

**The General Agreement on Trade in Services (GATS) and Energy Services  
Liberalisation in the Southern African Development Community  
(SADC): Issues and Prospects**

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**A research paper submitted in the Faculty of Law at University of the Western Cape, in  
partial fulfilment of the requirements for the degree of Master of Philosophy (MPhil) in  
International Trade and Investment Law**

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**June 2011**

## DECLARATION

I declare that, *The General Agreement of Trade in Services (GATS) and Energy Services Liberalisation in the Southern African Development Community (SADC): Issues and Prospects*, is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Taapano Paradza

Signed: ..... June 2011



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## **DEDICATION**

To my mother:

Rashiwe Makani



## LIST OF ABBREVIATIONS

BBBEE	Broad Based Black Economic Empowerment
BBL/D	Million Barrels Per Day
BCM	Billion Cubic Meters
CPC	Central Product Classification
DDA	Doha Development Agenda
DRC	Democratic Republic of Congo
EC	European Communities
FDI	Foreign Direct Investment
GATS	General Agreement on Trade in Services
GATT	General Agreement on Trade and Tariffs
IPP	Independent Power Producers
MFN	Most Favoured Nation
MDG	Millennium Development Goals
MW	Megawatts
NT	National Treatment
RERA	Regional Electricity Regulatory Association
SADC	Southern African Development Community
SAPP	Southern African Power Pool
STEM	Short Term Electricity Market
TPA	Third Party Access
UNCTAD	United Nations Conference on Trade and Development
US	United States
WTO	World Trade Organisation

## KEY WORDS

GATS

GATT

Regional Trade

WTO

SADC

Doha Negotiations

Energy Services

Liberalisation

Services Trade

Southern African Power Pool



## CONTENTS

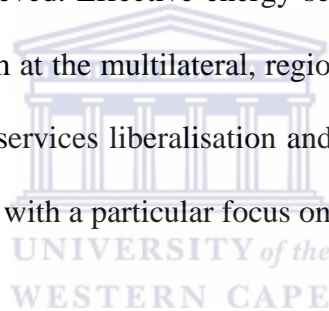
Declaration	i	
Acknowledgement	ii	
Dedication	iii	
List of Abbreviations	iv	
Key Words	v	
Contents	vi	
Abstract	viii	
<b>CHAPTER 1</b>	<b>INTRODUCTION AND BACKGROUND</b>	<b>1</b>
1.1	Introduction and Background	1
1.2	Problem Statement	2
1.3	Aims of research	3
1.4	Significance of Research	4
1.5	Methodology	5
1.6	Overview of Chapters	5
<b>CHAPTER 2</b>	<b>BRIEF OVERVIEW OF THE SADC ENERGY RESOURCES</b>	<b>7</b>
2.1	Introduction	7
2.2	Primary Energy Resources	7
2.2.1	Coal	7
2.2.2	Natural Gas	9
2.2.3	Hydro Power	11
2.2.4	Oil	12
2.2.5	Uranium	13
2.2.6	Renewable energies	13
2.3	Conclusion	14
<b>CHAPTER 3</b>	<b>MULTILATERAL, REGIONAL, BILATERAL BARRIERS TO ENERGY SERVICES LIBERALISATION AND TRADE</b>	<b>15</b>
3.1	Introduction	15
3.2	Energy Services at the Multilateral Level	16
3.2.1	The GATS and its Importance	16
3.2.2	Scope of the GATS	16
3.2.3	The GATS Modes of Supply	18
3.3	GATS Weaknesses	19

3.3.1	Treatment of Energy Services in the GATS	19
3.3.2	Lack of Clarity on Important Sub-sectors— Electricity	22
3.3.3	Flexibility and Safeguards	24
3.3.4	Absence of Energy Services Specific Rules	26
3.4	Energy Services at the Bi-lateral Level	27
3.4.1	Barriers to Cross-Border Supply	27
3.4.2	Challenges to Electricity Trading in the Southern African Power Pool (SAPP)	29
3.4.3	Barriers to Commercial Presence (Mode 3)	31
3.4.4	Barriers to Temporary Movement (Mode 4)	36
3.5	Conclusion	37
<b>CHAPTER 4</b>	<b>THE DOHA DEVELOPMENT AGENDA AND ENERGY SERVICES</b>	<b>39</b>
4.1	Introduction	39
4.2	The United States Proposal	40
4.2.1	Suggested Classification of Energy Services	42
4.3	The European Communities Proposal	43
4.3.1	Suggested Classification of Energy Services	45
4.4	The Venezuelan Proposal	46
4.4.1	Suggested Classification of Energy Services	47
4.5	The Indonesian Proposal	48
4.5.1	Suggested Classification of Energy Services	49
4.6	The Cuban Proposal	49
4.7	Common Elements of the Five Proposals	50
4.8	An Evaluation of the Proposals	51
4.9	Implications for SADC Countries	53
4.10	Conclusion	54
<b>CHAPTER 5</b>	<b>RECOMMENDATIONS AND CONCLUSIONS</b>	<b>55</b>
5.1	Introduction	55
5.2	Conclusion	59
	<b>BIBLIOGRAPHY</b>	<b>60</b>



## ABSTRACT

Increasing energy needs globally have recently led to an interest in effectively bringing energy services in the trading system. Energy services were part of the Uruguay Round of negotiations, whose main achievement was the General Agreement on Trade in Services (GATS). The objective of the GATS is to achieve progressive liberalisation and reduction or elimination of trade barriers of all services sectors, including energy services. The GATS has made commendable progress in liberalising many service sectors, however it has not made meaningful progress with energy services. Furthermore though the SADC region engages in energy services trade through bilateral and regional agreements, a variety of barriers inhibit major successes from being achieved. Effective energy services trade and liberalisation has therefore proved problematic both at the multilateral, regional and bilateral level. This study, seeks to investigate why energy services liberalisation and trade at the multilateral, regional and bilateral level is problematic, with a particular focus on the SADC region.



# CHAPTER 1

## INTRODUCTION AND BACKGROUND

### 1.1 Introduction and Background

Energy plays a critical role in all national economies globally. The provision of affordable, adequate and reliable energy is essential for economic welfare, eradication of poverty, infrastructure development, commerce, communication, transport, and other economic activities. Energy is broadly classified into primary and secondary energy. Primary energy is contained in raw fossil fuels, such as, coal, oil, and natural gas. Secondary energy is the useable form to which primary energy can be converted, for example, electricity from gas or coal. Energy is also either renewable (solar, wind, biomass, tidal, geothermal, and hydro) or non-renewable (coal, oil, gas, nuclear).<sup>1</sup>

There is a further distinction between energy products and energy services. Energy products consist of easily traded and stored products, such as, natural gas, oil, and solid fuels. These fall under the scope of the General Agreement on Trade and Tariffs (GATT). Energy services are those services involved in the exploration, development, extraction, transportation, transmission, distribution, marketing, consumption, trade, and management of energy, energy products, and fuels.<sup>2</sup> These services fall under the General Agreement on Trade in Services (GATS), and are the focus of this research. Exploration include services, such as, geological and geophysical services, energy auditing, power demand forecasting and environmental impact assessment services among others. Transmission and distribution services include customer metering, billing, and collection, maintenance and repair, installation, and

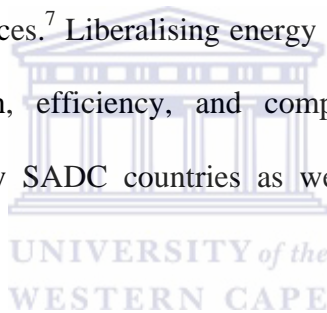
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<sup>1</sup> Mukherjee, Goswami (2009) *Trade In Energy Services: GATS and India* Indian Council for International Research Working Paper No. 321 <<http://www.icrier.org/pdf/WorkingPaper231.pdf>> [Accessed 1 April 2010]

<sup>2</sup> Eberhard (2003) *GATS Energy Services Negotiations and Energy Market Regulation and Liberalisation in South Africa* Trade and Industrial Policy Strategies Working Paper 9 <<http://www.tips.org.za/node/253>> [Accessed 1 April 2010]

upgrading activities among others.<sup>3</sup> Energy trade and management consist of, among others, energy trading, brokering, and energy management. Other emerging services include those related to greenhouse gas emissions reductions and trading of emission rights.<sup>4</sup>

Despite the importance of energy, the Southern African Development Community (SADC)<sup>5</sup> countries continue to face ever increasing costs of energy, energy shortages, unreliable supply, and domination of the energy services sector by state enterprises. According to Lwanda, the failure to achieve high energy access rates is because energy planning and service provisions in Africa have been limited to the nation state.<sup>6</sup> Due to the capital intensive nature of the energy industry state enterprises in the SADC do not have adequate finances to invest in energy services.<sup>7</sup> Liberalising energy services successfully will result in foreign investment, competition, efficiency, and competitiveness. Unfortunately these benefits continue to elude many SADC countries as well as other developing countries globally.



## 1.2 Problem Statement

Attempts to liberalise<sup>8</sup> energy services at the multilateral level under the World Trade Organisation (WTO) were negotiated during the Uruguay Round<sup>9</sup> which resulted in the GATS. Its main objective was to achieve progressive liberalisation of services through a set of multilateral rules. Energy services are one of the service sectors covered under the GATS.

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<sup>3</sup> Evans (2000) *'Liberalising Global Trade in Energy Services'*

<sup>4</sup> United Nations Conference on Trade and Development (2003) *'Managing Request Offers Under The GATS: The Case of Energy Services'* Document UNCTAD/DITC/TNCD/2003/5

<sup>5</sup> SADC is made up of 15 countries, which are, Angola, Botswana, DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, Zimbabwe

<sup>6</sup> Lwanda 'Prioritising Energy Security in Southern Africa' (2009) 8 (1) *South African Journal of International Affairs* 3

<sup>7</sup> WTO Council for Trade in Services (2010) *'Energy Services Background Note'* Document S/C/W311

<sup>8</sup> Liberalisation means removing, or at least reducing, barriers to trade.

<sup>9</sup> The Uruguay Round of Multilateral Trade Negotiations, usually simply referred to as the 'Uruguay Round' took place between 1986 and 1994 among signatories of the original GATT. It led to the creation in 1995 of the WTO, the institution dealing with international trade issues.

Though the GATS managed to achieve commendable progress in liberalising many service sectors, such as, the financial services and telecommunications sector, the energy services industry has not achieved meaningful liberalisation.

The GATS in general has had limited success in liberalising energy services.<sup>10</sup> In other words, the multilateral rules have not succeeded in making WTO members, especially developing countries; open up their markets to private investment at the global level. As a result of a lack of adequate investment in energy services, SADC countries are experiencing energy shortages, especially of electricity. This poses a serious challenge, because this can hamper regional economic growth and development. As a regional grouping SADC is engaging in energy services liberalisation and trade at the regional level and on a bilateral level. However, this has still not resulted in successful liberalisation and trade in energy services. This study, therefore, seeks to investigate why energy services liberalisation and trade at the multilateral, regional and bilateral level has proved problematic, focusing on the SADC region.

### **1.3 Aims of the Research**

The aims of this research are:

1. To investigate why the GATS has achieved a minimal level of energy services liberalisation in developing countries, especially in the SADC region.
2. To explore the domestic and external regulatory barriers impeding energy services liberalisation
3. To investigate the prospects of further liberalisation of energy services in the ongoing Doha negotiations, and how this is likely to impact on the energy sector in the SADC.

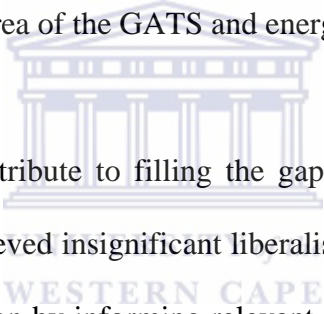
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<sup>10</sup> Nag, Biswajit, Debdeep 'Services in Regional Trade Agreements: Implications for India' (2008)2 *Energy Journal* 16

4. To show current and future energy services liberalisation plans at the regional level, SADC.

#### 1.4 Significance of the Research

Research specifically focusing on energy services liberalisation at both the multilateral and regional level is limited. Services trade has often been seen as less important and, therefore, remains under-researched.<sup>11</sup> For example, research into private energy service providers in Southern Africa is needed to obtain an understanding of the kinds of barriers they face in foreign countries.<sup>12</sup> Little research has been done on the political economy of services trade.<sup>13</sup> Past research has focused mainly on energy products which fall under the GATT. Various gaps still exist, especially in the area of the GATS and energy services



The research will, therefore, contribute to filling the gap as regards why energy services, given their importance, have achieved insignificant liberalisation in the SADC. The research will make a significant contribution by informing relevant stakeholders, such as, government and its energy regulatory agencies, non-governmental agencies, and regional trade organisations on how liberalising energy services can make a positive impact on the regional economy, since energy services impact on the overall cost of energy and the overall cost structure of all the SADC economies. Furthermore, energy services are key to economic growth and development and should, therefore, receive more attention.<sup>14</sup>

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<sup>11</sup> Trade and Industrial Policy Strategies (2009) '*SADC Trade: Services Sector Liberalisation*'

<sup>12</sup> Eberhard (2003) '*GATS Energy Services Negotiations, Energy Market Regulation and Liberalisation in South Africa*' Trade and Industrial Policy Strategy Working Paper 9

<sup>13</sup> Hoekman (2006) '*Liberalising Trade in Services: A Survey*' World Bank Working Paper 4030

<sup>14</sup> Okelo (2006) '*General Agreement on Trade in Services: A Case for Energy Services in Kenya*' Working Paper 2006

Energy services liberalisation is an important area under negotiation in the Doha Round.<sup>15</sup> Therefore, it is an area of current interest. This research will, therefore, provide an insight into possible negotiating strategies that can be adopted by the SADC region. Critical questions and issues concerning SADC in the current Doha negotiations, as regards energy services, will be examined. This can then assist negotiators in preparing for the ongoing negotiations. Complexities that exist specifically in the energy services sector under the current GATS framework and the SADC Trade Protocols will also be detailed hence, assisting relevant stakeholders to make suggestions for reforming the energy services under the auspices of the GATS and SADC.

## **1.5 Methodology**

This study will be literature based with emphasis on the analysis of the relevant available literature on the subject-matter. The study will rely on both primary and secondary literature sources. Primary sources include in particular, WTO Agreements, WTO cases, WTO statistics, and WTO Members' proposals as well as all relevant SADC documents. Use will also be made of background papers, books, and academic or scholarly articles. Various internet sites will be consulted for relevant up-to-date information.

## **1.6 Overview of Chapters**

The paper will consist of five chapters: Chapter 1 will provide the introduction, statement of the problem, and background. A brief explanation of energy services will also be given.

Chapter 2 will provide a brief overview of energy resources in the SADC region, while Chapter 3 will discuss the deficiencies and barriers impacting negatively on liberalisation and trade in energy services on the multilateral and at the SADC regional and bilateral levels.

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<sup>15</sup> WTO Council for Trade in Services (2008) '*Communication from the United States*' Document S/C/W58

Chapter 4 will focus on the current proposed reforms pertaining to energy services in the GATS, in the Doha negotiations. Finally Chapter 5 will provide recommendations and conclusions.



## CHAPTER 2

### BRIEF OVERVIEW OF SADC ENERGY RESOURCES

#### 2.1 Introduction

To halve the number of people living in poverty by 2015, the first of the eight globally agreed targets known as the Millennium Development Goals (MDG) requires that more people have access to energy. The SADC region is endowed with abundant energy resources, namely, hydropower, coal, natural gas, oil, uranium and various forms of renewable energy. Though the region possesses adequate energy resources for its development, these resources still remain largely under-exploited. Consequently, the overall SADC electricity access rate is 25%.<sup>16</sup> The purpose of this chapter is to provide a brief overview of primary energy resources in the SADC region.



