stage Affected</u>	<u>Nature of the measure</u>	<u>Origin</u>	<u>Impact</u>	<u>Market failure</u>	<u>Non-economic policies</u>
	1. Horizontal 2. Vertical 3. Service	1. M1 2. M2 3. M3 4. M4	1. Access/ establishment 2. Operation	1. Quantitative 2. Qualitative	1. Legal or regulatory instrument 2. Administrative practice	1. Formally discriminatory 2. De facto discriminatory 3. Non- discriminatory 4. Discriminatory application	1. Monopoly 2. Public Goods 3. Externalities 4. Asymmetric information 5. Co-ordination problems	1. Distribution justice 2. Regulatory failure 3. Public interest
Merchant Shipping Act No.57 of 1951	Service	M1 M3 M4	Operation	Qualitative- addresses registering, licensing and recording of ships	Legal	Non- Discriminatory	Asymmetric information (chapter 3: certificates of competency and qualification)	
Shipping Laws Amendment Act No.57 of 1998	Service	M1 M3 M4	Operation	Qualitative	Legal	Non- Discriminatory	Asymmetric information (ch 3 certificates of competency qualification) ;Amendment to Merchant Shipping Act 57 of 1951 addresses externalities such as pollution.	Public Interest- addresses safety issues
Shipping General Amendment Act No. 23 of 1997	Service	M1 M3 M4	Operation	Qualitative	Legal	Non-discriminatory	Externalities; Co-ordination problems; Asymmetric information	Public Interest- addresses safety issues
Merchant Shipping (Small Vessel Safety) Regulations, 2002	Service	M1 M3 M4	Operation	Qualitative	Legal	Non-discriminatory	Co-ordination problems; Asymmetric information	Public Interest- addresses safety issues

Merchant Shipping (Licensing of Vessels) Regulations, 2002	Service	M1 M3 M4	Access Operation	Qualitative- license issued on condition of validity of local safety standard.	Legal Admin	Non-discriminatory		Public Interest
Merchant Shipping (Ship Identification Number) Regulations, 2004	Service	M1	Operation	Qualitative- both foreign and domestic ships must be identifiable	Legal	Non-discriminatory		Public Interest- addressed safety issues.
Amendment of Tonnage Regulation, 1986	Service	M1 M3 M4	Operation	Qualitative	Legal Admin	Non-discriminatory Deals with declaring size of vessel in terms of tonnage		Public Interest- addresses safety issues
Merchant Shipping (Notification of Building of Vessels) Regulations, 2002	Service	M1 M4	Access	Qualitative	Legal Admin	Non-discriminatory		Public Interest- addresses safety issues
Ship Registration Regulation, 2002	Service	M1 M3 M4	Operation	Qualitative	Legal	Non-discriminatory	Co-ordination problems- Owners of Ships and operators of Ships to be registered. Act addresses only SA ships	Public Interest Addressed safety issues
Registration of Ships Act No. 58 of 1998	Service	M1 M3 M4	Operation	Qualitative- Owners of Ships and operators of Ships to be registered. Act addresses only SA ships	Legal	Non-discriminatory	Co-ordination problems-	Public Interest

Port Rules in terms of the National Ports Act No.12 of 2005	Service	M1 M3 M4	Operation	Qualitative- Deals with licensing, safety, port usage, environmental issues	Legal	Non-discriminatory	Co-ordination problems-	Public Interest
National Ports Act No. 12 of 2005	Service	M1 M3 M4	Entry & Operation	Qualitative License requirement chapter 6 para 57; Conditions of license addressed in para 58- where the terms and conditions of a license may provide for the determination of performance standards and provide for the control and reasonable fixing of prices to be charged by an operator.	legal	Discriminatory	MonopolyPort services controlled by SA government/authorities. Externalities ch 7 Asymmetric information Co-ordination- ch 6	Public Interest
Marine Traffic Act No 2 of 1981	Service	M1 M3 M4	Access/establishment Operation	Qualitative	Legal	Non-discriminatory- provides that every ship shall enjoy the right of innocent passage	Co-ordination problems- purpose of the Act is to regulate sea traffic in South Africa. The Minister may prescribe regulations for ship reporting procedures, sea lanes and traffic separation schemes.	Public Interest

Carriage of Goods by Sea Act No 1 of 1986	Service	M1 M3 M4	Operation	Qualitative Act requires declaration of goods for purposes of claiming in the event of damage or loss of goods	Legal	Non-discriminatory	Co-ordination problems Externalities -pollution from ships	Public Interest-addresses safety issues
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M1 = Cross Border; M2 = Consumption Abroad; Mode 3 = Commercial Presence; Mode 4= Presence of Natural Persons

Table 7 provides the results of the mapping exercise for the legislation governing the maritime transport sector. Legislation assessed was of service level application which is non-discriminatory. The measures were found to be non-discriminatory in nature and addressed issues of public interest (safety), co-ordination problems (maritime traffic control) and externalities (environmental pollution). There is no explicit differentiation between foreign and local service suppliers.

Table 8: South African Legislation regulating the Gas and Pipeline Sector

Regulation	<u>Sectoral scope of the measure</u>	Modes	Stage Affected	Nature of the measure	Origin	Impact	Market failure	Non-economic policies
	1. Horizontal 2. Vertical 3. Service	1. M1 2. M2 3. M3 4. M4	1. Access/ establishment 2. Operation	1. Quantitative 2. Qualitative	1. Legal or regulatory instrument 2. Administra tive practice	1. Formally discriminatory 2. De facto discriminatory 3. Non- discriminatory 4. Discriminatory application	1. Monopoly 2. Public Goods 3. Externalities 4. Asymmetric information 5. Co-ordination problems	1. Distribution justice 2. Regulatory failure 3. Public interest
Gas Act No.48 of 2001	Service	M1 M 3 M 4	Access/ establishment Operation	Qualitative Quantitative Technical standards and compliance with standards for storage and safety required. Licenses are required from the regulatory authority for the distribution, operation and trading of gas.	Legal	Non-discriminatory.	Information asymmetries. Co-ordination problems- geographical zoning for purposes of control and safety	Distribution justice Public interest
Petroleum Pipelines Act No.60 of 2003	Service	M1 M 3 M 4	Access/ establishment Operation	Qualitative compliance with standards for storage and safety required. Licenses are required from the regulatory authority for the	Legal	Non-discriminatory.	Information asymmetries. Co-ordination problems-Addresses conformance with safety relating construction of pipelines section 20.	Distribution justice; Public interest

				distribution, operation and trading of petroleum				
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M1= Cross Border; M2= Consumption Abroad; Mode 3= Commercial Presence; Mode 4=Presence of Natural Persons

