

# TIPS

TRADE & INDUSTRIAL POLICY STRATEGIES



Research Report Series 2011-03

## Negotiating Trade in Services Liberalisation – Reflections on SACU's Experience

Prepared by the Trade Law Centre (tralac) through  
TIPS's financial support

June 2011



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## 1. Introduction

For many of the African states, negotiations to liberalise trade in services is a relatively new phenomenon. For the Southern African Customs Union (SACU) member states, the only experience acquired on this subject was during multilateral negotiations in the context of the General Agreement on Trade in Services (GATS). Now SACU countries are confronted with the issue of services liberalisation in the context of the Economic Partnership Agreement (EPA) negotiations, seemingly without a clear and coherent strategy on how to deal with this new trade related issue. There are a number of reasons for this, and the paper attempts to present the possible explanations for this state of affairs. It starts with an assessment of the depth and scope of commitments undertaken during the Uruguay Round and the challenges created by the different degrees of liberalisation. This places the SACU member states at different stages in their services liberalisation process, which together with their different levels of development have the potential to produce a fragmented approach towards services liberalisation.

The paper further considers the effect services liberalisation currently has at the regional level of SACU, the regional level of SADC and the bilateral level of the EPA, as well as the future impact these services negotiations can have on the SACU member states. The SADC Protocol on Services, which is being circulated amongst member states for approval, is also analysed to provide an indication of what can be anticipated at SADC regional level.

The final part of the paper deals with the preparation for negotiations and the activities countries can carry out in order to equip government to more effectively understand and negotiate the complexities of trade in services. The preparation phase focuses on two aspects, that of defensive interests which feed into the formulation of the services offer and, that of offensive interests which play a role in the formulation of the services request. The paper considers, amongst other things, the sources where regulatory information on services can be found, how to conduct a trade regulatory audit, the alignment of international obligations with domestic laws, the creation of enquiry points, and the establishment of communication channels between government and stakeholders.

While the paper is relatively technical for those not familiar with trade in services negotiations, we provide an annexure (Annexure A) that sets the GATS background in easy terms. The technical terms used in the body of the paper are also explained in this Annexure.

## **2. Services trade liberalisation in SACU**

### **a) The multilateral framework**

The first multilateral agreement to regulate trade in services, the GATS, was negotiated and agreed during the Uruguay Round. Amongst other things, the agreement provides a framework for countries to make liberalisation commitments in specific services sectors and modes of supply. These specific commitments are legal obligations undertaken by the individual member states concerning the level of market access allowed to foreign services and suppliers and the conditions under which they are allowed to operate domestically. These undertakings are recorded in the national schedules of specific commitments of each member state on a sector-by sector-basis and only bind the countries to the extent that they have committed themselves. The schedules are attached to GATS and form an integral part of the agreement. All the member states of the Southern African Customs Union (SACU)<sup>1</sup> are signatories of GATS and have submitted national liberalisation schedules. The process of negotiating and implementing services liberalisation commitments at the multilateral forum is to date, the only experience the SACU member states have had with regards to the liberalisation of trade in services.

In terms of the GATS, there is no requirement on World Trade Organization (WTO) member states to schedule a minimum number of commitments;<sup>2</sup> however they are obliged to enter into successive rounds of negotiation to liberalise trade in services.<sup>3</sup> Countries therefore made varying commitments ranging from very limited to fairly liberal.

Roy (2009) argues that there are four key determinants which explain why governments undertook varying commitments during the Uruguay Round of negotiations: democracy, relative power, relative endowments and the negotiating process. One can add to this list the argument that many of the African member states liberalised offensive sectors - notably tourism -, with the hope of attracting more foreign investment (Kruger, 2009). Yet, variations around commitments remain: for example, Namibia made commitments in only three sub-sectors (out of a possible 160 sub-sectors) while South Africa made commitments in 91 sub-sectors.

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<sup>1</sup> The member states are Botswana, Lesotho, Namibia, Swaziland and South Africa.

<sup>2</sup> This was the case in the Uruguay Round regardless of whether a member state was a developed, developing or least developed country (LDC). It was long after the Uruguay round, only in 2003, that the WTO Council for Trade in Services adopted the 'Modalities for the special treatment for least developed country members in the negotiation on trade in services (TN/S/13)'. Flexibility is provided for LDCs by requiring them to liberalize fewer sectors, and fewer types of transactions, and by progressively extending market access in line with their development situation.

<sup>3</sup> See GATS Art. XIX: 1

There is a major challenge created by the different degrees of commitments, and this is in terms of how negotiating partners, particularly in a configuration such as SACU, can agree on a suitable method to liberalise services trade between them,<sup>4</sup> or alternatively agree on a common and coherent approach in future services negotiations with third parties.

**Table 1: Liberalisation under GATS by SACU member states**

	<b>Botswana</b>	<b>Lesotho</b>	<b>Namibia</b>	<b>South Africa</b>	<b>Swaziland</b>
<b>1. Sectors committed (out of 12)<sup>5</sup></b>	3	10	2	9	3
<b>2. Sub-sectors committed (out of 160)<sup>6</sup></b>	20	78	3	91	9
<b>6. Percentage of sub-sectors liberalised</b>	<b>12.5%</b>	<b>48.75%</b>	<b>1.88%</b>	<b>56.88%</b>	<b>5.63%</b>

The type of analysis presented in Table 1 on the degree of liberalisation by SACU member states under the GATS is necessary to promote observance to the disciplines of GATS Art. V. Basically the services chapter must have “substantial sectoral coverage” with regards to the number of sectors included, the modes of supply and the volume of trade affected. The substantial coverage requirement is further qualified by a footnote to GATS Art. V:1(a) which specifically states that “agreements should not provide for the a priori exclusion of any mode of supply”<sup>7, 8</sup>.

<sup>4</sup> Imagine the hypothetical scenario where a country with few commitments like Namibia negotiates a services chapter with a country like South Africa which has made significant commitments (see Table 1). To improve market access for services suppliers, countries have to go beyond the existing commitments undertaken in GATS. It will be easier to agree to a WTO-plus services chapter for Namibia than for South Africa, only because far fewer commitments have been made. The policy and regulatory space within which South Africa can manoeuvre is therefore more limited. During the Economic Partnership Agreement (EPA) negotiations, South Africa argued that due to its substantial liberalisation progress made in the Uruguay Round, it would be more difficult to offer WTO-plus concessions.

<sup>5</sup> The number of core sectors included in the GATS schedule of each country as defined in MTN.GNS/W/120. See Annexure A for further details.

<sup>6</sup> The number of sub-sectors included in the GATS schedule of each country as defined in MTN.GNS/W/120.

<sup>7</sup> If developing countries are parties to a services agreement, GATS Art. V:3(a) states that flexibility must be provided when considering the degree of substantial sectoral coverage, particularly regarding the elimination and prohibition of discriminatory measures. It does not specify how much flexibility must be provided, but such flexibility should be extended in accordance with the level of development of the countries concerned, both overall and in individual sectors and sub-sectors. When the services agreement only involves developing countries (South-South arrangements) more favourable treatment may be granted to juridical persons owned or controlled by natural persons of the parties to the agreements (GATS Art V:3(b)).

<sup>8</sup> If developing countries are parties to a services agreement, GATS Art. V:3(a) states that flexibility must be provided when considering the degree of substantial sectoral coverage, particularly regarding the elimination and prohibition of discriminatory measures. It does not specify how much flexibility must be provided, but such flexibility should be extended in

Parties are further required to extend national treatment to service suppliers by eliminating “substantially all” discrimination. This latter provision not only calls for the elimination of existing discriminatory measures, but also for the prohibition of new or more discriminatory measures. These requirements aim to prevent the negotiation of an agreement with a too limited scope but, unlike GATT Art. XXIV, there is no Understanding on the interpretation of GATS Art. V; nor is there agreement among the WTO Members on the interpretation of its provisions. This particular situation gives rise to uncertainty regarding the appropriate application of the rules and leads to inconsistency when assessing a trade agreement with a services component.<sup>9</sup>

As noted above, currently there is no agreed definition of what constitute “substantially all trade” in the area of services, or an acceptable way of determining that threshold. This uncertainty is compounded, not only by the fact that countries made radically different commitments during the Uruguay Round, but also by their diverse levels of development. Some have tried to remedy this situation: in the CARIFORUM EPA negotiations between the Caribbean countries and the EU, certain minimum targets were proposed during the negotiations to provide more certainty on the complying with the relevant WTO rules.<sup>10</sup> In the EPA negotiations, the more developed economies were expected to liberalise 75 percent while the lesser developed economies were expected to liberalise 65 percent of their sub-sectors.<sup>11</sup> Yet, there is a flaw to this approach, and this lies with the fact that liberalisation is focused solely on the number of the sectors; the calculation does not take account of the modes of supply or volume of trade as specified in GATS Art. V. Yet, it is still advisable to define minimum thresholds that are acceptable to all parties before the start of any services negotiations.

Table 1 shows that South Africa committed 91 sub-sectors (or 56.9 percent) of the potential 160 sub-sectors, Lesotho 78 (or 48.75 percent), Botswana 20 (or 12.5 percent), Swaziland 9 (or 5.6 percent) and Namibia only 3 (or 1.8 percent). It can be argued that the positions

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accordance with the level of development of the countries concerned, both overall and in individual sectors and sub-sectors. When the services agreement only involves developing countries (South-South arrangements) more favourable treatment may be granted to juridical persons owned or controlled by natural persons of the parties to the agreements (GATS Art V:3(b)).

<sup>9</sup> GATS Art. V: 7 requires member states party to an agreement liberalising trade in services to promptly notify any such agreement and any enlargement or any significant modification of that agreement to the Council for Trade in Services. Parties are further obliged to report on the progress of any phase-in if the agreement is implemented on the basis of a time frame. However, only some services agreements have been notified, a few examined and none pronounced upon by the Council for Trade in Services (CTS).

<sup>10</sup> That is specifically with GATS Art. V.

<sup>11</sup> If considering and counting the number of sub-sectors committed in the CARIFORUM negotiations, it can be argued that the suggested thresholds were not achieved.

reflect the fact that countries that made fewer commitments have more policy space and options available to them in the services negotiations. Alternatively, one could say that such countries may also have greater leverage when making request from the negotiating parties to open up new markets.