#### 2.2 Primary Energy Resources

##### 2.2.1 Coal

Nearly all of Africa's coal reserves are in Southern Africa and these are mostly used for electricity generation. About 90% of total reserves are in South Africa and most of the remaining coal deposits are located in the neighbouring countries such as Botswana, Zimbabwe, Mozambique and Swaziland.<sup>17</sup> South Africa at end 2009 had estimated coal reserves of 53 billion tonnes<sup>18</sup>, 3.7% of the world total, which makes it the largest coal producer in the SADC and the fifth largest coal producer in the world.<sup>19</sup> Furthermore, South Africa is the world's third largest coal exporting country, exporting 25% of its production

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<sup>16</sup> Ram (2009) 'Africa's Intra-Regional, Inter-Regional and Intercontinental Electricity Trade: Techno, Politico, Economic Considerations and Future Prospects'. African Development Bank Publication < <http://www.worldenergy.org/documents/p001416.pdf> > [Accessed 18 August 2010]

<sup>17</sup> Karekezi 'Poverty and Energy in Africa—A Brief Review' (2002) 30 *Energy Policy Journal* 917

<sup>18</sup> Eskom (2010) 'Coal' <[http://www.eskom.co.za/live/content.php?Category\\_ID=121](http://www.eskom.co.za/live/content.php?Category_ID=121)> [Accessed 1 August 2010]

<sup>19</sup> BP (2010) 'BP Statistical Review of World Energy' < <http://www.bp.com/productlanding.do?categoryId=6929&contentId=7044622> > [Accessed 17 August 2010]



internationally and uses 53% for electricity generation. In contrast, Zimbabwe at end 1997 had a total of 10.6 billion tonnes in situ in 21 deposits.<sup>20</sup> The 2010 BP Statistical Energy Survey estimates that Zimbabwe's coal deposits represent 0.1% of the world total. Zimbabwe's single coal mine, Wankie, is also a significant coal producer in the region, the bulk of its output being used for electricity generation while some is exported to other SADC countries, such as, Zambia and the DRC.

Tanzania has an estimated total of about 1.5 billion tonnes in reserves, that have so far been identified. The country's main coal reserves are at Mchuchuma, Katewaka and Kiwira, which have an average annual output of 35,000 tonnes.<sup>21</sup> This output is mostly consumed locally for power generation. Zambia has a single coal operation, the Maamba colliery, whilst Malawi's producer, the Mchenga mine, produces approximately 50 000 tonnes per year. Swaziland has two small collieries which produce around 400 000 tonnes annually. Botswana has a single coalmine, operated by Anglo American, which is devoted to supplying Botswana's coal fired power station.

Increased use of coal in the SADC is beginning to generate the common environment problems associated with coal use throughout the world. Examples include, indoor air pollution, local air pollution, greenhouse gases emissions, and land degradation in the case of open cast coal mines.<sup>22</sup> Despite the negative impact of coal on the environment, the role of coal in the SADC remains important because of concerns over energy security and increasing demand for energy. The demand for emerging services related to greenhouse gas emissions

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<sup>20</sup> Southern Centre for Energy and Environment (1997) *'Implementation Strategy to Reduce Environmental Impact of Energy Related Activities in Zimbabwe'* Southern Centre for Energy and Environment Working Paper 5

<sup>21</sup> Eastern Africa Energy Resource Base (2010) *'Fossil Fuels Tanzania'* <[http://regionalenergy-net.com/index.php?option=com\\_content&task=view&id=43&Itemid=35](http://regionalenergy-net.com/index.php?option=com_content&task=view&id=43&Itemid=35)> [Accessed 18 September 2010]

<sup>22</sup> Karekezi 'Poverty and Energy in Africa—A Brief Review' (2002) 30 *Energy Policy Journal* 918

reductions and trading of emissions rights is likely to increase as the sector becomes more capital and technology intensive, to improve efficiency and to reduce its negative impact on the environment.<sup>23</sup>

### 2.2.2 Natural Gas

Natural gas is the cleanest burning fossil fuel and produces far lower levels of carbon emissions.<sup>24</sup> Gas in the region is used, among others, as energy for residential purposes, such as, heating and cooking, as well as for industrial activities, such as, steam raising, drying, kiln firing, furnace firing, cooling, heat treatment and slab re-heating, ammonia production and power generation.

Total natural gas reserves in Africa in 2002 amounted to 1, 3010 billion cubic meters (bcm), of which most reserves are in North Africa, accounting for 63.3% of total gas reserves on the continent.<sup>25</sup> In the SADC region, gas supplies mainly come from four countries. First, Mozambique has proven gas resources amounting to 127 bcm. Most productive exploitation takes place in the Pande and Temane fields, which produce 3, 29 bcm a year, making Mozambique the biggest producer of natural gas in the region. Secondly, South Africa is the second highest producer of natural gas in the region, producing 3, 2 bcm in 2008. Thirdly, in Namibia there are proven resources in the Kudu field but no major output, and, finally, Angola, which is currently undertaking large developments to expand output, has proven reserves of 269 bcm.<sup>26</sup>

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<sup>23</sup> World Trade Organisation (1998) '*Energy Services Background Note*' Document S/C/W/52

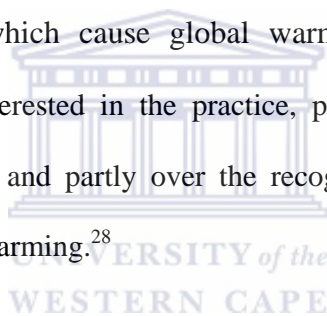
<sup>24</sup> Department of Minerals and Energy (2005) '*Gas Infra-Structure Plan*' <[http://www.dme.gov.za/pdfs/energy/gas/gas\\_infrastructure\\_plan.pdf](http://www.dme.gov.za/pdfs/energy/gas/gas_infrastructure_plan.pdf)> [Accessed 18 August 2010]

<sup>25</sup> International Energy Agency (2004) '*Key World Energy Statistics*' <<http://www.iea.org/textbase/nppdf/free/2004/keyworld2004.pdf>> [Accessed 20 August 2010]

<sup>26</sup> Frost and Sullivan (2010) '*Southern African Oil and Gas Market*' <<http://www.frost.com/prod/servlet/report-toc.pag?repid=M571-01-00-00-00>>

The reasons why the gas industry, despite being small, has received so much attention is because, first, gas is gaining market share globally, as a clean or environmentally friendly fuel. Secondly, the expansion of gas fits well into the present drive to increase fuel diversity. There is also relatively fast growth in certain industries that require gas as feedstock.

Due to domestic market limitations related to their size and credit worthiness, and to the significant investments and sizable minimum reserves required to support export projects, natural gas is substantially underutilised or wasted in many SADC and other African countries where very large quantities of natural gas associated with oil production are being flared; wasting the resource and causing significant environmental damage by increasing the release of greenhouse gases, which cause global warming.<sup>27</sup> Recently the international community has become more interested in the practice, partly in concern over unnecessary wasting of the world's resources, and partly over the recognition of the harm that excessive carbon emissions have on global warming.<sup>28</sup>



Expanding natural gas exports from SADC countries will achieve considerable advantages:

- A cleaner environment. The gas development will reduce greenhouse gas emissions by using millions of cubic feet of gas a day that would otherwise have been burned off.
- Economic benefits. Natural gas has a steeper projected growth curve than oil, at least over the next 20 years. This can be beneficial for job creation and investment in local economies.

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<sup>27</sup> World Energy Council Report (2005) *'Regional Energy Integration in Africa'*  
<<http://www.worldenergy.org/publications/317.asp>> [Accessed 25 September 2010]

<sup>28</sup> Homer (1993) *'Natural Gas in Developing Countries'*  
<<http://docserver.ingentaconnect.com/deliver/connect/wb/9780821323298/v1n1/s1.pdf?expires=1285323921&id=58760681&titleid=7769&accname=University+of+the+Western+Cape&checksum=94FE0CFCFB5B94C6CB9E7B5F279D1DED>> [Accessed 17 August 2010]

- According to the 2005 World Energy Council Report on Regional Energy Integration in Africa, projects like the West Africa Gas Pipeline (WAGP) distribute economic benefits to several nations, and the success of those projects involves governments and the private sector working together.<sup>29</sup> Thus, natural gas could play a vital role in Africa's regional energy integration, as well as Africa's integration in the global economy in the long term.

### 2.2.3 Hydro Power

Hydropower is also one of the cleanest and most reliable sources of energy. Hydropower is readily available in many SADC countries, for both large and small scale hydro projects.

According to the 2004 World Energy Council Report, the axis of the great African lakes from Kenya to Zambia, and the Atlantic coastline from Guinea to Angola, possess nearly 60% of total African hydroelectric resources. The Inga Dam in the Democratic Republic of Congo (DRC) is the largest single source of hydropower in the SADC and among one of the largest in the world.<sup>30</sup> The DRC's rivers have an estimated hydroelectric power potential of 150,000 MW, which, if harnessed, have potential to provide energy to the entire SADC region.

Zimbabwe's Zambezi River has a total estimated capacity of 7,200 MW.<sup>31</sup> South Africa has moderate hydroelectric potential. It imports hydro power from Mozambique's Hidroelectrica de Cahora Bassa. Mozambique is increasing power generation in order to boost exports to South Africa by 75 percent over the next three years.

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<sup>29</sup> World Energy Council Report (2005) *'Regional Energy Integration in Africa'*  
<<http://www.worldenergy.org/publications/317.asp>> [Accessed 25 September 2010]

<sup>30</sup> Tshombe, Ferreira, Uken 'NEPAD Vision and the Inga Hydro-Electric Scheme' (2007) 18 (3) *Journal of Energy in Southern Africa* 20

<sup>31</sup> Mbohwa 'Zimbabwe: An Assessment of the Electricity Industry and What Needs to Be Done' (2002) 15 (7) *The Electricity Journal* 82

Hydroelectricity enjoys several advantages over other sources of electrical power, including a high level of reliability, it does not incur transport costs like coal, it is a fairly simple, proven technology, possesses high efficiency, very low operating and maintenance costs, and is environmentally friendly. However, the generation of hydroelectricity is not without environmental effects. Large areas of land may be flooded when dams are built. This will disrupt wildlife habitats and residential and farming areas. Exploitation of the vast hydropower resources will constitute a significant infusion of renewable energy resources into the energy economy of the region over the medium to long term.<sup>32</sup>

#### 2.2.4 Oil

In the SADC region Angola is the only significant oil exporter and producer, producing an average of 1.25 million barrels per day (bbl/d) of oil in 2005.<sup>33</sup> According to the 2008 BP Statistical Energy Survey, Angola had proved oil reserves of 9.035 billion barrels at the end of 2007 or 0.72 % of the world's reserves. Smaller proven reserves are found offshore in the DRC and South Africa. Oil was also recently discovered in the northern parts of Mozambique. The region's refineries are concentrated in South Africa<sup>34</sup>, with additional refining capacity located in Angola, Madagascar, Tanzania and Zambia. South Africa is the region's largest oil consumer (over 68 percent of the region's total), and the second largest oil consumer in Africa after Egypt. According to the African Development Bank and the African Union, there is very little trade in oil between African producers and Southern African countries. For example though Angola is in Southern Africa, it exports more than 90% of its crude oil mainly to China and the US.

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<sup>32</sup> South Africa Yearbook 2005/2006 <[http://www.dme.gov.za/energy/renew\\_hydro.stm](http://www.dme.gov.za/energy/renew_hydro.stm)> [Accessed 18 August 2010]

<sup>33</sup> Clough (2008) '*Energy Profile of Southern Africa*' <[http://www.eoearth.org/article/Energy\\_profile\\_of\\_Southern\\_Africa](http://www.eoearth.org/article/Energy_profile_of_Southern_Africa)> [Accessed 19 August 2010]

<sup>34</sup> African Development Bank and the African Union (2009) '*Oil and Gas in Africa*' <<http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Full%20Document%20-%20Oil%20and%20Gas%20in%20Africa.pdf>> [Accessed 19 August 2010]

The transport sector is the major consumer of oil accounting for approximately 60% of total consumption. The high oil import bill exposes the energy sector of SADC countries to external energy price shocks.

### **2.2.5 Uranium**

Uranium is the fuel for generating nuclear energy. Substantial uranium reserves are located in South Africa, Zimbabwe and Namibia. Only South Africa uses uranium for electricity generation, at the Koeberg Nuclear Power Station, which contributes about 6 percent of total electricity in South Africa, and earned more than R1,5 billion from uranium exports in the past five years.<sup>35</sup>

### **2.2.6 Renewable Energies**

Renewable energies includes bio-energy, thermal and solar energy, wind energy, geothermal energy<sup>36</sup> and hydroelectric energy. SADC countries are well endowed with renewable energy resources such as, hydro-power capacity, biomass, solar and significant wind potential.<sup>37</sup>

According to Karekezi and Ranja, the renewable energy resource potential in the SADC region has not been fully exploited, mainly due to the limited policy interest and investment levels. In addition, technical and financial barriers have contributed to the low levels in harnessing renewable energy in the region.

Support for renewables can be described as lukewarm; however, there are good prospects for greater development and use of renewable energy technologies in the region. The recent interest in renewable energy in the region is driven, among others, by the increase in oil

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<sup>35</sup> Department of Minerals and Energy (2010) <<http://www.dme.gov.za/energy/nuclear.stm>> [Accessed 18 August 2010]

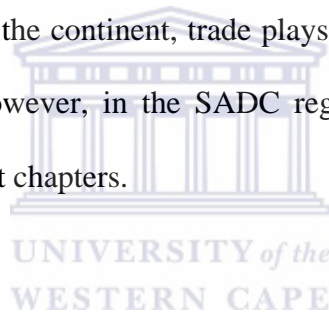
<sup>36</sup> Geothermal energy is the natural heat from the earth's interior stored in rocks and water within the earth's crust. The main source of this energy is the constant flow of heat from the earth's interior to the surface.

<sup>37</sup> Karekezi ,Ranja (1997) '*Renewable Energy Technologies in Africa*'

prices, and the electricity crises faced by most power utilities in the region. Furthermore, renewables are a vital option for mitigating and reducing the emissions of greenhouse gases. Given the low access rates of electricity, SADC countries continue to depend mostly on fossil fuels.

### **2.3 Conclusion**

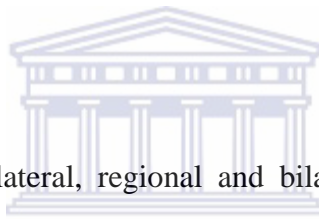
The SADC region has abundant energy resources to meet all its energy demands, yet the majority of its population lack access to energy, especially electricity, which is critical to economic growth and eradication of poverty. Given that the energy resources are not equally endowed among SADC regions, or, put differently, energy resources are unequally distributed across the region and the continent, trade plays a critical role in providing access to different types of energy. However, in the SADC region, this has its own challenges, which will be explored in the next chapters.



**CHAPTER 3**  
**MULTILATERAL, REGIONAL AND BILATERAL BARRIERS TO ENERGY**  
**SERVICES LIBERALISATION AND TRADE**

**3.1 Introduction**

Energy is estimated to be the biggest business in the world economy; with a turnover of at least US\$1.7 to 2 trillion a year.<sup>38</sup> Despite the enormous value of this sector an estimated 1.5 billion people lack access to electricity and 85% of these people live in Sub-Saharan Africa and South Asia.<sup>39</sup> The World Energy Council estimates that global investment in energy between 1990 and 2020 will amount to US\$30 trillion, based on 1992 prices. Furthermore, the 2009 World Energy Outlook Report states that, half of all energy investment is needed in developing countries.