Table 8 provides the results of the mapping exercise for the legislation governing the gas and pipeline sector. The Acts analysed include the Gas Act No. 48 of 2001 and the Petroleum Pipelines Act No. 60 of 2003 which are of service level application, affecting access, operation and establishment of local service suppliers to the sector. The Act does not mention foreign participation in these sectors and as such there is no formal differentiation between local and foreign service suppliers. The measures contained in the legislation is of a qualitative and quantitative nature and largely address issues of public interest (safety), information asymmetries and co-ordination problems with regard to technical standards for storage.

Table 9: South African Legislation regulating the Air Transport Sector

Regulation	<u>Sectoral scope of the measure</u>	Mode	Stage Affected	Nature of the measure	Origin	Impact	Market failure	Non-economic policies
	1. Horizontal 2. Vertical 3. Service	1. M1 2. M2 3. M3 4. M4	1. Access/ establishment 2. Operation	1. Quantitative 2. Qualitative	1. Legal or regulatory instrument 2. Administrative practice	1. Formally discriminatory 2. De facto discriminatory 3. Non-discriminatory 4. Discriminatory application	1. Monopoly 2. Public Goods 3. Externalities 4. Asymmetric information 5. Co-ordination problems	1. Distribution justice 2. Regulatory failure 3. Public interest
Aviation Laws Amendment Act No.98 of 1996; Aviation Laws Amendment Act No.82 of 1997	Service	M1 M3 M4	Operation	Qualitative	Legal	Non-discriminatory	Asymmetric information-the Act empowers the Commissioner of the Civil Aviation to issue technical standards	Public interest
Carriage by Air Act No.17 of 1946	Service	M1 M3 M4	Access/ establishment Operation	Qualitative	Legal	Non-discriminatory-no specific mention of the nationality of the service provider	Co-ordination problems eg ticketing for passengers, luggage, goods etc	Public Interest
International Air Services Act No.60 of 1993	Service	M1 M3 M4	Access Operation	Qualitative Section 13(2) SA recognises aircraft licenses (mutual recognition) of aircraft licenses to operate by states party to the Int'l Air Service Transit	Legal	Non-discriminatory	Co-ordination problems- addresses safety issues	Distribution justice; Public Interest

				Agreement signed at Chicago on 7 Dec 1944. The Act aims to promote trade, tourism and competition amongst persons providing Int'l Air Services.				
International Air Services Act No.60 of 1993	Service	M1 M3 M4	Access Operation	Qualitative Section 13(2) SA recognises aircraft licenses (mutual recognition) of aircraft licenses to operate by states party to the Int'l Air Service Transit Agreement signed at Chicago on 7 Dec 1944. The Act aims to promote trade, tourism and competition amongst persons providing Int'l Air Services.	Legal	Non-discriminatory	Co-ordination problems- addresses safety issues	Distribution justice; Public Interest
South African Airways Act No.5 of 2007	Service	M1 M3 M4	Access/ establishment Operation	Qualitative- the SAA Act and Companies Act does not provide for a limitation on foreign ownership.	Legal	Discriminatory	Monopoly	Public Interest

M1 = Cross Border; M2 = Consumption Abroad; Mode 3 = Commercial Presence; Mode 4= Presence of Natural Persons

Table 9 provides the results of the mapping exercise for the legislation governing the air transport sector. The Acts analysed were the Aviation Laws Amendment Act No.98 of 1996; Aviation Laws Amendment Act No.82 of 1997, the Carriage by Air Act No.17 of 1946, the International Air Services Act No.60 of 1993 and the South African Airways Act No.5 of 2007. These Acts are of service level application and provide for co-ordination issues such as ticketing and air traffic control, as well as issues of public interest relating to safety and externalities relating to environmental pollution. The Act allows for private operators but does not explicitly mention or differentiate between foreign and local service suppliers

Table 10: South African Legislation of horizontal application relevant to the transport sector

Regulation	<u>Sectoral scope of the measure</u>	Modes	Stage Affected	Nature of the measure	Origin	Impact	Market failure	Non-economic policies
	1. Horizontal 2. Vertical 3. Service	1. M1 2. M2 3. M3 4. M4	1. Access/ establishment 2. Operation	1. Quantitative 2. Qualitative	1. Legal or regulatory instrument 2. Administrative practice	1. Formally discriminatory 2. De facto discriminatory 3. Non-discriminatory 4. Discriminatory application	1. Monopoly 2. Public Goods 3. Externalities 4. Asymmetric information 5. Co-ordination problems	1. Distribution justice 2. Regulatory failure 3. Public interest
Companies Act No.71 of 2008	Horizontal	M1 M 3 M 4	Access/ establishment Operation	Qualitative	Legal	Non-discriminatory		Distribution justice ; Public Interest
Competition Act No. 89 of 1998	Horizontal	M1 M 3 M 4	Access/ establishment Operation	Qualitative-a Minister must approve M & A above a certain threshold.	Legal	Discriminatory		Distribution justice ; Public Interest
Broad Based Black Economic Empowerment Amendment Act No.46 of 2013 and the BBBEE Code 1019 of 2013 issued under the section 9 of the BBBEE Act of 2003.	Horizontal	M1 M 3 M 4	Access/ establishment Operation	Qualitative Quantitative-discriminatory measures are contained in the BBEE Code such as skills transfer, employment requirements, local ownership. De Jure discriminatory. The act aims to support historically disadvantaged groups and businesses belonging to disadvantaged groups which could lead to de	Legal	Discriminatory		Distribution justice ; Public Interest