The ongoing negotiations at the multilateral level were intended to gradually level the playing field but the current imbalance between the degree of commitments made by negotiating parties can render bilateral and regional services negotiations more challenging. A recommendation in this regard is thus that negotiating parties must determine the precise levels or degree to which the services sectors must be liberalised as well as the flexibility that will be provided for lesser developed countries at the onset of the services negotiations. Not only are the countries in SACU at different levels of development, they are also at different stages in their respective liberalisation processes. Precise parameters or guidelines will make the achievement of substantial liberalisation transparent and more predictable. This acceptable threshold must preferably be decided and agreed before the negotiating rounds to schedule specific commitments. It is also a good idea to adopt an agreed set of detailed guidelines - similar to what was done in the case of COMESA<sup>12</sup> - in order to provide clarity on the process and concepts involved in the negotiations.

#### **b) Ongoing negotiations at the WTO**

As stated in its Preamble, the GATS is intended to contribute to trade expansion “under conditions of transparency and progressive liberalization and as a means to promoting the economic growth of all trading partners and the development of all developing countries”. From this statement, two key objectives of GATS and of trade services liberalisation can be construed: a) ensuring increased transparency and predictability of relevant trade rules and regulations; and b) promoting progressive liberalization through successive rounds of negotiations. The idea is for the successive rounds to build on what has already negotiated and achieved during the Uruguay Round of negotiations although while WTO member states started these ongoing negotiations in 2001, participation has generally been poor.

Focusing on SACU, it emerges that South Africa is the only SACU member state taking part in the ongoing GATS negotiations. This is in a context in which Lesotho is the only SACU member state not expected to participate in the successive negotiations due to its Least Developed Country (LDC) status. The latter is the result of the WTO Ministerial Decision

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<sup>12</sup> See COMESA Training Manual: A Guide to the Preparation of Schedules of Commitments on Services.

adopted on 18 December 2005<sup>13</sup> that recognises the particular economic situation of such LDC economies and the difficulties these face, thereby acknowledging that these countries were not expected to undertake new commitments in the context of the progressive liberalisation under the GATS. All other WTO member states were however urged to participate actively in the negotiations in order to achieve higher levels of liberalisation of trade in services.

On 29 March 2006 South Africa submitted its conditional initial offer in the framework of the ongoing services negotiations under the GATS<sup>14</sup>. South Africa then bound an additional 30 sub-sectors, all of these commitments occurring in the transport sector. Although this seems like extensive liberalisation beyond what was already undertaken, the fact remains that the depth of the commitments is particularly shallow: using the traditional calculation proposed by the EU in the CARIFORUM negotiations - described in Section 2.a above -, it appears that South Africa would have increased its liberalisation threshold by 30 percent, from committing 91 sub-sectors to committing 121 sub-sectors. This would however be a gross misrepresentation: the picture changes completely when the commitments are put under closer scrutiny; below is an extract from the offer to illustrate this particular point:

<b>G. Pipeline Transport</b>	<b>Limitations on market access</b>	<b>Limitations on national treatment</b>
(a) Transportation of fuels (CPC 7131)	Mode 1: Unbound Mode 2: None	Mode 1: Unbound Mode 2: None
(b) Transportation of other goods (CPC 7139)	Mode 3: Unbound Mode 4: Unbound	Mode 3: Unbound Mode 4: Unbound

In all of the newly committed sectors, Modes 1, 2 and 4 were left unbound with only Mode 2 being liberalised. Mode 2 deals exclusively with 'consumption abroad' and essentially the service is delivered outside the territory of the party making the commitment. Also, in this mode of supply, parties may only impose restrictive measures affecting its own consumers and not those of other countries on the activities taking place outside of its jurisdiction. Therefore the effects Mode 2 commitments will have on the access on foreign suppliers are negligible.

<sup>13</sup> See WT/MIN(05)/DEC.

<sup>14</sup> The initial conditional offer is available at: [http://www.esf.be/pdfs/gats\\_initial\\_offers/South%20Africa%20Initial%20Offer%20-%20April%202006.doc](http://www.esf.be/pdfs/gats_initial_offers/South%20Africa%20Initial%20Offer%20-%20April%202006.doc)



Most of the other changes in the conditional initial offer were aimed at cleaning up the inscriptions in the schedule, particularly those mentioning the Telkom monopoly.<sup>15</sup> However, in the introduction to the offer, South Africa reserves its right to modify, extend, reduce or withdraw, in whole or in part, this offer at any time prior to the conclusion of the ongoing services negotiations, as well as to make adjustments to its horizontal commitments, in view of the enlargement of its sector-specific commitments. The conditionality of the document was confirmed by the South African Department of Trade and Industry (the **dti**) which acknowledged that the offer is a work in progress and that it is in the process of being revised.<sup>16</sup> The most recent offer South Africa submitted was the one of March 2006; no additional or revised offer has since been submitted. Minimal progress has been made. Whilst this is for a number of reasons,<sup>17</sup> these include the fact that the negotiations on trade in services are linked to the progress made in the other areas relating to trade in goods. The SACU member states of Botswana, Namibia and Swaziland have not been participating in these negotiations.

At the moment it seems as if participants are reluctant to liberalise trade in services beyond their current GATS obligations. It is more likely that countries will only publish and commit reforms already undertaken at the domestic level, while they leave the more ambitious commitments for regional or bilateral negotiations. The approach taken here will inevitably have an impact on the process at the regional level because liberalisation commitments made at the multilateral level are for the benefit of all WTO members. The areas liberalised at the WTO will not be the subject of regional negotiations since these already apply to the negotiating parties in SADC and SACU.<sup>18</sup> The further the degree of liberalisation at the multilateral level, the less leverage or negotiating power a party might have in the regional negotiations. This is arguably a reason for the cautious approach of South Africa in the ongoing multilateral negotiations.

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<sup>15</sup> In parts of the schedule reference was made termination of the Telkom at the end of 2003 after which a duopoly would be implemented. After the introduction of Neotel, the Second National Operator (SNO), it was necessary to update the schedules with the current status quo.

<sup>16</sup> The 2006 offer is nevertheless the most recent one publicly available.

<sup>17</sup> See Togan (2011).

<sup>18</sup> Seychelles is not a WTO member but is in the process of acceding to the WTO. It is therefore the only SADC/SACU country that will not automatically receive the market access and national treatment benefits agreed at the WTO.

### **3. Effects of services trade liberalization**

#### **a) Considerations at the regional level of SACU**

Regarding services negotiations in SACU, so far it has been each country for itself. The process of negotiations at the EPA level has shown that SACU member states prefer an approach that is in its own interest, rather than in the interest of the configuration.

The defining feature of a customs union is the common external tariff (CET) which sets it apart from other forms of integration. In a Free trade Agreement (FTA) each party maintains its own tariffs towards third parties, while parties to a customs union replace these individual tariffs against third countries with a single tariff which is referred to as the common external tariff (CET). The existence of the CET has a number of implications for the management of a customs union one of which is the requirement to negotiate trade agreements as a single entity. This, which is a feature of the 2002 SACU agreement that can be found in Art. 31(2), translates into the fact that SACU member states are under obligation to establish a common negotiating mechanism for the purpose of undertaking trade negotiations with third parties. Yet, this has not yet been implemented, although the role of such mechanism to facilitate the formulation of common positions is generally widely recognised. The absence of a common negotiating mechanism leads to the lack of a unified approach which is proving to complicate the structure and objectives of SACU. Due to the scope of the SACU agreement, it can be argued that the obligation only extend to the goods part of the negotiations: the SACU agreement focuses solely on the movement of goods and does not mention services except for commitments on railway and road transport as they relate to tariffs and transit obligations.

From recent negotiations and policy debates in SACU, it is clear that the member states are not in agreement on how to move forward in the arena of trade in services. One reason for this disjointed approach is the fact that South Africa's services industries are considerably more developed than those of other countries in the region. South Africa is already exporting a wide range of services to its lesser developed neighbours, in many instances without any meaningful competition. The BLNS (Botswana, Lesotho, Namibia and Swaziland) countries, in contrast, do not have many noteworthy industries to protect against foreign competition. South African firms providing services in the BLNS countries will likely suffer the most from increased competition when these countries liberalise their services industries. It seems that some BLNS countries are realising that liberalisation is the only way of avoiding complete dominance by the South African firms.

It appears as if the developing countries in the region are eager to start liberalising trade in services, most likely because foreign direct investment is seen as an important source of development,<sup>19</sup> but also arguably to reduce reliance on South African firms. Botswana, Lesotho and Swaziland have already indicated their interest in pursuing deeper services liberalisation. In a sense it seems as if these countries have nothing to lose by substantially opening up their services sectors, but much to gain in terms of more competitive pricing, greater choice, product specialisation, technology transfer and development of their domestic industries. But, would services liberalisation alone will bring benefits to the BLNS countries? At the SACU summit in June 2010 the Heads of State and Government hinted at the possibility when they undertook to develop “SACU positions on new generation issues, taking into account ongoing negotiations”. Although it is too early to tell how the process will unfold, South African services providers already have substantial operations in all sectors and, at first glance, these are the companies that will benefit from further liberalisation in the neighbouring countries. It can also be questioned whether the providers in the BLNS countries would be able to compete with the more developed providers dominating the South African market.

Currently “services” is not addressed or even mentioned in the SACU agreement, nor is any SACU services strategy apparent from the treatment of services issues. The benefit of addressing services in the SACU context can however be raised since trade in services is already considered at many other levels: the services liberalisation process has been initiated at the bilateral level with the EU, at the regional level with SADC / COMESA; and, discussions have started of how to incorporate services in the larger Tripartite Agreement. As the focus of these services chapter is mainly on services liberalisation it will be of little use to again address liberalisation issues at the intra-regional level of SACU. Efforts should rather be focussed at services liberalisation under SADC or COMESA since the frameworks for services interaction in these regions have already been drafted.

If SACU member states want to directly address the issue of services within the configuration, the basis of the discussion should be deeper integration. With deeper integration, the focus should be shifted from liberalising the barriers that exist at the borders, towards addressing the ‘behind-the-border’ issues, which exist within the jurisdiction of the member states. Deeper integration, amongst other things, includes domestic issues such as transparency, competition regulation, specific sectoral disciplines, mutual recognition and the

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<sup>19</sup> Nevertheless, whether foreign investment will materialise when the BLNS countries liberalise their services markets is a completely different question. In many instances this not only depends on the regulatory barriers but also on the nature of the local market.

harmonisation of certain areas. Binding obligations in these areas can lead to a more complete integration of a regional services market.