Undoubtedly trade, at the multilateral, regional and bilateral levels is a key catalyst for investment and trade in energy services. Despite SADC countries engaging in energy services trade and liberalisation, especially electricity, these efforts are fraught with difficulties. Unlike trade in goods which is impacted upon by ‘border measures’, trade in energy services is stifled mostly by ‘behind the border measures’, technical aspects of the sector and deficiencies in the GATS. This chapter therefore intends to show the deficiencies and barriers to energy services trade, first explaining the GATS and how it relates to energy services, then proceeding to show the deficiencies of the GATS in its relation to energy services. Furthermore, this chapter will also show the barriers to energy services trade and liberalisation within the context of the three GATS modes of supply applicable to energy services and in the process reflect challenges to energy services trade in the SADC, specifically electricity trading.

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<sup>38</sup> The Economist ‘*The Slumbering Giants Awake*’ *A Survey of Energy*, 10 February 2000: 6–7

<sup>39</sup> World Energy Outlook Report (2009)  
<[http://www.worldenergyoutlook.org/docs/weo2009/WEO2009\\_es\\_english.pdf](http://www.worldenergyoutlook.org/docs/weo2009/WEO2009_es_english.pdf)> [Accessed 3 August 2010]



## 3.2 Energy Services at the Multilateral Level

### 3.2.1 The GATS and its Importance

The GATS is an international trade agreement, or treaty, of the World Trade Organisation (WTO) which came as a result of the Uruguay negotiations held in 1986-1994. It is an extremely important agreement because, first, services including energy services comprise the major part of economic activity of most nations around the world, and secondly, the GATS influences national domestic laws and regulations.<sup>40</sup> Thirdly, it is the first international agreement to provide rules governing all international trade in services. Finally, the importance of the GATS is also reflected in Article 23 paragraph 2 of the SADC Trade Protocol, which states:

*“Member states shall adopt policies and implement measures in accordance with their obligations in terms of the WTO General Agreement on Trade in Services (GATS), with a view to liberalising their services sector within the Community.”*

Given that the SADC Draft Protocol on Trade in Services has not yet been adopted, the GATS, apart from bilateral agreements, is an essential instrument to govern SADC intra-regional services trade as well as trade with the rest of the WTO members.<sup>41</sup>

### 3.2.2 Scope of the GATS

The GATS covers all measures affecting trade in services<sup>42</sup> taken by governments and public authorities, at all levels of government, national, provincial and local, as well as by non-governmental bodies in the exercise of delegated powers (e.g. government mandated

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<sup>40</sup> Marcrory et al (2005) *The World Trade Organisation: Legal, Economic and Political Analysis, Volume 2*

<sup>41</sup> Cronje et al (2010) *Supporting Regional Integration in East and Southern Africa: Review of Select Issues*

<sup>42</sup> The term ‘measures affecting trade in services’ was explained or clarified in the EC Bananas 111 Case. According to the panel, “No measures are excluded a priori from the scope of the GATS as defined by its provision. The scope of the GATS encompasses any measure by a member to the extent it affects the supply of services regardless of whether such measure directly governs the supply of services or whether it regulates other matters but nevertheless affects trade in services”

regulators or licensing bodies). In addition to this the GATS covers all service sectors; however, GATS Article I: 3b excludes services supplied in the exercise of governmental authority. These are defined in Article I: 3c as services not supplied on a commercial basis, nor in competition with one or more service suppliers.<sup>43</sup> In simple terms the GATS seems to try to protect public services from the application of both the general rules<sup>44</sup> and specific rules<sup>45</sup> of the GATS.

There is, however, a problem with the GATS provision (Article I: 3c) since there is uncertainty over what is included in government services.<sup>46</sup> Hoekman also points out that there is little agreement in the relevant literature as to what the above- mentioned provision means. The debate around this exclusion<sup>47</sup> in relation to energy services is that energy services such as electricity, given their strategic, social and economic importance must not

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<sup>43</sup> Mattoo, Adlung (2008) 'A Handbook of International Trade in Services'

<sup>44</sup> GATS general rules are also referred to as general obligations. These are the basic principles of the trading system and apply to all services sectors, whether or not a country has made any specific commitments in those sectors. These include, Most Favoured Nation Treatment (MFN), means WTO members must treat regulation of services and services providers from all other members equally and without discrimination. For example, any regulation that South Africa imposes on foreign services and service providers in their country must be applied equally to all other members. Transparency requires that all measures of general application affecting trade in services be published by a member, and that other members be informed of significant changes affecting trade in services.

<sup>45</sup> Specific obligations apply only to service sectors in which a country has made commitments. Specific obligations can be applied 'horizontally' (across all services sectors or across all modes of supply for a particular service sector), or 'vertically' (only applicable to one service sector or to a specific mode of supply). Market Access applies in areas where commitments are made, but may be subject to specific, listed limitations or conditions – for example limitations may be imposed on the number of service suppliers or employees in the sector, the value of transactions, or the use of foreign capital in the sector. National Treatment requires that governments provide foreign services and service providers with treatment as good as that provided to "like" domestic services and service providers in sectors where specific commitments are made. The key requirement is not to modify, in law or in fact, the conditions of competition in favour of the member's own service industry.

<sup>46</sup> In US FTAs with Chile and Singapore this ambiguity is overcome by specifically stating in the annex, what is excluded from the negotiations. These exclusions include law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care.

Hodge (1998) 'Does South Africa Gain from the Inclusion of Services in Trade Agreements?' <  
[http://www.commerce.uct.ac.za/Economics/Programmes/postgraduate\\_programmes/masters/Specialisations/TRP/Research/Hodge\\_services.pdf](http://www.commerce.uct.ac.za/Economics/Programmes/postgraduate_programmes/masters/Specialisations/TRP/Research/Hodge_services.pdf)> [Accessed 22 September 2010]

<sup>47</sup> The debate around this exclusion is propelled by GATS opponents, who argue that developing countries will be forced to open up public services to private provision and competition, possibly undermining the ability of governments to provide these services.

fall within the GATS ambit. While this concern is valid, Cohen argues that electricity is within the GATS ambit because,

*“if a fee is charged for a service such as a fee for electricity, the public service is likely not exempt from GATS. Also, as soon as there is some kind of competition between the public and private sectors, the GATS rules would apply.”*<sup>48</sup>

The fact that energy services do not fall within the ambit of Article 1:3c is further confirmed by Hodge, who noted that sectors such as electricity are specific targets for aggressive liberalisation requests from industrial countries, hence not excluded from negotiations.

### **3.2.3 The GATS Modes of Supply**

To understand barriers in energy services, it is essential to understand how energy services are supplied under the GATS. The GATS does not define a service, but Article I: 2 of the GATS defines trade in services as consisting of four types of transactions or modes of supply.<sup>49</sup> The four modes make it possible for countries to organise and schedule their market access (Article XVI) and national treatment<sup>50</sup> (Article XVII) commitments. Article XVI and Article XVII apply only to sectors the countries want to liberalise. The GATS provides countries with the freedom to choose the modes in which they will make commitments.<sup>51</sup>

The principal GATS modes of supply for international trade in energy services are cross-border supply, commercial presence, and movement of natural persons.

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<sup>48</sup> Cohen (2002) *‘From Public Good to Private Exploitation: Electricity Deregulation, Privatisation and Continental Integration’*  
<[http://nl1519.policyalternatives.ca/sites/default/files/uploads/publications/National\\_Office\\_Pubs/electricity.pdf](http://nl1519.policyalternatives.ca/sites/default/files/uploads/publications/National_Office_Pubs/electricity.pdf)> [Accessed 4 July 2010]

<sup>49</sup> Mattoo, Sauve (2003) *‘Domestic Regulation and Service Trade Liberalisation’*

<sup>50</sup> National treatment implies the absence of discriminatory measures that can modify the conditions of competition to the detriment of foreign service suppliers.

<sup>51</sup> Pineau (2003) *‘International Trade Agreements and the Peruvian Electricity Sector’*

- *Mode 1:* covers cross-border supply of services and does not require the physical movement of the supplier or consumer. In energy services, examples include cross-border interconnection of electricity grids, transporting of oil and gas through pipelines, online trading and brokering services, and transmission of designs services via the Internet, among others.
- *Mode 2:* covers consumption abroad, as with a consumer travelling to the supplying country for services, such as, tourism and education, and consumers travelling to a supply, as well as work, such as, the repair of aircraft or ships outside an owner's home country.
- *Mode 3:* requires the establishment of a local presence to provide energy services. Examples include services, such as, seismic surveying, energy efficiency auditing, energy marketing and other activities that can be reasonably supplied only through the physical establishment of a commercial presence in a foreign country.
- *Mode 4:* covers the temporary movement of skilled professionals to deliver technical and managerial services, as well as the temporary movement of semi-skilled and unskilled personnel for construction and upgrading of energy facilities and grids.

### **3.3 GATS Weaknesses**

#### **3.3.1 Treatment of Energy Services in the GATS**

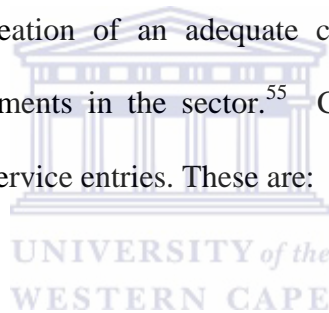
In 2006 the United Nations Conference on Trade and Development noted that the Uruguay negotiations concentrated on sectors where international trade was already significant and looked promising for investors. The energy sector was not among them.<sup>52</sup> Okelo also supports the above by arguing that multilateral negotiations concentrated on general trade

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<sup>52</sup> United Nations Conference on Trade and Development Contribution by the UNCTAD Secretariat (2003)'*Managing Request Offers Under The GATS: The Case of Energy Services*' Document UNCTAD/DITC/TNCD/2003/5

and not on energy trade and services. This is fully reflected in the WTO Services Sectoral Classification List known as the W/120. It covers 12 service sectors<sup>53</sup> and over 150 sub-sectors. It is used as the basis for making liberalisation commitments in the context of the GATS.

However, it does not cover energy services as a separate comprehensive service sector hence making commitments in some sub-sectors is not possible to undertake because the current classification does not explicitly include many new energy services, such as the operation of power pools, energy trading and brokering, carbon credit trading<sup>54</sup> and energy management among many others. The issue of classification is highly important because some WTO members are asking for the creation of an adequate classification as a prerequisite to undertaking any further commitments in the sector.<sup>55</sup> Currently, the W/120 lists energy services as part of other generic service entries. These are:



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<sup>53</sup> (1) Business Services (2) Communication Services (3) Construction and Related Engineering Services; (4) Distribution Services; (5) Environmental Services; (7) Financial Services; (8) Health Related and Social Services; (9) Tourism and Travel Related Services; (10) Recreational, Cultural and Sporting Services; (11) Transport Services (12) Other Services not included elsewhere.

<sup>54</sup> Carbon credit trading offers a way for companies to reduce their overall carbon dioxide output in order to comply with pollution laws and regulations. Carbon credits and markets are therefore key components of national and international attempts to mitigate the growth in concentrations of greenhouse gases (GHGs). Some countries promote voluntary emissions trading by offering tax credits or other incentives to companies that participate in the schemes. In other countries carbon credit trading is mandatory. For example, a number of countries have signed an international emissions trading agreement, known as the Kyoto Protocol, which makes carbon credit trading mandatory.

Delich (2010) 'What is Carbon Credit Trading?' <<http://www.wisegeek.com/what-is-carbon-credit-trading.htm>> [Accessed 4 August 2010]

Recently, there has been a move in developed countries, especially by the United States and the European Union, to apply some form of Border Tax Adjustment (BTA) on imports from countries who have failed to implement green house gas reduction policies and whose industries do not bear the same burden as industries already subject to domestic carbon reduction obligations. However there are concerns that this will have serious negative implications on international trade, particularly for energy and energy related products at a time when it is recovering from the global financial crisis. The use of BTAs on carbon emitting goods and processes also raises legal concerns involving the GATT and the WTO Agreement, as there is some doubt about their legality. Whether or not such border measures are legal has never been tested before a GATT or WTO dispute settlement panel. However, it is anticipated that their introduction will likely result in a dispute being brought before the dispute settlement panel.

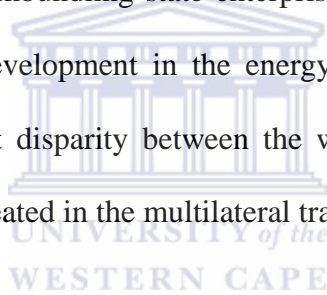
<sup>55</sup> Disenyana, Samuel (2009) 'Trade in Electricity Services in the Southern African Customs Union: Towards a Negotiating Strategy' South African Institute of International Affairs, Development Through Trade Programme Occasional Working Paper No.46

- *"Services incidental to mining"*, described as "services rendered on a fee or contract basis at oil and gas fields, e.g. drilling services, derrick building, repair and dismantling services, oil and gas well casings cementing services."
- *"Services incidental to energy distribution"*, described as "transmission and distribution services on a fee or contract basis of electricity, gaseous fuels and steam and hot water to household, industrial, commercial and other users."
- *"Engineering related scientific and technical consulting services"*, relates to oil and gas field exploration and geological surveying services which are classified as "Geological, geophysical and other scientific prospecting services."
- Pipeline transportation of fuels is covered as a sub-sector of transport services described as "transportation via pipeline of crude or refined petroleum and petroleum products and of natural gas"
- A number of other activities directly involved in the energy services chain are covered under other GATS sectoral classifications, including architectural and engineering services, construction work for civil engineering, and wholesale and retail trade services with respect to energy equipment and fuels.

It is also worth mentioning that The United Nations Provisional Central Product Classification (CPC) also does not list energy services as a separate category. The W/120 is based on the CPC of 1991. Evans argues that, "the limitation is problematic because the CPC is supposed to provide the corresponding Central Product Classification (CPC) number that WTO members use to indicate an offer or commitment in each sector or subsector." The current treatment of energy services, therefore, does not reflect current market realities. The United States delegation to the WTO attributed this to the following:

*"When the W/120 was written, much of the energy industry was dominated by state-owned enterprises operating mostly within home markets as vertically integrated companies with monopoly positions. Most service functions were performed "in-house" by oil companies and power generation utilities that controlled the whole production and distribution chain. Services negotiators in the Uruguay Round focused primarily on sectors where discrete services were readily identifiable, trade was already significant, business interest in trade liberalization was strong, and consumer benefits were apparent."*<sup>56</sup>

The W/120 is, therefore, based on the previous paradigm in which vertically integrated state enterprises controlled all aspects of energy services, from generation to marketing, and did not distinguish between the goods and services aspects of energy trade. The process of structural reform, which entails unbundling state enterprises and introducing competition in energy services<sup>57</sup>, is a recent development in the energy sector, especially in developing countries; hence there is a great disparity between the way energy markets are currently operating and the way they are treated in the multilateral trade rules.<sup>58</sup>



### **3.3.2 Lack of Clarity on Important Sub-sectors -- Electricity**

The unclear treatment of important sub-sectors such as electricity, in the multilateral trade rules weakens the GATS agreement as a vehicle of liberalisation, partly because of the confusing nature of electricity. According to Patterson "electricity is not a physical substance nor is it a fuel. Electricity is a physical phenomenon happening instantaneously throughout the entire interconnected system".<sup>59</sup> Electricity cannot be stored, and must be consumed as it

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<sup>56</sup> Communication from the United States, Classification of Energy Services, S/CSC/W/27, 18 May 2000, paragraph 7

<sup>57</sup> For example Zimbabwe unbundled its power utility, ZESA into generation, distribution and transmission. Zambia's power utility ZESCO has also recently began looking into how best to unbundle the utility. South Africa's Eskom independent transmission is also set to be unbundled, and will come into being in September 2010, when approval by cabinet is expected.

