

THE UNIVERSITY OF THE WESTERN CAPE

LAW FACULTY

Mini-thesis submitted in partial fulfillment of the requirements for the LLM: Trade, Investment and Business Law in the Faculty of Law of the University of the Western Cape



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TITLE:

**Promoting Transport Liberalisation under the SADC Trade in Services Protocol: The
Zambian Road Transport Operators Experience**

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Declaration

‘I declare that this mini-thesis titled Promoting Road Transport Liberalisation under the SADC Protocol on Trade in Services is my own work, that it has not been submitted 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’.



Demetria Hatoongo-Mudenda

Dedication

This mini-thesis is dedicated to my children Maria and Mweetwa for their endurance during the period I had to be away from home to undertake my studies. May you be inspired to attain greater achievements.



Acknowledgements

The financial assistance received from the Faculty of Law of the University of Western Cape, towards my LLM studies is hereby acknowledged. The opinions expressed and conclusions arrived at are mine and are not necessarily to be attributed to my sponsors.



Key Words

Cabotage

General Agreement on Trade in Services

Most Favoured Nation

National Treatment

Southern African Development Community

Service Liberalisation

Specific Commitments

Third Country Rule

Trucking

Unilateral liberalisation



Acronyms

BRTA	Bilateral Road Transport Agreement
CBRTA	Cross Border Road Transport Agency
COMESA	Common Market for Eastern and Southern Africa
CTS	Council for Trade in Services
CU	Customs Union
DDA	Doha Development Agenda
DSB	Dispute Settlement Body
EAC	East African Community
EU	European Union
FDI	Foreign Direct Investment
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
IMF	International Monetary Fund
LDC	Least Developed Countries
MFN	Most Favoured Nation
NAFTA	North American Free Trade Agreement
NT	National Treatment
PTA	Preferential Trade Area
RECS	Regional Economic Communities
RTA	Regional Trade Agreement
RTSA	Road Transport and Safety Agency
SADC	Southern African Development Community
SADCC	Southern African Development Co-ordination Conference
TFTA	Tripartite Free Trade Area
UN	United Nations
WTO	World Trade Organisation

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CHAPTER ONE

1.0 INTRODUCTION

The Southern African Development Community (SADC) is a voluntary cooperative association of sovereign states that covers most of Sub-Saharan Africa south of the equator and the Indian Ocean Islands. The SADC was formed to promote cooperation in trade, economic and social development, and to provide a means for harmonising various aspects of a range of disciplines in order to maximise the mutual advantages of coordinated actions. The SADC borders on and overlaps with other trade regions such as the Common Market for Eastern and Southern Africa (COMESA) and East African Community (EAC).¹

In Africa, regional economic integration has for a long time constituted an integral part of development strategies. Regional economic integration has in this regard been viewed as a means to achieve sustained economic growth and development, as well as overcoming the region's structural problems such as political fragmentation, low per capita incomes and small intra-regional markets.² In the SADC region, economic integration has been viewed as cardinal in consolidating regional political structures in the post-colonial period, as well as creating a regional bloc for effective use in international political forums.³

Notwithstanding the foregoing, the SADC agenda for economic integration has been marked with severe economic imbalances among the member states which favour the dominant South African economy. This explains the ideology of trade cooperation upon which the SADC was originally founded upon. The predecessor to the SADC, the Southern African Development Co-

¹ SADC, *Facilitation of Road Transport Market Liberalisation in the SADC Region Report* (2010) 4

² Soko M, *The Political Economy of Regional Integration in Southern Africa* (2005) 1

³ Soko M, *The Political Economy of Regional Integration in Southern Africa* (2005) 1

ordination Conference (SADCC) was essentially political in nature and its main objective was that of reducing economic dependence of the region on South Africa during the apartheid era.⁴

The fall of apartheid has created conditions conducive to regional political and economic co-operation as is evidenced in the SADC Regional Indicative Strategic Development Plan (RISDP) which contains timeframes for economic integration, in particular the creation of a free trade area by 2008, a customs union by 2010, a common market by 2015 and a monetary union by 2016.⁵

The relationships between the SADC member states are largely governed by a series of Protocols covering various areas of mutual concern including services. In this paper, the discussion will be focused on the liberalisation of the transport service sector. The transport services sector in the SADC region traditionally falls under the SADC Protocol on Transport, Communications, and Meteorology (SADC TCM) and most recently the SADC Protocol on Trade in Services (SADC TIS) has been agreed to by member states to govern services.

The SADC TIS like most other Regional Trade Agreements (RTAs) on trade in services has mechanically followed the precedent of RTAs on trade in goods, as well as the multilateral framework of the World Trade Organisation (WTO) under the General Agreement on Trade in Services (GATS). These RTAs have mainly focused on the elimination of explicit barriers to the entry of service providers. Furthermore, the targeted services markets are ideally opened on a Most Favoured Nation (MFN) or nonpreferential basis.⁶

The aim of trade in services liberalisation measures is to foster greater trade and competition as well as the enhancement of welfare and efficiency gains by removing and/or relaxing domestic and foreign regulatory controls or barriers to entry into the market for foreign service suppliers. In contrast to trade in goods, services are often intangible, invisible, and perishable usually requiring simultaneous production and consumption. The need in many cases for proximity

⁴ Soko M, *The Political Economy of Regional Integration in Southern Africa* (2005) 2

⁵ UNCTAD, *Towards SADC Services Liberalisation, Balancing Multiple Imperatives* (2010) 1

⁶ Mattoo A and Payton L, *Service Trade Development in Zambia* (2007) 45

between the consumer and the producer implies that one of them must move to make an international transaction possible.⁷

In the SADC region, the liberalisation of trade in services is meant to help secure the availability and affordability for the regional citizens of quality but low-cost services, and also to make the region competitive in world trade.⁸ All SADC member states hold membership to the WTO. During the Uruguay round, which resulted in among other agreements, the first multilateral agreement on trade in services, most SADC member states undertook services liberalisation commitments of varying degrees. South Africa and Lesotho made the most commitments while Madagascar and Mozambique made the least commitments.

The classical arguments in favour of undertaking commitments for trade in services under the GATS (as well as the SADC TIS when countries begin their negotiations) include offering legal guarantees and certainty to foreign services providers as well as the introduction of foreign competition or the fostering of existing foreign competition. This in turn results in more foreign investment which is as a result of legal certainty and irreversibility of conditions of operations for service providers, wider choice of services for the consumer including state of the art services such as supply chain management for instance, lower prices of services through competition with national incumbents and other foreign providers.

Undertaking commitments for trade in services further results in effective technology transfer through the use of modern equipment and management methods; through the employment and training of local staff who are then able to create their own businesses at least in sub sectors with low costs of entry such as the taxi industry where all one needs is a vehicle and driving skills. Bearing in mind the foregoing perceived benefits of trade in services, it is important for Africa as a whole to undertake commitments for trade in services liberalisation both at the international and regional level since its low share of global trade is attributed more to lack of capacity to

⁷ Mattoo A and Payton L, *Service Trade Development in Zambia* (2007) 10

⁸ Khumalo N, *Liberalising Trade in Southern Africa* (2008) 56

produce adequate quantities of quality goods and services to meet both the needs of domestic operators and export markets than to the demand side constraints.⁹

The SADC region will be the main area of focus in this paper because of the pending negotiations to liberalise trade in services in six priority sectors (including road transport), which negotiations are expected to be concluded by 2015 under the SADC TIS. The SADC region is characterised by vast differences in economic size, development and structure. The scale of service output and trade also differ markedly by country. Most SADC member states are constrained by expensive and inefficient industries. Effective service sector liberalisation could contribute to increased competition within the SADC member states which in turn could generate increased investment, lower prices and improved output in services with spin-off benefits for the wider domestic and regional economy.¹⁰

The foregoing arguments hold equally true for the liberalisation of the transport service sector which has been said to directly translate into reduced import costs as well as generally increasing the competitiveness of exports.¹¹ However these benefits may come at a cost of local firms losing what has been previously guaranteed domestic markets.

According to the WTO services classification, transport services include maritime services, internal waterways transport services, air transport services, space transport, rail transport, road transport, pipeline transport and services auxiliary to all modes of transport.¹² African countries including those from the SADC region are said to have relatively high transport costs when compared to other regions¹³. Pederson attributes this to among other reasons under-developed road infrastructure and limited market competition in the transport sector in Africa.¹⁴

⁹ Khumalo N, *Liberalising Trade in Southern Africa* (2008) 56

¹⁰ Stern M, Truen S and Ramkolowan Y, *SADC Trade in Services: Negotiating National Interest* (2011) 5

¹¹ Raballand G, Kunanaka C & Giersing B, *The impact of regional liberalization and harmonisation in Road Transport Services: A focus on Zambia and lessons for landlocked countries* (2008) 2

¹² <http://www.sadc.int/tis> (accessed on 16th September 2012)

¹³ Rizet C & Hine J, 'A Comparison of the Costs and Productivity of Road Freight Transport in Africa and Pakistan' *Transport Reviews* (1993) 13 (2) 151

¹⁴ Pedersen P, 'Freight Transport under Globalisation and its Impact on Africa' *Journal of Transport Geography* (2001) 9 86

For countries that are landlocked, the transport and communications sector comprise a small share of Gross Domestic Product (GDP). They are particularly small in Botswana and Zimbabwe at 5.0% of GDP. In South Africa, Mozambique, Seychelles and Mauritius, the contribution is higher. This may be a reflection of the relative size and development of these sectors or could be an indication of the high cost of such services in some of the economies of SADC member states.¹⁵ In the SADC region, several initiatives have been undertaken to address high transport costs including the recent signing by member states of the SADC TIS.

The SADC TIS sets out the framework for the liberalisation of trade in services between SADC member states and will serve as a basis for negotiations. Starting with six core services sectors (construction, communication, transport, energy, tourism and financial), the envisioned liberalisation will eventually cover almost all sectors and modes of supply. The ultimate aim is for each member state to treat the services and service suppliers of other members, in the same way as its own service suppliers and services by eliminating explicit barriers to the entry of service providers in the member states.¹⁶

The road transport service is critical in the SADC region as it is estimated that about 90% of cargo flow into and out of the region is carried by road transport.¹⁷ In Zambia concerns have been raised by stakeholders such as the road transport operators that complete services liberalisation in the SADC region will result in their loss of market share due to the entry onto the Zambian domestic market of foreign road transport operator competitors with access to cheaper finance (in say South Africa) to buy or lease the vehicles, with access to cheaper fuel and spare parts outside of Zambia.¹⁸

1.1 RESEARCH PROBLEM

In Zambia the services sector has significantly contributed to GDP with nearly 64 per cent being generated in services compared with 56 per cent a decade earlier.¹⁹ However, there has been

¹⁵ Stern M, Truen S and Ramkolowan Y, *SADC Trade in Services: Negotiating National Interest* (2011) 9

¹⁶ Khumalo N, *Liberalising Trade in Southern Africa* (2008) 57

¹⁷ <http://www.sadc.int/tis> (accessed on 16th September 2012)

¹⁸ Sunday Times of Zambia, <http://times.co.zm> (accessed on 20th September 2012)

¹⁹ Mattoo A & Payton L, (eds) *Services Trade & Development: The Experience of Zambia* (2007) 10

insignificant growth in services such as tourism, transport and communication. It is estimated that transport costs can contribute as much as 17 per cent to import costs in Zambia.²⁰

This can partly be attributed to the fact that while Zambia has since 1990 seen significant services liberalisation following the enactment of investment laws targeted at attracting Foreign Direct Investment (FDI). There are a number of barriers to the operation of foreign road transport operators on the domestic routes under Bilateral Road Transport Agreements (BRTAs) that have been signed among SADC member states.²¹

The BRTAs are provided for under the framework of the SADC TCM where competition in the domestic market is restricted to foreign road transport operators through two rules namely the cabotage rule and the third country rule. These provisions which are protectionist in nature guarantee access to domestic markets for road transport operators in a particular country. Cabotage is when an international transporter picks and drops cargo between two towns in Zambia. The Third country rule is a regional requirement that international transporters move products between two foreign countries only if they pass their own country.²²

The proposed research will examine road transport liberalisation under the SADC TIS. It will be argued that the continued existence of anti-competitive practices in the domestic markets of SADC member states partly contributes to the high transport costs in the region.

It is important therefore that as member states prepare to negotiate the extent of road transport liberalisation under the SADC TIS, commitments are undertaken which will ensure that service markets in SADC are opened on an MFN or non-preferential basis. The benefits which would accrue to all SADC member states would include:

- a. More investment through legal certainty and irreversibility of conditions of operations.
- b. Wider choice of services for the consumer including state of the art services such as supply chain management for instance.

²⁰ Raballand G, Kunanaka C & Giersing B, *The impact of regional liberalization and harmonisation in Road Transport Services: A focus on Zambia and lessons for landlocked countries* (2008) 2

²¹ Article 5.3 of the SADC Transport, Communication and Metrology Protocol

²² Mattoo A & Payton L, (eds) *Services Trade & Development: The Experience of Zambia* (2007) 47

- c. Lower prices of services through competition with national incumbents and other foreign providers. and
- d. Effective technology transfer through the use of modern equipment and management methods and through the employment and training of local staff then able to create their own businesses at least in sub sector with low costs of entry (e.g. freight agency).²³

1.2 SIGNIFICANCE OF THE STUDY

The importance of the services sector in SADC region cannot be overemphasised. The benefits which would accrue to SADC member states after transport liberalisation are far immense than the continued maintainance of the protectionist measures under the BRTA. Road transport liberalisation will result in larger markets, lower prices and higher efficiency for services consumers through enhanced competition as well as employment creation.

Member states have agreed to hold and conclude negotiations on liberalising priority sectors (road transport included) between 2012 to 2015. The SADC TIS will cover all services and suppliers in all sectors.²⁴ As road transport plays a pivotal role, it is imperative that in negotiating their schedule of commitments, member states commitments reflect good economic policy rather than the dictates of domestic political economy (e.g. where liberalisation is prevented solely by the political power of vested interests) or international negotiating pressure. This is not to say however, that countries will reap benefits merely by opening up their markets since the freeing of markets alone without enhancing access to services beyond the level that is provided by markets may actually reduce the opportunities and benefits of openness. There is need therefore to have reforms that are sequenced to ensure that the resulting regulatory framework enhances the access to transport services for all consumers.