Both SADC and COMESA member states have included far reaching obligations in their regional agreements and protocols, but member states are struggling to implement many of these obligations, especially those relating to harmonisation. For example, a tour guide qualified in Namibia is not allowed to provide services in South Africa. South African law requires all tour guides to comply with the requisite competence as determined by the South African Qualifications Authority. A guide must therefore first complete training or obtain recognition of prior learning with an accredited institution before being allowed to register with the Provincial Registrar of Tourist Guides in South Africa. Now the peculiar situation exists that, as soon as Namibians tour guides cross the border, they are no longer allowed to operate. So in practice a local South African guide has to accompany the Namibian guide when operating within the borders of South Africa. These are one of the many issues that will have to be addressed through mutual recognition agreements or the harmonisation of training standards. Closely related to this, will be the efforts to ease the movement of natural persons (Mode 4) and improve commitments in this mode of supply.

#### **b) Considerations at the regional level of SADC**

To some extent, the issue of deeper integration has already been addressed at the SADC level; it is simply a matter of giving effect to the obligations agreed in the SADC Protocol. Keeping in mind our example above regarding the movement of tour guides, the SADC Protocol on Tourism already provides for harmonising tourism training and education.<sup>20</sup> Amongst other things member states agree to evolve a common education policy regarding tourism and environmental related issues; coordinate and harmonise training at tourism institutions; develop exchange programmes; and ensuring the complementarity of training courses. (Yet, this has not happened in SADC.) Also in the area of transport services, member states to the SADC Protocol on Transport, Communications and Meteorology agree to ambitious undertakings to develop harmonised policies, harmonised operating conditions and harmonised standards and regulations. For instance, in the area of road transport these include measures to harmonise the following: vehicle safety and equipment, driving licences, documentation, and procedures, carrier obligations, transport law enforcement, technical standards, road infrastructure, transit charges, safety requirements for dangerous loads, and regional trunk road projects. Similar deeper integration measures are included in the

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<sup>20</sup> As per Art. 6 of the SADC Protocol on Tourism.

Protocol on Education and Training, the Protocol on Energy, the Protocol on Finance and Investment, the Protocol on Health and the Protocol on the Facilitation on Movement of Persons (not ratified yet).

As such, the instruments for deeper services integration already exist in SADC; it is just a question of giving effect to the undertakings by implementation. Of course this is not an easy task and each area is at different stages of the development. The important thing however is that these have been agreed and that the instruments collectively provide member states with an idea of the vision of SADC and what it wants to achieve in the long run.

The importance of developing trade in services is recognized in Art. 23 of the SADC Protocol on Trade, where member states are urged to adopt policies and implement measures in accordance with their GATS obligations in order to liberalise trade in services. Discussions to address trade in services in line with Art. 23 of the SADC trade Protocol commenced in September 1999 when the SADC Committee of Trade and Industry decided that priority should be given to elaborate a regional strategy to liberalise trade in services. A SADC Trade Negotiations Forum meeting to implement the mandate was held shortly afterwards in June 2000 in Lesotho where the Maseru action plan was adopted. Six core services sectors were identified at the meeting which would be the subject of SADC's initial focus. The priority services sectors are: transport, communications, financial, construction, tourism and energy. These are considered as the key services sectors to support development in SADC, while the first three (transport, communications and financial services) are regarded as essential to facilitate the physical trading of goods.

According to the draft SADC Protocol on Trade in Services, the aforementioned six priority sectors will be the focus of the first negotiating round; with the round being completed no later than 3 years after the start the negotiations.<sup>21</sup> After that the parties must enter into rounds of successive negotiations within three years of completing the first round to cover the liberalisation of the remaining services sectors.<sup>22</sup> The SADC Trade Negotiating Forum for Services will adopt negotiating guidelines for each consecutive round of services negotiations.

The guidelines for the first round provide that the starting point for negotiations shall be the existing GATS commitments in these sectors and horizontal sections of each of the member states. However, as stated in Art. 16(1) of the services Protocol, negotiations are to be in conformity with GATS Art. V. This article sets out certain requirements that must be

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<sup>21</sup> Art. 16(2) – (3) of the draft SADC Protocol on Trade in Services.

<sup>22</sup> Art. 16(1) – (3) of the draft SADC Protocol on Trade in Services.

observed when parties negotiate services agreements.<sup>23</sup> The problem is that the SADC services negotiations cannot meet the threshold if its coverage is limited to six sectors. It is therefore likely that the agreement will only be notified to the WTO after the successive rounds to address the remaining sectors. A situation similar to that set out above arose in the case of Mercosur. There, it was decided that the Montevideo Protocol dealing with services liberalisation would not be sent for legislative approval until the texts of the sectoral annexes and the lists of specific commitments had been completed. It can be assumed that this decision was taken in order to comply with the requirements of GATS Art. V. The Montevideo Protocol only entered into force in 2005 after six negotiating rounds addressing all of the services sectors were completed. Shortly after that, the Montevideo Protocol was notified to the WTO in December 2006. This dimension between agreeing and applying commitments must be taken into account if SADC member states wish to design the negotiations in conformity with GATS Art V. The regional integration framework for services also requires the absence or elimination of substantially all discriminatory measures.<sup>24</sup> Flexibility regarding these two substantive requirements is, however, afforded to developing countries that are parties to Economic Integration Agreements particularly with reference to a lower level of coverage requirement, lesser elimination of discriminatory measures and less favourable treatment to foreign juridical persons. WTO Members are required to notify Economic Integration Agreements to the Committee on Regional Trade Agreements for consideration “directly following the parties’ ratification of the RTA or any party’s decision on application of relevant parts of the agreement, and before the application of preferential treatment between the parties”.<sup>25</sup> Although the process was initiated more than 10 years ago, there is still no signed Protocol on trade in services.

The potential benefits of a coherent regional approach to services trade liberalisation carry significant potential payoffs. A regional vision can help achieve greater transparency through the development of rules that require mutual openness from all the parties. A regional approach can also increase the credibility of domestic policy choices through the adoption of legally binding commitments, and the creation of efficient regulation through rules that favour the adoption of international best practices.

The Draft Protocol is in the process of being circulated amongst member states for approval after cosmetic changes were made to the MFN clause. The purpose of the MFN clause is to ensure that a member state’s service providers are never disadvantaged in relation to those

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<sup>23</sup> The requirements of the GATS Art. V have already been briefly set out in Section 2.a above.

<sup>24</sup> Article V(1)(b).

<sup>25</sup> Transparency Mechanism for Regional Trade Agreements, paragraph 3 (WT/L/671).

of a non-member if another member decides to negotiate a better regime for services trade with a third party. Nothing prevents a member state from entering into new preferential agreements with third parties provided such agreements do not impede or frustrate the objectives of the regional Protocol. The Protocol does not, however, prescribe measures to prevent a member from negotiating preferential agreements with third parties if it is found to hinder the objectives of the Protocol. The Protocol only obliges a member to inform other member states of its intention to negotiate such an agreement and to afford them an opportunity to negotiate the preferences granted therein on a reciprocal basis. If, however, some member states conclude a preferential agreement in, for example, the SADC-EPA context prior to the adoption of this Protocol, those member states must afford reasonable opportunity to the other member states to negotiate the preferences granted therein on a reciprocal basis. Despite this particular obligation, member states may maintain measures which are inconsistent with the MFN obligation provided those measures are listed in the MFN exemption list. The agreed list of MFN exemptions that must be annexed to the Protocol must be reviewed by the Trade Negotiating Forum for Services on a regular basis with a view to ultimately eliminate them.

Even after the Protocol is signed, major work still lies ahead for the member states. Negotiating a services Protocol has additional complexities that have to be dealt with, the most important one being the schedule or list of commitments. After all, preferences are not granted through tariff concessions, but through discriminatory restrictions on the movement of labour and capital and a variety of domestic regulations such as technical standards, licensing requirements and procedures as well as professional qualification requirements. These discriminatory restrictions can range from limits on the number of (foreign) suppliers in telecommunication and banking to less favourable access to essential facilities such as telecommunication networks and airports. Barriers on trade in services are therefore found behind the border. They are regulatory in nature and more difficult to remove than mere tariff reductions at the border.

The request and offer procedure similar to the one being used in the WTO will be employed to facilitate the scheduling of the commitments. Under this approach, member states retain the right not to undertake commitments and are under no legal obligation to publish discriminatory measures or market access restrictions maintained in the domestic market. The Positive List approach to liberalisation affords countries the possibility to make commitments that do not necessarily reflect or lock in the regulatory status quo. Each SADC Member submits a 'request' on what it would like other Members to 'offer'. Negotiations continue with each Member responding to the 'request' with the 'offer' it is willing to make. After negotiations the process is repeated with revised submissions and offers until

agreement is reached. Nonetheless according to Article 16(3) the first round of negotiations should be concluded within three years after the commencement of such negotiations. In addition, member states must enter into successive rounds of negotiations three years after the completion of the previous one. It is however important to note that in terms of Article 16(4) member states agreed to a standstill on the introduction of new and more discriminatory barriers to trade in services during the negotiation process. Judging from the length of time it took other configurations to complete the whole process, a long road lies ahead.<sup>26</sup>

The structure of the draft Agreement corresponds to that of the GATS with only a few deviations relating to legal definitions such as commercial presence, national and juridical persons and subsidiaries. These definitions read together with the denial of benefits clause in Article 22 play a critical role in determining the degree to which the preferential agreement discriminate against non-member countries. The Article provides that a member state may deny the benefits of the Protocol to a service supplier of another member state if the service is being provided by an enterprise that is owned or controlled by persons of a non-member state and that has no substantial business operations in the economy of a member state. In other words, preferential treatment may be restricted to service suppliers that are owned or controlled by nationals of the member states. In addition, enterprises must conduct “substantive business operations” in a member state to qualify for preferential treatment. The imposition of these restrictions influences a firm’s ability to take advantage of the preferential treatment and varies according to the definition given to “substantive business operations”. The term is defined in Article 1 of the draft SADC Protocol on Trade in Services to require an entity to be incorporated in and licensed by a Member State to provide services. The definition clause in the draft Protocol provides that the “substantial business operations” requirement must still be further developed and refined through negotiations after the adoption of the Protocol.

