

The role of the SADC Protocol on Trade in Services in regional integration

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ABSTRACT

Trade in Services can be described as a transaction between a supplier and a consumer without any physical movement of goods across international borders. This, in itself, presents major economic growth possibilities in both regional and multilateral terms. Regional trade agreements, if drafted to suit the specific region's strengths, can promote Trade in Services and establish regional integration. The fact that Trade in Services and regional integration, throughout the Southern African Development Community (SADC) specifically, is moving forward at such a slow pace is due to the lack of political ambition and policy makers failing to emphasise the establishment of trade specific regulatory coherence among member states. Given policy's impact on Trade in Services, regional trade agreements must be designed to address new and emerging issues that, not only haven't been taken up in previous trade agreements, but which is also region specific and focused enough to build on new standards found in other new trade agreements that will boost regional integration. SADC countries are still in process of establishing a regional services market and, as it currently stands, major development possibilities still exist. This study compares the Trans-Pacific Partnership (TPP) with SADC's Protocol on Trade in Services (PTIS), with the goal to determine the principles that are necessary to establish a regional market for the integration of Trade in Services. It was found that the PTIS lacks such principles and that integration of services throughout the SADC region is highly unlikely if set forth in its current direction. The finding was that the establishment of regional integration of Trade in Services throughout SADC will have to start with regulatory coherence among its members.

Key words:

Trade in Services, modes of trade, regulatory coherence and regional integration.

LIST OF ABBREVIATIONS

AEC	African Economic Community
AT	Abuja Treaty
AU	African Union
BOP	Balance of Payments
CMT	Committee of Ministers responsible for Trade
COS	Committee of Senior Officials
FDI	Foreign Direct Investment
FTAs	Free Trade Agreements
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
ITC	International Trade Centre
IW	Investor Words
LDCs	Least Developed Countries
MFN	Most Favoured Nation
NCMs	Non-conforming Measures
OECD	Organisation for Economic Co-operation and Development
PTIS	Protocol on Trade in Services
SA	South Africa
SADC	Southern African Development Community
SADPA	South African Development Partnership Agency
SOEs	State Owned Enterprises
TNFS	Trade Negotiating Forum for Services
TPP	Trans-Pacific Partnership Agreement
TSADC	Treaty of the Southern African Development Community
UNCTAD	United Nations Conference on Trade and Development
US	United States
USA	United States of America
WTO	World Trade Organization

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1 Introduction

1.1 Trade in Services

It is difficult to imagine industries operating without services¹ such as telecommunications, internet connection, funding, accounting systems, legal support, transportation or logistical services, to mention a few. According to the International Trade Centre (ITC), the services sector is the largest sector in the global economy. The United Nations Conference on Trade and Development's (UNCTAD) Secretary-General Dr Mukhisa Kituyi, said that the focus and nature of trade is shifting towards services, especially in developing countries. For this reason, he stated that policy makers must address the effects of the change in trade. Policy makers can do so by becoming aware of the nature and variety of services and that it subsists in various forms of services which could bring about substantial economic growth.² It is responsible for approximately 70% of international gross domestic product (GDP) and it contributes to about 60% of worldwide employment. In terms of value³, services contribute to about 46% of global exports.

The supply of services can be described as a transaction between a supplier and a consumer without any physical movement of goods.⁴ An activity of economic value that is intangible, cannot be stored and does not lead to the possession of a physical thing. A service is disbursed at the point of sale and is the other leg of the two main components of any economy, thus being something other than dealing in goods.⁵ Trade in Services entail the trade and supply of a product which is also for all purposes intangible, again unlike

¹ Examples of services can be seen in the transfer of goods, such as the postal service delivering mail, and the use of expertise or experience, such as a person visiting a doctor: Investor Words (IW) 2017 <http://www.intracen.org/itc/sectors/services/>.

² UNCTAD 2017 <http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1390>.

³ Which can be described as that part of the production process in the manufacturing of goods which relates to production services embodied in the goods it produces.

⁴ ITC 2017 <http://www.intracen.org/itc/sectors/services/>.