				facto discrimination against foreign service suppliers in favour of domestic companies.				
Employment Services Act No.4 of 2014	Horizontal	M4	Access	Qualitative foreign nationals must produce a valid work permit. Foreigners may be employed but the owner must demonstrate an attempt of a diligent search for such qualifications, skills set, experience amongst South Africans. Criteria for employing foreign national equivalent to application of economic needs test even though the Act does not explicitly state an economic needs test is required.	Legal	Discriminatory	Asymmetric information	Distribution justice Public Interest
Immigration Act No.13 of 2002	Horizontal	M4	Access	Qualitative The Regulations identify critical skills for work visa applications. Work permits and or business permits are required for foreign nationals. Work permits are granted to foreign nationals. A foreigner is required to invest the prescribed financial or capital contribution in	Legal	Discriminatory		Distribution justice Public Interest

				such business (this requirement may be waived on a case by case basis). Business must be deemed desirable by the Minister of Trade and Industry and Minister of Labour. The Act requires that 60% of the workforce employed by foreign nationals are South African				
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M1 = Cross Border; M2 = Consumption Abroad; Mode 3 = Commercial Presence; Mode 4= Presence of Natural Persons

Table 10 provides the results of the mapping exercise for the horizontal legislation relevant to the transport sector. This included an assessment of several pieces of legislation, bills, regulations and Codes. The measures contained in these legal instruments were found to be largely discriminatory in nature, affecting access, establishment and operation for foreign service suppliers. The various legal instruments contained a range of qualitative measures ranging from the application of discretionary powers for incoming investment to issues of skills transfer, local employment and local ownership.

Summary of results

A total of thirty three pieces of legislation governing the transport sector and its related sub-sectors were analysed. Legislation analysed were of service level and horizontal application. The results obtained from the analysis indicate few restrictions in the service level legislation governing the transport sector. Measures contained in the service level legislation largely addressed issues of public interest (safety standards), distributional justice, externalities (environmental damage and pollution control) and lastly, co-ordination problems (traffic flows). These do not appear restrictive or discriminatory against foreign service suppliers. A greater presence of trade restrictive measures was identified in the

horizontal legislation, these related to stipulations in terms of percentage of local persons to be employed, skills transfer as well as the application of discretionary powers. Details pertaining to the measures will be discussed in detail in Chapter 5.

CHAPTER 5- DISCUSSION

The central focus of this chapter, is to discuss the data findings as presented in Chapter 4 of the study. The research objective of the study is to determine the level of liberalisation of the South African transport service sector through an analysis of the legislation governing the sector and identifying the presence of trade restrictive measures that would restrict market access, establishment and or operation. Transport services play a pivotal economic role and both the manufacturing and services sectors are dependent on the effective functioning of transport services.

It could be said that South Africa's transport sector is fairly advanced relative to the rest of Africa, however in comparison to developed and major emerging economies, South Africa's transport sector could use considerable improvement which requires significant investment. The level of liberalisation, which addresses market access, establishment and operations is therefore fundamental to foreign investors. To assess the level of liberalisation, an examination of the legislation governing the transport sector and its related sub-sectors is necessary to identify any restrictive measures contained in the legislation.

The methodology employed in this study is the World Bank's regulatory assessment on services, trade and investment (RASTI). It is a qualitative approach which examined the following:

- Laws and regulations applicable to the sector/sub-sector
- Restrictions on access to and operation in the sector/sub-sector
- Quantitative and qualitative measures which may or may not be discriminatory

This entailed an examination of relevant legislation on a case by case basis, per sub-sector, to identify the presence of trade restrictive measures. Legislation examined included service sector legislation and non-sector specific (horizontal) legislation. As discussed earlier, barriers to trade in services are referred to as behind the border measures which manifest as licensing conditions, foreign equity ceilings, economic needs tests, performance requirements among others. Data obtained from the examination of the legislation is the primary data which was verified against

the WTO and World Bank I-TIP trade in services restrictions database and juxtaposed to South Africa's commitments in the transport services sector as reflected in its schedule.

South Africa's commitments in the transport services sector is an important reference point indicating in which sub-sectors commitments were made. Table 11 below indicates that South Africa has undertaken commitments only in road transport services. (WTO, 2013). The absence of commitments in the other transport sub-sectors does not mean the denial of market access or national treatment to foreign service suppliers but that the South African government has chosen to retain the policy space in these transport sub-sectors and is free to either maintain restrictions or introduce new restrictive measures. An analysis of legislation was undertaken in the following sectors maritime, air transport services, pipeline, road transport services and rail transport services even though South Africa's commitments are limited to the road transport services sector.

Table 11: SA's GATS Commitments for Transport Services

Type of Transport Service	Commitment
Maritime Transport services	No
Air Transport services	No
Rail Transport Services	No
Pipeline transport	No
Internal Waterways Transport	No
Space Transport	No
Road Transport Services	Yes
Services Auxiliary to all Modes of Transport	No
Other transport services	No

Source: WTO Services Database, 2013

The road transport services sector consists of the following sub-sectors as contained in Table 12. South Africa has undertaken commitments in the passenger transport sector, freight transport and maintenance and repair of road transport equipment. In other words, South Africa has undertaken to partially liberalise the sector. Commitments in the majority of the sub-sectors are limited.

These will be discussed in greater detail later in the study. The absence of commitments in the other transport sub-sectors does not mean the denial of market access or national treatment to trade partners but that the South African government has chosen to retain the policy space in these transport sub-sectors and is free to either maintain restrictions or introduce new restrictive measures.

Table 12: SA's GATS Commitments for Road Transport Services

Type of Road Transport Service	Commitment
Passenger Transportation	Yes
Rental of Commercial Vehicles	No
Supporting Services for Road Transport	No
Freight Transport	Yes
Maintenance and Repair of Road Transport Equipment	Yes

Source: WTO Services Database, 2013

Table 13 provides an indication of the MFN exemption pertaining to road transport. In terms of which, cabotage is restricted to South African registered vehicles and operators. In addition, regional bilateral or plurilateral agreement that provide for the transport rights of passengers and cargo to or from South Africa and between third countries, these rights are to be reserved for the road transport operators of the contracting parties to existing and future agreement.