The preparations for negotiations under the SADC TIS should therefore include management of stakeholder interests by member states in order to dispel consternations such as those raised by Zambian road transport operators of loss of market share particularly that road transport

²³ Mattoo A & Payton L, (eds) *Services Trade & Development: The Experience of Zambia* (2007) 40

²⁴ Bingandandi L & Ndabeni A, *Key Issues in the SADC Trade in Services Protocol*, (2012) 3

liberalisation does not mean that only foreign or entirely foreign suppliers would provide road transport services.

In any case, as the market currently operates a foreign road transport operator can operate on a local route by obtaining an investment licence to create a commercial presence in Zambia.²⁵ There has not been any empirical study undertaken to substantiate the claims of loss of the market share of the Zambian road transport operators. The claims could therefore be more premised on resistance to competition.

1.3 RESEARCH QUESTIONS

The following research question has been extracted after a preliminary review of available literature:

1. Does the proposed regulatory framework under the SADC TIS on transport liberalisation provide rules to overcome the existing regulatory restrictions in the SADC region that impede the cross-border provision of road transport services?

1.4 RESEARCH OBJECTIVES

The research will focus on the following specific objectives:

1. Examine briefly how the rules on trade in services have evolved multilaterally under the WTO General Agreement on Trade in Services (GATS) particularly the provisions on economic integration.
2. Examine the legal framework of the SADC TIS regime regarding transport liberalisation.
3. Examine the existing regulatory framework on cross border road transportation in Zambia.

²⁵ Section 68 of the Zambia Development Agency Act No.11 of 2006

4. Critical analyse the arguments for and against road transport liberalisation in the SADC region. This will assist in having a clear understanding of the potential benefits that Zambia can harness from road transport liberalisation particularly that despite having some openness in the transport sector, transport costs are still relatively high.
5. Make recommendations on how countries in SADC should proceed with the negotiations for services liberalisation under the SADC TIS as well as what commitments the member states may make to open markets in certain service sectors.

1.5 SCOPE OF THE STUDY AND METHODOLOGY OF STUDY

This proposed research will focus only on road transport operators undertaking the trucking business (i.e. to freight) in Zambia. This is because in the trucking business, there has been notably foreign direct investment by foreign trucking operators from the SADC region and different authors have written on the impact of this competition to the Zambian trucking operators.

This will be a desktop study referring mainly to secondary data in support of transport liberalisation (in the SADC region and Zambia in particular). A review of the literature on the subject and legal protocols such as the GATS, SADC TIS and SADC TCM will be relied on. The provisions of the Zambia Road Traffic Act No. 11 of 2002 on cross border road transportation and the Zambia Development Agency Act No. 11 of 2006 on issuance of an investment licence to set up a business in Zambia to undertake cross border road transportation will also be looked at.

1.6 STRUCTURE OF THESIS

This thesis is structured as follows: Chapter Two briefly looks at the GATS, the first set of multilateral legally enforceable rules governing international trade in services. The provisions

allowing member states of the WTO to engage in economic integration will be looked at. An examination of trade in services in the SADC region under the SADC TIS will then be undertaken and emphasis will be on the legal obligations placed on member states by the provisions. Chapter Three looks at the extent of road transport liberalisation in the SADC region under the various BRTA signed among the SADC states under the framework of the SADC TCM protocol. An analysis of how the provisions of the two SADC protocols drive the agenda of transport liberalisation will be given. Chapter Four looks at the regulatory framework of cross border road transport operations under the Zambia Road Traffic Act No. 11 of 2002. An examination of the implications of the provisions of Zambia Development Agency Act No. 11 of 2006 regarding the establishment of a commercial presence of a foreign road transport operator will be undertaken. The chapter will also look at arguments in favor of and against transport liberalisation. Admittedly road transport operators in Zambia will be affected by the opening up of regional markets, however it will be argued that due to the heavy reliance on road transportation for its trade as well as due to the numerous transport corridors connecting Zambia to the rest of the SADC region, road transport liberalisation will greatly benefit Zambia. Chapter Five is the conclusions and recommendations. Proposals are made on how countries in SADC region should proceed with the negotiations for services liberalisation under the SADC TIS as well as what commitments the member states may make to open markets in the road transport service sector.

CHAPTER TWO

2.0 GATS AND THE SADC TIS: AN OVERVIEW

2.1 Introduction

The General Agreement on Trade in Services (GATS) adopted at the conclusion of the Uruguay Round came into force in 1995 and extends the rules-based multilateral trading system to the large and dynamic sector of services trade including transport.²⁶ The GATS' contribution to trade in services rests on two main pillars: (a) ensuring increased transparency and predictability of relevant rules and regulations, and (b) promoting progressive liberalisation through successive rounds of negotiations.

This chapter discusses the multilateral rules on trade in services under the auspices of World Trade Organisation (WTO) which are embodied in the GATS. The provisions in the GATS that permit for the setting up of regional economic integration agreements or preferential trade areas (PTAs) as a means of fostering liberalisation of trade in services will be discussed. In particular the provisions of Article V of the GATS will be looked at and the conditions that must be met by WTO members intending to set up a regional economic integration agreement or PTA will be highlighted. The provision of the said Article V of the GATS exist as an exception to the general principle of non-discrimination in the treatment of one's trading partners under the rules of most of the WTO agreements.

There are several Regional Trade Agreements (RTAs) that have been set up involving trade in services as an exception to the general principle of non-discrimination under the GATS. These RTAs include North American Free Trade Agreement (NAFTA), the European Union (EU), the Southern African Development Community (SADC), etc. The SADC region will be the main

²⁶ Gallagher P, *Guide to the WTO and Developing Countries* (2000) 15

area of focus in this paper because of the recent initiatives by the SADC member states to liberalise trade in services under the recently signed SADC Protocol on Trade in Services (SADC TIS).

The SADC member states have agreed to conduct negotiations for liberalisation of trade in services in six priority sectors (including road transport) which negotiations are to be undertaken between 2012 to 2015. An examination of the provisions SADC TIS confirms that some of the fundamental principles such as non-discrimination contained in the GATS have been mirrored in the provisions of the SADC TIS on the liberalisation of trade in services. This chapter will equally look at the current developments in the WTO negotiations under the Doha Development Round. An examination of how the services trade negotiations have been proceeding under the Doha Round as well as the development dimension of RTAs envisioned in the Doha round will be undertaken.



2.2 Scope of Application of the GATS

Traditionally international trade has normally been understood as involving only the movement of goods and services across national borders. However, since the delivery of services very often requires the physical presence of the person or company supplying the service in the export market, the definition of trade in services under the GATS has been couched in a much more comprehensive context. The definition covers not only the supply of services across national borders but also transactions involving cross-border movement of factors of production (such as capital and labour) or service users. For example a student who goes to study in a different country is said to be importing education services in the country of study; this kind of service supply is therefore equally covered under the GATS.

Owing to this close link between the production and consumption of a service, the GATS defines trade in services depending on the presence of the service supplier and the consumer at the time of the transaction in what are called modes of supply. There are four modes of supply and these

encompass the supply of a service from the territory of one member into the territory of any other member (that is cross-border supply); the supply from within the territory of one member to the service consumers of another member (that is consumption abroad e.g. tourism); the supply from within the territory of a member through commercial presence (that is commercial presence e.g. through the setting up by a foreign company of a branch or subsidiary); or the presence of natural persons in the territory of any other member (that is the movement of persons).²⁷

The GATS has been structured in two parts comprising the framework agreement containing the general rules and disciplines; and the national schedules which list individual countries' specific commitments on access to their domestic markets by foreign suppliers.²⁸ It is in the national schedules that a country would then list how foreign service suppliers or services would have access to its markets under the four modes. Under Article I: 1 of the GATS it is provided that the Agreement applies to measures by members affecting trade in services. A measure covers any action taken by any level of government as well as by non-governmental bodies to which regulatory powers have been delegated. A measure could take any form. It could be a law, a regulation, an administrative decision or guideline or even an unwritten practice.

The GATS further defines what the term service means. Under Article I: 3 (b) of the GATS service is defined to include any service in any sector except services supplied in the exercise of governmental authority. For a service to qualify as being supplied in the exercise of governmental authority (or the carve-out as it is sometimes called), it has to be supplied neither on a commercial basis, nor in competition with one or more service suppliers.²⁹

The scope of application of the GATS has been broadly interpreted in a number of cases that have gone before the Dispute Settlement Body (DSB) of the WTO. However, suffice to say that

²⁷ Qureshi A and Ziegler A, *International Economic Law* (2007) 333

²⁸ World Trade Organisation, *GATS Fact and Fiction* (1998) 1

²⁹ Article I: 3 (c) of the GATS

there are two exceptions that are expressly provided to this wide general application under the GATS. The exceptions to this wide general application of the GATS include services provided to the public in the exercise of governmental authority and services in the air transport sector, air traffic rights and all services directly related to the exercise of air traffic rights³⁰.

In the Case of *European Communities-Regime for the Importation, Sale and Distribution of Bananas*³¹ which matter dealt with the interpretation of the scope of application of the GATS, the appellate body looked at Article I: 3 of the GATS. The appellate body held that Article I: 3 (b) as read together with Article XXVIII (b) are to be understood to mean that there is nothing to suggest a limited scope of application of the GATS. There is therefore no legal basis for a prior exclusion of measures from the scope of the GATS. What this means is that no services are excluded from the application of the GATS save for those services that have been expressly excluded from the general application of the GATS in its text.

The appellate body further went on to point out that Article I: 1 of the GATS provides that this Agreement applies to measures by members affecting trade in services. The appellate body then went ahead to point out that the use of the term affecting reflects the intent of the drafters to give a broad reach to the GATS. In the view of the appellate body the ordinary meaning of the word affecting implies a measure that has an effect on, which in turn indicates a broad scope of application of the GATS.

Houtte on the other hand has argued that this description of the scope of application of the GATS is too wide and that it makes little sense to liberalise trade in services in the same way as trade in goods. This he argues is because services are more person related when compared to goods which can be traded from far flung places without the necessity of people being in close proximity for their trade.³² What is important to note in this debate however, is that during the Uruguay round, coming up with a more comprehensive definition of trade for trade in services under the multilateral trading system was seen as imperative due to the peculiarity of services trade that entails that the supplier and consumer of the service be in close proximity at the time

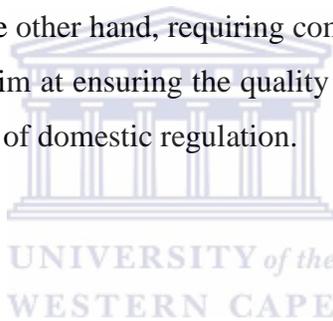
³⁰ World Trade Organisation, *GATS Fact and Fiction* (1998) 1

³¹ WT/DS27/AB/R Para 220

³² Houtte H, *The Law of International Trade* (2002) 128

of the transaction of supply. This in part explains the appellate body's broad interpretation of the scope of application of GATS in the *European Communities-Regime for the Importation, Sale and Distribution of Bananas* case cited above.

While the main objective of the GATS is liberalisation of trade in services, this should not be confused for deregulation.³³ Many service industries must and will remain carefully regulated in the public interest.³⁴ The GATS makes a distinction between trade barriers that distort competition and restrict access to markets on the one hand, and regulations which are necessary to pursue public policy objectives and ensure the orderly functioning of markets on the other hand. For example, restrictions on the number of suppliers of a certain service or discrimination against foreign suppliers are considered barriers to trade in services and may be subject to negotiation in future rounds. On the other hand, requiring compliance with technical standards or qualification requirements which aim at ensuring the quality of the service and the protection of public interest are legitimate forms of domestic regulation.



2.3 Structure of the GATS

The GATS has been structured in two parts as was noted earlier in the preceding paragraph. The first part of the GATS comprises the text of the Agreement (that is to say its Articles and Annexes). The second part of the GATS is comprised of the schedules of specific commitments undertaken by WTO members. Members can choose to undertake commitments in any of the service sectors and the commitments that each member undertakes are then inscribed in each country's national schedules. One of the main features of the GATS is that governments are free to choose which services they include in their schedules and, even within the committed sectors,

³³ Article VI of the GATS allows for members to have domestic regulations dealing with trade in service. However, since domestic regulations may be used by a country to afford protection to its nationals, there is a requirement that all measures (under domestic regulation) of general application affecting trade in services are administered in a reasonable, objective and impartial manner

³⁴ Under Article XIV which provides for general exceptions to the GATS obligations, Foot Note 5 gives clarity that the public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society e.g. to protect public morals

to maintain limitations on the degree of market access and national treatment they are prepared to guarantee; the governments can also depart from the Most Favoured National (MFN) treatment provided they list an MFN exception to that effect. The principles of MFN, market access and national treatment are fully explained below.³⁵

What is important to note here is that the national schedules are an integral part of the GATS, just as tariff schedules are an integral part of the GATT. While the text of the GATS applies uniformly to all members of the WTO, the scheduling of commitments is decided by the member concerned, either autonomously or, in most cases, subject to negotiation and agreement with other members. The GATS allows for each member to undertake specific commitments in a manner commensurate with its level of development. It is thus accepted that developing countries assume a narrower range of commitments than their industrialised partners.³⁶

The GATS like the GATT incorporates a number of fundamental principles in its text. The text of the GATS consists of six parts namely the scope and definition (Article I); the general obligations (Article II to XV); the specific commitments (Article XVI to XVIII); the progressive liberalisation provisions (Article XIX to XXI); the institutional provisions (Article XXII to XXVI); and the financial provisions (Article XXVII to XXIX). It is not proposed to exhaustively look at all the provisions of the GATS.