⁵ IW 2017 <http://www.investorwords.com/6664/service.html>.

the supply of goods. Services can either be traded directly, thus exported across borders, or form part of a global or regional value/supply chain that is not necessarily exported directly, but contributes to the overall production of the final product or service.⁶

For a service to be classified as being traded, the supply thereof must occur between a supplier and consumer from different countries.⁷ This poses a few issues to start with, such as how authorities will govern tax implications or customs and excise that flow from such transactions? Can governments confidently secure compliance with its laws or regulations (those that are not inconsistent with international law)? Can governments establish measures that will prevent deceptive or fraudulent practices and what will the implications be if such practices do occur? What can governments do in the event of serious balance-of-payments difficulties or inequalities?⁸ This is especially a problem in the Southern African Development Community (SADC) to the extent to which domestic regulation structures and legislation are in place.⁹ This is because SADC members have different domestic regulation structures and achieving regulatory coherence to integrate Trade in Services throughout the SADC region, will require some form of legal conformity.

International law on Trade in Services has, in recent times, also slowly evolved and a great deal of work has been done to answer and govern most of the questions and problems posed above.¹⁰ However, Trade in Services is still a growing trade in terms of global recognition and understanding of how it actually affects countries and their economies. Services are becoming

⁶ ITC 2017 <http://www.intracen.org/itc/sectors/services/>.

⁷ ITC 2017 <http://www.intracen.org/itc/sectors/services/>.

⁸ Can a government temporarily restrict trade, on a non-discriminatory basis, despite the existence of specific commitments?

⁹ "The central role of domestic regulation in the services sector and services trade is one key aspect of the added complexities to be considered in the analysis of services trade liberalisation/integration." Cattaneo *Services trade liberalisation* 10.

¹⁰ Reference is made to chapters 3 and 4.

increasingly tradable due to innovation as well as the rapid evolution and development of technology. International Trade in Services can be seen as "the new frontier for expanding and diversifying exports", which can offer extensive opportunities, especially for developing and least developed countries (LDCs).¹¹ For this reason, increasingly more governments are including Trade in Services in regional trade agreements. It is, therefore, important to investigate the impact of a regional Trade in Services policy, especially the impact that it may have on the Southern African Development Community (SADC).¹² However, it is critical to bear in mind that the simple recognition of the services sector and its importance, does not mean that either Trade in Services expansion, or Trade in Services integration, will spontaneously benefit the economies of developing countries.¹³ In regard to trading in goods, the standard assumption is that liberalisation will give effect to better efficiency, wellbeing, economic growth and the reduction of poverty. This assumption is incorrect in terms of Trade in Services liberalisation, because the liberalisation and integration of Trade in Services is far more complex, with far more variables than trading in goods.¹⁴

1.2 Trade in Services and regional integration

The main objective of this study is to examine how the Southern African Development Community's (SADC) Protocol on Trade in Services (PTIS) integrates Trade in Services within the SADC region. This will be done by studying some key aspects of what Trade in Services entail, investigating how SADC's current policy compares with modern standards, and by

¹¹ WTO statistics show that the share of developing economy services export increased from 24% in 2005 to 32% in 2015, and the share of LDCs in global services export increased from 0.4% in 2005 to 0.8% in 2015. Increased services export from the LDCs is an important contributor of meeting the sustainable development goals of doubling the export from LDCs by 2020.

¹² ITC 2017 <http://www.intracen.org/itc/sectors/services/>.

¹³ Cattaneo *Services trade liberalisation* 9.

¹⁴ Cattaneo *Services trade liberalisation* 9.

establishing what SADC needs to do to integrate regional Trade in Services if found that it fails to integrate the regional services market.

The importance of services is increasingly recognised globally and its increased importance has led to its inclusion in the Uruguay Round of trade negotiations which led to the General Agreement on Trade in Services (GATS);¹⁵ a treaty of the World Trade Organization (WTO). Trade in Services has, since January 2000, become one of the main focus areas of both regional-bilateral¹⁶ and multilateral¹⁷ trade negotiations under the WTO.¹⁸ Trade in Services integration, throughout the Southern African region, has not been a primary focus area. The lack of its member states to address Trade in Services in regulations and policies, has given both SADC's enterprises and consumers a substantial disadvantage. SADC, with its ultimate objective to eradicate poverty throughout the region¹⁹, implemented a Trade in Services policy after 12 years of negotiating a framework in 2012²⁰, known as the Protocol on Trade in Services (PTIS). The aim is to diversify SADC's economies through better Trade in Services²¹ among its members, while being regulated by the PTIS when ratified by its member states.