Table 13: South Africa Final List of Article II MFN Exemptions GATS/EL/78

Sector or Subsector	Description of measure indicating its Inconsistency with Article II	Countries to which measures applies	Intended Duration	Conditions creating the need for the exemption
Road Transportation	Regional bilateral and plurilateral Road transport agreements providing for the transport rights to carry goods and passengers to or from South	Botswana Lesotho Swaziland Malawi	Indefinite	To enhance the development of an integrated road transport

	Africa and between third countries concerned, to be reserved for the road transport operators of the contracting parties to existing and future agreements. Cabotage restricted to South African registered vehicles and operators.	Zimbabwe Other sub-Saharan African countries		system to underpin the economic development of the region and to ensure the availability of an efficient distribution network for relief supplies in case of natural disasters such as droughts in the region.
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Source: WTO, 1994

Table 14, provides an indication of the limitations per mode of supply and limitations concerning market access and national treatment in the passenger transportation sub-sector. “Unbound” has been indicated for the cross-border supply and for the consumption abroad for passenger transportation service, meaning that South Africa is free to maintain or introduce new discriminatory measures in this sector for both market access and national treatment. With regard to commercial presence, the schedule indicated “None”, meaning that this sub-sector is open and foreign service suppliers may establish a commercial presence in South Africa to supply passenger transportation services. The last mode of supply is the presence of natural persons, according to the schedule; South Africa has not undertaken any commitments, meaning it is closed except as indicated in the horizontal commitments. South Africa’s horizontal commitments on mode 4 include intra-corporate transferees, sales persons and persons engaged in establishment.

With regard to the presence of natural persons, the schedule indicates that it is unbound, but allows for the temporary presence of natural persons for a maximum period of three years. Such

Sector	Mode of Supply	Limitations on Market Access	Limitations on National Treatment
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persons are allowed entry without requiring compliance for an economic needs test. This applies to intra-corporate transferees, sales persons and persons engaged in establishment.

Salespersons are allowed entry for a period of 90 days provided they do not receive remuneration and do not make direct sales to the general public. Intra-corporate transferees include executives, managers, specialists, professional, in terms of the horizontal commitments such persons must have been in the prior employ of the juridical person outside South Africa for a minimum period of a year.

The same limitations and restrictions are indicated for the Maintenance and Repair of Transport Equipment and freight transportation sub-sectors. The same interpretation provided for commitments in the passenger transportation may be applied to those sectors in terms of South Africa's trade commitments in these sectors.

Passenger Transportation (CPC 7121; CPC 7122)	1.Cross-Border	Unbound	Unbound
	2.Consumption Abroad	Unbound	Unbound
	3.Commercial Presence	None	None
	4.Presence of Natural Persons	Unbound except as indicated in Horizontal Commitments	Unbound except as indicated in Horizontal Commitments
Maintenance and Repair of Transport Equipment (CPC 6112)	1.Cross-Border	Unbound	Unbound
	2.Consumption Abroad	Unbound	Unbound
	3.Commercial Presence	None	None
	4.Presence of Natural Persons	Unbound except as indicated in Horizontal Commitments	Unbound except as indicated in Horizontal Commitments
Freight Transportation (CPC 7123)	1.Cross-Border	Unbound	Unbound
	2.Consumption Abroad	Unbound	Unbound
	3.Commercial Presence	None	None
	4.Presence of Natural Persons	Unbound except as indicated in Horizontal Commitments	Unbound except as indicated in Horizontal Commitments

Table 14: South Africa's GATS Commitments

Source: WTO Services Database, 2013

Summary of the results

Data presented in Chapter 4 was compiled per sub-sector and the results are organised accordingly. Legislation analysed relating to the road sub-sector in Table 5:

- National Land Transport Act No.5 of 2009 - the Act is of service level application because it covers both road and rail and addresses road based public and passenger transport as well as rail transport. The three levels of government (local, provincial and national) are the sole suppliers of roads infrastructure and the Act requires that transport planning is integrated with land development and land use planning.

National government provides a framework for the issuance of licenses for operators providing public transport while provincial government is delegated to issue licenses for the provision of road transport services. The criteria however, for license qualification is not stipulated leaving for discretionary powers in the granting of licenses. According to the Act a person may only operate a road based public transport service so long as they are a holder of an operating license or permit and that person is registered in terms of the National Road Traffic Act. A cross-reference to the National Road Traffic Act indicates that licenses and permits are issued on a non-discriminatory basis and conditions for such issuance is dependent on matters of roadworthiness, maintenance and safety of vehicles. The National Road Traffic Act also recognises international driving licenses granted outside the borders of South Africa and is in line with article 6.10 of the SADC Transport, Communication and Meteorology Protocol which provides that a license issued in one member state shall be valid for the driving of a vehicle issued in another state.

The National Land Transport Act specifically prohibits the “drop off” and “pick up” of passengers near borders unless the service provider has a permit to engage in cross-border road transport. The prohibition may be intended as a border control measure and to prevent illegal border crossing. Moreover, the Act contains provisions relating to standards of vehicles, qualification of inspectors largely to address public interest issues and co-ordination problems. The Act itself is non-discriminatory in that it does not contain any restrictive measures neither does it discriminate against foreign service suppliers as license requirements and issues around standards and safety apply to both foreign and domestic service suppliers.

- The Cross-Border Transport Act No.4 of 1998- provides for the co-ordinated provision of regulation and law enforcement with respect to cross border road transport by public and private sector. The Act also provides for the establishment of the Cross-Border Road Transport Agency (CBRTA). In terms of this Act provision is made for agreements between South Africa and other States to control and regulate cross-border transport based on reciprocity as well as for equal treatment. In this regard, consideration is given to a foreign state's track record in terms of reciprocity in the issuance of permits for cross-border freight and road transport, the granting of cabotage permits to South African carriers. In general however, cabotage permits are prohibited unless it is in the public interest or where a foreign applicant accords South African carriers equal treatment and if there is no South African carrier able to provide a similar service.