The denial of benefits clauses found in most Regional Trade Agreements tend to be very liberal whereby they only deny preferential treatment to juridical persons that do not conduct substantial business operations in a member country. In other words, these agreements do not limit benefits derived from the preferential agreement to juridical persons that are owned

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<sup>26</sup> For example the ASEAN and Mercosur configurations, both consisting of mainly developing countries took many years to negotiate services. In Mercosur, the Montevideo Protocol on trade in services was signed in 1997 and since then there has been six negotiation rounds to expand the scope of liberalisation by agreeing on additional commitments. These commitments made in the first six rounds have been consolidated and approved by the Council of the Common Market (CMC), but must be domestically incorporated before they can enter into force and become effective. In the ASEAN configuration, the ASEAN Framework Agreement on Trade in Services was signed in 1995. Five negotiating rounds have been held since with subsequent rounds planned until the end of 2015.



or controlled by nationals of its member states. These agreements also afford third country investors the opportunity to take full advantage of the expanded market opportunities created by the preferential agreement. After all, one of the main objectives of these agreements is to attract greater volumes of investment including from third country investors. Key services sectors, particularly infrastructure and network services sectors (such as telecommunication, finance, transport, energy and water supply) possess the ability to enhance economic growth. It is therefore important not to inhibit market access to the most efficient suppliers of these services.

The importance of finalising the negotiating process and implementing the Protocol as soon as possible is aptly illustrated by a recent study done by Business Leadership South Africa, an organisation created by 80 of South Africa's largest companies (see Annexure B for the list of companies). These companies, which pay 80% of the corporate tax in South Africa and have a significant presence in 49 of Africa's 53 countries, were asked in a survey to reflect on what they need to do to double the size of their companies over the next 15 years. One third of the respondents pointed out that the South African market was either constrained or saturated for their products; as such, expanding markets within the continent promotes their growth. However, what is required is more efficient and less costly movement of goods, capital and people across borders. It would also require regional recognition of education and skills qualifications, harmonised standards and registration requirements for companies<sup>27</sup>.

In terms of Article 7 of the draft Protocol, the Trade Negotiating Forum for Services must negotiate an agreement for the mutual recognition of requirements, qualifications, licenses and other regulations that must be fulfilled by service suppliers to get authorisation, licenses and certification to start operating in another member state. This very important process must commence within two years after the entry into force of the Protocol. This could potentially be the most beneficial aspect of the Protocol for businesses that wish to expand or operate in the regional market.

Similarly, each member state must according to the transparency obligation in terms of Article 8 publish any measure having an effect on trade in services. In addition, members must at least annually inform the Trade Negotiating Forum for Services of any new or changes to existing laws, regulations or administrative guidelines which affects trade in services covered by its specific commitments. Another important transparency enhancing provision, although only on a best endeavours basis, requires members to provide all other

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<sup>27</sup> Spicer and Godsell (2010).

members information on any measure of general application that it proposed to adopt in order to allow them an opportunity to comment on the proposed measure. The importance of transparency is especially critical given the regulatory nature of impediments to trade in services. It also helps to reduce transaction costs for businesses and promotes accountability and good governance.

The potential benefits of a coherent regional approach to services trade liberalisation carry significant potential payoffs. A regional vision can help achieve greater transparency through the development of rules that require mutual openness from all the parties. A regional approach can also increase the credibility of domestic policy choices through the adoption of legally binding commitments, and the creation of efficient regulation through rules that favour the adoption of international best practices.

### **c) Considerations at the bilateral level of the SADC EPA**

There are practical challenges for countries that are members to more than one customs union, particularly regarding the alignment and administration of the CET.<sup>28</sup> The same challenges are not shared by countries that are party to multiple services agreements because each member state country maintains the autonomy to set its own liberalisation framework *vis à vis* other participating members. This liberalisation framework is created by the drafting of the country schedules and the stipulation of commitments and limitations. It will be a simple process of extending this liberalisation framework in subsequent negotiations, depending on the negotiations leverage and requests from the new negotiating parties. There may be certain administrative difficulties in applying multiple services agreements, but in principle there are no restrictions or insurmountable challenges in negotiating more than one services agreement.<sup>29</sup> The value of the same countries negotiating a second services agreement (as will be the case if SACU member states negotiate another services agreement after the conclusion of the SADC services negotiations), can be questioned. In such a case, the liberalisation of services would have already been addressed between these members; so to be beneficial, a subsequent agreement must go beyond liberalisation to address deeper integration issues.<sup>30</sup>

There would however be value in negotiating a bilateral services agreement with the EU since that can provide access to new markets for all negotiating parties. But in these

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<sup>28</sup> See section 3.a above.

<sup>29</sup> A case in point is Chile which currently has 15 services agreements in place.

<sup>30</sup> As already set out in section 3.a.

negotiations the degree of development between the countries within the SADC EPA group are giving rise to fundamental differences in negotiating approaches. The objectives of the countries within the SADC EPA group are in conflict; while some pushes for liberalisation, others would take a more protectionist stance. Is there still a chance that the SACU member states can reconcile these divergent approaches and arrive at a common solution?

Currently, only Botswana, Lesotho and Swaziland are prepared to continue with the ongoing services negotiations, while South Africa and Namibia opted out of the process. What makes this situation unique is the fact that Namibia is the only initialling ACP country that opted out of the services part of the negotiations. Strangely enough, despite the opposition to include a new generation trade agenda in the EPAs, none of the other ACP countries took that route.<sup>31</sup> It can of course be argued that Namibia went further than any other ACP country by also managing to attach a list of concerns (also known as the contentious issues) to the interim EPA. New generation trade issues (including services) was however not part of these concerns because Namibia only initialled the goods chapter of the interim EPA. Namibia's name was deleted from Art. 67 of the interim EPA which dealt with the ongoing negotiations on trade in services, investment, competition and government procurement.

Despite its liberal approach during the Uruguay Round, it now seems if South Africa is taking a step back. In South Africa's official trade policy and strategy framework document<sup>32</sup> published in September 2009, the **dti** recognises the importance of trade in services.<sup>33</sup> Yet, the document is rather vague on South Africa's treatment of services and does not provide any real clarity on its official approach forward. Well defined research, more accurate data and statistics, determination of South Africa's competitiveness strengths and the establishment of a trade in services forum are steps proposed to inform its trade strategy. No mention is made of services negotiations in current or upcoming negotiations with third parties and it remains to be seen to what extent services will be included in future agreements.

One can speculate on the reasons for the strategic shift in South Africa's approach to multilateral negotiations – these can include issues such as: the offensive interest of South African companies in a range of services sectors in many sub-Saharan African countries; the

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<sup>31</sup> If South Africa ends up signing the EPA, it would be the only country that also opted out of the services part of the negotiations.

<sup>32</sup> The document concentrates on the industrial policy debate but neglects to emphasise the importance of the services sector in promoting and facilitating South Africa's industrialisation strategy. Services are included almost as an afterthought, focusing more on past events than on the way forward.

<sup>33</sup> The document sets out the key principles and approaches to South Africa's strategy for global integration with respect to its engagements and negotiations at multilateral, regional and bilateral levels.

Black Economic Empowerment regulations; the policy against privatisation of state owned industries dominating certain segment of the services market or the introduction of competition in these sectors; political factors such as organised labour, and the influence of domestic business lobby groups. Add to that the formal reasons given by South Africa regarding the sequencing of negotiations at the regional level in order to give preference to the establishment of a regional common market, and you have a rather compelling argument for a more conservative approach.

From recent negotiations and policy debates in the SADC EPA, it is clear that the member states are not in agreement on how to move forward in the arena of trade in services. So now it seems almost certain that only some of the members - namely Botswana, Lesotho, Swaziland and Mozambique - are considering negotiating on services, with a differentiated clause to be included in the EPA text to provide for the differentiated approach within SACU. This situation is not ideal, but what is also worrying is that these countries that are in agreement on pursuing services and investment negotiations are still not combining their scarce resources and capacity to negotiate as a unified 'services front'. At the start of the SADC EPA negotiations, Tanzania was given the responsibility to coordinate the issue of the trade in services. Botswana was designated to coordinate the overall efforts of the SADC EPA configuration and to prepare negotiating positions while each SADC EPA member state has been assigned a negotiation issue or issues to coordinate. Table 2 sets out the coordinating responsibilities for each of the participating SADC EPA member states.

**Table 2: Coordinating responsibility of the SADC EPA member states**

<b>Responsibility</b>	<b>Coordinating country</b>
Rules of Origin	Lesotho
Legal and Institutional Issues	Lesotho
Database	SADC Secretariat
Agriculture	Angola
Fisheries	Angola & Mozambique
SPS & Standards	Botswana
Development Cooperation	Namibia
Trade Facilitation	Namibia
Non Agricultural Market Access	Mozambique
Services	Tanzania
Investment & Competition Policy	Tanzania
Other trade related issues	Swaziland

However, in April 2007 the East African Community (EAC) formally announced its intention to negotiate an EPA as a separate regional block, which meant that Tanzania subsequently withdrew from the SADC EPA negotiation process. This effectively left the SADC EPA group without a coordinating country to prepare negotiating positions in the area of services, and this shows from the fragmented approach by the countries choosing to be part of the second

phase of the negotiations.<sup>34</sup> This fragmented approach is evident from the fact that there was no concerted effort in choosing the priority sectors to address in the second phase of the negotiations; there were never any signs of a coherent and unified approach. A combined approach would have worked better both offensively and defensively speaking. In drafting the services requests, an important part of the process is an investigation into the offers made by the EU in terms of the Doha negotiations, and revised offers and CARIFORUM negotiations. This is a real demanding undertaking and identifying the gaps or areas for requests will therefore not be a simple task. Also, the sensitive industries of one country may differ from the next country and need to be identified by the whole region. It just makes more sense to arrive at a shared vision, by combining the scarce resources and local knowledge of the countries involved in the services and investment negotiations, especially if a country is negotiating with a resourceful and experienced partner such as the EU. Countries that are pursuing services negotiations in the context of the SADC EPA will have to urgently address this aspect.