¹⁵ WTO 2016 https://www.wto.org/english/tratop_e/serv_e/serv_e.htm.

¹⁶ Bilateral trade agreements are made between two contracting states only, for example South Africa and Lesotho or Australia and the USA. A regional trade agreement involves states of two or more members that share a common area known as that specific region wherein such contracting states are located. The purpose of such regional trade agreements is to establish and strengthen trade relations between the specific member states like the PTIS and the TPP. Oxford 2012 <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0019.xml>.

¹⁷ A multilateral WTO agreement is an agreement where all WTO members are party to the agreement which should not be confused with a plurilateral agreement which implies that WTO member countries are given the choice to voluntarily agree to sets of new rules. Signing a multilateral agreement imposes a certain standard of international coherence.

¹⁸ WTO 2016 https://www.wto.org/english/tratop_e/serv_e/serv_e.htm.

¹⁹ SADC 2012 <http://www.sadc.int/sadc-secretariat/directorates/office-deputy-executive-secretary-regional-integration/trade-industry-finance-investment/>.

²⁰ Cattaneo *Services trade liberalisation* 25.

²¹ SADC 2012 http://www.sadc.int/files/7313/6439/6118/Protocol_on_Trade_in_Services-2012-English.pdf.

This protocol has six primary objectives as set out in article 2 thereof, which can be interpreted into one main objective namely, to level the playing field among SADC members by ensuring that industries and consumers can take full advantage of a single regional services market.²² SADC is determined to achieve deeper regional integration and substantial economic growth and development. SADC Members are convinced that this Protocol is a step in the right direction in dealing with the challenges of globalisation.²³ It is expected that an integrated regional market will generate new opportunities that will strengthen the region's service capacity, efficiency and competitiveness. Members aim to expand services exports by cooperative mechanisms that will produce a dynamic trade sector throughout the SADC region.²⁴ The PTIS aims to encourage competition and attract more foreign direct investment to the SADC region.²⁵

Despite its shortcomings, the Trans-Pacific Partnership Agreement (TPP) is one example of trade negotiations which sets the current world standard for what is possible in order to integrate regional procurement of services.²⁶ The TPP²⁷, as one of the most recent and modern agreements to be concluded as a "GATS-plus" (relating to its Trade in Services related content) trade agreement, has promising fixtures despite the USA's withdrawal in 2017.²⁸ The TPP now only involves 11 Asia Pacific countries and, regardless of Japan's Prime Minister's comment in January 2017 shortly after the withdrawal of the USA, that the TPP without the USA is pointless, several

²² Cronjé 2014 *TRALAC* 7.

²³ Globalisation is the process by which the world is becoming increasingly interconnected because of massively increased trade and cultural exchange. Globalisation has increased the production of goods and services. BBC 2014 <http://www.bbc.co.uk/schools/gcsebitesize/geography/globalisation/globalisation-rev1.shtml>; SADC 2012 <http://www.sadc.int/files/7313/6439/6118/Protocol-on-Trade-in-Services-2012-English.pdf>.

²⁴ SADC 2012 <http://www.sadc.int/files/7313/6439/6118/Protoco-on-Trade-in-Servi ces-2012-English.pdf22>.

²⁵ Steenkamp, Grater and Viviers "Streamlining South Africa's export development" 58.

²⁶ Sandrey *Services trade in Africa* 15.

²⁷ TPP 2016 <http://tpp.mfat.govt.nz/text>.

²⁸ Tralac 2017 <https://www.tralac.org/news/article/11161-trump-revamps-u-s-trade-focus-by-pulling-out-of-pacific-deal.html>.

other signatory states are still determined to make the TPP work.²⁹ The TPP is a good example of a regional integration agreement which involves diverse economies of unequal sizes and negotiating partners with different levels of political power. The significance of the TPP to the SADC PTIS is that the PTIS aspires to achieve deeper regional economic integration and procurement of services, but these aspirations seem to be less ambitious than that of the TPP. The structures and liberalisation approaches adopted in these two agreements, are completely different. The TPP is driven to support, establish and facilitate. Support by enhancing micro to medium sized enterprises' ability to benefit from and to participate in the opportunities produced by the TPP.³⁰ It further establishes mutually advantageous rules for predictable legal and commercial trade and investment frameworks.³¹ It facilitates efficient and transparent customs procedures in the TPP region to ensure predictability for importers and exporters, while reducing its costs.³² The TPP wishes to promote trade of both goods and services in that region, but also has a broader international aim to contribute to the synchronisation of the development and expansion of world trade as the biggest trade agreement to date.³³