<sup>58</sup> Communication from the United States, Energy Services, S/W/58, 20 October 1998

<sup>59</sup> Patterson (2002) 'Energy Company? What Energy Company?' Briefing Paper by The Royal Institute of International Affairs

is produced. These are some of the reasons why the drafters of the GATT assumed that electricity should not be classified as a commodity.<sup>60</sup> According to Peneau electricity has never been clearly categorised nor included as a good or a service in international trade agreements.<sup>61</sup> Wang and Liu noted that the confusion stems from the fact that the electricity industry<sup>62</sup> was previously dominated by state enterprises which carried out all functions from generation to retailing. With liberalisation and unbundling of state enterprises, functions have been separated, and private companies have entered the industry.

The current reality, according to Bielecki and Desta, is that

*“electricity can be regarded as both a good and a service. Several GATT Contracting Parties started regarding electricity as a commodity and some of them have undertaken tariff bindings on it. In the Harmonised Commodity Description and Coding System (HS) developed by the World Customs Organisation (WCO), electrical energy is a commodity. However, it is an optional heading in the HS so that WCO countries are not required to classify it as commodity for tariff purposes. The optional nature of the electrical energy entry in the HS classification reflects the fact that some countries do not regard it as a commodity but a service.”*<sup>63</sup>

With different countries treating electricity as a commodity and others as a service it is difficult to undertake commitments since the GATS and the GATT rules offer very different kinds of protection to investments; hence clarification of this area is of great economic importance to foreign investors since it will have real legal implications for potential investment, and the protection of investors, in energy services. Despite the confusion surrounding electricity, there is a move towards a general consensus among scholars that

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<sup>60</sup> Bielecki, Desta (2004) *‘Electricity Trade in Europe: Review of Economic and Regulatory Challenges’*

<sup>61</sup> Peneau *‘Electricity Services in the GATS and the FTAA’* (2004) 12 (2) *Energy Studies Review* 258

<sup>62</sup> The electricity industry can be divided into four main sectors: generation, transmission, the low voltage network that takes power from the transmission network to final consumers, distribution, the low voltage network that takes power from the transmission network to final consumers and retail ,sale of electricity to final consumers including purchase of wholesale power, billing and metering.

<sup>63</sup> Bielecki, Desta (2004) *‘Electricity Trade in Europe: Review of Economic and Regulatory Challenges’*



distribution, transmission, transportation, and marketing and other related services fall under the GATS, while generation does not constitute a service subject to the GATS.

### **3.3.3 Flexibility and Safeguards**

Though liberalisation of energy services is likely to result in reliable, adequate, affordable and efficient access to energy, Okelo argues that liberalising the energy services sector through the GATS is essentially irreversible. This is so because when a government has made a commitment to open up a market sector to foreign companies it cannot unilaterally close the sector or add more regulations without the agreement of other WTO members as stipulated in GATS Article XXI, paragraphs 2.a and 2.b:

*At the request of any Member the benefits of which under this Agreement may be affected (referred to in this Article as an "affected Member") by a proposed modification or withdrawal notified under subparagraph 1(b), the modifying Member shall enter into negotiations with a view to reaching agreement on any necessary compensatory adjustment. In such negotiations and agreement, the Members concerned shall endeavour to maintain a general level of mutually advantageous commitments not less favourable to trade than that provided for in Schedules of specific commitments prior to such negotiations.*

*A modifying Member shall notify its intent to modify or withdraw a commitment pursuant to this Article to the Council for Trade in Services no later than three months before the intended date of implementation of the modification or withdrawal.*

Reaching an agreement on compensation is a crucial part 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 Article XXI.<sup>64</sup> In a nutshell, flexibility that might be required to make policy changes is constrained. Furthermore, the GATS has immense implications for democracy and the right of future governments to change the direction of economic and social policies.<sup>65</sup>

The above is further compounded by the fact that, despite governments being able to choose to which sectors of energy services they wish to give market access, as well as the regulations they wish to impose at the time of opening up a service sector, the GATS does not currently provide for the use of an emergency safeguard mechanism in various situations.<sup>66</sup> For example, it will be difficult to protect the domestic energy services industry should its survival come under threat from foreign competition.

Given the strategic nature of energy and energy services, regulatory flexibility is required. Once a commitment to open energy services markets is made, imposing further regulation in the interest of an individual country is problematic. According to Benitah, during the Uruguay Round policymakers from developing countries expressed serious reservations about the potential implications of making greater market access concessions, hence their unwillingness to liberalise energy services.<sup>67</sup>

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<sup>64</sup> Kruger (2010) '*Modification of GATS Schedules*' <[http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause\\_dir\\_news\\_item&cause\\_id=1694&news\\_id=88226&cat\\_id=1101](http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=1694&news_id=88226&cat_id=1101)> [Accessed 2 August 2010]

<sup>65</sup> Third World Network Africa (2008) '*Background Paper: Services Liberalisation in Africa's Extractive Sector*' <[http://www.twnafrica.org/index.php?option=com\\_content&view=article&id=129:background-paper-services-liberalisation-in-africas-extractive-sector-&catid=41:occasional-papers&Itemid=97](http://www.twnafrica.org/index.php?option=com_content&view=article&id=129:background-paper-services-liberalisation-in-africas-extractive-sector-&catid=41:occasional-papers&Itemid=97)> [Accessed 13 August 2010]

<sup>66</sup> Van de Bossche (2005) '*The Law and Policy of the World Trade Organisation: Text, Cases and Materials*'

<sup>67</sup> Benitah (2005) '*Subsidies, Services and Sustainable Development*' International Centre for Trade and Sustainable Development Issue Paper 1 <[http://ictsd.org/downloads/2008/06/ip\\_services\\_01.pdf](http://ictsd.org/downloads/2008/06/ip_services_01.pdf)> [Accessed 26 June 2010]

### 3.3.4 Absence of Energy Services Specific Rules

An important reason why liberalising energy services at the multilateral level for SADC countries can be tricky and needs to be carefully thought through is that regulatory systems in most SADC countries are still undeveloped. The World Bank blames many of the failures of privatisation in developing countries on regulatory weaknesses.<sup>68</sup> Countries that have successfully liberalised their energy services introduced new complex regulations in order to ensure the creation of a competitive market. This ensures that liberalising efforts are not nullified by the market power of existing suppliers, especially those who control the transmission and distribution networks.<sup>69</sup> There is a need to supplement market access and national treatment commitments by additional commitments on regulatory principles aimed at ensuring basic conditions of competition in the liberalised markets.<sup>70</sup>

Unlike financial services and the telecommunications industry which have sector specific rules undertaken in the GATS, there are no additional regulations which specifically deal with issues specific to energy services in the GATS. For instance, the current rules of the GATS do not include any provision that guarantees access to the existing electricity distribution network. Open access to networks for suppliers is one of the prerequisites for effective competition in the energy industry.<sup>71</sup> Open access to the grid is commonly known as

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<sup>68</sup> World Bank (2004) *Press Conference on Reforming Infrastructure - Privatisation, Regulation and Competition*  
<<http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0%2C%2CcontentMDK:20212636~menuPK:34476~pagePK:34370~piPK:34424~theSitePK:4607%2C00.html>> [Accessed 6 May 2010]

<sup>69</sup> WTO Council for Trade in Services (1998) 'Energy Services Background Note' Document S/C/W/52

<sup>70</sup> Competition policy is widely perceived as a 'complement' to trade liberalisation. Trade liberalisation is aimed at reducing governmental rules that distort and limit trade among nations. On the other hand, by regulating the behaviour of market participants, competition law traditionally seeks to combat private restrictions that distort and limit vigorous competition among businesses, to the detriment of consumers. Thus, properly understood, trade liberalisation and competition policy are both aimed at increasing prosperity through the promotion of market processes, albeit through different means.  
Huang, Chen (2004) *Competition Policy as Welfare-Enhancing Complement to Trade Liberalisation: A United States Perspective*

<sup>71</sup> Palasthy (2002) 'Third Party Access in the Electricity Sector: EC Competition Law and Sector Specific Regulation' 20 *Journal of Energy and Natural Resources Law* 27

Third Party Access<sup>72</sup> (TPA). TPA is critical to liberalisation, especially of the electricity market and the trade in electricity services. In the GATS and the SADC Protocol on Energy there is no reference to the concept. Hernandez concluded that it is not simply enough to make market access and national treatment commitments in energy services; disciplines such as the TPA must be included in the GATS to ensure successful liberalisation of trade in energy services.

### **3.4 Energy Services at the Bilateral and Regional level**

#### **3.4.1 Barriers to Cross-Border Supply (Mode 1)**

The poor integration of the national and sub-regional networks in the SADC has stifled the potential for cross-border electricity trading in the region.<sup>73</sup> The situation is not helped by political instability, trade barriers, and inadequate infrastructure, such as, transmission lines between countries. According to Turkson and Wohlgemuth, these problems have rendered the harnessing of huge energy resources in the region almost impossible. Furthermore, limited transit rights, and unfair or non-transparent transmission fees, also stifle cross-border trade in energy services, especially electricity. Another barrier to trade in cross-border supply of energy services relates mostly to the transmission of funds. For example, according to Bielecki and Desta, exchange controls in SA prevent foreign banks from supplying their services to South Africans through the internet and put limitations on the cross-border transfer of capital to finance energy related transactions.

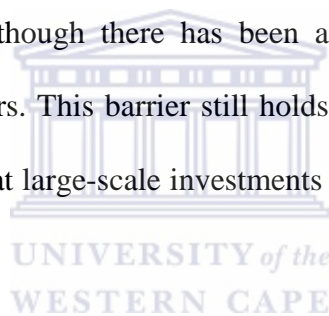
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<sup>72</sup> Third Party Access implies that, a company which owns an essential facility or infrastructure, without which competitors cannot provide services to their customers, cannot refuse other companies access to that facility without objective justification.

<sup>73</sup> Turkson, Wohlgemuth (1999) 'Power Sector Reform and Distributed Generation in Sub-Saharan Africa' (1999) 29 *Energy Policy Journal* 135

Regulation of prices within the region can be a trade barrier to the cross-border supply of electricity.<sup>74</sup> While price controls are required to achieve universal access to electricity, especially by the poor communities, generators of electricity may not be able to sell electricity at a price that will enable them to cover the costs of generation, and this will affect their return on investment. There is, therefore, a need to establish balance between the need for achieving universal access and increasing investment in generation. Disenyana and Samuel also noted that, where price controls are too strict, this can dissuade Independent Power Producers (IPP's) that intend to establish a commercial presence.

Electricity pricing is also a perceived barrier that stems from the region's historically low unit price of coal and electricity, although there has been a gradual and incremental rise in electricity prices over recent years. This barrier still holds strongly in the mind-set of many potential investors, who argue that large-scale investments cannot be justified due to the long paybacks involved.



According to Nag, Biswajit and Debdep, much of the recent and current international treaties addressing trade in energy services are at the regional and bilateral levels. The SADC has placed a high priority on regional trade, co-operation, and investment in energy services, particularly in electricity.<sup>75</sup> Estach et al argue that there are four major benefits associated with regional energy integration. These are: improved security of supply, better economic efficiency, enhanced environmental quality, and development of renewable resources.<sup>76</sup>

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<sup>74</sup> Disenyana, Samuel (2009) *'Trade in Electricity Services in the Southern African Customs Union: Towards a Negotiating Strategy'* South African Institute of International Affairs, Development Through Trade Programme, Occasional Working Paper No.46

<sup>75</sup> Chanda (2002) 'Social Services and the GATS: key Issues and Concerns' 31 (12) *World Development Journal* 199

<sup>76</sup> Estach et al (2008) 'How Efficient are Africa Electricity Companies? Evidence from Southern African Countries' 36 *Energy Policy Journal* 1969

### 3.4.2 Challenges to Electricity Trading in the Southern African Power Pool (SAPP)

The 1995 SADC Protocol on Energy, 1996 Energy Co-operation Strategy, and Energy Action Plan, all place a high priority on regional co-operation in energy investment and trade, particularly in electricity. The creation of the Southern African Power Pool (SAPP) in 1995 marked an important milestone towards energy services trade in the SADC. The SAPP is a 12 member SADC regional body that co-ordinate the planning, generation, transmission, brokering, and marketing of electricity on behalf of member state utilities in the SADC.<sup>77</sup>

Most electricity trading in the SAPP is undertaken through bilateral co-operation.<sup>78</sup> However, electricity is also traded on a competitive basis on the Short Term Electricity Market (STEM).<sup>79</sup>

The STEM makes use of four types of contracts: monthly, weekly, daily, and hourly. SAPP's transmission capacity does not meet current demands for increasing electricity trade on the interconnected grid system, nor for meeting reliability and security of supply. Since most electricity trading in the SAPP is through bilateral contracts, bilateral trading takes precedence over the use of transmission lines. This, therefore, limits competitive electricity trading that is not bilateral; hence the United Nations Economic Commission for Africa noted that the SAPP is faced with the challenge of investing in high capacity tie lines to increase trade.

The challenge for SAPP at the present time is to increase the number of participants in the short-term electricity market. Not all SAPP members are connected to the SAPP grid, for

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<sup>77</sup> Sikuka (2010) 'SADC Takes Investment Drive to Europe for Energy Sector' <<http://allafrica.com/stories/201003040417.html>> [Accessed 13 May 2010.]

<sup>78</sup> Southern Africa Power Pool Operational Report (2006) 'Regional Power Networking for Economic Expansion Issue' No. R07-06' <<http://www.sapp.co.zw/viewinfo.cfm?linkid=13&siteid=1>> [Accessed 23 May 2010]

<sup>79</sup> The Short-Term Electricity Market (STEM) is an energy market in the Southern African Power Pool where electric power is traded on a daily basis.

example, Angola, Malawi and Tanzania. These three countries do not currently participate in electricity trading in the SAPP even though they are SAPP members. This contributes to limited electricity trade in the power pool. The situation is further compounded by network problems. For example, grid failure in some countries sometimes weakens the trade in electricity for a long period. For example according to the SAPP, in 2006 the transmission network feeding into the SAPP from the Democratic Republic of Congo (DRC) collapsed because of vandalism and theft of copper cable. This crippled electricity trade between the DRC, Zimbabwe and South Africa for more than two weeks. Moreover, currently transmission bottlenecks in Zimbabwe are also hindering the electricity trade between northern and southern countries. This is mainly because of ageing equipment and lack of proper maintenance.



In line with international trends, successful regional trading in electricity requires a common framework for transmission pricing, rules for access to the transmission grid, competition, and agreed principles and procedures for dispute resolution.<sup>80</sup> Internationally these functions or duties are entrusted to a Regional Electricity Regulatory Association (RERA). The intention is to have common legal, regulatory and licensing systems to facilitate electricity trade and investment. The United Nations Economic Commission for Africa cited a joint project to construct two 400 kV power lines by the Mozambique Transmission Company and national utilities of Mozambique, Swaziland and South Africa to supply electricity to the MOZAL Aluminium smelter in Maputo as a typical example of the need for regional regulation. Different legal, regulatory and licensing systems existed in all three countries, which led to complex international agreements and arrangements.

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<sup>80</sup> Economic Commission for Africa (2004) 'Assessment of Power Pooling Arrangements in Africa' <[http://uneca.org/eca\\_programmes/sdd/documents/POWER\\_POOLING\\_rd.pdf](http://uneca.org/eca_programmes/sdd/documents/POWER_POOLING_rd.pdf)> [Accessed 20 June 2010]

The SADC does not currently have a RERA. This poses complications for regional electricity trade and investment, as noted above. However, the SADC is currently in the process of setting up a RERA which will be responsible, among others, for regional co-ordination of policy, strategy and legislation with a view to facilitating and increasing electricity trade and investment.