Regarding the position of South Africa one must not forget the impact GATS Art. V can have on the process of services negotiations. If the EPA negotiations are expanded to include services, parties will also have to comply with the disciplines of GATS Art. V. This provision requires “substantial sectoral coverage” with regard to the number of sectors included, the modes of supply, and volume of trade affected. In the context of the CARIFORUM EPA, this threshold is currently being interpreted by the EU as between 65 percent and 75 percent - expressed in terms of the share of W/120 sectors subject to scheduled commitments - depending on the country’s level of development<sup>35</sup>.

Due to this high threshold calculation it would be very difficult for a country like South Africa to go beyond existing multilateral commitments to liberalise more services sectors in multiple services negotiations in the absence of a clear approach to services liberalisation. Once the threshold of liberalising 75 percent of its services sectors with a developed group like the EU has been reached, it would be hard to grant better liberalisation commitments to other countries in subsequent negotiations. South Africa will most likely grant similar concessions to subsequent negotiating partners but to negotiate two or more totally different sets of services liberalisation commitments will be almost impossible. Negotiations are still proceeding at the regional and multilateral level and South Africa could possibly lose some negotiating leverage and policy space if their services markets are already opened to a significant degree.

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<sup>34</sup> See section 3.c above.

<sup>35</sup> Sauve and Ward (2009).

#### **4. Guidelines for negotiations on services trade liberalization**

##### **a) Preparation for services negotiations**

Despite the number of challenges created by the EPA negotiating process, it has also brought certain benefits in the form of capacity strengthening and technical expertise for some governments. Countries interested in proceeding with negotiations with the EU, such as Botswana, Lesotho, Swaziland and Mozambique have undergone training workshops, seminars and conferences to help them get to grips with the fundamental services issues.

Although general services training and knowledge is no doubt useful, it is also necessary for each country to carefully assess the current environment in all their sectors: the applicable rules, the manner of regulation, the future strategy and the impact of liberalisation will differ radically from sector to another. So too will the approach of governments vary when addressing the same sectors in the different countries. The way in which services are traded, their international best practice rules, the request and offer process, and the drafting of services schedules are universally applicable to negotiating parties; but certain aspects such as the nature of the market including its conditions and potential, the competitive strengths of the industries operating in the market, the influence of state owned industries and parastatals, and the strategic policies of government are unique to each sector and country.

The focus should start to shift from the general understanding of services towards a more individual and customized approach fit for the development of the each of the sectors in a country.

Preparations at this stage of the negotiations revolve around the detailed knowledge of a country's services sectors; to submit an offer to another negotiating party the government must understand what is going on behind its own borders while requests rest on the ability of a government to identify the stakeholders which have an offensive interest in exporting services to the negotiating party.

##### **b) Behind the border issues (defensive interests)**

###### *GATS regulations*

To fully understand the framework within which services is traded domestically, a complete audit of the regulatory sources is necessary. The first source where information can be found regarding the regulation of services is in the GATS and its schedules. The GATS includes a

number of general obligations which member states must observe, but it also provides a framework for countries to make liberalisation commitments in specific services sectors and modes of supply. A large part of the legal frameworks for SADC and the SADC EPA is based on the GATS with similar obligations that apply. Therefore these schedules will naturally form a big part of the regional and bilateral negotiations and represent the baseline from which additional commitments are undertaken.

It is further crucial that the domestic legislation of a country is in line with the multilateral commitments made under the GATS. Recently, Botswana withdrew certain tourism regulations after realising their inconsistency with the country's GATS undertakings.<sup>36</sup> A review of the GATS schedules - to determine if the domestic law actually reflects the commitments made at the WTO - is necessary, particularly in the case of a country such as Lesotho. Despite its LDC status Lesotho made extensive initial commitments. (Lesotho only joined the Uruguay negotiations at a late stage after it was recognised that it would become more difficult to negotiate favourable terms of accession after the establishment of the WTO.)

Manduna (2005) argues that Lesotho faced considerable challenges in the services negotiations, not only in terms of technical and institutional capacity, and also in coordinating the various ministries, private sector and non-state actors. Manduna's research reveals that there was a lack of understanding on the technical aspects of scheduling while the responsible branch of government had limited capacity to deal with services negotiations. This has left Lesotho with a schedule of commitments containing some errors which in certain instances do not accurately reflect government policy. Before Lesotho participates in further services negotiations, it is crucial that its government undertake a process of domestic reform to align their domestic and international commitments; conflicting legislation will either have to be removed or the procedures of GATS Art. XXI must be invoked.<sup>37</sup>

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<sup>36</sup> Botswana promulgated a new set of tourism regulations in 2006 in which reservation was made for a number of tourist enterprises. The Botswana Tourism Regulations of 2006 stated in its Third Schedule that the following tourist enterprises are reserved for citizens of Botswana or companies wholly owned by citizens of Botswana: a) camping sites including caravan sites, b) guest houses, c) mekoro operations (canoe safaris), d) mobile safaris, e) motorboat safaris, and f) transportation. These reservations were, however, in conflict with the commitments made by Botswana in its GATS schedules. After the inconsistency was pointed out, Botswana removed the contradictory regulations in 2007.

<sup>37</sup> It is possible for countries to change schedules commitments already made at the multilateral level by following the procedures set out in GATS Art. XXI. According to the provision, a country wishing to modify or withdraw any commitments in its schedules can do so three years after the commitment entered into force. The country must notify its intention to change the commitment at least three months before implementing the change. This will give any WTO Member affected by the change an opportunity to identify itself as an affected Member, and to notify claims of interest for compensation. Countries will then enter into a consultation process to determine the necessary compensatory adjustments due to the affected country. Reaching an agreement on compensation is undoubtedly a critical aspect of the process but no explanation is provided on the nature of compensation or the manner in which it should be determined. The compensatory calculation is further complicated by a lack of historical precedents on the use of GATS Art. XXI. To date only two WTO

Perhaps also in the case of South Africa it might be necessary to do a similar review. Since the negotiation of its GATS schedule during the Uruguay Round, the country went through a radical political and economic transformation. A policy tool which has the potential to constitute an infringement of the national treatment principle is the equitable growth strategy of Black Economic Empowerment (BEE).

The enabling legislation allows various industries to issue guidelines and codes of good practice and use regulatory means, such as the balanced scorecard<sup>38</sup>, to achieve certain socio-economic objectives. However some multinationals may have global practices preventing them from complying with the ownership structure, in which case Equity Equivalent contributions<sup>39</sup> are recognised as a method for multinationals to satisfy BEE requirements in other ways than pure ownership transfers. It can be argued that if there is no need for foreign companies to conform to the BEE ownership requirements, there is indeed no national treatment violation.

The national treatment obligation requires a member state to accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment that is no less favourable than that it accords to own like services and service suppliers. Treatment is considered to be less favourable if it modifies the conditions of competition in favour of domestic services or service suppliers. The provision prohibits both *de jure* and *de facto* discriminatory measures. In this sense, foreign companies are actually accorded treatment 'more favourable' and not 'less favourable' than their domestic counterparts.

This latter situation must however be distinguished from the one found in Section 3 of the National Ports Regulations 2007 made under the National Ports Act 12 of 2005. In terms of this section, the National Ports<sup>40</sup> is the owner of the infrastructure and has the authority to enter into an agreement, contract, or partnership with a services supplier to perform certain services. Read together with relevant sections of the National Ports Authority Act 12 of 2005, the provisions mentioned above practically span all the services that can be provided at the

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Members have invoked the procedures of GATS Art. XXI. The EU submitted notifications to accommodate the harmonisation of the additional country schedules upon enlargement of the community, while the United States withdraw its GATS commitments made on gambling and betting services after a WTO dispute ruling in favour of Antigua.

<sup>38</sup> The balanced scorecard set out specific targets for equity ownership, management, procurement, and equality of employment in the case of 'historically disadvantaged individuals'.

<sup>39</sup> Recommended forms of Equity Equivalent contributions may include: enterprise creation programmes; programmes that promote social advancement; economic development programmes; projects aimed at technology transfer/diffusion within the small, medium and microenterprise sector of the local economy beyond the multinational's core business activities; programmes that promote economic growth and employment creation through the development of technological innovation beyond the multinational's core business activities; and initiatives that must lead to sustainable job creation.

<sup>40</sup> The National Ports is a division of Transnet which is fully owned by the South African government.



port terminal or facility. During the first four years of implementation 25 percent of these services are reserved for BEE compliant companies or persons, but after five years the allocation rises to 75 percent. A Level Four BEE Contributor must accumulate between 65 and 75 points when adding the scores achieved in ownership, management control, employment equity, skills development, preferential procurement, enterprise development and socioeconomic development. Enterprise development is only one component of the overall assessment and may accordingly exclude many multinationals from contending. If foreign suppliers are indeed excluded from tendering or participating on the basis of their composition, such BEE regulations have the potential to be discriminatory, if no equivalent rating for foreign suppliers is included<sup>41</sup>. At the moment, South Africa has not made any commitments in the maritime transport sector<sup>42</sup> meaning that it is free to introduce restrictions on foreign suppliers in this sector. However it is provisions such as these that restrict possibilities in making a liberalisation offer.

### *Domestic regulations*

Current realities and the conditions applicable in each of the sectors are however not accurately reflected in the GATS and its schedules. A complete regulatory audit should in addition to the GATS sources also consult the domestic regulatory framework to provide a clear picture of exactly what is happening behind the borders of each country. Unlike trade in goods, tariffs or duties are not applicable when services or suppliers enter a country. These are difficult - if not impossible - to impose on services; therefore barriers to trade in services are maintained through domestic laws and regulation. Liberalising trade in goods is a straightforward concept which involves the reduction of tariffs or duties, but the nature of services along with its unique domestic barriers, makes the liberalisation of a services sector quite different from what trade negotiators are used to.

So an important first step to determine the specific barriers applicable in a specific sector is to examine each piece of local legislation affecting trade in services, to establish whether it discriminates against foreign suppliers or denies market access in any way. Preparation of a full inventory of measures affecting all trade in services is necessary to cultivate a greater understanding and appreciation of the regulatory regime. All measures whether in the form of a law, regulation, rule, procedure, decision, administrative action or any other forms taken by central, regional or local governments and authorities, and non-governmental bodies in

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<sup>41</sup> See last paragraph of Section 3 of the National Ports Authority Regulations 2007: '...or an equivalent rating in terms of the Sector Code if any'.