For purposes of this discussion, focus will only be on those provisions relating to the general obligations and those provisions relating to specific commitments that are relevant to this discussion. In particular the discussion will focus on the general obligation provisions on non-discriminatory MFN principle, the provisions on Transparency and the provisions on Economic Integration. Similarly the discussion will focus on the following provisions on specific

³⁵OECD, *Market Access, Trade in Transport Services and Trade Facilitation* (2007) 19

³⁶ Article IV. In fact Article IV: 3 provides that special priority shall be given to the least-developed country (LDC) members in the implementation of paragraphs 1 and 2. Particular account shall be taken of the serious difficulty of LDCs in accepting negotiated specific commitments in view of their special economic situation and their development, trade and financial needs

commitments namely National Treatment (NT) and Market Access. This is because these general obligations are the very principles that underlie the SADC TIS.

2.4 Most Favoured Nation Treatment Principle

This principle requires that a country extends the same treatment to all its trading partners. The import of the MFN principle is that a member must immediately and unconditionally accord services and service suppliers of any other member treatment no less favourable than that it accords to like services and service suppliers of any other country. A member may however, maintain a measure inconsistent with this MFN obligation provided that such a measure is listed in and meets the conditions of the Annex on Article II MFN Exemptions. Similarly where a member enters into an agreement for economic integration under Article V of the GATS, it is permitted to extend preferential treatment to only the members of the economic regional agreement and not to all WTO members.³⁷

Article II:1 of the GATS provides that 'with respect to any measure covered by this Agreement, each member shall accord immediately and unconditionally to services and service suppliers of any other member treatment no less favourable than that it accords to like services and service suppliers of any other country'. Therefore if a country allows foreign competition in a sector, equal opportunities in that sector should be given to service providers from all other WTO members. This applies irrespective of whether the country has made no specific commitment to provide foreign companies access to its markets under the WTO.³⁸

In *European Communities-Regime for the Importation, Sale and Distribution of Bananas*³⁹ the appellate body gave an interpretation of the term no less favourable treatment under Article II: 1. It held that the obligation imposed by Article II is unqualified, that is to say that treatment no less favorable in Article II: 1 of the GATS should be interpreted to include *de facto*, as well as *de*

³⁷ Weiler J, Cho S and Feichtner, *International and Regional Trade Law: The Law of World Trade Organisation* (2011) 44

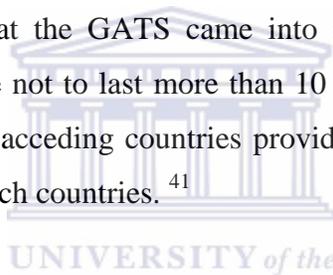
³⁸ Weiler J and Cho S, *Trade in Services* (2006) 2

³⁹ WT/DS27/AB/R Para 234

jure, discrimination. What this means is that a member should not either by law or fact accord treatment that is less favourable to other services or service suppliers of another member where the GATS is applicable.

In *Canada-Certain Measures affecting the Automotive Industry*⁴⁰ the appellate body further held that the text of Article II: 1 requires, in essence, that treatment by one member of services and services suppliers of any other member be compared with treatment of like services and service suppliers of any other country.

There are two exceptions to this MFN obligation. The first relates to the permitted exemptions that member states may undertake in the Annex on MFN exemptions. In order to protect the general MFN principle, the exemptions can only be made once and nothing can be added to the lists thereafter. From the time that the GATS came into effect, the exemptions were to be reviewed after five years and were not to last more than 10 years in any case. Thereafter MFN exemptions may also be listed by acceding countries provided that this is agreed to during the negotiations for the accession of such countries.⁴¹



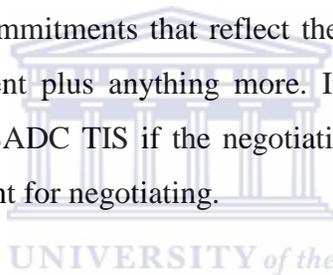
The general explanation for the Annex on the MFN exemption is that at the time when the GATS was concluded, some members had entered into preferential agreements on services either bilaterally or at regional level. Members felt that it was therefore necessary to maintain these preferences temporarily as a compromise. A total of at least 70 members made their scheduled services commitments subject to a further list of exemptions from Article II. The exemptions gave members the right to continue giving more favorable treatment to particular countries in particular service activities by listing ‘MFN exemptions’ alongside their first sets of commitments. In Africa, only South Africa listed for the MFN exemption in relation to Bilateral Road Transport Agreements (BRTAs) that it had entered into under the SADC region. In this sense the GATS framework for negotiating liberalisation commitments can be said to have had limited results in that most countries choose to commit legally only to maintaining their policy status quo or even less. Other still made very conservative commitments.

⁴⁰ WT/DS139/AB/R Para 171

⁴¹ Weiler J and Cho S, *Trade in Services* (2006) 5

For SADC member states this does not give a very good starting point for negotiating commitments for services liberalisation under the SADC TIS. This is because the SADC member states have agreed on negotiating guidelines which will see members make their offers or request at GATS-Plus commitments. What is meant as GATS-Plus commitments is that the SADC member states are to make commitments that are equivalent to their GATS commitments plus more.

Considering that under the GATS, the commitments made by most SADC member states were very conservative this could mean that the SADC member states may not offer much in the negotiations for commitments despite the fact that some SADC member states are currently implementing more liberal policies in their services sectors. The SADC member states will not have any impetus to make any commitments that reflect their individual country policies once they offer their GATS commitment plus anything more. It would therefore have helped the negotiations in SADC under the SADC TIS if the negotiating guidelines had set the countries existing policies as the starting point for negotiating.



The second exception to the MFN obligation relates to regional integration initiatives under Article V of the GATS referred to as economic integration clause which will be discussed in greater detail below.

2.5 Economic Integration

Article V: 1 of the GATS provides that:

‘this agreement shall not prevent any of its members from being a party to or entering into an agreement liberalising trade in services between or among the parties to such an agreement...’

Although the term ‘economic integration’ is used in the heading of Article V, there is no comprehensive legal definition of this term that exists either in the GATS or indeed in other

WTO agreements that deal with the issue of economic integration such as Article XXIV of GATT, the Enabling Clause of 1979 or the Waivers for arrangements between developed and developing countries.⁴² What is instructive from all these instruments however is that they inform the practices that are adopted in putting into operation the principles of such agreements. This then allows for an understanding of what economic integration entails.

Economic integration normally falls in the area of public international economic law in the form of agreements removing tariff and non-tariff barriers on imports and factor movement imposed by states and pooling sovereignty over economic affairs.⁴³ While GATS does make mention of the term economic integration, current usage in the WTO is of the term 'regional trade agreement' which includes free trade arrangements between countries or groups of countries that are not necessarily in the same region.⁴⁴ The term Regional Trade Agreements (RTA) will therefore be synonymously used in this discussion. RTAs can broadly be divided into Preferential Trade Areas (PTA), Free Trade Agreements (FTAs), Customs Union (CU), Common Markets and Economic Unions.⁴⁵

Article V: 1 of the GATS permits the members to enter into an economic integration agreement (EIA) for purposes of liberalising trade in services as an exception to the MFN obligation provided that certain conditions therein are met. The criterion to be satisfied is 2 pronged. It requires the EIA to firstly have substantial sectoral coverage and secondly to provide for the absence or elimination of substantially all discrimination in the sense of Article XVII (which deals with national treatment) between or among the parties in the sectors covered.⁴⁶

Further Article V: 1 provides that 'substantial sector coverage' should be understood in terms of the number of sectors and volume of trade affected by the modes of supply. In order to meet this condition, an EIA should not provide for the a priori exclusion of any mode of supply.⁴⁷

In the *Canada-Certain Measures affecting the Automotive Industry*⁴⁸ case the Panel in interpreting the meaning of 'substantially all discrimination' held that

⁴² Mangeni F, *WTO Negotiations on Rules on Regional Trade Agreements: African Perspectives* (2002) 35

⁴³ Mangeni F, *WTO Negotiations on Rules on Regional Trade Agreements: African Perspectives* (2002) 38

⁴⁴ Hong Kong WTO Ministerial 2005: Briefing Notes, *Rules: Regional Agreements-Building blocks or stumbling blocks?* <http://www.wto.org> (accessed on 19th November 2012)

⁴⁵ Pal P, *Regional Trade Agreements in a Multilateral Trade Regime: An overview* (2004) 2

⁴⁶ Article V: 1 (a) and (b)

⁴⁷ Foot Note 1 of Article V: 1 (a)

‘it is our view that the object and purpose of this provision is to eliminate all discrimination among service and service suppliers of parties to an economic integration agreement, including discrimination between suppliers of other parties to an economic integration. In other words it would be inconsistent with this provision if a party to an economic integration agreement were to extend more favourable treatment to service suppliers of one party than that which it extended to service suppliers of another party to that agreement. In the case in casu, Canada was found to have been extending favourable treatment (in the form of import duty exemption) to only a small number of manufacturers or wholesalers of motor vehicles in the United States to the exclusion of all other manufacturers or wholesalers in the United States and Mexico, members of North American Free Trade Agreement (NAFTA) ’.

There is a further requirement under Article V: 4 that even if an EIA meets the condition of substantial sectoral coverage and elimination of substantially all discrimination, the RTA should not raise the overall level of barriers to trade for third parties who are WTO members but not members of the RTA.

On 6 February 1996, the WTO General Council created the Regional Trade Agreements Committee. The purpose of the Regional Trade Agreements Committee is to examine regional groups and to assess whether they are consistent with the WTO rules. The committee also examines how regional arrangements may affect the multilateral trading system, and what the relationship between regional and multilateral arrangements should be. Differences between members on how to interpret the criteria for assessing the consistency of RTAs with the WTO rules have created a lengthy backlog of uncompleted reports in the Regional Trade Agreements Committee. In fact, consensus on WTO consistency has been reached in only one case so far: the customs union between the Czech Republic and the Slovak Republic after the breakup of Czechoslovakia.⁴⁹

Adolong and Miroudot argue that some of the RTAs that have so far been notified to the WTO contain GATS-Minus commitments and that some WTO members did not schedule MFN

⁴⁸ WT/DS139/R Para 10.270

⁴⁹ Weiler J, Cho S and Feichtner I, *Globalism V Regionalism* (2011) 8

exemptions under the GATS Schedules to allow them to enter into these RTAs. Departures from existing GATS schedules therefore cast clouds on the legal status of these EIAs.⁵⁰ For example under the SADC TIS which was recently signed by the SADC member states and which RTA will have to be notified to the WTO through the Regional Trade Agreements Committee at some later stage, only South Africa listed an MFN exemption at the time when it made its schedule of commitments.

This in essence means that other SADC member states that have not undertaken commitments to be exempted from their GATS MFN obligations through a RTA (such as the SADC TIS) allowing these SADC member states to give preferential treatment to only members of the SADC TIS on a reciprocal basis without extending the same benefits to other WTO members would be in breach of their MFN obligation under the GATS. The foregoing notwithstanding Article V of GATS has a criterion that must be met before a RTA can be considered to be GATS compliant.

This trend under the GATS for members of the WTO to make commitments with the MFN exemptions shows clearly that there is an unaddressed problem as far the liberalisation of the road transport sector is concerned. Besides these derogations under the MFN exemptions seem to have been meant to last forever by their drafters and will fall foul of the limitation to ten years, the period of validity for the MFN exemptions. They also remove a significant proportion of the traffic from the application of the MFN obligation and more generally from liberalisation.⁵¹

Matto further argues that as befits a multilateral agreement, the GATS in principle prohibits a country from discriminating between its trading partners. The explicit departures from this non-discriminatory obligation, such as the exception for regional integration agreements (under Article V of the GATS) and the exemptions listed by members (under the Annex II MFN exemptions), are well known. However the difficulties in preventing implicit discrimination

⁵⁰ Adlong R and Miroudot S, 'Poison in the Wine? Tracing GATS-Minus Commitments in Regional Trade Agreements', *Journal of the World Trade* 1047

⁵¹ WTO S/C/W/60, *Land Transport Services* (1998) 17

through domestic regulations and through the allocation of quotas have not been adequately appreciated.⁵²

2.6 National Treatment

This principle demands that there is equal treatment for foreigners and one's own nationals in terms of the laws and regulations applicable in the conduct of business operations in the particular member. Thus if a member allows foreigners to access its services markets it cannot discriminate against them in terms of its fiscal laws or regulations by collecting an amount of tax that is higher than that payable by its own nationals for example. What must be noted however, is that under the GATS (unlike the case under the GATT), national treatment applies only in so far as a member has made specific commitments in its schedule allowing foreign suppliers to operate in a particular service sector. In a sector where no such commitment is made, national treatment does not apply. In instances where specific commitment is made, the GATS further allows for limitations to be made in terms of national treatment.



Under Article XVII each member is to accord to services and service suppliers of any other member in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers. This may be either through formally identical treatment or formally different treatment to that it accords to its own like services or services suppliers. However such treatment shall be considered less favourable where there is modification of the conditions of competition in favour of services or service suppliers of the member compared to like services or service suppliers of any other member.

In *European Communities-Regime for the Importation, Sale and Distribution of Bananas*⁵³ it was held that where there is created less favorable conditions of competition for like service

⁵² Matoo A, Shaping Future GATS Rules for Trade in Services (2000) 5

⁵³ WT/DS27/AB/R Para 246

suppliers in a market there is inconsistency with the requirement of Article XVII of GATS and therefore a violation of the said Article.