### **3.4.3 Barriers to Commercial Presence (Mode 3)**

In many cases commercial presence (Mode 3) is the most effective way to provide energy services. It is also highly beneficial to the region since it brings Foreign Direct Investment (FDI). This can result in the transfer of efficient technologies, skills, and competitiveness, as well as providing access to global markets. However, companies face a variety of establishment restrictions.<sup>81</sup> In a recent 2010 study by the World Bank and the International Finance Corporation to determine investment environments, out of a group of 183 countries that were surveyed, Mauritius, South Africa and Botswana were ranked in the top 50, while five SADC countries ,Zimbabwe, Madagascar, Angola, Lesotho and the DRC were in the bottom 50, with the DRC ranked 175<sup>th</sup>.<sup>82</sup> This study shows that most SADC countries do not have a favourable environment to attract FDI in energy services and other economic sectors.

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<sup>81</sup> Article XVI of the GATS lists six types of restrictions that must not be maintained in the absence of limitations. In other words these have to be listed in the country's schedule of commitments, otherwise they will be illegal. The restrictions relate to the number of service suppliers, value of service transactions or assets, the number of operations or quantity of output, the number of natural persons supplying a service, the type of legal entity or joint venture, and the participation of foreign capital. These measures, except for (e) and (f), are not necessarily discriminatory, i.e. they may affect national as well as foreign services or service suppliers.

<sup>82</sup> World Bank and The International Finance Corporation (2010) '*Doing Business 2011*' <<http://www.doingbusiness.org/>> [Accessed 3 November 2010]



Brown and Stern identified three main categories of barriers to FDI. These are: restrictions on ownership and control, market access restrictions, and operational restrictions.<sup>83</sup> Mlambo further identified the following barriers: weak legal, judicial and financial systems, administrative 'red' tape, and corruption.<sup>84</sup> It is important at this juncture to point out that some barriers to commercial presence in the energy services industry are barriers generally associated with FDI in the SADC region. These barriers apply to energy services in that, energy services are supplied mainly through commercial presence, hence some barriers experienced in establishing or opening and operating a business for the purposes of rendering energy services are similar or identical to those generally associated with FDI.

Foreign firms seeking to retain full ownership of their operations face difficulties in establishing a local presence unless they join in a joint venture with locals or have local partners. For example, the Zimbabwean government recently announced that all foreign firms are permitted to own a maximum of 49% of shares while 51% is owned by locals.<sup>85</sup> A similar policy in South Africa is the Broad Based Black Economic Empowerment (BBBEE)<sup>86</sup> legislation which encourages foreign owned companies in all industries including energy, to sell a stake in their businesses to previously disadvantaged locals or to have previously disadvantaged local partners. In principle the BBBEE could be seen as inconsistent with the general principle of national treatment because it discriminates against investors who are not

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<sup>83</sup> Brown, Stern (2000) '*Measurement and Modelling of the Economic Effects of Trade and Investment Barriers in Services*' <<http://www.ingentaconnect.com/content/bpl/roie/2001/00000009/00000002/art00278>> [Accessed 6 May 2010]

<sup>84</sup> Mlambo 'Reviving Foreign Direct Investments in Southern Africa: Constraints and Policies' (2005) 17 (3) *African Development Review* 552

<sup>85</sup> The intention of the policy of giving black Zimbabweans 51% stake in all foreign owned companies has come under fire both in Zimbabwe as well as outside. This is because given the current economic climate in the country; it is argued that such a policy is counter productive as it will scare away the desperately needed foreign investment. There is still some uncertainty about this policy. It has been proposed that the policy be revised on a sector by sector basis, in other words local ownership targets must be reduced and set on a sector by sector basis, which seems to be more realistic.

<sup>86</sup> The BBBEE seeks, among others, to increase the participation or number of Black South African people who control and own enterprises as well as productive assets in all spheres of the economy including energy services.

Black South Africans.<sup>87</sup> Though such domestic policies are necessary to correct historical imbalances, they can be a barrier to trade and market access by foreign investors, especially given the capital intensive nature of the energy services industry.

A constraint on the operations of foreign owned companies that prevents FDI in energy services is the restriction on repatriation of profits. According to Gabriele, restriction on repatriation of profits is required because initial capital inflows from abroad will be replaced by capital outflows due to profit repatriation, while no additional export capacity is directly created.<sup>88</sup> However, Basu and Srinivasan are of the view that restricting profit repatriation is a barrier to FDI.<sup>89</sup> Furthermore, the root of this problem, according to Mlambo, is the high external indebtedness of some SADC member states having liquidity problems, who resort to tightening foreign exchange and profit remittance regulations. Such policies inhibit FDI since investors will not be freely allowed to repatriate profits to their home countries.

Dupasquier et al further observed that one of the reasons why foreign investors are reluctant to invest in Africa, despite its enormous profitable opportunities, is the relatively high degree of uncertainty in the region, which exposes firms to significant risks.<sup>90</sup> He noted that uncertainty in the region manifests itself in three ways: political instability, macro-economic instability, and lack of policy transparency. All of these are especially true of SADC

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<sup>87</sup> Cho, Dubash (2003) 'Will Investment Rules Shrink Policy Space for Sustainable Development? Evidence from the Electricity Sector' World Resources Institute, Trade-Related Agenda, Development and Equity Working Paper 16  
<[http://www.southcentre.org/index.php?option=com\\_content&view=article&id=389%3Awill-investment-rules-shrink-policy-space-for-sustainable-development-evidence-from-the-electricity-sector&catid=68%3Ainternational-taxation-investment-a-financing-for&Itemid=67&lang=en](http://www.southcentre.org/index.php?option=com_content&view=article&id=389%3Awill-investment-rules-shrink-policy-space-for-sustainable-development-evidence-from-the-electricity-sector&catid=68%3Ainternational-taxation-investment-a-financing-for&Itemid=67&lang=en)> [Accessed 20 May 2010]

<sup>88</sup> Gabriele (2004) 'Policy Alternatives in Reforming Energy Utilities in developing Countries' 32 *Energy Policy Journal* 1319

<sup>89</sup> Basu, Srinivasan (2002) 'Foreign Direct Investment In Africa: Some Case Studies' International Monetary Fund Working Paper, WP/02/61 <<http://www.imf.org/external/pubs/ft/wp/2002/wp0261.pdf>> [Accessed 22 May 2010]

<sup>90</sup> Dupasquier, Patrick ,Osakwe (2006) 'Foreign Direct Investment in Africa: Performance, Challenges and Responsibilities' 17 *Journal of Asian Economics* 241

countries. Though SADC countries possess abundant energy resources, they remain untapped due to a lack of investment. Foreign firms are discouraged precisely because of a lack of political and economic stability in the region.

A critical point is that SADC countries promote foreign investment without taking adequate steps to lift the constraints on FDI in the region. It is, therefore, not surprising that investment promotion activities in the region have not been as successful as expected. The failure of the SADC in attracting FDI in energy services is because of its weak co-ordination in mobilising finances, the “poor image” of the region among international financiers, low confidence in the organisation and management capacity of SADC institutions, and lack of knowledge among investors and financiers about opportunities in the SADC region.<sup>91</sup> For example, the poor image of SADC as a destination for FDI results from corruption. In a study covering more than 3600 entrepreneurs in 69 countries, African respondents listed corruption, followed by tax regulations or higher taxes, as major problems.<sup>92</sup> Corruption adds to the cost of business transactions and often leads to inefficient economic outcomes, especially given the capital intensive nature of the energy services industry.

Article III of the GATS requires that WTO members publish all new or changed laws, regulations or administrative guidelines that significantly affect trade in sectors subject to specific commitments. This transparency obligation is particularly relevant in energy services.<sup>93</sup> This is so because many energy projects and associated services require extensive

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<sup>91</sup> Isaksen(2002)'*Energy Cooperation in Southern Africa: What Role for Norway*' Michelsen Institute Working Paper 4 <<http://ideas.repec.org/p/chm/wpaper/wp2002-4.html>> [Accessed 26 June 2010]

<sup>92</sup> Brunnetti, Kisunko ,Weder (1997), '*Institutional Obstacles for Doing Business Data Description and Methodology of a Worldwide Private Sector Survey*'. Background Paper, World Development Report.

<sup>93</sup> The lack of transparency in energy services regulations reduces predictability for trade in the sector. In addition, a system with insufficient transparency leads to increased doubts on the part of those from the outside as to whether trade barriers do exist, thus resulting in a deterioration of market confidence in the country concerned.

licensing or permitting as well as other authorising decisions from the relevant government authorities. Bielecki and Desta assert that unclear or discriminatory administrative decision making, for example, in authorisation, licensing, permitting, and tendering procedures, is a barrier that unfairly disadvantages foreign service suppliers. In the SADC region unclear and slow administrative decision making, long tender procedures and low incentives have been cited as reasons for the SADC region continuing to lag behind in implementing a number of its energy generation and transmission projects.

In the electricity and gas industry, the transmission and distribution grids are essential for suppliers in the energy services industry. Without the grid or network it is impossible to supply electricity to consumers.<sup>94</sup> Transmission and distribution grids are considered natural monopolies because they are still controlled by state power utilities. National power utilities, therefore, affect liberalisation of the energy services market. In some cases power utilities try to deny access to the network to competitors, claiming lack of access, or charge excessive transport fees.<sup>95</sup> This situation is especially true in the SADC, where Independent Power Producers have accused parastatals of protectionism and not wanting competition.<sup>96</sup>

The energy sector is generally highly regulated in order to protect important policy objectives, such as, health and safety, environmental protection, universal service, and consumer protection. Cho and Bubash argue that it has been well documented that markets, if left to their own devices, are unlikely to address legitimate social and environmental concerns

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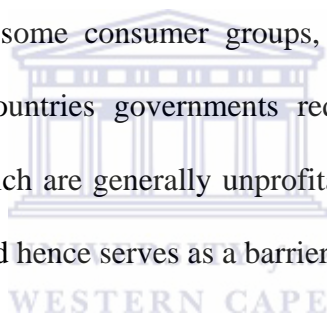
<sup>94</sup> Hernandez (2008) 'The Services Related to the Electric Industry Under the GATS: Is There a Need for New Provisions at the Multilateral Level for these Services?' <[http://www.scielo.unal.edu.co/scielo.php?pid=S1692-81562008000200005&script=sci\\_arttext](http://www.scielo.unal.edu.co/scielo.php?pid=S1692-81562008000200005&script=sci_arttext)> [Accessed 13 May 2010]

<sup>95</sup> Thomas, Walde (2001) '*Access To Energy Networks: A Precondition for Cross-border and Energy Services Trade*' <<http://www.dundee.ac.uk/cepmlp/journal/html/vol9/vol9-2.html>> [Accessed 21 May 2010]

<sup>96</sup> Van den Bosch (2010) '*Energy Southern Africa: Small Is Beautiful, Say Independent Power Producers*' <<http://ipsnews.net/africa/nota.asp?idnews=50408>> [Accessed 15 May 2010]

in the energy industry. For example, electricity distribution companies might be required to charge uniform prices across all regions of a country regardless of cost, and to bring power to isolated areas, even when the prices paid by consumers living in these areas are not sufficient to cover the costs. Remote locations and low population densities make them costly to serve, and their low consumption does not facilitate adequate returns. This is especially true in the SADC regions where the majority of the populations are in rural areas which are often sparsely populated. In most of Africa, FDI is often constrained by the small size of the market, both in terms of the size of the population and its purchasing power.<sup>97</sup>

In those countries where income distribution is more unequal, governments might require that below cost rates be offered to some consumer groups, such as, low income residential consumers. In most SADC countries governments require utilities to undertake rural electrification programmes<sup>98</sup>, which are generally unprofitable. This is contrary to the profit objective of the private sector, and hence serves as a barrier to FDI in energy services.



#### **3.4.4 Barriers to Temporary Movement (Mode 4)**

The ability of energy companies to temporarily move executives, technicians, and other specialists to foreign countries is essential in the energy services industry. The main barrier to this form of trade is immigration regulation which restricts the temporary entry of skilled people and managers. This is done by imposing unclear and discriminatory rules for entry. According to McGuire, another method governments use to prevent entry is refusal to

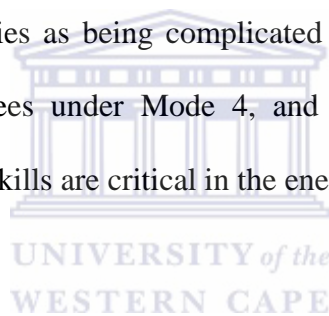
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<sup>97</sup> Countries such as, Botswana and Namibia, have small populations relative to their land base, while other countries, such as, Swaziland, Mauritius, Zimbabwe are small both in terms of physical size and population. Within the region, only South Africa, the DRC and Tanzania have a relatively large population base, and the latter two have very low per capita incomes.

<sup>98</sup> Rural electrification can take two basic forms: connection of provincial town and villages to the existing transmission infrastructure, where those are located close to existing lines; and the provision of non-grid electricity produced by diesel generators, where the geographic location makes the link-up to the grid uneconomic.

recognise the qualifications of employees of foreign service suppliers.<sup>99</sup> This will limit the scope of work that such service suppliers can carry out. In some cases entry depends on the person passing local examinations or other tests before being recognised as a professional.

Bielecki and Desta also identified time limitations on the presence of foreign experts, and economic needs tests, as barriers that affect energy services companies in the SADC. Furthermore, some countries limit certain work only to local citizens, place restrictions on the ability of foreigners to become citizens, and disallow services provided by self-employed people. Such restrictions frustrate companies and place unnecessary obstacles to trade and liberalisation of energy services in the SADC. For example, South Africa's immigration rules have been identified by companies as being complicated and an obstacle preventing intra-company movement of employees under Mode 4, and attracting scarce skills, such as, engineers and technicians. Such skills are critical in the energy services business.



### **3.5 Conclusion**

Despite the SADC region having abundant energy resources, trade barriers impede trade and liberalisation in energy services. As a result energy services trade between SADC countries, especially trade in electricity, which is so vital to the region's economic growth and development, continues to be hampered mainly because of the many reasons discussed above. The multilateral trade rules for energy services provided by the GATS are not adequately designed to deal with the complex and ever changing energy services industry of the 21<sup>st</sup> century. As a result, though the GATS has achieved commendable progress in liberalising and reducing trade barriers in other sectors of the world economy, energy services still face many trade barriers and enormous challenges. Furthermore, at the regional and bilateral level

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<sup>99</sup> McGuire (2002) *Market Access Opportunities and the Benefits of Liberalisation for developing Countries* <[http://www.unctad.org/en/docs/itcdtab20\\_en.pdf](http://www.unctad.org/en/docs/itcdtab20_en.pdf)> [Accessed 15 May 2010]

energy services, especially electricity are also hampered by various different measures across all three modes of supply. It is, therefore, important for the SADC states to seek ways of lowering and eventually eliminating trade barriers to ensure unrestricted trade in energy services.