The scope of this study will therefore be to: briefly investigate the theory behind Trade in Services and determine what Trade in Services entail; to determine the applicable principles required to promote Trade in Services and regional integration throughout SADC; to determine whether the PTIS adheres to such principles and how it compares with a modern trade agreement like the TPP; and lastly to make recommendations in this regard and provide lessons to be learned from the TPP approach, if any. The comparison of the PTIS and the TPP will be limited to the promotion of Trade

²⁹ Tralac 2017 <https://www.tralac.org/news/article/11161-trump-revamps-u-s-trade-focus-by-pulling-out-of-pacific-deal.html>.

³⁰ TPP 2016 <http://tpp.mfat.govt.nz/text>.

³¹ TPP 2016 <http://tpp.mfat.govt.nz/text>.

³² TPP 2016 <http://tpp.mfat.govt.nz/text>.

³³ TPP 2016 <http://tpp.mfat.govt.nz/text>.

in Services and regional integration while offering some policy suggestions based on the key findings.

1.3 Conclusion

Services can play a crucial part in the transformation and sustainability of an economy, as well as to assist in the creation of employment opportunities. In developed and developing countries, services directly affect the gross domestic product, trade as a whole, and foreign investment and exchange. It indirectly supports productivity growth and linkages between the other sectors of an economy. For this reason and as it will become clear throughout this study, proper trade policy leading to some form of binding commitments and implementation among its members that establishes market access, is the key to regional integration.³⁴ Agreeing on paper or in principle but lack of ratification, is futile. SADC can benefit from establishing a regional market that provides access to a wider variety of services that will produce regional development and public procurement of integrated services.

The following chapters will outline the background of Trade in Services. In Chapter 2 the theory behind Trade in Services will be investigated, as well as what it entails; after which the principles required to promote Trade in Services and regional integration throughout SADC, will be determined. In Chapter 3 the role of the SADC PTIS in regional integration and procurement of Trade in Services will be established. Chapter 4 will explore the relevance of the TPP agreement in terms of Trade in Services. Lastly, a summary of the findings and recommendations for what is required to integrate the SADC services market, will be provided in Chapter 5.

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³⁴ Evenett and Hoekman "Introduction and overview" 1.

2 Trade in Services background and policy development in SADC

2.1 Introduction

Considering the fact that both goods and services are tradable, the focus of this chapter will be on what Trade in Services entail as it relates to the following question: how does the SADC Protocol on Trade in Services promote the regional integration of Trade in Services throughout the SADC region? As a key component for economic growth, competitiveness and poverty alleviation, services sectors comprise of more than two-thirds of the global economy. In general terms, it is estimated that the impact services have on the Gross Domestic Product (GDP) of developed economies, ranges from 60-70%. In the Sub-Saharan African economies, the estimate is that services contribute to well over 60% of the regions' GDP.³⁵ Developing countries should, therefore, increasingly look to Trade in Services to respond to domestic supply shortages and to diversify and promote exports.³⁶

With the recent increase of preferential trade agreements and regional policies, more developing countries are also engaged in drafting regional rules for Trade in Services and investment within their regions.³⁷ GATS as the fundamental agreement for any Trade in Services policy, is one of the revolutionary achievements of the Uruguay Round when it entered into force in January 1995. It took a further 5 years for the GATS Trade in Services policy to be established as the only set of multilateral rules governing international Trade in Services.³⁸ GATS was inspired by similar objectives as its counterpart in trade of goods, the General Agreement on Tariffs and Trade (GATT). Its objectives are to give effect to liberal trade promotion and development among its members by means of creation of a credible and reliable structure for international trade rules. Such rules exist to ensure fair

³⁵ Sandrey *Services trade in Africa 2*.

³⁶ World Bank 2010 <http://elibrary.worldbank.org/doi/abs/10.1596/978-0-8213-8353-7>.