<sup>42</sup> Services at the port will most likely fall under Maintenance and Repair of Vessels (CPC 8868), Pushing and Towing services (CPC 7214) or Supporting services for maritime transport (CPC 745).

the exercise of delegated powers must be reviewed in order to arrive at a clear portrayal of the examined sector. The policy documents will give one an idea of what path the government wishes to follow in each of the sectors while the domestic regulations would tell one how this policy approach has been implemented.

Some commentators argue that countries must develop a clear services strategy that must be incorporated into national development plans, before proceeding with negotiations. However considering the current approach of services negotiations in the region, it is unlikely that there will be enough time to do this.<sup>43</sup> If this is the case, the policy documents can provide a general idea or overview of a country's intention in the various sectors; clues that can help plot a negotiating strategy to develop the sector in line with those objectives. If for instance, a national development plan calls for the "increased citizen participation and involvement in the tourism industry" through the "promotion of local tourism ownership and entrepreneurship"<sup>44</sup>, this can provide an indication of what to address during the services negotiations. The government can then try to protect the sector against foreign competition or implement other measures to stimulate the development of a sector such as the provision of certain subsidies. Alternatively, the government can include targeted provisions in the regulatory framework of the services agreement, as the CARIFORUM has done in Art. 112, 113 and 115 of the CARIFORUM-EU EPA.<sup>45</sup> Although this is an over simplified example, it shows how policy objectives can be translated into negotiating positions.

When such an investigation is done into the domestic barriers, the focus should be on restrictions that deny the market access for foreign suppliers, or measures that discriminate against foreign suppliers once they are operating in a country. Other measures including qualification requirements and procedures, technical standards and licensing requirements and procedures, are typically not included in the schedules. Those measures (e.g. need to obtain a license, universal service obligations, need to obtain recognition of qualifications in regulated sectors, need to pass specific examinations, including language examinations, non-discriminatory requirement that certain activities may not be carried out in environmental protected zones or areas of particular historic and artistic interest), even if not listed, apply in any case to investors of the other party and should be kept in a national register. A complete audit of these measures is needed for negotiating harmonised regulations and mutual recognition agreements. Moreover, because all these measures apply to both the local and

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<sup>43</sup> Botswana, Lesotho and Swaziland are in the process of services negotiations with the SADC EPA member states, while it is expected that the SADC services negotiations will start in the near future.

<sup>44</sup> Example taken from the Botswana National Development Plan (NDP) 10

<sup>45</sup> Schloemann and Pitschas (2008). These provisions deal with the transfer of technology on a commercial basis (Art. 112); the participation of small and medium sized enterprises in the tourism sector (Art. 112); and the participation of CARIFORUM services suppliers in financing projects to support the sustainable development of tourism.

foreign investors, there is no need to schedule any of these, unless for instance the licensing requirements state that applicants need citizenship, a market access restrictions and must be listed in the schedule, provided that sector is committed. The measures of foremost importance are those denying market access of foreign suppliers (market access restrictions), or measures discriminating against foreign suppliers (national treatment restrictions).

It is advisable that all the identified restrictions are stored where they are easily accessible by officials dealing with trade in services. This will enable persons dealing with trade in services to be aware of the current services regime and what exactly the restrictions are in each sector. This ability to accurately store and administrate large amounts of regulatory information will become increasingly important over time, especially if countries are negotiating more than one services agreement. Commitments made with each of the configurations will differ so you need some kind of a system to administer this type of information which becomes more complex as you take on more negotiations. A robust system will provide a clear view what is the regulatory status quo in each of the sectors – and that is crucial to prepare the ground for further liberalisation. Due to the diverse nature and scope of the various services activities several stakeholders are involved in the regulation of trade in services. These would also include government agencies or ministries, sector regulators, professional bodies and regulatory authorities. It would therefore be very difficult for a central agency to administrate such a broad range of activities without effective coordination between those government agencies, or without having access to a central database reflecting the current conditions.

Typically this kind of information must be kept by the Enquiry Points established in terms of GATS Art. III: 4. In terms of the provision, each WTO member is required to establish such an enquiry point and notify it to the Council for Trade in Services. Of the SACU countries only South Africa and Namibia established these enquiry points that were notified to the Council. Similar enquiry points are envisioned in the SADC EPA<sup>46</sup> and SADC regional services negotiations which will have the objective to provide specific information to investors and services suppliers. However the effectiveness of these enquiry points can be questioned. One apparent challenge is that there is no capacity to maintain or update the enquiry points in many countries. Other challenges include the collection and storage of

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<sup>46</sup> The CARIFORUM – EU EPA already provides for such an Enquiry Point in Art. 25. Under the GATS services suppliers and investors did not have direct access to these points and had to channel requests through their governments. Now the private sector can also make use of this route which points to the trend that information are being made more accessible to the private sector. This can help investors and services suppliers to take maximum advantage of the increased liberalisation of the markets.

information, the dissemination of information, establishing linkages with the interested parties and updating the enquiry points with relevant and current information.

This exercise of identifying and determining the basic framework within which services are traded, is essential for a country to understand the restrictions and discriminatory measures applicable in each sector.<sup>47</sup> Governments must gather considerable knowledge of all their services industries before being able to formulate a sensible liberalisation offer in line with its regulatory framework and its national policy objectives. The process of identification will also reveal the degree of compatibility with the international commitments made under the GATS.<sup>48</sup> A number of countries have undertaken trade regulatory audits of their services industries in the context of the EPA, but it nevertheless remains an important task for the responsible department to undertake. This can help to highlight regulatory weaknesses and ensure the proper sequencing of services liberalisation. It can also improve officials' understanding of the regulatory environment affecting trade and services and build valuable capacity and expertise for the upcoming regional negotiations. This can further pave the way for more effective cooperation between government department and agencies and lay the foundation for regulatory impact assessments or benchmarking against international best practices.

### **c) Exporting services (offensive interests)**

Besides being intimately acquainted with the conditions that exist within a country's own services sectors, knowledge of the offensive interests in market of the negotiating partners is fundamental. Under a service request, a country will ask (request) negotiating partners to improve their services markets by removing or lessening regulatory measures which impairs access or operating conditions within the host country. This request should be based on the interests and strengths of a country making the request as well as on the degree of regulatory restrictions in the country to which the request is made. Therefore preparations will consist of two parts: i) the determination of the export capacity of domestic industries and ii) the identification of regulatory and other barriers in the markets of the negotiating parties.

Some developing countries regard the offensive analysis of lesser importance than defensive interests because of their inability to supply services competitively. This analysis is however crucial to secure market access and more favourable conditions for a country's

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<sup>47</sup> The basic framework can be supplemented by the relevant domestic regulations as mentioned in GATS Art. VI, but the process to identify such measures can be cumbersome.

<sup>48</sup> Particularly in the case of Lesotho – see section 4.b above

services suppliers; including the supply of cross border services under Mode 1 and the movement of natural persons under Mode 4. A critical element for the successful preparations of an offensive analysis is establishing and maintaining proper channels of communication with relevant stakeholders and ensuring that there are avenues for constructive engagement between these stakeholders and the government ministry responsible for the negotiating of trade in services. Typically trade negotiations are conducted by the relevant Ministry, which in SACU, is the respective Ministries of Trade and Industry. For bilateral negotiations, in particular the EPA process, a national negotiating task force has been established in each country to provide a forum where stakeholders can generate initial proposals and assist the government to formulate negotiating positions. Government officials of various ministries, private stakeholders, the business community, research institutions, civil society organisations and academia are all typically involved in the negotiating process.<sup>49</sup> It is this interaction between governments and stakeholders that will contribute to the effectiveness of a country's involvement in the process of trade in services negotiations.

In the area of trade negotiations, the responsibility of government is to negotiate favourable market access and conditions for the companies that do the actual trading. The ministry responsible for trade negotiations<sup>50</sup> is typically not familiar with the practical issues and challenges apparent in each of the services sectors. Particularly in the area of trade in services, activities are so diverse and specialised that it will be difficult for the responsible ministry to keep up to date with all the developments. Each sub-sector further has its own rules, standards, procedures, conditions and even associations to facilitate the regulation of the specific industry. A simple review of even one sub-sector will expose the differentiation and specialisation when compared to other sub-sectors; each of 160 plus sub-sectors is indeed a niche area with its own characteristics. For these reasons it is essential to seek the advice and support of stakeholders, and in particular that of the private sector. It is a good idea to identify the most prolific, innovative and successful services suppliers in each of the sectors already exporting services, or which would likely have the potential and interest to expand beyond the borders of its host country. These suppliers can be approached in order

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<sup>49</sup> At regional level a three tier structure exists to streamline the EPA negotiations. The EPA Negotiating Forum (ENF) is the first level in this structure and comprises directors of the different SADC EPA member states. The ENF meets regularly to discuss negotiating positions and formulate strategies. Decisions taken at ENF level are presented to the next level in the negotiating structure, namely the Senior Officials. The Senior Officials are the Permanent Secretaries (usually of the Ministry of Trade and Industry) of each member state and the Brussels based ambassadors. The Senior Officials, in turn, report to the respective Ministers of Trade who are at the apex of the negotiating structure. Decisions made at the highest level should in turn reflect the positions articulated by the rest of the negotiating structure. Of course where countries are engaged in regional negotiations amongst each other, such as in SADC, the three tier structure at regional level will fall away.

<sup>50</sup> In the case of the SACU member states, the Ministries of Trade and Industry is responsible, except in the case of Swaziland where the Ministry of Foreign Affairs and Trade is the responsible department.

to articulate an offensive sector specific strategy that can feed into the overall strategy of the government. Most importantly, these private sector firms would be best placed to recognize potential export opportunities, identify existing barriers or challenges to trade and advise the ministry on the technicalities and issues peculiar to each industry.

For the engagement to be constructive and continuous, it is necessary for the consultations with the private sector to be a collaborative process, meaning the government must be more transparent by sharing the significance and progress of the negotiations with the participants. This collaborative process would likely entail information seminars to inform the private sector participants of the reasons behind the negotiations, the objectives government wishes to achieve, the consequences of liberalisation and the kind of support and the kind of support required from the private sector. The interaction could also include regular updates on the negotiating progress and any planned activities.

If a concerted effort is made to consistently involve the private sector in the process, the support given would be more valuable and arguably more targeted towards the pertinent issues. The fact remains that the input of the private sector is particularly crucial in drafting a services request due to the diverse and unique nature of the services sectors.