## CHAPTER 4

### THE DOHA DEVELOPMENT AGENDA AND ENERGY SERVICES

#### 4.1 Introduction

Article XIX of the GATS mandates WTO members to enter into successive rounds of negotiations with the objective of achieving further liberalisation in services trade. In this regard the Doha Development Agenda (DDA) was launched with high expectations in November 2001 in Doha, Qatar, and it was scheduled to be concluded in 2005. However, it is still awaiting completion.<sup>100</sup>

Energy Services is one of the critical sectors under negotiation and this is so mainly because of increasing global energy needs, its inadequate treatment in the Uruguay Round, the evolving structure of the sector, technological developments which have created room for private operators, the recent accession of Saudi Arabia and Oman, as well as negotiations for the accession of Russia, Algeria, Libya, Iran, Iraq or Ukraine, which will bring a substantial part of energy trade to the WTO.<sup>101</sup>

The purpose of this chapter is to explore and discuss the proposed changes pertaining to energy services in the GATS by analysing proposals submitted by the United States, the European Communities (EC), Venezuela, Indonesia and Cuba.<sup>102</sup> These proposals will show the developed country perspective and the developing country perspective, if any difference at all. Furthermore, they focused specifically on energy services issues; hence their inclusion in this chapter.

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<sup>100</sup> The Doha Round of negotiations was suspended because no agreement could be reached on agricultural issues such as subsidies and tariff and quota protections. Agriculture remains one of the most controversial issues.

<sup>101</sup> Lamy (2007) 'Doha Round Will Benefit Energy Trade-Lamy' 20<sup>th</sup> World Energy Congress, Rome <[http://www.wto.org/english/news\\_e/sppl\\_e/sppl80\\_e.htm](http://www.wto.org/english/news_e/sppl_e/sppl80_e.htm)> [Accessed 10 June 2010]

<sup>102</sup> Other proposals relating to the energy services sector have been submitted by Chile, Japan, and Norway and Canada, among others. No proposal was submitted from any African country.



## 4.2 The United States Proposal

The United States (US) at first submitted a paper on the issue of liberalisation of the energy sector on 20 October 1998 (document S/C/W/58.), followed by the submission of a more detailed paper (S/CSC/W/27) on classification of energy services in May 2000, and submitted a proposal (S/CSS/W/24) in December 2000.

The US proposal has three aims. First, presenting a new classification for energy services, that will be used to amend the W/120 so as to create a new separate comprehensive sector for energy services under the GATS. Secondly, the comprehensive classification of energy services can be used as the basis for developing a Reference Paper similar to that of the telecommunications sector.<sup>103</sup> This will be used to address issues specific to the energy services sector, such as access to the network, TPA, among others. Thirdly, the new classification can be used as a basis for developing a model schedule that would enable WTO members to undertake meaningful commitments in the energy sector.<sup>104</sup>

As discussed in the previous chapter, merely making market access and national treatment commitments alone will not lead to full liberalisation of energy services. The US, in its proposal noted that “commitments for energy services should also include a variety of principles aimed at ensuring the greatest possible market opening for energy services.” Principles proposed include technological neutrality, a concept introduced in the negotiations on basic telecommunications, to the effect that where no specific references are made to the type of technology used in providing basic telecommunications services, specific

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<sup>103</sup> Norway and Canada also supports the idea of a Reference Paper. See Communication from Norway, The Negotiations on Trade in Services, S/CSS/W/59, 21 March 2001, paragraph 55

<sup>104</sup> Communication from the United States ‘*Classification of Energy Services*’ S/CSC/W/27, 18 May 2000, paragraph 14

commitments would automatically cover all means of technology.<sup>105</sup> Technology in energy services continues to evolve at a rapid pace.

To ensure that energy services providers can use the best available technology, such as in site preparation and development, market access commitments should be made without regard for the technology used to provide energy.<sup>106</sup> This approach may seem problematic, given the environmental impact of some energy sources, such as coal and nuclear; however, the flexibility of the GATS in allowing countries to choose the sectors in which they wish to make commitments guarantees flexibility, in that a country can choose to make or not to make commitments in certain energy sub-sectors which utilise technologies and energy sources that are not environmentally desirable.

Temporary entry of equipment and tools used in energy services trade in foreign markets is essential to conducting business. In this regard the US proposal urges governments to consider eliminating tariffs on equipment and tools entering WTO member countries temporarily to provide a service. The US further urge consideration of other means to ensure that energy services providers can bring in equipment and tools of the trade that are necessary to provide a service on which a market access commitment is made. According to the US proposal such an initiative can significantly help facilitate trade activities and will induce cost savings and benefits associated with energy services liberalisation.

Similar to the proposed free movement of tools and equipment associated with energy services is also the need to ensure unrestricted movement of electronic information and

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<sup>105</sup> UNCTAD (2001) *Energy Services in International Trade: Development Implications* Document TD/B/COM.1/EM.16/2

<sup>106</sup> Communication from the United States *Energy Services* S/CSS/W/24, 18 December 2000, paragraph 5 and 13

transactions. Energy Services today rely on electronic information flows and transactions in activities, such as, geologic data analysis, trading and brokering, and energy efficiency services, among others. The US proposes that negotiations should ensure the free movement of these information exchanges and transactions.

As noted in the previous chapter regulations and technical requirements create significant impediments to market entry and competition. At the same time, however, regulation of the energy sector is essential to ensure the achievement of public interest goals, including the assurance of an open, competitive energy services market.<sup>107</sup> In the telecommunications negotiations WTO members recognised the need for specific additional commitments related to a highly regulated sector that was undergoing structural changes, often characterised by large incumbent suppliers. A similar situation is also faced in the energy services industry; hence the US proposed a similar Reference Paper specific for energy services.

#### **4.2.1 Suggested Energy Services Classification**

The US proposal recognised that each of the five categories listed below include many different activities. These energy activities are closely interrelated and, taken as a whole, can be said to comprise the “energy sector”. They are:

- 1) Activities related to the exploration, development and production of the energy resource;
- 2) Activities related to the operation of an energy facility;
- 3) Activities related to energy networks (e.g. energy transportation, transmission and distribution);
- 4) Services related to wholesale markets in energy, including trading and brokering;

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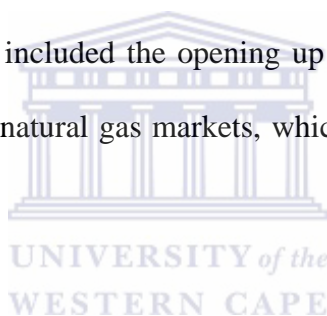
<sup>107</sup> Communication from the United States ‘Energy Services’ S/CSS/W/24, 18 December 2000, paragraph 14

- 5) Services related to the retail supply of energy, including metering and billing, as well as customer service.

### **4.3 The European Communities**

The European Communities (EC) in its communication on energy services of July 1999 provided a first contribution for a list of energy services. The EC and its member states submitted another contribution in March 2001 to the Council for Trade in Services containing their proposal on how to address energy services in the GATS negotiations.

The EC proposal first refers to the ongoing energy liberalisation process in the EC in which it is pointed out that the opening to competition of the energy sector in the EC has been realised by several steps and with the establishment of precise and clear rules. The latest steps in the energy liberalisation process has included the opening up to competition, subject to certain conditions, of the electricity and natural gas markets, which has resulted in significant price reductions for final consumers.



According to the EC communication, the EC proposal aims at engaging WTO members, which have opened their national markets to competition or which are willing to do so, to engage in negotiations to further reduce the barriers to trade in energy services.<sup>108</sup> Importantly, the EC proposal recognises the GATS principle of progressive liberalisation since, first, it refers to the possibility of using the step-wise approach to open up the markets to domestic and foreign competition; secondly, it recognises the need to maintain conditionality regarding market access opening; and, finally, the proposal is aimed at reducing barriers to trade in energy services rather than removing them outright.

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<sup>108</sup> Communication from the European Communities and their member states '*GATS 2000: Energy Services*' S/CSS/W/60, 23 March 2001, paragraph 4

The EC proposal emphasises the importance of regulatory reform and in this regard invites WTO members to establish an appropriate, transparent, objective and pro-competitive regulatory framework for this sector. The EC is of the view that commitments in this sector should also reflect the need to ensure a balance between trade liberalisation and the public policy objectives of regulatory measures.<sup>109</sup> The relationship between regulatory reform and liberalising international trade in energy services is also supported by the US proposal which noted that:

*"Market access and national treatment may well be meaningless without regulatory reform. At the same time, it does little good for trade liberalisation as a practical matter to create a pro-competitive regulatory environment unless market access and national treatment restrictions are eliminated."*<sup>110</sup>

It should be noted that regulatory reform entails introducing competition into industry segments that had previously been subject to control by privately owned, regulated monopolies, state owned enterprises or government agencies.<sup>111</sup> It is essential to point out that the EC considers that the regulatory framework may differ depending on the energy source.

The EC proposal is aimed at going beyond just creating a new energy services sector and suggests the need to create a transparent, objective and pro-competitive regulatory framework for the energy sector. It has been argued that due to the fact that the horizontal rules on competition have not been developed under the GATS, the only way to ensure the existence of a pro-competitive regulatory framework is to negotiate additional disciplines for the

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<sup>109</sup> Ibid

<sup>110</sup> Communication from the United States 'Energy Services' S/CSS/W/24, 18 December 2000, paragraph 7

<sup>111</sup> Melly. (2003) 'Electric Power and Gas Market Reform and International Trade in Services in Energy and Environmental services: Negotiating Objectives and Development Priorities', UNCTAD/DITC/TNCD/2003/3

energy sector, which is what the present EC proposal seems to suggest. In the context of the GATS, the only case where such a framework has been established is in the area of basic Telecommunications, through the adoption of the Reference Paper for the sector, which deals with issues like third party access rights to transmission networks.<sup>112</sup>

#### 4.3.1 Suggested Energy Services Classification

The communication stresses the importance of avoiding double listing in the energy services classification, since a number of energy related services are already covered under the existing classification. The suggested list for the new energy services category covers a number of those services, which are already included under different headings of the GATS services classification.



Like the US proposal, the EC proposal supports the idea of creating a new energy sector and divides energy activities into the following categories:

- 1) Services related to exploration and production;
- 2) Services related to the construction of energy facilities (construction, installation, maintenance and repair);
- 3) Services related to networks (operation of transportation/transmission and distribution, connection services, ancillary services);
- 4) Storage services;
- 5) Services for the supply of energy (wholesale sales of energy products, retail sales of energy products, trading, brokering);
- 6) Services for final use (energy audit, energy management, metering, billing);
- 7) Services related to decommissioning and;
- 8) Other energy related services (installation, maintenance and repair of energy equipment).

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<sup>112</sup> Butkeviciene (2003) 'An Overview of the Negotiating Proposals on Energy Services under the GATS Negotiations: European Communities in Energy and Environmental Services: Negotiating Objectives and Development Priorities', UNCTAD/DITC/TNCD/ 2003/3

#### 4.4 The Venezuelan Proposal

Venezuela states in its proposal that the trend towards outsourcing in various production sectors and the liberalisation of world services trade have also been reflected in energy services. In a large number of countries, including many developing countries, this has led to the introduction of new legal and regulatory frameworks for energy services. Thus, it is now possible to consider conducting negotiations on trade in energy services.<sup>113</sup>

At the same time, Venezuela draws attention to the fact that it would be in the interests of developing countries if these negotiations were approached with a wider focus than a merely trade based perspective, so that the results could help developing countries to achieve their objectives, such as, the strengthening of their domestic entrepreneurial capacity and technological development. In this regard Venezuela advocates that developing countries' policy space to implement policies aimed at domestic capacity building must be respected. Furthermore, developing countries should be allowed to open fewer sectors, liberalise fewer types of transactions, and progressively increase market access in line with their development situation, as stipulated in Article XIX of the GATS, which reads:

*“The process of liberalisation shall take place with due respect for national policy objectives and the level of development of individual members, both overall and in individual sectors. There shall be appropriate flexibility for individual developing country members for opening fewer sectors, liberalising fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching to such access conditions aimed at achieving the objectives referred to in Article IV.”*

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<sup>113</sup> Communication from Venezuela ‘Negotiating Proposal on Energy Services’ S/CSS/W/69, 29 March 2001, paragraph. 5-6

The Venezuelan proposal makes it clear that the ownership and rights of access to and use of natural resources should not be addressed in the negotiations on energy services.<sup>114</sup> This is because countries have full sovereignty over all their natural resources, a principle enshrined in U.N. General Assembly Resolution 1803 of 1962.<sup>115</sup> Furthermore, the members' right to regulate must be respected and the negotiations should not impair the right of governments to determine conditions of access to their markets and to set obligations with regard to public services.<sup>116</sup> In the words of a Venezuelan negotiator:

*"The aim of negotiations under GATS is neither deregulation nor privatisation of services sectors. The perspective promoted by Venezuela is that countries should think in terms of re-regulation which, in principle, entails regulating in a way that encourages both competition and efficiency."*<sup>117</sup>

Like the US, Venezuela recognises that the supply of services in the energy sector is often linked to the use of specialised tools and equipment; hence Venezuela proposed that negotiations should facilitate requirements for the temporary admission of goods, with respect for the principle that these requirements must be governed by the domestic rules applicable in each country.

#### **4.4.1 Suggested Classification of Energy Services**

Venezuela shares the position of the US and the EC that the classification included in W/120 does not reflect the current reality of the market in energy services; hence, a clear, precise and

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<sup>114</sup> Ibid,

<sup>115</sup> World Energy Council (2009) 'Trade and Investment Rules for Energy' <[http://www.worldenergy.org/documents/rules\\_of\\_trade\\_version\\_180809.pdf](http://www.worldenergy.org/documents/rules_of_trade_version_180809.pdf) > [Accessed 19 September 2010]

<sup>116</sup> Communication from Venezuela 'Negotiating Proposal on Energy Services' S/CSS/W/69,29 March 2001, paragraph. 5-6

<sup>117</sup> Borrero, Elbey (2003) 'An Overview of the Negotiating Proposals on Energy Services under the GATS Negotiations: Venezuela in Energy and Environmental services: Negotiating Objectives and Development Priorities' UNCTAD/DITC/TNCD/ 2003/3



unambiguous classification of energy services is required to enable the WTO members to make significant specific commitments.<sup>118</sup>

Upstream: technical services for discovering and developing energy resources.

1. Geological exploration
2. Drilling
3. Logging, well testing and wireline services
4. Completion and cementing services

Downstream: technical services for design, construction, operation and maintenance of energy facilities and networks.

5. Operation and management of energy facilities
6. Design and construction of facilities and networks to produce, transform and supply energy
7. Operation, management and maintenance of energy facilities.
8. Operation, management and maintenance of energy networks, including transportation, transmission and distribution of energy
9. Decommissioning, waste management, environmental protection, waste management and disposal activities
10. Wholesale marketing (supply) of energy.
11. Retail supply of energy

#### **4.5 The Indonesian Proposal**

The Indonesian proposal is one of the most recent proposals. The original proposal was submitted in November 2003 and its first and second revisions were submitted in 2006.