Unlike the case with market access (and this will become apparent when the provisions on market access are looked at in the next paragraph), there is no exhaustive list of national treatment limitations. Every measure has to be tested to see if it affects the conditions of competition in favour of nationals. If the measure fulfills the test, then it is a national treatment restriction, and should be scheduled if the member wants to maintain it. The practice has enabled the identification of typical national treatment restrictions such as nationality requirement, effective residency requirement, land ownership restrictions, and subsidies reserved to nationals.⁵⁴

2.7 Market Access

A country may in its schedule of commitments list market access conditions limiting or permitting how international trade in services may be undertaken. Under Article XVI members can undertake specific commitments through the modes of supply identified in Article I allowing services and service suppliers of any other member market access. However, where market access commitments are undertaken, Article XVI: 2 lists a set of measures mostly different types of quotas, that cannot be maintained in scheduled sectors unless pre-specified. These six permitted restrictions encompass limitations of the number of service suppliers, the value of transactions or assets, the number of operations or the total quantity of output, the number of natural persons that may be employed, the nature of legal entities permitted to supply services, and the extent of participation of foreign equity in an enterprise.⁵⁵

When it comes therefore to the commitments that member states incorporate in the schedules under market access and national treatment, the member states negotiate the terms multilaterally. The members do undertake negotiations bilaterally by making offers and requests. The conditions that are eventually agreed to however are then open to all members of the WTO.

⁵⁴ OECD, *Market Access, Trade in Transport Services and Trade Facilitation* (2007) 22

⁵⁵ Low P and Matoo A, *Is there a better way? Alternative Approaches to Liberalisation under the GATS* (2000) 27

The schedules containing commitments that each member state undertakes on national treatment and market access are similar to the schedule of tariffs under the GATT. It is only by reference to a country's schedule, and where relevant its MFN exemption list, that one can appreciate which services sectors and under what conditions the basic principles of the GATS (that is to say market access, national treatment and MFN treatment) apply within a country's jurisdiction.

The schedules are complex documents in which each country identifies the service sectors to which it will apply the market access and national treatment obligations of the GATS and any exceptions from those obligations it wishes to maintain. The commitments and limitations are in every case entered with respect to each of the four modes of supply which constitute the definition of trade in services in Article I of the GATS.⁵⁶

Thus the market access and national treatment obligations can only be understood in relation to a country's national schedules of specific commitments. A schedule of commitments is basically a chart with four columns and four rows. The first column contains the description of the sector. Members are free to describe and to delineate the sectors as they wish. In practice, however, they have recourse in nearly all instances to a combination of two classifications, the WTO W120 and the UN CPC which were earlier discussed in this chapter.

The second column of the schedule contains the limitations that a member wants to maintain concerning the principle of market access. By undertaking a market access commitment, a WTO member grants a treatment no less favourable than that provided under the terms, limitations and conditions agreed and specified in its schedule to services and services suppliers of any other WTO member. These conditions and limitations can either be discriminatory (that is to say only applying to foreigners) or non-discriminatory (that is where the conditions also apply to nationals but with the quantitative ceiling effect on the service as was earlier illustrated under the discussion on market access, a typical example would be a limitation on the number of suppliers in a service sector).

⁵⁶ Weiler J and Cho S, *Trade in Services* (2006) 9

The third column is devoted to national treatment restrictions. In the GATS context, National Treatment means that in any sector included in its schedule of specific commitments, a member is obliged to grant foreign services and service suppliers treatment no less favourable than that extended to its own similar services and service suppliers. The key requirement is to abstain from measures which are liable to modify, in law or in fact, the conditions of competition in favour of a member's own service industry.

The fourth column is devoted to additional commitments which members may want to undertake. In addition the sectoral part of the schedule (for example in our discussion the road transport section) does not necessarily list all the restrictions applicable to the sector. In order to avoid repetitions, members have agreed that restrictions common to all sectors committed (typically, legislation on the movement of persons, subsidy legislation and investment legislation) should be put ahead of the schedule in the horizontal section. Therefore, in practice, a commitment must always be read in the light of the horizontal commitments section.⁵⁷

Finally, a schedule of commitment has four rows. Each row is meant to cover a mode of supply, which are the different way in which services may be delivered which have been discussed when we looked at the scope of application of the GATS. A key feature of the GATS is that it covers every means by which services can be traded.

Thus the scope of obligations for a country under the GATS depends on the scope of the specific commitment made in the members' schedule. For example a member could under mode 1 supply in the market access column indicate 'None'. What this means is that such a member has undertaken to provide full market access, within the meaning of Article XVI, in respect of the services included within the scope of its sector commitment. In so doing, it has committed not to maintain any of the types of measures listed in the six sub-paragraphs of Article XVI: 2. At the other extreme, the Member may list 'unbound', which means that it keeps a complete regulatory freedom; if it has no restriction it may introduce some or if it has restrictions it may aggravate them or lighten them, or go back and forth as it wishes.

⁵⁷ OECD, *Market Access, Trade in Transport Services and Trade Facilitation* (2007) 23

The two distinct legal parameters of market access and national treatment are therefore used to determine conditions of market entry and participation. The approach has been to maintain that if a regulatory intervention embodies a market access restriction, the measure should be inscribed under Article XVI (market access article). If there is a discriminatory element, then the measure should be scheduled under Article XVII (national treatment article). In all other cases, the disciplines of Article VI (domestic regulations) apply. Regulatory interventions can of course be characterised as either restricting trade or not restricting trade, which is why there exists the requirement that regulatory interventions must be the least-trade restrictive possible.⁵⁸

The GATS explicitly recognises governments' right to regulate, and introduce new regulations, to meet national policy objectives as well as the particular needs of developing countries to exercise this right. The GATS further recognises that the regulation of services trade is still in its infancy and provides for the continuation of negotiations under its Article XIX. Under Article XIX of the GATS, members have agreed to undertake progressive liberalisation through successive trade rounds of negotiation. The current round of negotiations which was launched at the WTO's Fourth Ministerial conference in Doha, Qatar in November 2001⁵⁹ is still on going and is yet to be finalised. The Doha Round as it is known will be looked at in the next paragraph. An examination of how the services trade negotiations have been proceeding under the Doha Round as well as the development dimension of RTAs envisioned in the Doha round will be undertaken.

2.8 GATS under the Doha Development Round

Under Article XIX members are to enter into successive rounds of negotiations, beginning no later than five years from the date of entry into force of the WTO agreement. Under the mandate of Article XIX, the latest round of negotiations started in January 2000. In March 2001 the guidelines and procedure for the negotiations on Trade in Services were adopted by the Council for Trade in Services (CTS). At the Doha Ministerial Conference the services negotiations were integrated into the wider context of the Doha Development Agenda (DDA) and became part of

⁵⁸ Low P and Matoo A, *Is there a better way? Alternative Approaches to Liberalisation under the GATS* (2000) 9

⁵⁹ The Doha Round available at <http://www.wto.org> (accessed on 2nd May 2013)

the single undertaking whereby all subjects under the negotiations are to be concluded at the same time.⁶⁰ The services negotiations under the Doha Development Round covers four major areas namely market access; domestic regulation; GATS rules on emergency safeguard measures, government procurement and subsidies; and implementation of Least Developed Countries (LDC) modalities (that is to say special treatment for least developed countries under GATS Article IV:3).⁶¹

What is important to note further is that Article XIX provides for the special and differential treatment (S&D) for LDCs such as Zambia. During the Hong Kong Ministerial Declaration held in 2005, members agreed to provide targeted and effective technical assistance and capacity building for LDCs in accordance with LDC Modalities to strengthen their domestic services capacity, build institutional and human capacity, and enable them to undertake appropriate regulatory reforms.

Under the Hong Kong Ministerial Declaration, members are asked to take measures, in accordance with their individual capacities, aimed at increasing LDC participation in services trade, including strengthening programmes to promote investment in LDCs, with a view to building their domestic services capacity and enhancing their efficiency and export competitiveness; reinforcing export/import promotion programmes; promoting the development of LDCs' infrastructure and services exports through training, technology transfer, enterprise level actions and schemes, intergovernmental cooperation programmes, and where feasible, financial resources; and improving the access of LDCs' services and service suppliers to distribution channels and information networks, especially in sectors and modes of supply of interest to LDCs. Technical assistance is to be provided to LDCs to carry out national assessments of trade in services in overall terms and on a sectoral basis, and to assess interests in and gains from services trade.⁶²

⁶⁰ The Doha Round available at <http://www.wto.org> (accessed on 2nd May 2013)

⁶¹ Doha WTO Ministerial Declaration (2001) available at <http://www.wto.org> (accessed on 2nd May 2013)

The members have agreed under Para. 15 of the Doha Ministerial Declaration dealing with services that the negotiations on trade in services will be conducted with a view to promoting the economic growth of all trading partners. In particular the negotiations are to promote the development of developing and LDCs in accordance with the objectives of Article IV and XIX of the GATS

⁶² Mattoo A and Payton L, *Service Trade Development in Zambia* (2007) 5

In this regard an important achievement for LDCs has been the services waiver which emerged as one of the few deliverables of the 8th WTO Ministerial Conference in December 2011. After years of negotiations, a last minute compromise was found which allowed trade ministers to harvest what could be presented as an ostensibly pro-development result. Members are now authorised to grant preferences to services and service providers of LDCs – not only WTO members but all LDCs.⁶³

The waiver effectively operates as a new ‘enabling clause’ for trade in services and will allow for preferences over and above the all-encompassing MFN exemptions under GATS Article II. The waiver as agreed offers a two tiered solution that is to say, direct market access preferences for LDCs are automatically allowed; other non-market access preferences are not automatically covered. They can however, be authorised by the CTS. One observer noted that the services negotiations function as the engine of the Doha Round, and WTO Secretary-General Supachai Panitchpakdi stated that ‘this agreement should inject new dynamism not only in the services negotiations but also in other areas of the Doha agenda’.

Another important milestone attained for LDCs during the trade in services round negotiation has been the approval by the CTS of modalities for autonomous liberalisation. Autonomous liberalisation measures refer to measures undertaken unilaterally by WTO members to liberalise their services sector, as a consequence of their own national liberalisation processes or as a result of the World Bank (WB)/International Monetary Fund (IMF) structural adjustment programmes undertaken since 1995. The new agreement on modalities for autonomous liberalisation entails a sign of momentum at a time when WTO negotiations in most areas are stalling.

The negotiating mandate on autonomous liberalisation under the GATS was oriented toward the recognition of negotiating credits (benefits in subsequent negotiations under GATS) for national-level efforts in this regard. Zambia like most LDCs in the SADC region has equally undertaken measures aimed at liberalising its trade in services as a means of attracting FDI and improving domestic policy among other reasons. It would therefore be helpful in the future negotiations if efforts undertaken by countries through autonomous liberalisation were indeed recognised

⁶³ Schloemann H, The LDCs Services Waiver: Making it Work (2012) 1 (4) *Bridges Africa* 13

through negotiating credits as this is likely to give such countries (and others that have not made significant commitments), the impetus to make more meaningful commitments even at regional level.

When it comes to the trade in services negotiations in the transport sector in particular, as a result of the high level of inter-reliance between transport policy, competition policy and trade policy, the WTO negotiations on liberalising trade in transport services have developed into a very complex process, which has considerably distanced itself from the basic principles of trade negotiations, i.e. reciprocity and MFN status. Given the current impediments to global multilateral negotiations, bilateral or regional arrangements to liberalise trade in transport services might be considered useful stepping stones towards a more general process of liberalisation of international trade in transport services.⁶⁴

It is evident that RTAs have proliferated since the 1990s, particularly after the completion of the Uruguay Round. Nearly every country in the world now is either participating in or discussing participation in one or more regional agreements. With virtually all WTO members being partners in at least one RTA, these agreements have become by far the most important exception to the MFN principle. Some Scholars have argued that as the number of RTAs multiplies, networks of overlapping agreements may generate intricate webs of discriminatory treatment thereby leading to complex regulatory structures for the conduct of a growing share of world trade. The question that has arisen has been whether the immediate consequences of regionalism for the economic welfare of the integrating partners encourage or discourage evolution towards globally freer trade.⁶⁵

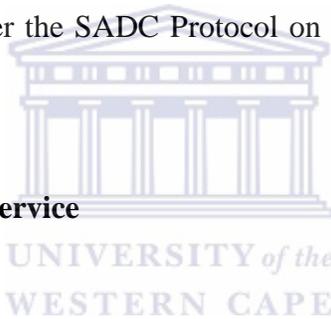
However, most analysts, including the WTO Secretariat, have concluded that on the whole, regional agreements have made a positive contribution to the liberalisation of world trade. Keeping in view the other large number of important issues regarding transparency of WTO rules on RTAs, the DDA has included the issue of RTA as an area for negotiation.⁶⁶

⁶⁴ OECD, *Market Access, Trade in Transport Services and Trade Facilitation* (2007) 221

⁶⁵ Nataraj G, *Regional Trade Agreements in the Doha Round: Good for India?* (2007) 4

⁶⁶ Doha WTO Ministerial Declaration (2001) available at <http://www.wto.org> (accessed on 2nd May 2013)

This then makes the initiative by SADC to undertake services liberalisation under the SADC TIS very crucial for the SADC member states to improve their capacities in negotiating commitments at regional level even as the multilateral negotiations under the DDA are yet to be concluded. This is especially so because the main constraints on service sector development in LDCs in the SADC region (such as Zambia and Lesotho) are that of small markets and limited endowments which could be alleviated by greater regional and global integration. Jelitto argues that in the SADC services negotiations for example, status quo commitments across all sectors should be bound as the floor of liberalisation.⁶⁷ In the event that the SADC member states are to adopt the status quo of their policies as the floor of liberalisation as argued by Jelitto, this would in turn improve the commitments that the SADC member states would make at the WTO level once the GATS negotiations are concluded. It is important at this juncture that an examination of how trade in services is envisaged under the SADC Protocol on Trade in Services be undertaken in the next paragraph.