The Act is of service level application and addresses road, passenger taxi and transport operators. It contains both qualitative and quantitative measures such as licenses and permits requirements for road based public transport. It also includes costs and limitations on the duration affecting the validity of permits. The Act however is non-discriminatory and addresses usage of public goods, asymmetric information and co-ordination problems. Measures in place are to ensure safety of passengers, to stipulate license conditions, conditions for vehicles in terms of roadworthiness and also to ensure general observance of road safety rules for purposes of co-ordination.

- South African National Roads Agency Limited (SANRAL) and National Roads Act - provides for the establishment of the Roads Agency to manage and control South Africa's national roads system. This entails the development, maintenance and rehabilitation of national roads. SANRAL is a public company wholly owned by the State in which the State is the only member and shareholder of the company.

The Act is of service level application and contains qualitative measures that affect access, establishment and operation. While South Africa's GATS commitments indicates that South Africa has made commitments in this sector, however, SANRAL holds a

monopoly on the provision of national roads infrastructure. The provision of other road infrastructure is the responsibility of provincial and local governments. In some cases the provincial government may request district municipalities to perform an agency function. The measures contained in the Act also aim to address co-ordination problems, asymmetric information and matters of public interest.

The Rail sub-sector

Legislation analysed relating to the rail sub-sector in table 6 were:

- National Land Transport Act No.5 of 2009- the Act provides for the provision of passenger and freight rail in terms of which planning authorities are required to submit an integrated transport plan. Passenger and freight rail transport services are provided by the State through state owned companies and government therefore holds a monopoly of the rail transport services. Provision is made for private operators who are required to apply for a license to operate. The Act itself is non-discriminatory and does not discriminate between foreign and domestic service suppliers. Measures in the act aim to address matters of asymmetric information, co-ordination problems and public interest issues.
- National Railway Safety Regulator Act No.16 of 2002-the Act is a legal instrument of service level application which affects access and operation. As discussed above, rail transport services are provided by the State. The Act contains qualitative measures which require safety permits and the adoption of safety standards these relate to asymmetric information and public interest matters.

The Maritime sub-sector

Legislation analysed in the maritime sector in table 7 were:

- The Merchant Shipping Act No.57 of 1951- addressed issues of administration, recording, registering and licensing of ships. It also addressed asymmetrical information issues such as the issuance of certificates of competency, service and qualification. The Act contains qualitative, non-discriminatory measures of licensing requirements and affects the operation stage of a supplier. Measures in the Act are applied on a non-discriminatory basis.

- Shipping Laws Amendment Act No.57 of 1998- this Act addresses asymmetric information relating to certificates of competency, services and qualification for various roles on a ship. It also addresses issues of externalities such as pollution from ships and general safety matters. These are applied on a non-discriminatory basis.
- Shipping General Amendment Act No. 23 of 1997- the Act addresses instances of when damages arises, safety issues relating to the movement of cargo and prevention of marine/environmental pollution. Measures in this Act are applied on a non-discriminatory basis and pertain to public interest matters and externalities.
- Merchant Shipping (Small vessel safety regulation, 2002) and the Merchant Shipping (Licensing of Vessels Regulations, 2002)- the former regulation addresses as its name suggests safety matters relating to small shipping vessels. The latter regulation addresses licensing of vessels in terms of which licenses are provided on condition of local safety certificates. Both these regulations are applied on a non-discriminatory basis, aim to address co-ordination problems and address public safety issues.
- Merchant Shipping (Ship Identification Number Regulations, 2004)- the aim of the regulation is to facilitate the identification of ships both foreign and domestic. The regulation pertains to South African ships and the measures contained therein affects operation of the ship. The regulation however is non-discriminatory and aims to address co-ordination problems and matters of public interest.
- Registration of Ships Act No.58 of 1998 and the Ship Registration Regulation, 2002 require that owners and operators of ships are registered in compliance with international conventions. All ships are required to declare their nationality to obtain clearance. The Act pertains to South African ships only. It aims to address co-ordination problems and matters of public interest. The measure contained therein is a qualitative measure and affects operation of the ship.

- National Ports Act No.12 of 2005 and Port Rules- the purpose of the Act is to promote the development of an effective and productive South African ports industry. It provides for the establishment of the National Ports Authority and Ports regulator with a view to promoting efficiency and improving the management and operations of ports. The Act and the rules are of vertical application and contain qualitative measures. The Ports Act itself provides for a license requirement and the conditions for the granting of such a license. There are several conditions and these include performance standards and fixing of prices to be charged by a licensed operator. The Act does allow for licensed operators and to ensure that businesses owned by historically disadvantaged groups are given the opportunity to participate in the operations of facilities in the port environment. South Africa has not undertaken any commitments in the Ports sector and the State holds a monopoly over the provision of port services. The National Ports Act is therefore discriminatory and aims to address externalities, asymmetric information and co-ordination issues as well as matters of public interest.
- Marine Traffic Act No. 2 of 1981-the Act aims to regulate marine traffic in South Africa in terms of which the Minister may prescribe ship reporting procedures, sea lanes and traffic separation schemes for ships. These measures aim to address co-ordination problems and matters of public interest which affect access, establishment and operation. The Act however is non-discriminatory.
- Carriage of Goods by Sea Act No.1 of 1986-provides for the administrative issues pertaining to the carriage of goods by sea such as bills of lading and liability in instances of loss or damage. The Act requires the declaration of goods for purposes of civil claims during loss or damage and is applied on a non-discriminatory basis. The measure in the Act affects operation and addresses co-ordination problems and externalities such as prevention of pollution.