If there is no capacity or potential in a given sector to competitively export services then it is no use to request the liberalisation of that sector. The sectors or sub-sectors with the most potential should be targeted and this can only be done if the government has a clear idea of the strength and prospects of the suppliers operating in the respective sectors.

Other stakeholders, including the various government departments, government agencies, national bodies, regulators, labour and academia are also well placed to make meaningful contributions in the negotiating process. These stakeholders are aware of the operating conditions and applicable rules in each of the sectors and can provide valuable advice and input on issues such as relevant data, the current environment and future plans. The wider the range of input from the relevant stakeholders, the better chance a government has to formulate a complete and well informed strategy.

In May 2010 the government of Botswana held a preparatory workshop with the view to build capacity to develop draft request and offers in the context of the SADC EPA services negotiations. Participants to the workshop included government officials, parastatals, non-state actors, regulators and professional associations. The objective was to equip participants with the necessary knowledge and expertise in assessing the offensive and defensive positions of Botswana by simulating the drafting of requests and offers to the EU. The workshop focussed on the negotiating process in general to ensure the stakeholders

had a common understanding of the liberalisation of trade in services along with its impact and consequences. Most importantly, these stakeholders identified their various areas of interest which was then translated into draft requests and offers to the EU. The approach was to create dedicated working groups to focus on the sectors identified by the Botswana government as priority sectors: finance, telecommunications, tourism and the cross-cutting area of movement of natural persons (Mode 4). Stakeholders had the opportunity to discuss the market structure, the quality and availability of the services, the regulatory principles, key offensive interests and development needs in each of the priority areas. This background information enabled participants to formulate appropriate offers and requests as well as to identify the required development support, cooperation and technical assistance. The workshop and outcome illustrated how stakeholders can share and disseminate information to benefit and contribute to the process of services negotiations. A preparatory meeting such as this can support the constructive engagement between a government and its stakeholders by proposing a framework of issues to be addressed and providing the necessary technical assistance to place these in the context of the negotiations.

To put together an informed and effective request, a country must also be aware of the status quo existing in the services markets of the negotiating party. Nothing prevents a country from requesting sweeping changes in all sectors, but in practice it is advisable to rather target the areas in which countries have the capacity and potential to excel. The outcome of stakeholders' consultation will therefore feed into the formulation of the request which must be combined with the conditions existing in the target market.

In the case of the EPA services negotiations, the GATS commitments undertaken during the Uruguay Round is the baseline from which requests and offers are constructed. The EU has further stated that the revised offers in terms of the ongoing multilateral negotiations are also part of the baseline, but in regional negotiations this is unrealistic since these are only conditional initial offers. Furthermore only South Africa and Mauritius took part in these ongoing negotiations which would effectively place them at a disadvantage if this would be utilised in regional services negotiations. Therefore the original GATS commitments should form the baseline when negotiating a services chapter. This exercise will be easier in some negotiations than others; African countries in general have made fewer commitments but when dealing with a configuration of 27 countries like the EU this can be a laborious task. The commitments made by all 27 EU countries will have to be examined to before a sensible request can be completed. This will also reveal to which extent the sectors and modes are already liberalised. Because this is such a massive task, it is recommended that all African configurations tackle this exercise of identifying the regulatory commitments under the GATS jointly.

Besides the multilateral commitments, countries must also address other barriers to services trade that are experienced in the target market when formulating the request. As stated before the diversity, specialisation and unique nature of each sub-sector makes it hard to obtain detailed information on barriers affecting services trade. Here a practical approach is required in order to identify the barriers in addition to the regulatory barriers, firms are facing when exporting services. Again it is the firms doing the trading, so they will be best placed to point out and advise on the practical challenges hindering effective trading. Measures to address these concerns can be included in the text of the services chapter. For example, in the CARIFORUM EPA, the EC proposed the inclusion of specific disciplines on several sectors of interest, namely: E-commerce; courier services; telecommunications; financial services; and maritime transport. In turn CARIFORUM negotiators insisted that tourism receive specific treatment given the economic importance of the sector to region, and subsequently a chapter dealing exclusively with tourism was included in the text of the CARIFORUM EPA. The most prominent obligation (de facto the responsibility of the EU) inserted into the regulatory framework of the text was the prevention of anti-competitive practices by tourism suppliers operating abroad. This obligation - which was included on the insistence of the CARIFORUM States - has the potential to improve the trading conditions for local suppliers, due to the power of vertically integrated European suppliers which can exert significant anti-competitive practices.<sup>51</sup> This dimension further emphasises the fundamental role clear and established communication channels between government and stakeholders fulfil.

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<sup>51</sup> Schloemann and Pitschas (2008).



## 5. Conclusion

Although this paper might seem to focus on the basics, a solid understanding of trade in services remains critical to place the negotiations and discussions in context. Such improved understanding is particularly important for the trade officials in the ministry leading the negotiations, because they will ultimately be responsible to articulate and incorporate a country's services liberalisation strategy. As part the preparations officials must understand what was agreed and undertaken during the GATS negotiations. Any services chapter will largely be based on the GATS and same approach will be followed when drafting the services schedules for a regional or bilateral agreement. What was committed in the schedules are legally binding obligations and governments must ensure that these are accurately reflected in their domestic laws. The multilateral dimension stays relevant because this is the baseline from which countries will negotiate additional services liberalisation commitments in future negotiations. For that reason, the GATS commitments made by the negotiating partner to which a services request is directed, must also be reviewed and analysed in order to determine the opportunities available for further liberalisation. From the onset of the negotiations, it is vital to observe and promote the disciplines set out in GATS Art. V. Due to the uncertainty and lack of clarity and experience in interpreting the provisions of the article, it is recommend that countries agree on the precise threshold of liberalisation, including the allotted flexibility for the lesser developed countries, at the start of the negotiations.

On the domestic front, officials require detailed knowledge and understanding of their country's services sectors. A good point of departure is to know exactly what is covered by the sectors and sub-sectors and where the domestic services suppliers fit into the classification. This will allow for the preparation of a full inventory of measures affecting trade in the different sectors, an analysis which will cultivate a greater appreciation and understanding of the regulatory regime in a country. It is advisable that these identified measures are stored where it can easily be accessed and updated by the responsible officials. This ability to accurately store and administer large amounts of regulatory information will become increasingly important over time, particularly if countries are involved in multiple services agreements. A robust database can provide the regulatory status quo in each of the sub-sectors and be instrumental in preparing the ground for further liberalisation. Such a system can also support the creation and advancement of services enquiry points, as required by GATS Art. III: 4. The diverse nature and specialisation involved in each of the services sectors and activities, makes it a complex task for the government to tackle

alone. Therefore the support of the stakeholders affected by services negotiations is a key aspect of the preparations. Their input can help to recognize potential export opportunities, identify existing barriers to services trade, as well as advise the government on issues unique to each sector. This communication channel can however not be a one way street and governments have to establish a collaborative process in order for the engagement to be constructive.

For many countries in the region the process of liberalising trade in services through trade negotiations is a novel experience. Trade in services, has in part, been addressed during the EPA negotiating process and this has enabled some governments to strengthen their capacity and technical expertise and generally come to grips with the fundamental issues involved in services negotiations. Some SACU member states – those that already signed the interim EPA - are more firmly bound the process of services negotiations. The signing of the interim EPA has created certain obligations for them, one of which is to go ahead with the process and negotiate a services chapter. It is difficult to predict how this process will unfold and what will be agreed, but this has arguably signaled the beginning of regional and bilateral services negotiations in southern Africa. The process in eastern Africa is already underway while SADC member states are inching closer to approve the SADC Protocol on Trade in Services. It is inevitable that all countries are sooner rather than later going to be involved in services negotiations. Moreover, it is likely that countries will negotiate on several levels – regional, bilateral, multilateral and perhaps even supra-regional in the context of the Tripartite agreement. Laying a solid foundation in the form of thorough preparations, accurate knowledge and improved understanding will become indispensable for countries wanting to successfully negotiate services.

## 6. References:

Kruger, P. 2007. Trade in services: The GATS in the SADC EPA context. Training Brief. Tralac. Stellenbosch

Kruger, P. 2009. Tourism liberalisation in southern and eastern Africa. Available. [Online] [http://www.kas.de/upload/auslandshomepages/namibia/MRI2009/MRI2009\\_07\\_Kruger.pdf](http://www.kas.de/upload/auslandshomepages/namibia/MRI2009/MRI2009_07_Kruger.pdf)

Manduna, C. 2005. The challenges facing Least Developed Countries in the GATS negotiations: A case study of Lesotho. Available. [Online]. [https://www.givengain.com/unique/tralac/pdf/20051206\\_mandunawp8.pdf](https://www.givengain.com/unique/tralac/pdf/20051206_mandunawp8.pdf)

Roy, M. 2009. Endowments, power and democracy: Political economy of multilateral commitments on trade in services. World Trade Organisation, Staff Working paper ERSD-2009-07

Sauve, P and Ward, M. 2009. The EC – CARIFORUM Economic Partnership Agreement: Assessing the outcome of services and investment. Available. [Online]. [http://ctrc.sice.oas.org/trc/Articles/EC-CARIFORUM\\_EconomicPartnershipAgreement.pdf](http://ctrc.sice.oas.org/trc/Articles/EC-CARIFORUM_EconomicPartnershipAgreement.pdf)

Schloemann, H. and Pitschas, C. 2008. Cutting the regulatory edge? Services regulation disciplines in the CARIFORUM-EU Economic Partnership Agreement. Available. [Online]. <http://www.gtz.de/en/dokumente/en-epa-cutting-the-regulatory-edge-2008.pdf>

Spicer, M and Godsell, B. 2010. Zuma's vision can be realised if we focus on the nitty-gritty of growth. *Business Day*, 23 November 2010, p.13.

Togan, Subidey. 2011. Services trade and Doha. Available. [Online]. <http://www.voxeu.org/index.php?q=node/6309>

## 7. Annexure A: An introduction to the GATS

The General Agreement on Trade in Services (GATS) is the first multilateral agreement to cover trade in services and its creation was one of the major achievements of the Uruguay Round of trade negotiations (1986-1993). The GATS establishes rules and disciplines to regulate the international trade of services, thereby extending the coverage of the multilateral trading system to also include trade in services.