2.9 SADC Protocol on Trade in Service

The SADC protocol on trade signaled the intention by member states to liberalise trade in services. While the protocol largely deals with trade liberalisation in goods, Article 23 thereof provides a mandate for negotiating trade in services in the SADC region. The said Article 23 of the SADC protocol on trade provides that member states recognise the importance of trade in services for the development of SADC countries. Member states are to adopt policies and implement measures in accordance with their obligations in terms of the GATS, with a view to liberalising services sectors within the SADC.⁶⁸

The members have agreed under Para. 29 of the Doha Ministerial Declaration dealing with WTO rules on RTA to negotiate with the aim of clarifying and improving disciplines and procedures under the existing WTO provisions applying to RTAs. The negotiations shall take into account the developmental aspects of RTAs

⁶⁷ Jelitto M, Trade in Services Liberalisation in SADC: Vehicle without a Driver or Just Getting into Gear? (2012) 1 (4) *Bridges Africa* 16

⁶⁸ Estate G, The Draft SADC Annex on Trade in Service (accesses on 13th January 2013) 6 www.unido.org

The SADC Protocol on Trade in Service (SADC TIS) provisions are largely modeled on the provisions of the GATS. The SADC TIS aims at providing a framework for progressive liberalisation of trade in services on a ‘GATS-Plus’⁶⁹ approach. For this and other reasons, concerns have been raised on whether the SADC TIS would be effective in improving the conditions for liberalisation in trade in services in the region since most SADC member states have not scheduled any meaningful commitments under the GATS.⁷⁰ Jelitto argues that settling for this outcome that reflects the negotiating mandate’s lack of ambition would not remove any of the region’s trade-crippling barriers or create new opportunities for business.⁷¹ This is unlike the Common Market for Eastern and Southern Africa (COMESA) initiative for liberalisation for trade in services which targets the elimination of trade discrimination among members in the negotiations.

Further the SADC has already concluded specific protocols that deal with services such as tourism; energy; transport, communication and meteorology; and finance and investment. One of the challenges therefore in developing the SADC TIS was to ensure that it did not conflict with any of the provisions contained in the existing protocols.⁷² This argument will further be pursued when looking at the provisions of the protocol on transport, communication and meteorology and the SADC TIS in the next chapter.

The agenda for a regional agreement on trade in services in SADC was first formalised in 2002 when trade ministers at a meeting held in Botswana agreed to include an annex on trade in services to the SADC protocol on trade. The members however eventually agreed on a protocol on trade in services. The draft protocol on trade in services was adopted by trade ministers in July 2009 and was presented for signature by the Heads of State and Government at their 32nd

⁶⁹ Jelitto M, Trade in Services Liberalisation in SADC: Vehicle without a Driver or Just Getting into Gear? (2012) 1 (4) *Bridges Africa* 15- This approach aims at improving upon the 1995 GATS Commitments

⁷⁰ Primack D, Situating Services Liberalisation and Integration for Africa’s Growth and Development (2012) 1 (4) *Bridges Africa* 5

With the exception of Lesotho and South Africa, most SADC member states have only scheduled few commitments. Primack argues that by generally adopting only GATS-based approaches, the outcomes produced tend to hold little commercial relevance for operators on the ground.

⁷¹ Jelitto M, Trade in Services Liberalisation in SADC (2012) 15

⁷² Ngwawi J, Leaders Approve the SADC Draft Protocol on Trade in Services (2012) 14 (6) *Southern Africa Today*

summit in August 2012 in Mozambique. Out of the 15 SADC member states 6 members (namely Angola, Botswana, Namibia, Madagascar, South Africa and Zimbabwe) did not sign the SADC TIS despite the SADC secretariat reporting that the relevant authorities were present.⁷³ As there is a requirement that a protocol be ratified by two-thirds of the SADC countries before it becomes effective, this could spell more delays before the SADC TIS could come into effect.

It is expected that negotiations under the SADC TIS will adopt an incremental approach with the initial focus being on the following priority service sectors transport, financial services, communication and tourism services. These negotiations which are scheduled to be concluded in 3 years began in April 2012. Countries were expected to make offers and requests by that date.

The main objectives of the SADC TIS are to progressively liberalise intra-regional trade in services (eliminate substantially all discrimination between Member States) with a view to create a single market for services trade; to promote sustainable economic growth and development; to enhance the capacity and competitiveness of the services sectors of state parties and to enhance economic development, diversification, local, regional and foreign investment in the services economies of the region.⁷⁴

2.10 Scope of Application of the SADC TIS

Article 3 provides for the scope and coverage of the SADC TIS. The SADC TIS applies to all measures at all government levels (that is to say central, regional, local government as well as non-governmental bodies) by state parties affecting trade in services. Trade in services is defined similarly to the provisions of Article 1 of the GATS through the four modes of supply. The SADC TIS does not apply to measures affecting air traffic rights or services directly related to the exercise of air traffic rights.⁷⁵ Further the SADC TIS defines services to include any services

⁷³ Geldenhuys R, *Market Opportunities in SADC for Services providers* (2012) 2

⁷⁴ Article 2 of the SADC TIS

⁷⁵ Article 3:3 (a) of the SADC TIS

except services supplied in the exercise of governmental authority.⁷⁶ A good example would be services procured by government agencies.⁷⁷ Interestingly these are equally not covered by any multilateral agreement. There is nonetheless a plurilateral agreement under the WTO which covers government procurement and applies only to those members that have signed this agreement.

2.11 General Obligations under the SADC TIS

As with the GATS, the SADC TIS has general obligations and this paper shall only examine those provisions relevant to the discussion in this paper. Article 4.1 of the SADC TIS deals with the non-discriminatory MFN treatment principle and provides that ‘upon entry into force of this protocol, with respect to any measure covered by the protocol, each state party shall accord immediately and unconditionally to services and service suppliers of any other state party treatment no less favourable than it accords to like services and service suppliers of any other state party or third country.’ The SADC TIS has been criticised as being less ambitious particularly with regard to the carve-out for MFN treatment⁷⁸ which allows countries to negotiate bilateral preferences and list exclusions to the MFN treatment principle.⁷⁹

Article 8 of the SADC TIS further places an obligation on member states to exercise transparency and provides that member states are to publish all measures of general application (e.g. laws, regulation, judicial decision etc.) pertaining to or affecting operations of the protocol. Member states are also required within one year of the entry into force of the protocol to designate or establish enquiry point. These enquiry points are meant to facilitate communication

⁷⁶ Article 3:5 (a) of the SADC TIS

⁷⁷ Article 13 of SADC TIS

⁷⁸ Article 4: 2-4 of the SADC TIS allows for members states to maintain preferences between/among SADC states; enter into future preferential agreements of SADC member states with 3rd countries; and maintain existing preferential agreements of SADC member states with third countries

⁷⁹ Article 4:5 of the SADC TIS The Trade Negotiating Forum for services is to regularly review the list of MFN exemptions with a view to determining which exemption can be eliminated. This has the potential of undermining the MFN principle since some exemptions might exist in perpetuity since no criteria is set on what will determine whether an exemption should be eliminated unlike under GATS where a time frame to do away with such lists was predetermined.

between member states in answering all reasonable inquiries and providing relevant information on matters covered by the protocol.

The SADC TIS further recognises the members' right to regulate services and service suppliers through new regulations. The caveat is that in regulating the sector, measures should not impair rights and obligation under the protocol.⁸⁰

2.12 Specific Commitments under the SADC TIS

As is the case under the GATS, specific commitments on market access and national treatment are to be undertaken through negotiations to liberalise trade in services by each member. These conditions are then indicated on each country's schedule of commitments as the requirements for permitting foreign services and service suppliers.

Article 14 of the SADC TIS which deals with the conditions that a country may maintain in relation to market access provides that in those sectors and modes of supply where specific commitments are undertaken, member states shall only adopt or maintain the 6 quota limitations as specified in the Article. This requirement is similar to the provisions of Article XVI of the GATS which stipulates the limitations on market access that a country may maintain where it decides to allow foreign services or service suppliers access to its market. What this means therefore is that where a country which is a member of SADC (or indeed the WTO) chooses to undertake specific commitments on its market access obligation, it can only do so by indicating the limitations provided for under Article 14 of the SADC TIS e.g. on the number of service suppliers that it will allow in a particular service sector.

A country's level of development is also to be taken into account when commitments for market access are undertaken under the SADC TIS. This is an improvement to the language under the

⁸⁰ Article 5 of the SADC TIS

GATS and takes cognisance of the fact that with the SADC, there are countries that are at disparity levels of development. It is submitted that LDC SADC members should take advantage of such provisions during negotiations by requesting offers that will benefit them in those service sectors that they have not fully developed but which are drivers of economic benefits e.g. financial services. Similarly members in undertaking market access commitments also undertake to allow for the movement of capital.⁸¹ This is particularly important if real development is to spread in the region as it will allow for investment to be set up in different SADC member states.

Under Article 15 which provides for national treatment commitments that members may undertake, member states must in principle not take any measures to modify the conditions of competition in favour of their own like services or service suppliers. In other words, foreign services and suppliers are not to be accorded less favourable treatment than local services or suppliers. Any inconsistent measures have to be listed in the schedule, e.g. discriminatory subsidies and other fiscal measures, market segmentation or prohibitions, nationality requirements or discriminatory licensing, registration, qualification, training requirements.

It is worth noting that the schedules of commitments under the SADC TIS have been replicated on the GATS schedules of commitments. Each member will therefore undertake commitments in a specific sector on either market access or national treatment in each mode of supply. A member may also undertake commitments either on market access or national treatment across sectors in what is known as the horizontal schedule of commitments. The entries to be made by member states include an entry of “none” (also termed as a full commitment) which means that a member binds itself to not having any measures which violate market access and national treatment for a specific sector and mode of supply. Unbound (also termed as no commitment) implies that no commitment is made for a particular mode of supply. The rest of the entries which include specification of some condition or limitation are known as ‘partial commitments’.⁸²

⁸¹ Article 14 Note 1 of the SADC TIS

⁸² Chanda R, *GATS and its Implications for Developing Countries: Key Issues and Concerns* (2002) 6

2.13 Conclusion

The GATS is sets up an important legislative framework for countries to undertake liberalisation of trade in services at the multilateral level. The potential benefits that would accrue to countries of the world as a result of liberalising trade in services are equally immense and indisputable. For example with regard to transport liberalisation, most other industries are dependent on a well-functioning transport network, making it imperative that as countries undertake to trade with each other in services, there is certainty through the legal regimes that are invoked in such trade. It is equally evident that the provisions of legal framework at the multilateral level under the GATS afford all players an equal opportunity in term of accessing the benefits of concessions arrived at during the bilateral and multilateral negotiations.

Due to the growing importance of trade in services for the development of countries including African countries, RTA's such as SADC could be viewed as stepping stones member states to develop their services industry for export in order for them to be able to engage in services trade at the multilateral level. This is more so because the SADC TIS is modeled on the GATS. Member states could therefore first enhance their domestic services to compete in the regional level in order to trade in services internationally. In the next chapter a closer look at road transport liberalisation under the SADC region will be undertaken in order to appreciate how regional integration can increase the competitiveness of services meant for export for SADC countries as well as the ensuing benefits for a country that undertakes road transport liberalisation.

CHAPTER THREE

ROAD TRANSPORT LIBERALISATION UNDER SADC: AN OVERVIEW

3.1 Introduction

Southern African Development Community (SADC) countries are currently involved in a number of service sector negotiations at the multilateral, regional and bilateral levels. However, the success of any trade agreement in terms of eventual economic impact will depend upon the structure of production and trade, the current level of preference given to domestic firms and the level of liberalisation involved.⁸³ As envisioned by the SADC Treaty, several protocols containing provisions for liberalisation of the services sector as well as harmonising regulatory regimes have been concluded and are at various implementation stages. SADC countries have therefore undertaken to cooperate on a number of services and have signed various protocols to that effect which include protocols on transport, energy, tourism, education, health. Transport in SADC region falls under the infrastructure and services core area under the SADC Protocol on Transport, Communications and Meteorology (SADC TCM).

The importance of adequate transport infrastructure services cannot be overemphasised. In SADC, inadequate transport and transit services (border facilities, rail, harbors, roads etc.) constitute a serious obstacle to intra-regional trade and reduce the region's international competitiveness. Transport costs are estimated at about 30%-40% of the total value of goods sold within the sub-region and represent the main constraint on general competitiveness.⁸⁴ Road freight transport like other core infrastructure (or producer services as they are sometimes called due to the dependence of economic production on these services) such as telecommunications and energy is an essential input of a country's production and trade of a number of services

⁸³ Stern M, Truen S and Ramkolowan Y, *SADC Trade in Services: Negotiating National Interest* (2011) 5

⁸⁴ Ramsamy P, *The Comparative advantages of the SADC Region as an Investment Destination* (2003) 7

(postal, distribution and logistical services to mention a few).⁸⁵ Road freight transport can either facilitate or hinder trade and production of goods or services depending on how efficiently it is made available to users. While significant differences exist from country to country, in most SADC countries, core infrastructure services are still inadequately and inefficiently supplied which adversely affects trade and production competitiveness.⁸⁶

In the recent past, the main mode of transportation in the SADC region has been shifting from railways to roads with the expansion of intra-community trade and container trade although most road networks in the northern region still remain underdeveloped.⁸⁷ Pearson argues that freight volumes have shifted from rail to road resulting in lower transport costs. The shift in traffic he argues is also partly due to the relative high rail tariffs and unreliable service, which are attributable to poor management, inadequate use of assets and poor costing practices. The SADC region also has one of the highest permissible gross vehicle mass (GVM) harmonised at 56 tonnes in the in the World (with the exception of Australia which has a higher GVM). This has also increased the competitiveness of road over rail. The negative consequence of such a high GVM is that it significantly raises road maintenance costs which are not fully covered by road user charges and toll fees collected for use of the road from foreign traffic in transit.⁸⁸

This chapter looks at the initiatives undertaken by SADC countries to liberalise road transportation under the framework of the SADC TCM. The SADC TCM envisages that road transport will be liberalised by countries entering into bilateral or multilateral road transport agreements as a means of allowing foreign road transport operators from one member state access to the transport sector of another member state. An overview of the provision of the SADC TCM on transport liberalisation under the mechanism of the bilateral road transport agreements will therefore be given. In addition the chapter will examine the initiatives on

⁸⁵ World Trade Organisation, *Road Freight Transport Services* (2010) 4

⁸⁶ Khumalo N, *Liberalising Trade in Southern Africa: Implementation Challenges for the 2008 SADC FTA and Beyond* (2008) 55

⁸⁷ Sano H and Mizuno K, *Regional Transport Infrastructure Development in Southern Africa* (2000) 116

⁸⁸ Pearson M, *Regional Infrastructure and Trade Facilitation Challenges in Eastern and Southern Africa: Aid for Trade Solutions (North-South Corridor)* (2008) 43

transport corridors which SADC has been implementing as a strategy for promoting regional integration and sustainable development in the region. A comparative analysis of the provisions of the SADC Protocol on Trade in Service (SADC TIS) and SADC TCM in the attainment of services liberalisation particularly in the transport sector will also be given.