The Air sub-sector

Legislation analysed in the air sector in table 8 were:

- The Air Services Licensing Act No.21 of 2008- the Act provides for the regulation of the domestic licensing process and the duties of licensees. The measures contained in the Act are both qualitative and quantitative in nature and affect access, establishment and operation. Domestic air services licenses are issued by the Air Service License Council in terms of which 75% of the domestic services of eligible applicants must be owned by South African and South African aircraft must be used to provide air services. In other words, there is a market access limitation of a maximum of 25% on foreign ownership for domestic service licenses. Foreign aircraft may be allowed to provide air services for a limited period of time. (WTO I-Tip database).
- Air Traffic Navigation Services Company Act No.45 of 1993- addresses matters relating to air traffic and navigation and provides for the establishment of the Air Traffic Navigation Services Company, a public company in which the State is the sole shareholder. The State therefore holds a monopoly over the provision of services relating to air traffic navigation. The Act prohibits private sector participation of both local and foreign owned firms. It also addresses co-ordination problems relating to the flow of air traffic in South Africa and compliance with international standards and norms.
- Aviation Laws Amendment Act No.82 of 1997- provides for the issuance of technical standards for civil aviation and provides for the granting of operating licenses. It also contains tariffs for air traffic charges applicable to both domestic and foreign aircraft. The Act contains qualitative measures which address asymmetric information such as licensing and public interest issues relating to safety. The Act is applied on a non-discriminatory basis.
- Carriage by Air Act No.15 of 2006- the Act gives effect to a convention for the alignment of rules relating to the international carriage by air for both goods and passengers. It addresses matters of ticketing, tagging, documentation etcetera which relates to co-ordination problems. The Act does not make formal differentiation between foreign and domestic service suppliers.

- International Air Services Act No.60 of 1993- Provides for the establishment of the International Air Services Council and the regulation and control of international air services. The Act requires a license to operate an international air service. The Act makes provision for the mutual recognition of aircraft licenses of aircraft license holders from a state party to the International Air Service Transit Agreement.
- South African Airways Act No.60 of 1993- provides for the transfer of shares from Transnet (state owned company) to South African Airways effectively making the South African government the sole owner of South African Airways.

The Gas and Pipeline Sector

Legislation analysed in table 8 were:

- The Gas Act No.48 of 2001- the Act aims to promote the efficient and sustainable development of the piped gas industry. It also aims to promote competitiveness and investment in the industry and establish a National Gas Regulator. Licenses are required to construct gas transmission, store, distribute and liquefy as well as to operate and trade in gas. The Act provides for geographical zoning however this is for purposes of control and safety.

The Act is service level in application and affects access and operation. It also contains both qualitative and quantitative measures requiring licenses and a limitation in terms of distribution by a licensed agent but within a specific geographic area. The Act is non-discriminatory and aims to address information asymmetries, co-ordination problems (storage and distribution), distribution justice (empowering previously disadvantaged communities) and public interest (safety standards). It is silent on foreign participation.

- Petroleum and Pipelines Act no.60 of 2003- the Act aims to promote the efficient and sustainable development of the petroleum pipelines industry. It also aims to promote competitiveness and investment in the industry and establish a Petroleum Pipelines Regulatory Authority.

The Act is of vertical application and requires the granting of a license by the regulatory authority. It is silent on foreign participation. It furthermore, aims to address information asymmetries, co-ordination problems, distribution justice and public interest. These relate to issues of licensing conditions, equitable re-distribution of economic opportunities in the sector, issues of technical standards relating to storage and safety issues and addresses conformance with safety relating construction of pipelines.

Horizontal legislation

Several acts were examined to determine the presence of trade restrictive measures. These have an economy wide impact on business operations, trade and investment. Legislation analysed in table 10 were the:

- The Companies Act No.71 of 2008- the Companies Act provides for the establishment, operation and management of the different categories of companies. It also ensures companies adopt good governance practices aligned to international standards on good governance.

The Act contains general qualitative measures in terms of which all companies are required to register with the Companies and Intellectual Property Commission (CIPC). The Act defines foreign companies as external companies and addresses issues of company registrations for both domestic and foreign companies. It does not discriminate against foreign service suppliers in terms of compliance requirements for foreign companies. The Act addresses a range of issues but also asymmetrical information issues in terms of company registrations and requirements such as filing for annual returns.

- The Competition Act No.89 of 1998 and the Competition Amendment Act No. 1 of 2009- provides for the development of an efficient, adaptable and flexible economy by promoting a competitive business environment and regulating uncompetitive business practice.

The Act has a direct bearing on the access, establishment and operation of a company and contains qualitative measures which require that a Minister must approve a merger and acquisition above a certain threshold, however this is applicable to all companies both foreign and domestic. The Act aims to address abuse by dominant companies but also aims to address distribution justice. Approval by the Minister on a case by case basis, instead of clear transparent criteria allows for discretionary application. Under the Competition Act public interest factors can be used to permit an anti-competitive merger or prohibit a pro-competitive merger which are contained in the Preamble, section 2 of the Act and in section 12 (A). In the Preamble, the Act states in general terms that the Act is necessary, “to regulate the transfer of economic ownership in keeping with the public interest.” Section 2 of the Act relates to the promotion of employment, the advancement of the “social and economic welfare of South Africans particularly those historically disadvantaged individuals. Section 12(A) (3) provides the criteria for whether a merger can or cannot be justified on public interest grounds. Consideration will be given to the industrial sector or region, employment, the ability of a small business or firm controlled or owned by historically disadvantaged persons to be competitive and/or the ability of national industries to compete in international markets.

- Broad Based Black Economic Empowerment Amendment Act No.46 of 2013- the objective of the Act is to support black owned and managed enterprises to address the inequalities of the past. It aims to increase the number of black people that own, manage and control enterprises, it also provides for skills transfer. The Act itself makes provision for a BBBEE Code which sets out specific thresholds for companies to become BBBEE compliant. A scorecard system is used in terms of which points are allocated to companies for ownership, management control, skills development and socio-economic development. The code itself applies to all companies, both foreign and domestic companies and contains qualitative and quantitative measures. The Act and the code aim to address matters of public interest and distribution justice, however, in the case of foreign companies a special dispensation applies. Foreign companies may appeal directly to the Minister of Trade and Industry for exemption from the requirements set out in the

Act. These are considered on a case by case basis by the Minister of Trade and Industry allowing for discretionary powers making the Act discriminatory in nature.