³⁷ World Bank 2010 <http://elibrary.worldbank.org/doi/pdf/10.1596/978-0-8213-8643-9>.

³⁸ WTO 2017 https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm.

and reasonable treatment of all members (which underpins the principle of non-discrimination). It aims to stimulate economic activity by means of a regional ratified policy.³⁹ The general obligations are of such a nature that it applies directly and automatically to all members and services sectors, which include all commitments concerned with market access and national treatment across the four modes of supply in specific selected sectors. Such commitments are relevant to individual country schedules and may vary significantly between the different member states.⁴⁰ In terms of a country's schedules, it only has to specify the specific sectors which that country is willing to commit to negotiate in. This is known as the positive list approach which is found in the PTIS in contrast to the negative list approach of the TPP. The negative list approach means that a treaty's obligations and commitments are applicable from the point of departure, unless it is stipulated otherwise in a country's schedules.⁴¹

Before comparing the two relevant regional policies (the PTIS and the TPP) that flow from the ground-breaking GATS agreement principles as it relates to Trade in Services, we must first consider what is meant by the term Trade in Services. However, this study does not aim to quantify specific services data⁴² that support the potential impact of Trade in Services within the SADC region.⁴³ Thus, any references to figures or data, will be to substantiate the argument that is put forward.

³⁹ WTO 2016 https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm.

⁴⁰ WTO 2017 https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm. For a detailed background refer to the links in this footnote, as it is not particularly relevant to this study outside the context of the PTIS and the TPP.

⁴¹ Cattaneo *Services trade liberalisation* 15.

⁴² Such information can be found in the under mentioned articles referred to in Jensen and Sandrey *Continental Wide Service Liberalization* 1-14.

⁴³ Sandrey *Services trade in Africa* 1-14.

2.2 Definition of Trade in Services

Practically speaking, it is not possible to formulate an all-inclusive definition to capture the full meaning of Trade in Services, but the following is worth considering:

The precise definition of a word inevitably depends on context. When the phrase "Trade in Services" is used as a label for an observable category of economic activities measured by statisticians for the national income accounts, it has a definition that is determined by the needs of national income accounting and the use of national income data for the management of macro-economic policies. When the term is used by economists to describe a concept in economic theory, the definition is determined by the logical structure of such theories. When businessmen talk about Trade in Services, they often talk about it in terms of the competitive position of the firm vis-à-vis its foreign competitors. And when law makers and policy makers talk about it, they inevitably seek to fit the definition to broader political and policy requirements.⁴⁴

2.2.1 Trade in Services definition – as per the PTIS

Both the PTIS and TPP agreements formulated a definition for Trade in Services. "The PTIS stipulates in article 3⁴⁵, that services will mean any service supplied by any sector, with the exception of services supplied by governments in terms of its governmental authority and function. Trade in Services means any service supplied from the area of one member state into the territory of another member state or when a service is supplied in the territory of one member state to a consumer from another member state. It will also be considered Trade in Services if a service supplier from one member state supplies a service by means of commercial presence in the territory of another member state or if a service supplier from any member state supplies services by means of natural persons in the territory of another member state."⁴⁶

⁴⁴ ITCD 2009 http://www.commercialdiplomacy.org/articles_news/trade_inservices5.htm.

⁴⁵ Article 3(2) of PTIS.

⁴⁶ Article 3(5) of PTIS.

2.2.2 Trade in Services definition – as per the TPP

The text of the TPP⁴⁷, on the other hand, does not provide a one chapter definition on what services is and it can be assumed from its text, that it is rather more inclusive than exclusive. It does, however, stipulate which services can be traded and how they can be traded if it falls in a certain category and chapter. Chapters 10 to 13 contain different aspects which relate to Trade in Services, each with different definitions of which services are included. Such services are open to competition but are subject to negotiations among its members, unlike GATS where WTO members guarantee limited access to their respective markets. Such access is restricted to specific sectors and modes of supply, as specified in the schedules⁴⁸ of commitments.⁴⁹

2.2.3 Trade in Services criterion

Both these agreements focus on the definition formulated in GATS. As seen above in the definition of the PTIS and GATS, services must be supplied through either one of the four modes of supply.⁵⁰ Such supply depends on the proximity of the supplier and the consumer at the time of the transaction.⁵¹ Trade in Services is intangible and it does not physically cross borders and is not (in normal circumstances) subject to customs tariffs or

⁴⁷ In terms of the TPP services relates to the use of or acquisition of goods or services, or any combination thereof... with a view to commercial sale or resale or use in the production or supply of goods or services for commercial sale or resale.