3.2 SADC Protocol on Transport, Communications and Meteorology

The SADC TCM was signed in 1996 and ratified in 1998. The SADC TCM provides a legal and broad policy framework for cooperation sets out principles and defines the strategic goals for the transport, communications and meteorology sectors. The focus in this chapter will only be on the provisions in the SADC TCM on road transport. Services provided in this subsector include passenger and freight transport, the rental of commercial vehicles, the maintenance and repair of road transport equipment and other supporting services for road transport.⁸⁹

As was the case in most other parts of the world, transport development in the SADC region was promoted by governments, as state-owned and managed enterprises both in railway and road transport. With the spread of private sector road transport, competition led to attempts by government to regulate competition by controlling the supply of services. The perception was that this should include the control of quantity of transport supplied, in all modes.⁹⁰ According to Ndulo et al, the road transport services sector is now generally liberalised in the individual SADC countries. However there seems to be limited liberalisation in the supporting services for road transport such as bus station services, highways, bridges and parking services. There are also restrictions on market entry provisions of cross-border road transport service.⁹¹

Under Article 2.1 of the SADC TCM, the scope of the protocol comprises the entirety of the transport sector in each member state and the region, including, but not limited to all policy,

⁸⁹ Khumalo N, *Services Trade in Southern Africa* Trade Policy Report No. 10 (2006) 20

⁹⁰ Nick Porre and Associates, *Road Transport Market Liberalisation in Eastern and Southern Africa* (2012) 1

⁹¹ Ndulo M, Hansohm D and Hodge J, *State of Trade in Services and Services Trade Reform in Southern Africa* NEPRU Research Report No.31 (2005) 76. In South Africa for example an application for a cross-border permit for passengers must be sent to the City of Johannesburg Municipality for allocation of time to load from a particular platform. Operators from other countries have argued that this disadvantages them as they are allocated stations that are outside the central business district where passengers are hesitant to board buses from.

legal, regulatory, institutional, operational, logistical, technical, commercial, administrative, financial, human resource and other issues. The general objective of the SADC TCM is to establish inter-alia transport systems which provide efficient, cost-effective and fully integrated infrastructure and operations, which best meet the needs of customers and promote economic and social development while being environmentally and economically sustainable.⁹²

While the focus of the SADC TCM is on the integration of road transport regional systems and networks through compatible policies, legislation, rules, standards and procedures⁹³, it also contains provisions pertaining to liberalisation and restructuring of the sector. Under Article 5.1 member states are to facilitate the unimpeded flow of goods and passengers between and across their respective territories by promoting the development of a strong and competitive commercial road transport industry which provides effective transport services to consumers. In particular member states are to progressively introduce measures to liberalise their market access policies in respect of the cross-border carriage of goods (or in other words freight road transport).⁹⁴

Nick Porre argues that the stated goal of progressive liberalisation implies reducing quantity regulation and increasing freedom to move and trade across borders. (that is to say, *increased liberty: a setting aside of rules, licences etc.*, –*Oxford Dictionary*) It does not suggest any reduction in quality regulation and may in fact require higher levels of quality regulation for some states in order to reassure their neighbours that they should permit their vehicles to operate on the neighbours roads.⁹⁵

Ndulo et al argue that there are major constraints to the expansion of cross-border trade in road transport service despite the fact that the sector is generally liberalised in the individual countries. Among the major constraints identified are cross-border permits, regional traffic facilitation and border administrative requirements.⁹⁶ As regards the issue of cross-border permits and market access by road transport operators from one member state into other SADC

⁹² Article 2.3 of the SADC TCM

⁹³ Article 2.4 of the SADC TCM

⁹⁴ Article 5.3:1 of the SADC TCM

⁹⁵ Nick Porre and Associates, *Road Transport Market Liberalisation in Eastern and Southern Africa* (2012) 11

⁹⁶ Ndulo M, Hansohm D and Hodge J, *State of Trade in Services and Services Trade Reform in Southern Africa* NEPRU Research Report No.31 (2005) 77

member states, the approach taken by SADC is to encourage cooperation through the conclusion of various bilateral and multilateral agreements by the member states in order to liberalise road transportation.

3.3 Bilateral and/ Or Multilateral Road Transport Agreements

When it comes to regulation of cross-border traffic as well as road transport liberalisation, the SADC TCM adopts a model based on bilateral road transport agreements (BRTAs) between member states whose purpose is that of regulating interstate transportation of passengers and goods. The SADC TCM envisages the conclusion of standardised bilateral or multilateral agreements based on the principles of non-discrimination, reciprocity and extra-territorial jurisdiction.⁹⁷

The bilateral agreements approach under the SADC region is based on interstate coordination of road transport liberalisation. Under the Common Market for Eastern and Southern Africa (COMESA) on the other hand the emphasis is on multiparty negotiations on road transport liberalisation. Under Article 85 of the COMESA Treaty member states are to agree on measures for the gradual reduction and eventual elimination of all non-physical barriers to road transport within the common market.⁹⁸ Complementing the COMESA Treaty, is the Protocol on Transit Trade and Transit Facilities (Annex 1), seeking to facilitate trade and transport in the Common Market. Articles 4 and 5 thereof, specifically speak to the means of transport and licensing of carriers in transit traffic and condition requirements for cross border movements.

The SADC has come up with model BRTAs on passengers and goods. The BRTAs are based on the principle of reciprocity that is to say the parties to the agreement undertake to treat operators from each country the same way as their nationals operating in the road transport sector. The BRTAs address various regulatory matters some of which will be discussed in greater detail below:

⁹⁷ Article 5.4 of the SADC TCM

⁹⁸ Article 85 (a) of the COMESA Treaty. The use of the word 'shall' in this article makes it mandatory for the member states to engage and agree collectively on transport liberalisation which is very positive as compared to the practice under SADC for members to move towards transport liberalisation on a bilateral basis first.

- (a) Single SADC carrier permits or licences- where two member states enter into a BRTA, e.g. Zambia and South Africa, road transport operators registered to undertake freight road transport in Zambia would then apply to the Road Transport and Safety Agency (RTSA) which is the Authority in Zambia charged with the responsibility for the issuance of road transport permits, for a permit to allow them to undertake cross-border road transportation. The RTSA would then write to the Cross Border Road Transport Agency (CBRTA), the Authority in South Africa responsible for the issuance of cross-border road transport permits seeking a no objection on whether the applicant transporter may undertake cross-border road transport carrying cargo into South Africa.

Where the CBRTA has no objection, it then writes back to its counterpart Agency in Zambia. The RTSA can then proceed to issue the cross-border permit to the Zambian operator. The permit that is then issued to such operator allows it to enter the frontier of South Africa without having to apply for another permit to traverse the South African territory. The permit thus allows for transportation between the territories of the two contracting states to the BRTA. It also provides for transportation between a point in the territory of the contracting state and a point in the territory of a third state, provided the journey includes the country of establishment of the transport operator, or what the professionals call triangular or third country traffic. The permit also allows for transit traffic.⁹⁹

In exceptional circumstances certain countries grant a cabotage permit. The prohibition on cabotage (which means picking passengers or freight traffic between two points in the same country) except with special authorisation applies to all cross- border traffic in the SADC region irrespective of the existence of a BRTA. South Africa is one country in the SADC region outside the European Union (EU) region that allows for cabotage permits.¹⁰⁰

⁹⁹ World Trade Organisation, *Road Freight Transport Services* (2010) Para 42

¹⁰⁰ World Trade Organisation, *Road Freight Transport Services* (2010) Para 60

This is what is hoped to be attained under the single SADC carrier permit. In practice however, the single SADC permit system does not always work as envisioned. Sometimes the Authority responsible for the issuance of permits may decline to grant a no objection to the applicant as a result of various reasons ranging from violation of road traffic rules in that country or because of non-compliance with other national laws.

In certain circumstances even where countries have signed a BRTA, the single SADC permit is not operationalised. For example Tanzania and Zambia have signed a BRTA since 1997 and yet operators from the two countries still have to apply for a permit at the border of either country to be able to traverse the territory of the two countries. This raises uncertainty in the manner business is conducted and further adds to the cost of doing business as cargo may be delayed at the border while the process of applying for a permit is undertaken.

Cross-border permits are still viewed as a major constraint to the efficient functioning of the road transport services sector in the SADC region. There are different permits across countries in terms of the type, duration and fees charged.¹⁰¹ In addition the road transport sector is heavily regulated mostly at national level. Regulatory measures cover a broad spectrum of issues, ranging from market access to security, road safety, fuel and infrastructure, road traffic (prohibitions and restrictions) and technical standards (in particular weights and dimensions).¹⁰² Furthermore the stringent cabotage laws are said to restrict the operations of transport companies and distort the market for transport services by preventing transport operators from operating outside the country in which they are registered from picking up a load en route to a third country.¹⁰³ For example a vehicle registered in Zambia may not pick cargo in Zimbabwe en route to South Africa with the

¹⁰¹ Ndulo M, Hansohm D and Hodge J, *State of Trade in Services and Services Trade Reform in Southern Africa* NEPRU Research Report No.31 (2005) 77

¹⁰² World Trade Organisation, *Road Freight Transport Services* (2010) 4

¹⁰³ Khumalo N, *Services Trade in Southern Africa* Trade Policy Report No. 10 (2006) 21

result this unnecessary increases transport costs as the operator must charge for an empty load on return.

The consequence of the foregoing requirements by different member states is that the intentions of having a single SADC permit system as a means of increasing easy access for road freight operators to the markets in the region are not fully realised. This is further exacerbated by the implicit acceptance that the management of all aspects of roads and road transport within the countries is subject to the sovereign rights of the government, and that local regulations are to be respected by foreign carriers within the country's borders. The terms of the agreements are thus universally assumed to be applicable only to cross-border movements.¹⁰⁴

(b) Carrier registration- this criterion is used for designating a beneficiary under the BRTA based on the place where the transport operators and the fleet of vehicles are registered assumed to be the same country¹⁰⁵. While the driver may be of a different nationality, in order for a vehicle to enjoy the benefits under the BRTA, it must trace its nationality to the country that is a party to the BRTA. Since the provision of road transport services is largely dependent on having drivers for the vehicles and considering the bureaucracy and cost involved in obtaining entry visas and temporary residence permits viewed as significant barriers to the free movement of people involved in service provision in the region¹⁰⁶, SADC countries should aim for meaningful liberalisation under mode 4 commitments during the negotiations for services liberalisation.

(c) Quota and capacity (permit) management systems- in terms of the quota, a committee determines the quotas, categories (journey and time) and any further conditions governing the permit use. Quotas are always specified in terms of either the number of individual journeys or the number of permits valid for a specified period for example

¹⁰⁴ Nick Porre and Associates, *Road Transport Market Liberalisation in Eastern and Southern Africa* (2012) 7

¹⁰⁵ World Trade Organisation, *Road Freight Transport Services* (2010) Para 35

¹⁰⁶ Khumalo N, *Services Trade in Southern Africa* Trade Policy Report No. 10 (2006) 39

SADC countries have not made significant WTO commitments in respect of Mode 4 and the few that have made commitments have restricted market access to highly skilled people.

three months or a year.¹⁰⁷ Some members under SADC are implementing the quota and capacity permit system using a route management system whose objective is mainly the control of the quantity of operators on a route by the issuing authority for example, in Botswana. What this means therefore is that an operator may apply for a permit to undertake cross-border road transport in Botswana from say Zambia but may not be granted the permit. This is because there is no guarantee that the permit will be issued as a no objection may not be granted on account that the route which is intended to be used already has other operators plying on it. This has the effect of making the single SADC permit system inoperable or not being optimally used.

- (d) Harmonised administrative (including consultative) procedures, documentation and fees; and
- (e) Information management, including a harmonised format of supporting information systems and exchange of information procedures.¹⁰⁸

In addition to promoting transport liberalisation through BRTA, the SADC has been promoting intra-regional transport development by placing particular emphasis on the development of the so called corridors (which is a route connecting landlocked areas with ports).¹⁰⁹ This is in order to develop a reliable and efficient infrastructure for road transport which is key to reducing costs as well as attracting investment in the region.

3.4 Road Transport Development Corridors

The concept of development corridors was born in the 1980s when the Southern African Development Co-ordination Conference (SADCC) constructed corridors (transport routes such as railways, roads, pipelines etc.) from inland countries to ports other than in South Africa in order to compete with South Africa which was under the apartheid regime.¹¹⁰ The SADC TCM

¹⁰⁷ World Trade Organisation, *Road Freight Transport Services* (2010) Para 44

¹⁰⁸ Article 5.4 of the SADC TCM

¹⁰⁹ Sano H and Mizuno K, *Regional Transport Infrastructure Development in Southern Africa* (2000) 116

¹¹⁰ Sano H and Mizuno K, *Regional Transport Infrastructure Development in Southern Africa* (2000) 127
The SADCC is the former body of SADC.

places priority on the construction of corridors¹¹¹ and encourages the integration of infrastructure development along the development corridors. The development corridors approach in the transport infrastructure development that SADC has adopted recognises the need for an integrated transport system and an integrated transport policy framework to achieve regional integration.¹¹²

The term corridor is frequently used for explaining transportation networks in the Southern Africa region. Since there are six landlocked countries in the SADC region with rich mineral resources the need to develop intra-regional corridors has always been viewed as paramount.¹¹³ While previously corridors were purely concentrated on transportation there is now a shift in the concept through the adoption of multisectoral economic development corridors or spatial development initiatives¹¹⁴ as they are sometimes called. The transport corridor development approach is largely viewed as having the potential to reduce poverty as it opens a variety of development opportunities along the corridor.¹¹⁵

The transport development corridors are part of a number of reforms that have been undertaken under SADC which are meant to increase the participation of the private sector in both the road infrastructure and management. The SADC barometer has asserted that the privatisation of transport systems can cure many of the ills of bad management and poor maintenance.¹¹⁶ Thus in a bid to improve transport in the region, SADC countries have identified a number of development corridors aimed at creating integrated production, transport and development systems along existing railways and roads. These include the North-South (being implemented as

¹¹¹ Under Article 1.1 of the SADC TCM a corridor is defined to mean a major regional transportation route along which a significant proportion of member states' or non-member states' regional and international imports and exports are carried by various transport modes, the development of which is deemed to be a regional priority. Member states undertake to improve transport services in all sub-sectors with a focus on transport corridors.