- Employment Services Act No.4 of 2014- the Act provides, amongst other things, for the employment of foreign persons and relates to the Mode 4, the temporary movement of natural persons. The Act requires foreign nationals to obtain a valid work permit. In terms of employing a foreigner, an employer must satisfy that there are no other persons in the Republic with suitable skills. Moreover, when a foreign national is recruited they must develop a skills transfer plan. While the Act does not explicitly prescribe the application of an economics needs test, the criteria in terms of which a foreign national may be employed constitute an economics needs test rendering parts of the Act potentially in conflict with South Africa's GATS commitments. The Act contains discriminatory measures and aims to address asymmetric information, distribution justice and matters of public interest.
- Immigration Act No. 13 of 2002 (as amended) and its Regulations- the Act recognises the need to regulate influx of foreigners for employment purposes, economic growth, foreign investment and to promote tourism. It contains restrictions on the entry of foreign nationals, provides for the granting of visas for temporary entry as well as permanent residence permits. Foreigners can obtain work visas, critical skills visas and intra-corporate transfer visas in order to work in South Africa for a limited period of time. Firms can apply for corporate visas to employ foreigners provided a range of requirements are met. In order to qualify for a business visa, a foreigner is required to invest the prescribed capital contribution (this requirement may be waived for business undertakings declared to be in the national interest) and provided at least 60% of its total staff component is locals. The Act together with the regulations is discriminatory and has a direct bearing on South Africa's GATS Mode 4 commitments.

The new immigration regulations of 22 May 2014, provide for a critical skills visa which will be valid for a period of 5 years. The application for a critical skills visa requires confirmation from a suitable professional body that the applicant possesses the required

skills and/or qualifications along with appropriate experience. The list of critical skills was published in the government gazette on 3 June 2014.

Business visas may be issued for a maximum of three years. The regulations provide for criteria in respect of a business visa application requires an amount of cash invested in South Africa or an amount in cash and a capital contribution. The actual amount will be determined in consultation with the Minister of Trade and Industry. An additional requirement is that, 60% of the total staff complement employed by the applicant must be South African citizens. The granting of a business visa is also contingent upon the feasibility of a business and an application must be accompanied by a letter of recommendation from the Department of Trade and Industry. Feasibility of a business determined in terms of contribution to the national interest of South Africa. The list of desirable and undesirable businesses was published in the government gazette on 15 July 2014.

Intra company transfer visas may be granted for a period of 4 years and this is a significant improvement from the old Act in which these visas were only issued for a period of 2 years.

The Act also allows for businesses to apply for corporate visas, however are required to prove the need to employ the requested number of foreigners, that they were unable to find South African citizens with the required skills set. In addition the application for a corporate visa must be accompanied by documentation from the South African Qualifications Authority (SAQA).

According to the new immigration regulations access to intra-corporate transfer visas improved by a year from 3 to 4 years. The new immigration regulations therefore, are aligned to the country's horizontal commitments. However with regard to the identification of critical skills for critical skills visas and desirable or undesirable businesses and the criteria in order to qualify for a business visa, this may be in conflict with South Africa's GATS mode 4 commitment to allow market access for persons

involved in the establishment of businesses in the sectors in which South Africa has made specific commitments.

The results of the analysis indicate that a remarkably low presence of trade restrictive measures in the service level legislation governing the transport sector. While the operating environment of some sectors are characterised by open competition such as the road , air transport and airfreight sectors, others such as the ports and rail sector are operated by state owned companies that effectively hold a monopoly over these sectors. Qualitative measures are prevalent across the sub-sectors however, these are not overly restrictive so as to discriminate against foreign suppliers but are measures in place to address safety and matters of public interest while quantitative measures such as economic needs tests, numerical restrictions, geographical zoning and other measures are less prevalent.

The results of the analysis for horizontal legislation reveal a greater presence of restrictive measures both qualitative and quantitative and warrant a more in-depth discussion of the findings. Particularly in the Competition Act, the BBBEE Act and its Code, Immigration Act No. 13 of 2002, the new Immigration Regulations and the Employment Service Act No.4 of 2014.

The Competition Act states that large mergers & acquisitions require approval by the Minister and does not put forth clear criteria. This allows for the inclusion of performance requirements, quotas on local employment and other restrictive measures in a transaction, ultimately resulting in a trade restrictive measures albeit a negotiated measure as was the case of Walmart's entry into the South African market.

The BBBEE Act and the accompanying Code were found to contain trade restrictive measures. It is however, important to note the intention for which the legislation was promulgated, that is to address historical inequities, however the measures contained in the Code may be applied and construed to discriminate against foreign service suppliers.

The findings of the study may be used as a baseline for the TFTA and SADC negotiations on the transport sector and provides a sense of the measures in place and the policy space available to give effect to the realization of regional economic integration. Studies analysing the legislation of various service sectors is necessary for the broader negotiation process which will establish the baseline and inform negotiation positions/strategies. The legislation governing the transport sub-sector both horizontal and vertical is not contrary to the commitments undertaken by South Africa and reflected in the GATS service schedule.

Existing literature about South Africa's transport sector, broadly addresses the importance of the transport sector and its role in terms of promoting growth and development in the Southern African region. Disenyana & Khumalo, (2009) make an important point about the lack of information, capacity, statistics and skills for effective participation, within the context of SADC and SACU, necessary for future negotiations. Disenyana & Khumalo, (2009) confirm that research assistance is required to enable member states to make informed decisions about in which sectors offers should be made. Moreover Disenyana & Khumalo (2009) suggests member states negotiating strategy, is based on negotiations by mode and that data collection and publication is addressed to inform assessments and strategies going forward. While this study does not provide a cost-benefit analysis it provides the technical information required for the engagement in a services negotiation.

Naudé's (1999), findings that transport sector is uncompetitive due to the dominance of state owned corporations is confirmed in this study as well. However, Naudé's argument for increased competitiveness is based on the volume of trade in goods between South Africa and the region and does not consider actual legislation governing the sector to ascertain actual trade restricting measures neither does it provide information pertaining to trade in transport services resulting in a disjuncture between the data presented and the argument constructed.