⁴⁸ The purpose of such schedule commitments is to establish legally binding obligations. The only obligation that is not subject to the respective commitment schedules and which applies across all services covered by the GATS is the most-favoured-nation (MFN) principle. This means that all service suppliers from member states are to be treated equally.

⁴⁹ WTO 2017 *Trade in services brochure* 1.

⁵⁰ UN 2017 <http://unctad.org/en/Pages/DITC/Services/Global-importance-of-services.aspx>.

⁵¹ GATS s 1.3.

commodity taxes.⁵² For this reason, a well-structured regional policy is necessary to facilitate Trade in Services throughout SADC.

The four modes/practices/methods in which a service must be traded to result in a service as being traded according to GATS, comprises of the following: (a) Trade in Services across borders, flowing from one state to another state, giving effect to cross-border trade where the service crosses the border and not the supplier (mode 1); (b) By the utilisation of services in a foreign state by consumers in that foreign state, resulting in consumption abroad (mode 2); (c) By means of an economic footprint in a foreign state's territory - thus, the supply of services through commercial presence (mode 3); and (d) By the relocation of natural persons, mostly temporary or for fixed periods, to supply services in a foreign state's territory (mode 4).⁵³ These modes were designed to specify what Trade in Services is. The idea was that GATS member states introduce these modes to better understand their services sectors, negotiate for better market access and, ultimately establish regional integration by the broadening of trade markets with Trade in Services.⁵⁴

In recent times a so called "mode 5"⁵⁵ has emerged which adds to a better understanding of what Trade in Services is. The introduction of a new mode is due to the fact that more manufacturers are buying, producing and selling services which are known as "servicification".⁵⁶ This term entails that goods and services should be approached as interdependent and not independent.

⁵² UN 2017 <http://unctad.org/en/Pages/DITC/Services/Global-importance-of-services.aspx>.

⁵³ GATS s 1.3.

⁵⁴ WTO 2016 https://www.wto.org/english/tratop_e/serv_e/serv_e.htm.

⁵⁵ "In a nutshell mode 5 services exports are domestic intermediate services inputs that are incorporated in one country's merchandise exports". Cernat and Kutlina-Dimitrova 2014 *Journal of World Trade* 1109-1126.

⁵⁶ "Servicification encompasses service inputs, production and after sales services i.e. the whole life-cycle of a product." Cernat and Kutlina-Dimitrova 2014 *Journal of World Trade* 1116.

This new indirect mode focuses on highlighting the importance that services play in the manufacturing sector's exports.⁵⁷

2.3 Identifying services and the trade thereof

*2.3.1 Useful examples of how services can be traded*⁵⁸

The UN, as a global organisation, promotes the increasing important role of Trade in Services in the global economy, as well as the impact it has on the development of countries. It was highlighted at the UN conference on Trade and Development in 2014, that services are directly linked to poverty reduction and improves access to basic services such as education, water and health.⁵⁹ SADC can benefit from better educational, water, health and energy services that will supplement developmental growth of the region. The WTO, as another global organisation, has also played a key role in promoting the relevance and importance of Trade in Services and it has given us four examples from the perspective of an importing state to better understand the functioning and role of Trade in Services:

(a) Mode 1: Trade in Services across borders

A user in country X receives services from a foreign country through its telecommunications or postal infrastructure. Such supplies may include consultancy or market research reports, tele-medical advice, distance

⁵⁷ Cernat and Kutlina-Dimitrova 2014 *Journal of World Trade* 1112.

⁵⁸ The reader is encouraged to have a look at Sauv  and Roy (eds) *Research Handbook on Trade in Services*, published in September 2016. A free sample of its first chapter is available, and it seems to be a good guidebook for practitioners who aim to specialise in services trade, which is not the scope of this study and therefore limited or none reference will be made to it.