The GATS basically consist of two main elements: a) a set of general concepts, principles and rules that automatically apply across the board to measure affecting trade in services; and b) specific commitments on market access and national treatment. These specific commitments are legal obligations undertaken by the individual member states concerning the level of market access permitted to foreign services suppliers and the conditions under which they are allowed to operate domestically. Specific commitments are recorded in the national schedules of each member state on a sector-by sector-basis and only bind the countries to the extent that they have committed themselves.

As part of the Uruguay Round of negotiations, SACU member states negotiated these 'schedules of specific commitments' and annexed them to the GATS to form an integral element of the framework. These GATS schedules reflect a positive list approach where members list only the commitments they are willing to undertake. The GATS provides a sector-based system for classification of services for the purpose of structuring the commitments of member states. The system, which is known as the W120 classification system, comprises the following twelve (12) core services sectors:

- Business;
- Communication;
- Construction and Engineering;
- Distribution;
- Education;
- Environment;
- Financial;
- Health;
- Tourism and Travel;
- Recreation, Cultural, and Sporting;
- Transport; and
- Other.

These sectors are further subdivided into a total of some 160 sub-sectors. In each sub-sector the commitments are entered into the schedules according to the four modes of supply as listed in GATS Art. I.

The four modes of supply are as follows:

- Cross border supply (**Mode 1**): Services supplied from the territory of one member state across the border into the territory of another member state. Presently, cross-border services are increasingly delivered through electronic means.
- Consumption abroad (**Mode 2**): The resident moves abroad to consume services in the territory of another member state. It doesn't necessarily need to be the consumer who moves – it can also be the property of the consumer that moves.
- Commercial presence (**Mode 3**): Foreign suppliers establish an operation in the territory of another member state. This can be done through a number of means, for example establishing a local affiliate, subsidiary, or representative office.

- Movement of natural persons (**Mode 4**): The entry and temporary stay of residents moving from one member state into another. The length of stay usually depends on the type of work and the level of skill.

When making a commitment the government therefore binds the specified level of market access and national treatment and undertakes not to impose any new measures that would restrict entry into the market or the operation of the service. For each service sector or sub-sector that is offered, the schedule must indicate, with respect to each of the four modes of supply, any limitations on market access or national treatment which are to be maintained.

Below is an extract from South Africa's GATS schedule<sup>52</sup>. This part only refers to domestic legal services as a sub-sector of Business services. A schedule typically contains a column each on market access and national treatment in which the commitments made in the relevant sub-sector will be indicated. The numbers listed in the schedule refers to the four modes of supply.

1. Business Services	Limitations on Market Access	Limitations on National Treatment
A. Professional Services:	1) Unbound	1) Unbound
a) Legal Services – domestic law only (CPC 861+)	2) Unbound	2) Unbound
	3) An advocate is not allowed to form a partnership / company	3) None
	4) Unbound except as indicated in the horizontal section	4) Unbound except as indicated in the horizontal section

Commitments can range from 'Unbound' to 'None' for any individual mode of supply in any given sector / sub-sector. If a country decides that there are no limitations or restrictions in a certain mode of supply, the entry will read 'None'. Considering South Africa's schedule, there are accordingly no national treatment restrictions when referring to the establishment of a commercial legal services provider (Mode 3) in the country. The Guide to reading GATS schedules<sup>53</sup> confirms that "*all commitments in a schedule are bound unless otherwise specified*". The market access column in Mode 3 accordingly indicates that there is only one market access restriction to consider when establishing a commercial presence – *an advocate can not form a partnership or company*. Note that if a service sector is omitted from a schedule, that country has no obligations on market access and national treatment in that specific sector that was left out. This means that the country is then free to introduce new measures to restrict entry into the market or the operation of services within the country.

If a government enters the word 'Unbound' in its schedule, it wishes to remain free in that given sector and mode of supply. This means that a country can introduce or maintain measures inconsistent with market access or national treatment in the sub-sector where the government indicated 'Unbound'. In this case, South Africa can impose measures inconsistent with market access or national treatment in Mode 1 and 2 when providing domestic legal services.

<sup>52</sup> South Africa's schedule can be viewed at [http://www.wto.org/english/tratop\\_e/serv\\_e/serv\\_commitments\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/serv_commitments_e.htm)

<sup>53</sup> [http://www.wto.org/english/tratop\\_e/serv\\_e/guide1\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/guide1_e.htm)

In relation to market access, South Africa is allowed to place the following restrictions on foreign companies<sup>54</sup>:

- Restrictions on the number of service suppliers;
- Restrictions on the total value of service transactions or assets;
- Restrictions on the total number of service operations or the total quantity of service output;
- Restrictions on the number of natural persons that may be employed in a particular;
- Measures that restrict or require supply of the service through specific types of legal entity or joint venture; and
- Percentage restrictions on the participation of foreign capital, or restrictions on the total value of foreign investment.

The Guidelines for scheduling specific commitments under the GATS<sup>55</sup> contain some examples of limitations to national treatment made by countries, and gives an indication of what countries assume to be inconsistent with national treatment. This list is only illustrative and by no means exhaustive:

- Eligibility for subsidies reserved to nationals;
- Higher license fees charged for non-residents;
- Agents or managers must be citizens;
- Residency requirement for managers and the members of the board of directors of a company;
- Condition of licenses is one year previous residency;
- Foreign companies are required to have a registered office in the country;
- The foreign service supplier must prove commitment to recruit and develop more local human resources; and
- Foreign services suppliers are required to offer on-the-job training for national employees<sup>56</sup>.

Entries in Mode 4 frequently read 'Unbound except as indicated in the horizontal section'. Besides specific commitments, Member States can also stipulate horizontal limitations which are commitments that apply across the entire range of the scheduled services sectors. Examples of horizontal commitments can include: application across sectors; flexibility of commitments; categories of stay of natural persons; durations of stay for natural persons; and, conditions of entry, requirements and compliance by natural persons<sup>57</sup>. Horizontal commitments are generally referenced in the sub-sectors; theoretically speaking it is not necessary to include the words, '*except as indicated in the horizontal section*' since horizontal commitments automatically apply to all services listed in that country's schedule. These commitments can be found at the beginning of a country's schedule.

Even with the existence of country schedules, the regulatory nature of trade barriers in services makes it difficult to identify the prevailing conditions in each sector. Trade barriers found in the form of trade in goods are difficult if not impossible to impose on services; therefore barriers to trade in services are maintained through domestic laws and regulation. To further determine the specific domestic restrictions applicable in an unbound sector, each

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<sup>54</sup> GATS Art. XVI (2)

<sup>55</sup> [http://www.wto.org/english/tratop\\_e/serv\\_e/sl92.doc](http://www.wto.org/english/tratop_e/serv_e/sl92.doc) Guidelines for scheduling specific commitments under GATS

<sup>56</sup> [http://www.wto.org/english/tratop\\_e/serv\\_e/sl92.doc](http://www.wto.org/english/tratop_e/serv_e/sl92.doc) Guidelines for scheduling specific commitments under GATS

<sup>57</sup> [http://www.acci.asn.au/text\\_files/trade\\_international/GATS%20-%20Movement%20of%20Natural%20Persons.pdf](http://www.acci.asn.au/text_files/trade_international/GATS%20-%20Movement%20of%20Natural%20Persons.pdf)

piece of legislation in that sector needs to be examined to establish whether it discriminates against foreign suppliers or denies market access in any way. This illustrates just how complicated it is to determine the current barriers in each sector of a specific country. Although the ultimate aim of liberalisation is the reduction of barriers and a freer services trade, a related objective is to increase the transparency of laws and regulations that affect the trading of services.

**Source: Adapted from Kruger (2007)**

## 8. Annexure B: Members of Business Leadership South Africa

ABSA Group Limited	Industrial Development Corporation of SA Limited	Sanlam
Adcorp Holdings Limited	Investec Bank Limited	Sappi Limited
African Oxygen Limited	Izingwe Capital (Pty) Limited	Sasol Limited
African Rainbow Minerals Limited	Jay and Jayendra (Pty) Limited	Shell South Africa Energy (Pty) Limited
Alexander Forbes	JD Group Limited	Standard Bank Group Ltd
Anglo American SA Limited	JSE Limited	Standard Chartered Bank South Africa
Anglogold Ashanti Limited	KPMG	Stanlib Limited
Anglo Platinum Limited	Kumba Iron Ore (Pty) Limited	TATA Africa Holdings SA (Pty) Ltd
ArcelorMittal South Africa	Liberty Life Limited	Telkom SA Limited
Areva	Lonmin Plc	The Aveng Group
BHP Billiton SA Limited	Massmart Holdings Limited	The Bidvest Group Limited
Barloworld Limited	Media24 Limited	The South African Breweries limited
BMW SA (Pty) Limited	Mercedes-Benz of South Africa (Pty) Limited	The Tongaat-Hulett Group Limited
BP Southern Africa (Pty) Limited	Mitsubishi Corporation	Tiger Brands Limited
British American Tobacco Company	Mitsui and Co Europe PLC	Total South Africa
Deloitte	MMI Holdings Limited	Transnet Limited
Dimension Data Holdings plc	Mondi Limited	Tsogo Sun Group (Pty) Limited
Discovery Holdings	MTN Group Limited	Unilever SA (Pty) Limited
Edgars Consolidated Stores Limited	MultiChoice South Africa	Vodacom Group
Engen Petroleum Limited	Murray & Roberts Holdings Limited	Volkswagen of SA (Pty) Limited
Ernst and Young	Nampak Limited	Woolworths
Ernest Oppenheimer & Son (Pty) Limited	Nedbank Limited	Xstrata South Africa
Eskom Holdings Limited	Nestle South Africa	ZICO
Exxaro Resources Limited	Old Mutual Assurance Co. South Africa Ltd	
Freeworld Coatings Limited	PG Group (Pty) Limited	
FirstRand Bank Limited	Pick n Pay Group	
Gold Fields Limited	Public Investment Corporation	
Goldman Sachs International	Remgro Limited	
Hollard Group	Reunert Limited	
Impala Platinum Limited	Rio Tinto	
Imperial Holdings Limited	Safika Holdings (Pty) Limited	

Source: Business Leadership South Africa, [www.businessleadership.org.za](http://www.businessleadership.org.za)