Like Venezuela, Indonesia draws attention to the fact that negotiations on energy services should accord developing countries appropriate flexibility to open fewer sectors, liberalise fewer types of transactions and to progressively extend their market access in line with their development situation, in accordance with Article XIX of the GATS. It also shares the view

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<sup>118</sup> Communication from Venezuela 'Negotiating Proposal on Energy Services' S/CSS/W/69, 29 March 2001, paragraphs. 22-25

that the negotiations should respect national policy objectives and the member's right to regulate the supply of energy services within their territories.<sup>119</sup>

#### **4.5.1 Suggested Classification of Energy Services**

The Indonesian proposal has classified energy services in five main categories. Under each main classification, a breakdown of services is presented with CPC Provisional Codes. The purpose of the proposal is to suggest that the proposed classification list, as amended, be used as a "supplement" to the classification of energy services in the W/120.<sup>120</sup> The categories are:

- 1) The upstream services comprised of non-renewable energy and renewable energy;
- 2) The downstream services related to energy transformation, transportation and distribution services;
- 3) The "energy commercialisation services" consists of the wholesale supply of energy, retail supply of energy and commission agent service;
- 4) The "professional services" including expertise supply services, human resources training and development services; and
- 5) The "other energy services" covering any activity not listed in the previous services.<sup>121</sup>

#### **4.6 The Cuban Proposal**

In its introduction the Cuban proposal noted that new technologies introduced in recent years have permitted, together with growth in trade, a certain degree of liberalisation of energy services which, in turn, have been accompanied by new regulations in many developing countries aimed at extending these services as development strategy instruments. The energy services sector's inclusion in the negotiations will, therefore, have to be focused on the

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<sup>119</sup> Communication from Indonesia '*Proposal on Classification of Energy Services*' S/CSC/W/42,27 November 2003, paragraph 5

<sup>120</sup> Committee on Specific Commitments, Report of the Meeting Held on 4 December 2003, S/C S C/M/31, paragraph 10

<sup>121</sup> Some of the subdivisions are as follows: Risk Analysis, Efficiency Services (Implementation of Energy Conservation Methods, Recycling of Waste Product, Energy Management), Data and Information Services.

development of developing countries domestic capacities through greater access to new technologies, coupled with the promotion of a sustainable environment.

Like Venezuela, the Cuban proposal is also of the view that negotiations should guarantee the right of developing countries to regulate and handle the supply of energy services in their territories in order to meet their domestic policy objectives. They should also facilitate the increasing participation of developing countries in international trade in these services by strengthening their domestic capacity, in accordance with the GATS. According to the Cuban proposal the opening up of markets resulting from the negotiations should help to increase the energy supply capacities of all WTO members, in particular developing countries.

The negotiations should ensure that energy services are made accessible to as many people as possible in order to substantially improve their standard of living and to promote the economic growth of the developing countries. Furthermore, the negotiations should be aimed at enhancing the competitiveness of developing country energy service suppliers and improving their access to technologies on favourable commercial terms.

#### **4.7 Common Elements of the Five Proposals**

The five proposals have the following common elements in the negotiating proposals:<sup>122</sup>

- (a) Acknowledge that improved market access in the energy services sector can have beneficial effects for all countries.
- (b) Negotiations on liberalisation of energy services should not address the issue of ownership of natural resources.
- (c) The energy sector will continue to be regulated to ensure the achievement of public goals.

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<sup>122</sup> Zarilli (2001) *'Energy Services in International Trade: Development Implications'*  
<[www.unctad.org/sections/comdip/docs/webcdpppt20\\_en.ppt](http://www.unctad.org/sections/comdip/docs/webcdpppt20_en.ppt)> [Accessed 15 June 2010]

- (d) Countries are in different phases of regulatory development; therefore their commitments will reflect the existing levels of market reform.
- (e) A new comprehensive energy services classification is required.

#### **4.8 Evaluating the Proposals**

There is consensus among all proposals on the fact that the GATS classification does not define an energy services sector hence most of the proposals have attempted to capture the scope of the energy services sector. However, surprisingly none of the proposals have specifically mentioned the issue of electricity, which still need to be clearly clarified at the multilateral level. This is important, because, among others the treatment of electric power in an international trade dispute will differ depending on the classification of electricity as a good or a service.



As mentioned previously, the US proposal goes beyond the classification of energy services debate and calls for the development of a Reference Paper similar to the Reference Paper on Telecommunications Services. According to Zarilli, the purpose of such a paper would be to ensure transparency in the formulation and implementation of rules, non-discriminatory TPA to and interconnection with energy networks and grids, and prevent anti-competitive practices for energy services in general.<sup>123</sup> The EC proposal does not expressly call for the need of a Reference Paper but supports the US idea by inviting WTO members to establish an appropriately transparent, objective and pro-competitive regulatory framework for the energy services sector.

In contrast, the Venezuelan and Indonesian proposals do not go beyond the classification debate. Commenting on the US proposal, many delegations argued that the work on energy

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<sup>123</sup> Ibid

should focus on classifications issues, while other issues referred to in the US proposal, including a reference paper can be addressed in other contexts and at a later stage.<sup>124</sup>

Though there has been mixed responses to negotiate a Reference Paper, the effective implementation of GATS Article IV and XIX: 2, provisions favouring developing countries would require a Reference Paper. This will assist in ensuring that energy services providers from developed countries commit to provide access to technology, information networks, distribution channels and public service obligations as conditions for market access to energy sectors committed by developing countries.<sup>125</sup> Developing countries will thus be able to derive benefits which they could otherwise have not been able to negotiate individually with trading partners and investors.



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The US, Cuba, Venezuela and Indonesia make reference to energy activities irrespective of the energy source. This approach apparently overlooks the fact that some energies are more sensitive than others from political and strategic points of view and are, therefore, under different regulatory regimes. For example nuclear energy is sensitive to security of all nations, hence need different treatment.

By examining the proposals presented by the various countries it is evident that what is under discussion is not the coverage of the energy services sector by the GATS as such, but its identity as a separate sector in its own right, as opposed to a group of sub-sectors covered by other services sectors, as is the current situation. The current negotiations on energy services face the danger of not resolving some of the important issues. For example, energy is a big

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<sup>124</sup> Committee on Specific Commitments, Report of the Meeting Held on 23 and 24 May 2000, S/CSC/M/15, 29 June 2000, paragraph 25

<sup>125</sup> Zarilli (2003) *Energy and Environmental Services: Negotiating Objectives and Development Priorities* UNCTAD/DITC/TNCD/2003/3

contributor to climate change. It would have been important for the GATS energy services negotiations to propose ways to support widespread adoption of and access to reasonably priced renewable energy services. Such a move will further support objectives of the United Nations Framework Convention on Climate Change and the Kyoto Protocol and assist signatories of these conventions in meeting their obligations.<sup>126</sup>

#### **4.9 Implications for SADC Countries**

Though the SADC bloc or any SADC country in their individual capacity did not submit a proposal on the debate around energy services in the DDA, the SADC together with all other WTO members will be affected by the final outcome of these negotiations. However, in future negotiations it is essential for SADC to negotiate energy services with the following objectives in mind; to ensure universal access to energy, increase the share of business globally for SADC energy services companies and strengthen their competitive position through negotiating favourable market access conditions.<sup>127</sup>

Though the SADC is facing a challenge in providing access to adequate affordable energy, especially electricity, there is a need to access knowledge, expertise and technology in energy services to improve the energy sector and to benefit from the abundant energy resources, which can make a significant contribution to the economic growth of the region. According to Okelo, this implies an increasing need for foreign investments and the establishment of more competitive and liberalised energy markets.

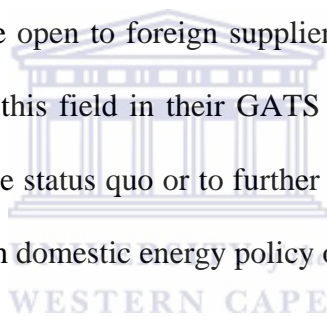
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<sup>126</sup> The Kyoto Protocol is an international agreement linked to the United Nations Framework Convention on Climate Change. The major distinction between the protocol and the convention is that the convention encouraged industrialised countries to stabilise GHG emissions, while the protocol commits them to do so.

<sup>127</sup> Zarilli (2003) '*Energy and Environmental Services: Negotiating Objectives and Development Priorities*' UNCTAD/DITC/TNCD/2003/3

Most SADC countries import energy services be it for the construction of electricity infrastructure, such as power stations, or services related to oil and gas exploration. These services are capital and technology intensive, which is the reason why governments have not succeeded in harnessing energy resources. The conclusion of the DDA is likely to produce a modern, comprehensive, unambiguous coverage of energy services, which will make it easier to make commitments in sub-sectors in which energy services investments are required.

Only a limited number of developing countries<sup>17</sup> have experience with the structural reform of the energy sector; consequently, they have not yet developed the emerging energy services that usually emanate from the liberalisation of the sector. Then, developing country energy services markets are by and large open to foreign suppliers. However, developing countries have made few commitments in this field in their GATS schedules, and thus still have the flexibility to retain or maintain the status quo or to further liberalise their markets where it is deemed to be most consistent with domestic energy policy objectives.



#### **4.10 Conclusion**

At the conclusion of the Doha Round energy services are likely to have a separate comprehensive sector under the multilateral rules to facilitate trade and liberalisation of this sector. Though developing countries are likely to be impacted significantly by these changes, it is interesting to note that African countries have not made any contribution to the energy services negotiations in the Doha Round; however their developing counterparts from Asia and the Americas have made significant contributions. The SADC countries need to push aggressively for the liberalisation of energy services markets, in both domestic and foreign services markets and to promote the development of improved rules which will be beneficial to them by forging a common negotiating position.

## **CHAPTER 5**

### **RECOMMENDATIONS AND CONCLUSION**

#### **5.1 Introduction**

This chapter will draw conclusions from the research as whole, with a view to recommending practical and effective solutions. The intention of this research was to investigate why Energy Services liberalisation and trade at the multilateral, regional and bilateral level has proved problematic, particularly focusing on the SADC region. In order to deal with the key challenges identified in this research, various recommendations are proposed below.

#### **5.2 Recommendations**

- Failure of the Uruguay Round to give energy services the attention it deserves resulted in multilateral trade rules not fully developed to cater for the specific needs associated with the energy services sector. The Doha Round though currently suspended is a critical step in the right direction, since for the first time energy services are being discussed as a separate sector. Drawing upon the experiences of the telecommunications and the financial services sectors, which were discussed separately, discussing energy services as a sector on its own will yield positive results. It is therefore imperative that the Doha Round be resuscitated to ensure that negotiations on energy services are concluded.
- The GATS does not have a separate comprehensive classification of energy services in the WTO Services Sectoral Classification List, the W/120. It is therefore recommended that a separate comprehensive classification be created, which fully captures all energy services activities and their various sub-sectors, as well as new and emerging services associated with the industry. The various proposals discussed in the previous chapter shows many similarities between the proposals and a general consensus that a new comprehensive classification is required. This will eliminate the



current confusion in scheduling commitments, provide clarity, certainty and simplicity in scheduling commitments, and will also go a long way to encouraging countries to undertake commitments.

- Simply making the GATS commitments in Energy Services will not achieve the objective of liberalisation and elimination of trade barriers in energy services, as has been noted previously. A Reference Paper is required for Energy Services to fully capture and formulate appropriate rules, which take into account unique technical issues of the sector. Such a solution worked effectively in the Telecoms sector. The Reference Paper should address barriers to trade; especially those related to TPA, interconnection, market access and investment and competition safeguards. All WTO members should be asked to incorporate this Reference Paper into their schedule of commitments.
- The power infrastructure demand in the region requires considerable investment. Liberalising at the domestic level is required first before looking outside. Liberalisation at the domestic level will help identify and eliminate unnecessary obstacles to investment by private companies, promote competition, and afford regional companies which have the necessary resources the opportunity to enter the market. It is therefore recommended that the individual governments of the SADC member states liberalise their domestic energy services industry in order to allow unhindered private sector participation in the industry. An alternative, would be for the SADC to negotiate and issue a directive, which sets minimum levels of liberalisation and at the same time allows countries to undertake 'deeper liberalisation' should they wish. This route worked successfully in the EC when it liberalised its electricity and gas markets; however, such a route will need to be

adapted to suite the SADC situation and prevailing circumstances. Whichever route is taken, the ultimate result must be a liberalised energy services market in the region.

- To ensure successful electricity trade in the SADC and eliminate unnecessary obstacles to trade it is essential that a RERA be brought into existence with a sense of urgency. It must be an independent body, free of political interference. Its objectives, among others, must be to create capacity building, information sharing and experience sharing among regulators, and co-ordination of regional policy, strategy and legislation, with a view to harmonising regulatory frameworks that will enhance regional electricity trade and investment.
- The SADC states should negotiate a common regional position regarding energy services. This will assist in presenting a united front during negotiations and at the same time ensure that regional circumstances are taken into account before the GATS changes are implemented.
- Pending a continuation of the Doha negotiations, governments should endorse the objective of facilitating movement of energy services personnel across national boundaries. In this regard governments should co-operate with one another through arrangements, understandings, and protocols governing conditions of entry. Furthermore, measures to minimise differences among national and regional approaches to the movement of energy services personnel should be pursued through the development of jointly agreed security protocols, understandings, screening and documentation.
- International experience demonstrates that regional or inter-regional electricity integration brings substantial benefits to consumers in terms of lower costs and improved reliability and quality of service. It is, therefore, recommended that, the SADC and the SAPP encourage member states currently not connected to the power

pool to come on board. The connection of SAPP members currently not connected to the SAPP grid will increase power trading.

- The SADC and the SAPP should encourage different governments to allow other types of technology, for example, solar home systems, to sell power in the pool. The utilisation of this technology could also assist to increase the electricity volume within the power pool.
- To achieve the GATS objective of progressive liberalisation of trade in services through the elimination of barriers and obstacles to trade, developing countries, including SADC countries, must be strongly encouraged to progressively eliminate barriers to energy services trade, especially through the inclusion of commitments to market access and national treatment. Making commitments is important in that it provides policy stability to investors as well as locks in domestic liberalisation reforms or efforts, in situations where there is opposition to such reforms. This creates a positive investment climate, which will attract greater investment responses.
- Energy Services investments entail long-term commitments of capital. Therefore, given the long-term nature of energy investments, governments should commit to fair and equitable treatment of investors. It is, therefore, recommended that governments ensure that all measures and policies governing energy are based on accepted international norms, including full, disclosure, transparency, and non-arbitrary treatment. Governments should also strictly adhere to the GATS standards or principles of non-discrimination, which are national treatment and Most Favoured Nation treatment, to ensure a stable and reliable energy services investment climate.
- There is a need for further detailed research into, and education on, the experiences of energy services trade and liberalisation, particularly in developing countries, that have succeeded in this regard. An appreciation of derived benefits by stakeholders and

decision makers, including government ministers, technocrats, and even the business sector and non-governmental organisations, can result in mobilisation of support to influence political leaders to fully endorse and support free trade and liberalisation in energy services. A robust communication campaign targeting selected decision-makers and, emphasising existing success stories must also be undertaken.

### **5.3 Conclusion**

Energy Services is a critical area of global trade; however, despite its importance this sector is confronted by many challenges. The multilateral rules in the GATS are not fully and effectively designed to fully integrate this sector in the trading system. It is therefore likely that liberalisation and elimination of trade barriers and undertaking meaningful commitments, especially by developing countries, such as the SADC bloc, will be achieved in the long term. However, by making full commitments to trade in energy services, SADC nations will ensure that consumers in their markets have access to a greater selection of services at competitive prices, which in turn may lead to further economic benefits, such as, the growth of domestic energy services firms that may eventually export to the world market.

During the Uruguay Round energy services were not a priority for WTO members mainly because this sector was dominated by state enterprises; hence there was no room for private companies. However, the growing importance of energy needs globally has also resulted in growing demand for energy services; hence their growing importance in the multilateral trade forum. For the first time energy services are being recognised and discussed as a separate sector, which reflects their growing importance and need to fully make trade in this sector efficient.