Literature analysing legislation in terms of trade restrictive measures however, is absent and the current study would augment existing literature on South Africa's transport services providing the detailed information required for a negotiation process. The methodology employed in the analysis of the legislation is the World Bank's regulatory assessment toolkit which aims to provide information about measures that would impede access, operation and or establishment of a foreign service supplier. Moreover, the study compares South Africa's commitments in the transport sector reflected in SA's GATS schedule of specific commitments to actual legislation in force. It was found that the commitments are not contrary to the actual legislation applied and that there are greater restrictions in the horizontal measures analysed than in the vertical legislation. The South African government maintains monopolies in various sub-sectors which continue to restrict effective competition and efficiency in most transport services sub-sectors.

CHAPTER 6- CONCLUSION

The transport sector is critical to the performance of various sectors of the economy both trade in goods and services hinges on an efficient and reliable transport services sector. South Africa has undertaken limited commitments in the transport sector and the sector in general is controlled by the government through state owned firms. While South Africa's transport sector is competitive relative to Africa, relative to developed economies, the transport sector lags behind due to inefficiencies resulting in increased transaction costs which impede the overall competitiveness in terms of economic performance.

Trade in services in general including transport services is governed by domestic regulation which may affect access and operation of firms in the market. The objective of the study was to undertake an analysis of the legislation governing the transport sector in South Africa with a view to identifying the presence of trade restrictive measures. Impediments to trade in services are generally located in behind the border measures or legislation such as limitations in terms of foreign ownership or participation, licenses, monopoly rights among others. The study therefore considered horizontal legislation, which has an economy wide impact, vertical legislation, which are sector specific legislation and service level legislation. This study therefore applies the RASTI methodology which may be replicated to determine the level of liberalisation of other service sectors. The results of the study may be used in a transport sector negotiation both in a regional context through the SADC and the TFTA negotiations or the WTO negotiations. Technical information is required in a negotiation process and a clear understanding of the availability of policy space.

This study focussed on a specific sector and due to limitations was unable to include the freight and logistics sector. An exclusive study on the freight and logistics sector, the regulation, costs and role players would provide an understanding of a pivotal transport sub-sector. Data in this study was also limited to legislation which does not test the practical application of processes and challenges encountered by businesses in terms of gaining entry into the South African market.

There is certainly potential for a study of this nature to be replicated, employing the RASTI methodology across other service sectors to understand the technical aspects of legislation, the findings of which would become the baseline for negotiations in the services sector. Moreover, it would empower government to develop well informed negotiation positions and negotiations would be fully cognisant of the availability of policy space or the lack thereof. Studies of this nature would assist in the much needed development of capacity in the formulation of negotiation positions.

The results are conclusive on the research question that this study sets out to answer. What is the level of liberalisation of the transport services sector in South Africa? What trade restrictive measures are contained in the legislation governing the sector?

The analysis of South Africa's WTO commitments services schedule in the transport sector reveals that South Africa has only undertaken a commitment in the road transport services sub-sector and these include commitments in passenger transportation, freight transport and the maintenance and repair of road transport. South Africa does not have commitments with respect to the rental of commercial vehicles and supporting services for road transport. The presence of monopolies and state owned companies and agencies are therefore not surprising in view of the overall commitments by South Africa in the transport sector.

The study of the data reveals a remarkably low presence of trade restrictive measures in the sectoral level legislation governing the transport sector and its related sub-sectors, while there is a greater presence of trade restrictive measures in the horizontal legislation. Sectoral level legislation places greater emphasis on technical safety standards, matters relating to control of environmental damage, co-ordination issues and matters relating to public interest. Issues raised on the sectoral level legislation are not discriminatory against foreign service suppliers. Horizontal legislation contains measures such as economic needs test, restrictions relating to intra-corporate transferees and approval of investment, merger and acquisition transactions. These measures may affect access, establishment and or operation of foreign service suppliers.

The BBBEE Act in particular contains measures that address employment quotas, skills transfer and transfer of technology.

Measures in the vertical legislation address, externalities such as control of environmental pollution, asymmetric information and co-ordination problems in general. Measures contained in the horizontal legislation however, may affect access, establishment and or operation.

The results of the study takes into account that the transport sector in South Africa has the characteristics associated by a natural monopoly. In this regard, the WTO GATS agreement Article VIII, addresses monopolies and exclusive services suppliers established under government legislation (Adlung & Mattoo, 2008). The GATS agreement therefore recognises the state owned enterprises such as Transnet, the Ports Authority and other state owned corporations and government agencies provided that certain restrictions as listed under Article VIII are not maintained by the Member.

The study maps regulations governing the various transport sub-sectors, however this alone does not provide an indicator of trade barriers. This method does not take into account trade barriers emanating from the actual way in which laws are implemented and administered which also have the effect of increasing transaction costs. Furthermore, the study does not quantify the costs and benefits of the regulations mapped, but does provide policy makers with a sense of the policy space available and the location of trade restrictive measures. It would therefore be worthwhile to address actual application of the law taking into account the experiences of the private sector in terms of transporting goods and also in terms of the provision of transport services.

In response to the research question, what is the level of liberalisation of the transport sector in South Africa it is possible to conclude that there is a significant amount of policy space available in national legislation governing the transport sector and that sectoral level legislation does not discriminate against foreign service suppliers in the sub-sectors in which private services suppliers are permitted. Horizontal legislation however, is restrictive and would require amendments to provide improved equitable access to foreign service suppliers. Within the context of trade in services, this means that countries would have to amend or reformulate laws

and regulations to ensure the removal of trade restrictive measures. South Africa's commitments as reflected in the GATS schedule may also require amendment to facilitate increased levels of liberalisation in the transport sector. However, at present the commitments as reflected in the schedule is aligned to the domestic legislation governing the transport sector.

In view of the limitations of this study future research, assessing the costs, benefits and trade effects would assist in determining the impact of a specific measure. Future research should also consider the freight and logistics sector which has been excluded from this study due to the lack of regulation at sectoral level. The scale and scope of the freight and logistics sector in terms of its contribution to trade warrants an exclusive study.

It is recommended that the methodology used in this study is applied in preparation for regional service sector negotiations providing negotiations with the technical information required to make and develop informed positions.

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