⁵⁹ UNCTAD 2017 <http://unctad.org/en/Pages/DITC/Services/Global-importance-of-services.aspx>. For a detailed documentation of actual data and findings on services as the new frontier for sustainable development and the exploitation of the potential that services trade bring to the table, please refer to UNCTAD 2013 *Findings on Services, Development and Trade* 7-39 and UNCTAD 2014 *Exploiting the Potential Trade in Services for Development* 12-20. These sources will give the reader a proper background on how services trade can actually benefit and influence a countries economy with recent data and statistics. It also provides developing countries with some guidance on how to expand its participation in the world of services trade.

training, or architectural drawings.⁶⁰ The user receives a service from a supplier in a different country without any physical exchange of some goods taking place. In the case of an architectural drawing, the person does receive a product, either by post or electronically, which can be utilised in the consumer's own country. The fact is that the consumer and supplier both stayed in their respective countries and the service crossed the border.

(b) Mode 2: consumption of services in a foreign state

Nationals of country X have moved abroad as tourists, students, or patients to consume the respective services.⁶¹ In this case, the citizen(s) of one country physically left their own country and entered the borders of another country to physically consume the respective service offered there. This may be for example to study abroad at a foreign University, to tour through a foreign country, or to receive medical services from a specialist in a foreign country.

(c) Mode 3: provision of services through a commercial footprint

The service is provided within country X by a locally-established affiliate, subsidiary, or representative office of a foreign-owned and controlled company (bank, hotel group, construction company, etc.) from country Z.⁶² In this example, the service provider from country Z established an affiliate branch within the borders of country X, and actually went across the border into the foreign country and now offers the services there to be consumed by the consumers of that foreign country.

(d) Mode 4: service trade by movement of labour

A foreign national from country Z provides a service within country X as an independent supplier (e.g. consultant, health worker) or employee of a

⁶⁰ WTO 2016 https://www.wto.org/English/tratop_E/serv_e/gatsqa_e.htm.

⁶¹ WTO 2016 https://www.wto.org/English/tratop_E/serv_e/gatsqa_e.htm.

⁶² WTO 2016 https://www.wto.org/English/tratop_E/serv_e/gatsqa_e.htm.

service supplier (e.g. consultancy firm, hospital, construction company).⁶³ This is an example of the temporary movement of an individual from a foreign country into the borders of another country in order to supply a service.

2.3.1.1 Development of a new "Mode 5"

The above described four modes of services supply found in GATS, do not fully consider the fact that a significant share of services is embodied in goods, and is traded around the world. It is, therefore, arguably necessary to consider the implementation of an alternative mode of supply namely, mode 5.⁶⁴ One definite characteristic of mode 5 is that it instantaneously relates to both goods and services as a result of its focus on the interrelation between goods and Trade in Services. Mode 5 could be explained as follows: in the production of a vehicle, producers require services like engineering, consulting, design, employees and basic services such as electricity and retail to be able to run a factory and procure the necessary input materials. Thus, mode 5 services represent the services which form part of the value of goods before it is exported. It is important to distinguish this mode from modes 1 to 4 because in trade terms, after-sales services are supplied internationally through modes 1 to 4.⁶⁵ Mode 5 entails that states must realise that services are being traded indirectly under a goods trade regime as pre-sales trade. This implies that the trade rules applied by GATT which relates to trade in goods, entail payment of duties. Trade in cross-border services are not supposed to involve the payment of duties, but thinking in terms of mode 5 where services are being traded incidentally under the goods trade rule, duties are sometimes payable. Consider Cernat's example of software trade:

If software is sold cross-border separately (e.g. via mode 1), this transaction will appear as Trade in Services. However, if the software is installed in information and communication technologies equipment, the value of the software is counted

⁶³ WTO 2016 https://www.wto.org/English/tratop_E/serv_e/gatsqa_e.htm.

⁶⁴ Cernat and Kutlina-Dimitrova 2014 *Journal of World Trade* 1115.

⁶⁵ Cernat and Kutlina-Dimitrova 2014 *Journal of World Trade* 1116.

as goods and not as services trade any longer. So, for services which are exported not directly but "in boxes", embodied in manufacturing goods, the regulatory regime is crucial since when services are "sold in boxes", they usually pay custom duties.⁶⁶

It is debatable that a new way of thinking about how services can be traded, as found in mode 5, needs to be incorporated in new trade agreements. Understanding how regional supply chains can benefit from new trade rules that are applicable to specifically SADC, in this instance, is required to understand the ways in which goods and services are put together along global and regional supply chains.⁶⁷ Services can thus range from architecture to finance and investment, to space transport or even basic services such as the supply of water and electricity, and they are each vital because they serve as the key input to the production of most goods as seen in the last mentioned concept of a mode 5 method for Trade in Services. This study will focus on modes 1 to 4, as it applies directly to the respective texts of the PTIS and the TPP.