## **BIBLIOGRAPHY**

### **Journal Articles**

Chanda R 'Social Services and the GATS: key Issues and Concerns' (2002) 31 (12) *World Development Journal* 199

Dupasquier C, Patrick N, Osakwe 'Foreign Direct Investment in Africa: Performance, Challenges and Responsibilities' (2006) 17 *Journal of Asian Economics* 241

Estach A et al 'How Efficient are Africa Electricity Companies? Evidence from Southern African Countries' (2008) 36 *Energy Policy Journal* 1969

Gabriele A 'Policy Alternatives in Reforming Energy Utilities in developing Countries' (2004) 32 *Energy Policy Journal* 1319

Karekezi S 'Poverty and Energy in Africa—A Brief Review' (2002) 30 *Energy Policy Journal* 917

Lwanda G 'Prioritizing Energy Security in Southern Africa' (2009) 8 (1) *South African Journal of International Affairs* 3

Mbohwa C 'Zimbabwe: An Assessment of the Electricity Industry and What Needs to Be Done' (2002) 15 (7) *The Electricity Journal* 82

Mlambo K 'Reviving Foreign Direct Investments in Southern Africa: Constraints and Policies' (2005) 17 (3) *African Development Review* 552

Palasthy A 'Third Party Access in the Electricity Sector: EC Competition Law and Sector Specific Regulation' (2002) 20 *Journal of Energy and Natural Resources Law* 27

Turkson J, Wohlgenuth N 'Power Sector Reform and Distributed Generation in Sub-Saharan Africa' (1999) 29 *Energy Policy Journal* 135

Tshombe L, Ferreira I, Uken E 'NEPAD Vision and the Inga Hydro-Electric Scheme' (2007) 18 (3) *Journal of Energy in Southern Africa* 20

### **Books**

Bielecki J, Desta M (2004) '*Electricity Trade in Europe: Review of Economic and Regulatory Challenges*' Kluwer Law International. The Hague

Cronjé J, Willemien D, Fundira T, Mwanza W, Bursvik E, McCarthy C, (2010) '*Supporting Regional Integration in East and Southern Africa: Review of Select Issues*' Trade Law Centre for Southern Africa, Stellenbosch

Evans C (2000) '*Liberalising Global Trade in Energy Services*' AEI Press: Washington

Huang Z and Chen C (2004) '*Competition Policy as Welfare-Enhancing Complement to Trade Liberalization: A United States Perspective*' Kluwer Law International. The Hague

Karekezi S and Ranja T (1997) '*Renewable Energy Technologies in Africa*' ZED Books, London

Krajewski M (2003) '*National Regulation and Trade Liberalisation in Services: The Legal Impact of the GATS on National Regulatory Autonomy*' Kluwer Law International, The Hague

Mattoo A, Stern M, Zanini G (2008) '*A Handbook of International Trade in Services*' Oxford University Press. New York

Marcroly P, Appleton A, et al (2005) '*The World Trade Organisation: Legal, Economic and Political Analysis, Volume 2*' Springer Science and Business Press. New York

Van de Bossche P (2005) '*The Law and Policy of the World Trade Organisation: Text, Cases and Materials*' Cambridge University Press, New York

**Working Papers, Issue Papers, Background Papers, Occasional Working Papers**

Basu A, Srinivasan K (2002) *'Foreign Direct Investment in Africa: Some Case Studies'* International Monetary Fund Working Paper, WP/02/61

Benitah (2005) *'Subsidies, Services and Sustainable Development'* International Centre for Trade and Sustainable Development Working Paper 1

Biswajit N and Debdep D (2008) *'Services in Regional Trade Agreements: Implications for India'* Department of Economics, Jadavpur University Working Paper 05-08

Brunnetti A, Kisunko G, Weder B (1997) *'Institutional Obstacles for Doing Business Data Description and Methodology of a Worldwide Private Sector Survey'*. Background Paper, World Development Report

Cho A and Dubash N (2003) *'Will Investment Rules Shrink Policy Space for Sustainable Development? Evidence from the Electricity Sector'* World Resources Institute Working Paper

Disenyana T and Samuel C (2009) *'Trade in Electricity Services in the Southern African Customs Union: Towards a Negotiating Strategy'* South African Institute of International Affairs, Occasional Working Paper No.46

Eberhard A (2003) *'GATS Energy Services Negotiations and Energy Market Regulation and Liberalisation in South Africa'* Trade and Industrial Policy Strategies Working Paper 9-2003

Hoekman B (2006) *'Liberalising Trade in Services: A Survey'* World Bank Working Paper 4030

Isaksen J (2002) *'Energy Cooperation in Southern Africa: What Role for Norway'* Michelsen Institute Working Paper 4

Matoo, A and Sauve, P (2003) *'Domestic Regulation and Services Trade Liberalisation'* World Bank Publication

Mlambo (2005) *'Reviving Foreign Direct Investments in Southern Africa: Constraints and Policies'* African Development Bank Publication

Mukherjee A and Goswami R (2009) *'Trade in Energy Services: GATS and India'* Indian Council for International Research Working Paper No. 321

Okelo J A (2006) *'General Agreement on Trade in Services: A Case for Energy Services in Kenya'* Consultancy by the School of Economics, University of Nairobi

Olotu (2010) *'Experience in Terms of Policies (Subsidising/ Financing Programmes) Implemented by REA to Improve Access to Sustainable/Renewable Energies in Rural Areas'* Unpublished Paper presented at the UN Expert Meeting on Renewable Technologies as Energy Solutions for Rural Development 9 -11 February 2010, Tanzania.

Pineau (2003) *'International Trade Agreements and the Peruvian Electricity Sector'* School of Public Administration, University of Victoria

Patterson (2002) *'Energy Company? What Energy Company?'* The Royal Institute of International Affairs Briefing Paper

Ram (2009) *'Africa's Intra-Regional, Inter-Regional and Intercontinental Electricity Trade: Techno, Politico, Economic Considerations and Future Prospects'*. African Development Bank Publication

Southern Centre for Energy and Environment (1997) *'Implementation Strategy to Reduce Environmental Impact of Energy Related Activities in Zimbabwe'* Southern Centre for Energy and Environment Working Paper 5

### **Web Sources**

African Development Bank and the African Union (2009) *'Oil and Gas in Africa'*

<http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/Full%20Document%20-%20Oil%20and%20Gas%20in%20Africa.pdf>



Brown, Stern (2000) '*Measurement and Modelling of the Economic Effects of Trade and Investment Barriers in Services*'

<http://www.ingentaconnect.com/content/bpl/roie/2001/00000009/00000002/art00278>>

BP (2010) '*BP Statistical Review of World Energy*'

<http://www.bp.com/productlanding.do?categoryId=6929&contentId=7044622>>

Cohen (2002) '*From Public Good to Private Exploitation: Electricity Deregulation, Privatisation and Continental Integration*'

[http://nl1519.policyalternatives.ca/sites/default/files/uploads/publications/National\\_Office\\_Pubs/electricity.pdf](http://nl1519.policyalternatives.ca/sites/default/files/uploads/publications/National_Office_Pubs/electricity.pdf) >

Clough (2008) '*Energy Profile of Southern Africa*'

[http://www.eoearth.org/article/Energy\\_profile\\_of\\_Southern\\_Africa](http://www.eoearth.org/article/Energy_profile_of_Southern_Africa)>

Delich (2010) '*What is Carbon Credit Trading?*'

<http://www.wisegeek.com/what-is-carbon-credit-trading.htm>>

Department of Minerals and Energy (2010) <http://www.dme.gov.za/energy/nuclear.stm>>

Department of Minerals and Energy (2005) '*Gas Infra-Structure Plan*'

[http://www.dme.gov.za/pdfs/energy/gas/gas\\_infrastructure\\_plan.pdf](http://www.dme.gov.za/pdfs/energy/gas/gas_infrastructure_plan.pdf)>

Eastern Africa Energy Resource Base (2010) '*Fossil Fuels Tanzania*'

[http://regionalenergynet.com/index.php?option=com\\_content&task=view&id=43&Itemid=35](http://regionalenergynet.com/index.php?option=com_content&task=view&id=43&Itemid=35)>

Economic Commission for Africa (2004) '*Assessment of Power Pooling Arrangements in Africa*' [http://uneca.org/eca\\_programmes/sdd/documents/POWER\\_POOLING\\_rd.pdf](http://uneca.org/eca_programmes/sdd/documents/POWER_POOLING_rd.pdf)>

Frost and Sullivan (2010) '*Southern African Oil and Gas Market*'

<http://www.frost.com/prod/servlet/report-toc.pag?repid=M571-01-00-00-00>>

Hernandez J (2008) '*The Services related to the Electric Industry Under the GATS: Is There and Need for New Provisions at the Multilateral Level for these Services?*'

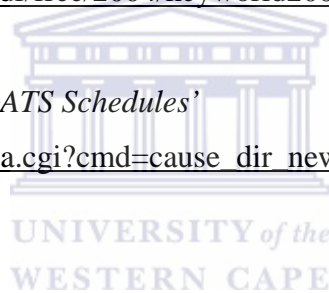
[http://www.scielo.unal.edu.co/scielo.php?pid=S169281562008000200005&script=sci\\_arttext](http://www.scielo.unal.edu.co/scielo.php?pid=S169281562008000200005&script=sci_arttext)

Hodge (1998) '*Does South Africa Gain from the Inclusion of Services in Trade Agreements?*' <[http://www.commerce.uct.ac.za/Economics/Programmes/postgraduate\\_programmes/masters/Specialisations/TRP/Research/Hodge\\_services.pdf](http://www.commerce.uct.ac.za/Economics/Programmes/postgraduate_programmes/masters/Specialisations/TRP/Research/Hodge_services.pdf)>

Homer (1993) '*Natural Gas in Developing Countries*' <<http://docserver.ingentaconnect.com/deliver/connect/wb/9780821323298/v1n1/s1.pdf?expires=1285323921&id=58760681&titleid=7769&accname=University+of+the+Western+Cape&checksum=94FE0CFCFB5B94C6CB9E7B5F279D1DED>>

International Energy Agency (2004) '*Key World Energy Statistics*' <<http://www.iea.org/textbase/nppdf/free/2004/keyworld2004.pdf>>

Kruger (2010) '*Modification of GATS Schedules*' <[http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause\\_dir\\_news\\_item&cause\\_id=1694&news\\_id=88226&cat\\_id=1101](http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=1694&news_id=88226&cat_id=1101)>



Lamy (2007) '*Doha Round Will Benefit Energy Trade-Lamy*' 20<sup>th</sup> World Energy Congress, Rome <[http://www.wto.org/english/news\\_e/sppl\\_e/sppl80\\_e.htm](http://www.wto.org/english/news_e/sppl_e/sppl80_e.htm)>

McGuire (2002) '*Market Access Opportunities and the Benefits of Liberalisation for developing Countries*' <[http://www.unctad.org/en/docs/itcdtab20\\_en.pdf](http://www.unctad.org/en/docs/itcdtab20_en.pdf)>

South Africa Yearbook 2005/2006 <[http://www.dme.gov.za/energy/renew\\_hydro.stm](http://www.dme.gov.za/energy/renew_hydro.stm)>

Sikuka (2010) '*SADC Takes Investment Drive to Europe for Energy Sector*' <<http://allafrica.com/stories/201003040417.html>>

Southern Africa Power Pool Operational Report (2006) '*Regional Power Networking for Economic Expansion*' Issue No. R07-06' <<http://www.sapp.co.zw/viewinfo.cfm?linkid=13&siteid=1>>

Third World Network Africa (2008) '*Background Paper: Services Liberalisation in Africa's Extractive Sector*'

<[http://www.twnafrica.org/index.php?option=com\\_content&view=article&id=129:background-paper-services-liberalisation-in-africas-extractive-sector-&catid=41:occasional-papers&Itemid=97](http://www.twnafrica.org/index.php?option=com_content&view=article&id=129:background-paper-services-liberalisation-in-africas-extractive-sector-&catid=41:occasional-papers&Itemid=97)>

Van den Bosch (2010) '*Energy Southern Africa: Small Is Beautiful, Say Independent Power Producers*' <<http://ipsnews.net/africa/nota.asp?idnews=50408>>

Walde T (2001) '*Access to Energy Networks: A Precondition for Cross-border and Energy Services Trade*' <<http://www.dundee.ac.uk/cepmlp/journal/html/vol9/vol9-2.html>>

World Bank (2004) '*Press Conference on Reforming Infrastructure - Privatisation, Regulation and Competition*'

<<http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0%2C%2CcontentMDK:20212636~menuPK:34476~pagePK:34370~piPK:34424~theSitePK:4607%2C00.html>>

World Energy Council Report (2005) '*Regional Energy Integration in Africa*' <<http://www.worldenergy.org/publications/317.asp>>

World Bank and The International Finance Corporation (2010) '*Doing Business 2011*' <<http://www.doingbusiness.org/>> [Accessed 3 November 2010]

World Energy Council (2009) '*Trade and Investment Rules for Energy*' <[http://www.worldenergy.org/documents/rules\\_of\\_trade\\_version\\_180809.pdf](http://www.worldenergy.org/documents/rules_of_trade_version_180809.pdf)>

World Energy Outlook Report (2009) <[http://www.worldenergyoutlook.org/docs/weo2009/WEO2009\\_es\\_english.pdf](http://www.worldenergyoutlook.org/docs/weo2009/WEO2009_es_english.pdf)>

Zarilla (2001) '*Energy Services in International Trade: Development Implications*' <[www.unctad.org/sections/comdiv/docs/webcdppt20\\_en.ppt](http://www.unctad.org/sections/comdiv/docs/webcdppt20_en.ppt)>

Trade and Industrial Policy Strategies (2009) '*SADC Trade: Services Sector Liberalisation*'

<http://www.sadctrade.org/files/Service%20Sector%20Liberalisation%20Literature%20Review.pdf>

### **Multilateral Text**

Borrero, Elbey (2003) *'An Overview of the Negotiating Proposals on Energy Services under the GATS Negotiations: Venezuela, in Energy and Environmental services: Negotiating Objectives and Development Priorities'* UNCTAD/DITC/TNCD/ 2003/3

Butkeviciene J (2003) *'An Overview of the Negotiating Proposals on Energy Services under the GATS Negotiations: European Communities Energy and Environmental services: Negotiating Objectives and Development Priorities'* UNCTAD/DITC/TNCD/ 2003/3

Communication from the United States, Classification of Energy Services, S/CSC/W/27, 18 May 2000, paragraph 7

Communication from the United States, Energy Services, S/W/58, 20 October 1998, paragraph 2

Communication from the European Communities and their member States, GATS 2000: Energy Services, S/CSS/W/60, 23 March 2001, paragraph 4

Communication from Venezuela, Negotiating Proposal on Energy Services, S/CSS/W/69, 29 March 2001, paragraph. 5-6

Communication from Indonesia, Proposal on Classification of Energy Services, S/CSC/W/42, 27 November 2003, paragraph 5

Committee on Specific Commitments, Report of the Meeting Held on 4 December 2003, S/C S C/M/31, paragraph 10

Committee on Specific Commitments, Report of the Meeting Held on 23 and 24 May 2000, S/CSC/M/15, 29 June 2000, paragraph 25

Melly C (2003) *'Electric Power and Gas Market Reform and International Trade in Services, in Energy and Environmental services: Negotiating Objectives and Development Priorities'* UNCTAD/DITC/TNCD/ 2003/3

UNCTAD (2003) *'Managing Request Offers Under the GATS: The Case of Energy Services'* Document UNCTAD/DITC/TNCD/2003/5

UNCTAD (2003) *'Managing Request-Offer Negotiations under the GATS: The Case of Energy Services'* Document UNCTAD/DITC/TNCD/2003/5

UNCTAD (2001) *'Energy Services in International Trade: Development Implications'* Document TD/B/COM.1/EM.16/2

WTO Council for Trade in (2010) *'Services Energy Services Background Note'* Document S/C/W311

WTO Council for Trade in Services (1998) *'Energy Services Background Note'* Document S/C/W/52

WTO Council for Trade in Services (2008) *'Communication from the United States'* Document S/C/W58

Zarilli (2003) *'Energy and Environmental Services: Negotiating Objectives and Development Priorities'* UNCTAD/DITC/TNCD/2003/3