¹¹² SADC, *Desk Assessment of the Regional Indicative Strategic Development Plan 2005-2010* (2011) 50

¹¹³ Sano H and Mizuno K, *Regional Transport Infrastructure Development in Southern Africa* (2000) 116

¹¹⁴ Sano H and Mizuno K, *Regional Transport Infrastructure Development in Southern Africa* (2000) 127

South Africa proposed the spatial development initiative (SDI), an initiative similar to the development corridor in conceptual terms and has been instrumental in the implementation of the Maputo corridor between Gauteng in South Africa and Maputo in Mozambique by sharing in the initial infrastructure investment.

¹¹⁵ SADC, *Desk Assessment of the Regional Indicative Strategic Development Plan 2005-2010* (2011) 50

¹¹⁶ Khumalo N, *Services Trade in Southern Africa* Trade Policy Report No. 10 (2006) 21

a pilot infrastructure project and which will be looked at briefly below), Maputo, Beira, Limpopo, Mtwara, Nacala and Lobito Corridors.¹¹⁷

3.4.1 The North-South Corridor

The north-south corridor is a pilot multimodal upgrade of a transit/transport route in the region. The pilot project is being implemented under the auspices of the COMESA-EAC-SADC Tripartite Free Trade Area (TFTA). COMESA, EAC and SADC have long recognised the importance of improved trade facilitation in deepening regional integration, reducing cross-border transaction costs in order to improve regional infrastructure development programmes. The corridor was selected as it is the busiest in terms of freight volumes and values in eastern and southern Africa. It runs from the Copperbelt of northern Zambia and southern DR Congo to Dar-es-Salaam port in Tanzania on Africa's east coast and ports in South Africa, particularly Durban.¹¹⁸ Among the issues addressed under the north-south corridor programme include exploring the reduction of transport and transit costs in the region through transport infrastructure improvements, implementation of common trade facilitation measures among the three Regional Economic Communities (RECs), as well as providing a vehicle for a regional Aid for Trade implementation strategy.¹¹⁹

All these efforts to increase private sector participation in road infrastructure management can be said to be all aimed at seeing the road services sector being liberalised. The need to tie the liberalisation of the sector with the rehabilitation and upgrading of road infrastructure is therefore likely to achieve the potential for regional liberalisation. Under the SADC Regional Indicative Strategic Development Plan which contains timeframes for economic integration a target of 2008 was set to have liberalised regional transport markets.¹²⁰ The liberalisation of road

¹¹⁷ Khumalo N, *Liberalising Trade in Southern Africa: Implementation Challenges for the 2008 SADC FTA and Beyond* (2008) 58

¹¹⁸ Pearson M, *Regional Infrastructure and Trade Facilitation Challenges in Eastern and Southern Africa: Aid for Trade Solutions (North-South Corridor)* (2008) 42

¹¹⁹ Pearson M, *Regional Infrastructure and Trade Facilitation Challenges in Eastern and Southern Africa: Aid for Trade Solutions (North-South Corridor)* (2008) 43

¹²⁰ SADC, *Desk Assessment of the Regional Indicative Strategic Development Plan 2005-2010* (2011) 49

transport markets was envisaged to be undertaken in stages as discussed in the following paragraph.

3.5 Market Access

Under Article 5.3 liberalisation of market access policies is to be undertaken in a phased approach although two or more member states which are in the position to implement the provisions of this Article ahead of other member states may agree to liberalise their policies on the basis envisaged in the phased approach by concluding appropriate bilateral agreements.¹²¹

The SADC TCM further envisages that member states will achieve the same levels of liberalisation by concluding formally a multilateral agreement¹²² to govern the operations of transport operators from various member states. What this means therefore is that while two member states may sign a BRTA ultimately all members would then move from the BRTAs and be signatories to a multilateral agreement.

The following is the phased approach that the SADC TCM envisages for the liberalisation of road transportation:¹²³

- a. PHASE I- this will involve the abolition of restrictions on carriers of two member states to carry goods on a defined route between such states or in transit across the territory of another member state en route to a third member state or non-member state. This is provided however that such transit traffic may only be undertaken if the carrier's vehicle traverses the territory of its home state.
- b. PHASE II- this will involve the abolition of restrictions on carriers of one member state to carry goods on a defined route between another member state and a third member state

¹²¹ Article 5.3:4

¹²² Article 5:6

¹²³ Article 5:7. This phased approach is not however to be construed as requiring a member state to permit carriers of another member state to carry goods between points in such first mentioned member state (a practice termed as cabotage).

or non-member state, irrespective of whether the carrier's vehicle traverses the territory of its home state.

- c. PHASE III- this will involve the abolition of restrictions on carriers of one member state to carry goods between another member state and a third member state or a non-member state.

There has been slow progress with regard to the liberalisation of road transport mainly due to the protective stance taken by most member states which have been slow to allow market access for cross-border traffic (as is provided for under the provisions of SADC TCM) through a number of measures for example the prohibition of cabotage. Thus despite member states having entered into bilateral agreements to increase market access for foreign transport operators from other member states the impact has been limited on the overall regional market.¹²⁴

Despite this slow progress in road transport liberalisation some successes have been scored in liberalising other sectors of transport such as air transport within the SADC region. Air transport has been liberalised based on the Yamoussoukro Decision implemented in 2009. Though still dominated by monopolies, air transport has seen significant participation of the private sector with positive indications in terms of service availability for the consumer. As trade liberalisation negotiations continue both at WTO in terms of the GATS and through bilateral agreements with certain external parties (such as the EU-Economic Partnership Agreements), it has become imperative for SADC countries to urgently liberalise their services sectors among themselves in order to have a co-ordinated approach.¹²⁵

The SADC TIS is hoped to avail the SADC member states the opportunity to take this co-ordinated approach to liberalising trade in services among the countries in the region. What is important is that there must be concerted efforts to build on the work that is being implemented under other SADC protocols dealing with different services such as the SADC TCM so that the legislative framework in SADC is complementary of the efforts to liberalise services in the region.

¹²⁴ SADC, *Desk Assessment of the Regional Indicative Strategic Development Plan 2005-2010* (2011) 50

¹²⁵ Khumalo N, *Services Trade in Southern Africa* Trade Policy Report No. 10 (2006) 43

3.6 The SADC Protocol on Trade in Services as complemented by the SADC Protocol on Transport, Communications and Meteorology

It is important to give a highlight of provisions of the SADC TIS and the SADC TCM that are complementary of the process of services liberalisation in the road transport sector as well as those provisions which are likely to raise possible conflict in the implementation of the two protocols so that as member states begin the negotiations under the SADC TIS they can be well advised of such impending conflict.

The provisions under the SADC TCM on single licences for carriers would complement the provision of Article 7 under the SADC TIS which provides for the mutual recognition by member states of inter-alia requirements, qualifications, licences and regulations for the purpose of the fulfilment by service suppliers for the authorisation, licensing, operations and certification of service suppliers in particular professional service suppliers.

Similarly bilateral or multilateral agreements addressing the harmonisation of administrative procedures, documentation and fees concluded under the SADC TCM would complement the provisions of Article 18 of the SADC TIS which urges member states to promote an attractive and stable environment for the supply of services through, inter alia, the development of simplified administrative procedures.

In terms of provisions which would be potential conflict areas these include Article 5.3 of the SADC TCM which emphasises reciprocity in terms of market access. This may be inconsistent with the very principle of the SADC TIS which is based on the non-discriminatory general obligation of MFN treatment. While MFN exemptions may be sought under the SADC TIS, these cannot be used to diminish specific commitments made (i.e. including those of market access). The alternative would be for a member state to then list those countries that it accords reciprocity to under the SADC TCM so that preferential treatment can be accorded to some members over others.

Further Article 5.4 of the SADC TCM provides that members may maintain quota and capacity management systems. Member states, when negotiating their commitments under the SADC TIS need to be mindful of this provision, such that in the event that they agree to liberalise road transport (which would in principle have to be done on an MFN basis), then members might have to consider either doing away with quota or capacity conditions or listing specific limitations in order to be consistent with Article 14 of the SADC TIS provisions on market access.

3.7 Conclusion

Road transport is an important core service input into the production and trade of goods and services in all economies. The price and quality paid for road transport services determines the competitiveness of goods and services for the countries in SADC at national, regional and international level. There has been a lot of cooperation undertaken by SADC countries to liberalise road transportation as well as harmonisation of standards to ensure free flow of traffic in the region.



All of SADC member states have extensive Road Traffic and Transport legislation that exists to control the activities of road transport operators (both passengers and goods). The legislation typically defines vehicle standards, dimensions, permissible load weights; driver licensing (and in some countries professional driver permits); and the rules of the road in relation to speed, signage etc. The following chapter will look at the legislative framework in Zambia which allows for cross-border road transportation as well as the setting up of commercial presence in the road sector by foreign operators.

CHAPTER FOUR

CROSS-BORDER ROAD TRANSPORTATION UNDER THE ZAMBIAN LEGAL FRAMEWORK: AN OVERVIEW

4.1 Introduction

As indicated in the previous chapter, road freight transport is highly regulated at national level to deal with matters such as market access, security, road safety, the taxation of vehicles, fuel, infrastructure, social legislation (driving hours and rest periods, wage norms and social insurance cover), road traffic (prohibitions and restrictions), environmental standards, and technical standards (weights and dimensions).¹²⁶

In this chapter the main area of concern will be with the legal framework that guarantees market access to foreign road transport operators from other Southern African Development Community (SADC) member states to the Zambian road transport service sector. The chapter will therefore focus on the Zambian legal regulatory framework as it allows for cross border road transport operations under the Road Traffic Act No. 11 of 2002. An examination of the provisions of Zambia Development Agency Act No. 11 of 2006 regarding the establishment of a commercial presence of a foreign road transport operator (or mode 3 supply of road transport services) will be undertaken.

The chapter will further look at some of the arguments by scholars in favour of road transport liberalisation as well as those arguments that do not further road transport liberalisation. It is admitted that some road transport operators in Zambia will be affected by the complete opening up of regional markets, however the argument advanced is that due to Zambia's heavy reliance on road transportation for trade as well as due to the numerous transport corridors connecting Zambia to the rest of the SADC region, it will be to Zambia's benefit to liberalise the road transport services sector under the SADC Protocol on Trade in Service (SADC TIS).

¹²⁶ World Trade Organisation, *Road Freight Transport Services* (2010) 15

4.2 Legal and Institutional Framework for Road Transport Services in Zambia

The Zambian Government during the 1990s undertook fundamental and radical economic structural reforms as part of the New Economic Recovery Programme (NERP) launched in 1989. Trade reforms were imposed as a by problems of the balance of payments, but also by the requirements of the World Trade Organisation (WTO) and the various regional integration initiatives under both the Common Market for Eastern and Southern Africa (COMESA) and SADC.¹²⁷

The development towards a market economy started with a number of liberalisation measures aimed at opening up the domestic market to foreign investment and to encourage private sector participation in all aspects of the economy. The Zambian Government put in place legislative measures aimed at removing obstacles that hindered private sector participation in the economy.¹²⁸ The transport sector too underwent liberalisation to allow for private sector participation in a sector previously dominated by state run monopolies such as United Bus of Zambia (UBZ) in the passenger transport, Contract Haulage Limited (CH) for goods transport and Zambia Railways Limited (ZR) to mention but a few.^{PE}

The Zambian Government through its then Ministry of Communications and Transport adopted the Transport Policy whose main objectives under road transport include among others the creation of an enabling environment to attract both local and foreign private investment aimed at developing the road transport industry.¹²⁹ The Transport Policy further states that the Government shall encourage quality licensing. However, further under the heading ‘licensing’ the Transport Policy document states that appropriate measures should be introduced to ensure balanced distribution of transport services.¹³⁰ This seems to refer to some kind of quantitative restriction despite the fact that the main objective of the Transport Policy is liberalisation of the transport sector as a whole and road transport in particular.

¹²⁷ Meeuws R, *Zambia Transport and Trade Facilitation Audit* (2004) 10

¹²⁸ Ministry of Communications and Transport -Zambia, *Transport Policy* (2002) 3

¹²⁹ Ministry of Communications and Transport -Zambia, *Transport Policy* (2002) 19

¹³⁰ Meeuws R, *Zambia Transport and Trade Facilitation Audit* (2004) 27

Poree argues that liberalisation of transport implies, by definition, the reduction of regulatory measures to control the supply of transport and the increase of the freedom with which transport operators can access the markets of the region. This process is endorsed in all the regional accords as a necessary prerequisite to promote competition, efficiency, investment, economic development and prosperity. But the reality is that the processes defined in the bilaterals, the current procedures and the perspectives of the regulators do not currently support the principles of liberalisation.¹³¹

Following the launch of the transport policy in Zambia, a number of reforms were undertaken which included some institutional and legal reforms in the road sector. Three Acts of Parliament¹³² were enacted which established three statutory bodies to deal with all matters concerning the road sector as well as the legal framework for the administration of the road sector.

The established agencies include the National Road Fund Agency (NRFA) responsible for mobilising funds for both road infrastructure maintenance and development, the Road Development Agency (RDA) responsible for road infrastructure development and the Road Transport and Safety Agency (RTSA) responsible for inter-alia licensing and road safety. We shall only concentrate on Act No. 11 of 2002 which establishes the RTSA and mandates it to administer the law on road transport as well as provides the legal framework for the issuance of permits that allow for market access for cross border road transport operators.

Raballand et al maintain that regulations are the key barriers to liberalisation and efficiency improvements in the road transport industry. They further point out that it is important that SADC states should get their policies right before making commitments under the General

¹³¹ SADC, *Facilitation of Road Transport Market Liberalisation in the SADC Region* (2010) 1 (available at <http://www.tis.sadc.int/report>)

¹³² Ministry of Communications and Transport -Zambia, *Transport Policy* (2002) 7

Following the deregulation of the road transport industry a number of service providers have joined the market. To ensure that the quality of service being provided meets the expectations of the users there is need for a very effective regulatory regime. The Three Act include the Road Traffic Act No. 11 of 2002, the Public Roads Act No.12 of 2002 and the National Road Fund Act No. 13 of 2002

Agreement on Trade in Services (GATS).¹³³ Although strictly speaking road transport is covered by the GATS, there are provisions within the General Agreement on Tariffs and Trade (GATT) which foresee the importance of road transport and the adverse effects of regulations whose intent would be to restrict road transportation.

Article III: 1 of the GATT which provides for national treatment on inter-alia regulations stipulates that rules, regulations and requirements affecting ... the internal transportation of products ... should not be applied ... so as to afford protection to domestic production. Article III.4 establishes a national treatment principle in this respect, specifying that these provisions shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the products.

Further Article V of the GATT also establishes detailed and rigorous rules concerning freedom of transit for WTO members by providing that there shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or other means of transport.¹³⁴

Further all charges and regulations imposed by contracting parties on traffic in transit to or from the territories of other contracting parties shall be reasonable, having regard to the conditions of the traffic. With respect to all charges, regulations and formalities in connection with transit, each contracting party shall accord to traffic in transit to or from the territory of any other contracting party treatment no less favourable than the treatment accorded to traffic in transit to or from any third country.¹³⁵ As Zambia is a member of the WTO, it is important that it adheres to the foregoing provisions of the GATT in the promulgation of its regulations on road transport

¹³³ Raballand G, Kunaka C and Giersing B, *The Impact of Regional Liberalisation and Harmonisation in Road Transport Services: Zambia* (2008) 11

¹³⁴ Article V:2 of the General Agreement on Tariffs and Trade

¹³⁵ Article V:4 and V of the General Agreement on Tariffs and Trade

to avoid the challenge by other members of its regulations on grounds that they are not GATT compliant.

Within the Eastern and Southern African region the treaties and agreements such as COMESA and SADC mention the objectives of promotion of competition, efficiency, reduction of costs, regulatory frameworks to facilitate road haulage operations, equity of treatment of operators and intentions to promote liberalisation. At the operational level, the current application of regulatory systems in all countries does not support these objectives. In most areas, the quantity controls are ineffective and unnecessary and in all areas the continual increase in the costs and the levels of regulation is constraining the efficiency of road transport to the detriment of the economic objectives of trade and growth.¹³⁶

Road transport in Zambia is controlled and regulated by the RTSA. The Zambian transport industry is made up of three basic sectors namely the local goods or commercial market, the cross-border transport sector and the passenger market comprising of local and cross-border operations. Cross border transport is mainly performed by companies from all over the region with 39% South African, 17% Zambian and 41% Zimbabwean registrations being the major operators.¹³⁷ The RTSA is mandated under the Road Traffic Act No. 11 of 2002 to among other things undertake vehicle testing, collect road licence fees, issue cross border-permits, collect road user fees, as well as road traffic law enforcement.¹³⁸

The Road Traffic Act No. 11 of 2002 provides a comprehensive legal framework for the regulation of road traffic management, road safety as well as cross border road transportation among other things. The Road Traffic Act provides for the issuance of permits to persons wishing to undertake the business of road transport operators both locally and/or cross border. A road transport operator intending to undertake road transportation services on the local route must first apply to be licensed by the RTSA in accordance with the provisions of the Road

¹³⁶ SADC, *Facilitation of Road Transport Market Liberalisation in the SADC Region* (2010) 1 (available at <http://www.tis.sadc.int/report>)

¹³⁷ SADC, *Facilitation of Road Transport Market Liberalisation in the SADC Region* (2010) 48 (available at <http://www.tis.sadc.int/report>)

¹³⁸ Raballand G, Kunaka C and Giersing B, *The Impact of Regional Liberalisation and Harmonisation in Road Transport Services: Zambia* (2008) 11

Traffic Act No.11 of 2002. Similarly a road transport operator that intends to undertake road transport services on the international or cross-border route must apply to the RTSA for the issuance of a cross-border road transport permit.

Part VIII of the Road Traffic Act No. 11 of 2002 deals with the licensing of public service vehicles for goods and passengers on the local route. The Act provides that a person that intends to operate road transport services as a public service vehicle must apply for the issuance of a road service licence. Under Section 108 the Director of the RTSA may grant a road service licence to any citizen of Zambia, who applies for such a licence. The said section further defines a citizen of Zambia to mean an individual who is a citizen, a partnership composed exclusively of persons who are citizens of Zambia or in relation to a body corporate one that is incorporated under the laws of Zambia with not less than seventy-five percent of the membership being exclusively composed of persons who are citizens of Zambia.¹³⁹

While Zambia has made considerably firm steps in the liberalisation of the transport sector there still exist some legal and institutional constraints for access to the national and international road transport market.¹⁴⁰ In terms of institutional constraints for access to the road transport markets, an examination of the institutional structures that prevail in most of the countries of the SADC region shows that there are typically several different departments involved in the regulation of road transport. In almost all countries, there is a department of transport which may be coupled with several other functions such as public works, infrastructure, roads and other departmental combinations. The departments of transport are typically responsible for transport policy and legislation and in almost all cases have a sub-department responsible for the control of cross-border regulation.¹⁴¹

In some countries, this function has been assigned to a state agency (such the RTSA in Zambia) in order to provide for the necessary resources and facilities to manage the permit system. In addition to the department of transport, there is in most countries an enforcement agency or

¹³⁹ Section 108 (3) of the Road Traffic Act

¹⁴⁰ Meeuws R, *Zambia Transport and Trade Facilitation Audit* (2004) 22

¹⁴¹ SADC, *Facilitation of Road Transport Market Liberalisation in the SADC Region* (2010) 17 (available at <http://www.tis.sadc.int/report>)

institution which varies considerably from country to country. This makes it hard for operators to know which government institution to channel their grievances in the event that they are faced with challenges of accessing a particular market; or where the operators are already having access in a market and have challenges (such as rent seeking behaviors from officers who want to be corrupted) then it becomes difficult for the operators to know which correct government institution would be the appropriate one to address the challenges that the operators would be facing in order to undertake services in the foreign country. Furthermore it becomes difficult to comply with each different country's institutional requirements as road transport operators must engage with different government institutions in each country.

In terms of legal constraints for access to the road transport markets, section 108 of the Road Traffic Act No. 11 of 2002 is a typical example, as it grants the Director of the RTSA the authority to put restrictions on the issuance of a licence. The said section 108 provides that the Director in deciding whether to grant or refuse or vary a road service licence in respect of any route, shall have regard to inter-alia the suitability of the routes on which a service may be provided under the licence; the needs of Zambia as whole in relation to traffic and the co-ordination of all forms of transport; the payment of reasonable wages and observance of proper conditions of service in respect of the drivers and conductors of the applicant employees; the reliability and financial stability of the applicant; facilities at the disposal of the applicant for carrying out vehicle maintenance and mechanical repairs; and any previous convictions of the applicant for any offence under the Act.¹⁴²

Further section 108 (12) requires a person applying for a road service licence to submit to the Director the rate of fares for the proposed services. The import of these restrictive conditions under section 108 which deal with the issuance of road service licences for road transportation is that there still exist quantitative restrictions in the road transport sector and the fares are not representative of what should obtain in a liberalised road transport economy. Meeuws argues that in a liberalised road transport sector, the establishing of the rates should be completely left to

¹⁴² Section 108 (7) of the Road Traffic Act No. 11 of 2002.

the operators. Any reference to the fares should therefore be removed from the Road Traffic Act No. 11 of 2002.¹⁴³

The transport policy also makes reference to regional road transport and provides that in order to promote the growth of the road transport industry in the region, the Government will among other things enter into bilateral and/ or multilateral road transport agreements with neighbouring countries based on non-discrimination, reciprocity and extraterritorial jurisdiction as well as ensure that relevant legislation for the harmonisation of road traffic and safety standards conform with regional and international protocols.¹⁴⁴

In terms of the international or cross-border road transportation, the key determinants of market entry for foreign operators into the Zambian road transport sector are permits (called cross-border road transport permits) and fleet ownership. The cross-border road transport permits are based on bilateral road transport agreements signed between pairs of countries where as fleet ownership is based on the establishment of commercial presence in Zambia (or the provision of road transport services through mode 3 supply). Based on the SADC TCM and the model bilateral road transport agreements for passenger and freight transport services, SADC states have concluded bilateral road transport agreements to facilitate international road transport on all major corridors of the sub-region.¹⁴⁵

Under the Road Traffic Act No. 11 of 2002, section 232 provides that the Minister may on the advice of the RTSA by statutory instrument regulate the cross-border carriage of goods and passengers as the Minister may consider necessary to incorporate the requirements of the SADC TCM.¹⁴⁶ There are currently no regulations that the Minister has promulgated on cross-border road transportation, however the RTSA is currently working on amendments to the Road Traffic Act No. 11 of 2002 which will include the cross-border road transportation regulation. The

¹⁴³ Meeuws R, *Zambia Transport and Trade Facilitation Audit* (2004) 27

¹⁴⁴ Ministry of Communications and Transport -Zambia, *Transport Policy* (2002) 21

¹⁴⁵ Raballand G, Kunanaka C & Giersing B, *The impact of regional liberalization and harmonisation in Road Transport Services: A focus on Zambia and lessons for landlocked countries* (2008) 11

The cross-border road transport permits are issued both to Zambian operators who intend to undertake cross-border road transportation services to other SADC countries as well as to foreign operators intending to undertake road transport services from their countries into Zambia.

¹⁴⁶ Section 232 (a) of the Road Traffic Act No. 11 of 2002

proposed cross-border road transportation regulation is modeled on the South African cross-border regulation.

It is expected that the cross-border road transportation regulation will be submitted to the Zambian Parliament during the 2013 sessions. The foregoing notwithstanding, in chapter 3 the operationalisation of the single permit system as a means to access markets for foreign road transport operators within SADC was discussed at great length and it is not proposed to repeat the discussion here. Suffice to say that Zambia through the RTSA controls cross border road transport through the issuance of cross-border road transport permits which are given defined countries and on defined road transport corridors routes.

Cross-border road transport permits are available for three months and twelve months. Cross-border road transport permits require the name of the operator and a physical address, vehicle registration number and details of the type of transport (passenger or goods), the number of trips and destination or transit countries.¹⁴⁷ The regulation of the transport operations within Zambia are therefore subject to different licensing and control regimes for cross-border traffic. Within most of the SADC countries the aspects of road transport operations that are mentioned in the treaties and bilaterals road transport agreements that are the subjects of the cross-border regulations are theoretically controlled by the road traffic authorities. As noted in several studies, this introduces problems as the local traffic authority regulations in many countries are not aligned with the high level accords or their objectives.¹⁴⁸

A further problem caused by this situation is that the local traffic officials generally do not have adequate training to apply cross-border regulations and in some areas they police customs regulations. The rationale for countries permitting this situation is not immediately apparent, but the net effect is that road transport operators are harassed and delayed by officials of all types at many points along the main road transport corridors.

¹⁴⁷ SADC, *Facilitation of Road Transport Market Liberalisation in the SADC Region* (2010) 49 (available at <http://www.tis.sadc.int/report>)

¹⁴⁸ SADC, *Facilitation of Road Transport Market Liberalisation in the SADC Region* (2010) 2 (available at <http://www.tis.sadc.int/report>)

The trucking sector is most liberalised in Zambia.¹⁴⁹ It is in the trucking sector that market entry of foreign operators into the Zambia road transport based on fleet ownership is most prevalent. Efforts have been made to create an enabling environment to attract private investment in this sector. This can be confirmed from the provisions of Section 108 (3) of the Road Traffic Act which provides that notwithstanding the provisions contained therein, the Director may grant a road service licence to a person who is not a citizen of Zambia but is a holder of an investment licence issued in terms of the Investment Act No. 39 of 1993.

The Investment Act No. 39 of 1993 underwent amendments and was merged with other statutes into what became known as the Zambia Development Agency Act No. 11 of 2006. All legal requirements aimed at attracting private investment are currently now contained in the ZDA Act NO. 11 of 2006 whose objectives are to inter-alia foster economic growth and development by promoting trade and investment in Zambia through an efficient, effective and coordinated private sector led economic development strategy as well as promote greenfield investments through joint ventures and partnerships between local and foreign investors.

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Section 68 of the Zambia Development Agency Act No. 11 of 2006 provides that:

A person who wishes to

- (a) develop premises as a multi-facility economic zone;
- (b) export prescribed goods and services;
- (c) invest in any business enterprise;
- (d) register a micro or small business enterprise, education enterprise, skills training enterprise or rural business enterprise for purposes of this Act; or
- (e) operate a business enterprise in a multi-facility economic zone; shall submit an application to the Board in a prescribed form and the application shall be accompanied by a prescribed fee and such documents and information as may be required by the Board.

¹⁴⁹.Raballand G, Kunanaka C & Giersing B, *The impact of regional liberalization and harmonisation in Road Transport Services: A focus on Zambia and lessons for landlocked countries* (2008) 15

The tariffs in the trucking industry in Zambia are all deregulated. Road transport tariffs are largely influenced by the demand and the existence (or lack of) competition between operators and transport modes.