2.3.2 Complexity of Trade in Services and services identification

There are many small enterprises, especially from developing countries, that are unaware of the fact that dealing with foreigners, either visiting their offices to conduct business or in the rendering of services using the internet, transmits to the exportation of services.⁶⁸ This makes regulation of such interactions and movement of services challenging and the task to ensure that the necessary dues are paid (if any), is also a challenging one. Trade in Services can become very complicated and the need for well drafted policy, with definite objectives and means to establish such objectives, is necessary to establish certainty and market predictability within the region. The overall position is that the services sector's diverse and fragmented nature makes it challenging to collect data, mainly because of the scarcity of

⁶⁶ Cernat and Kutlina-Dimitrova 2014 *Journal of World Trade* 1120.

⁶⁷ Cernat and Kutlina-Dimitrova 2014 *Journal of World Trade* 1120-1126.

⁶⁸ ITC 2005 <http://www.tradeforum.org/Trade-in-Services-Awareness-the-First-Step/>.

knowledge and lack of extensive understanding of what the services sector's role is within an economy;⁶⁹ even more so within the SADC economies.

Thus, the role that services play in overall growth and development of an economy, amounts to an extensive range of economic activities that must be recognised as an input function firstly. This means that, before you can render any service, some form of material operations (the utilisation of space) needs to be in place. In order to provide telecommunications services, enterprises will need satellites, call centres, communication lines etc. In order to provide transport services, enterprises need equipment and staff to actually run a transport business. This goes hand in hand with immaterial operations (which require time, unobserved space, knowledge), for instance the rendering of financial services. Services need to be recognised as being the architect of economic activities.⁷⁰ Services are the direct contributor of economic activity which gives effect to the physical production of goods and even more services, such as use of labour and capital (finance) which is generated by knowledge.⁷¹ This is where mode 5 comes into play and it seems that no current trade agreement directly incorporates this method of Trade in Services.

In this sense, national regulations directly influence the international supply of services as it relates to specific sectors in foreign countries and ways of Trade in Services. This directly impacts the role that services can play in the building of an economy. Countries can, if they grasp the different modes of supply and the impact that services have on its different sectors, strengthen its national services sector effectively by increasing the linkages between its

⁶⁹ ITC 2005 <http://www.tradeforum.org/Trade-in-Services-Awareness-the-First-Step/>.

⁷⁰ Tideman and Hoekman 2010 *Journal of Economic Literature* 645.

⁷¹ Tideman and Hoekman 2010 *Journal of Economic Literature* 645.

primary and secondary⁷² sectors⁷³, as well as the producers and consumers. The one is directly or indirectly dependent on the other, and it is for this reason that countries have to negotiate relevant regional Trade in Services agreements. Regional trade agreements also play a vital part in international trade and its success is directly linked to national regulations allowing it to integrate that specific regional market. It is clear that, for this to happen in SADC, governments are required to think broader than the traditional scope of manufacturing/ goods, and must rather focus on how services supplement and strengthen the current way of trading.

For governments to understand that services are actually an economic activity that directly adds value to another economic item, three distinctions must be made between goods and services. The production and consumption of services take place simultaneously - services cannot be stored like goods, and a service is an intangible thing. Services cannot exist, if not found in persons and goods.⁷⁴ In general terms, services can be grouped in two categories namely, factor services and non-factor services. Factor services are services resulting from income flowing from labour and capital which include investments abroad, interest, dividends and property. Non-factor services entail freight, travel and most other transport services. It also includes current account transactions⁷⁵ that are not separately

⁷² Countries with large service sectors, like the United States, are typically more developed than countries that primarily rely on agriculture or industrial goods. Service jobs include a variety of manual labour jobs, such as waiters and truck drivers, as well as knowledge-based jobs like financial planning. While value in other sectors is measured in the amount of goods produced, success in the service sector can be measured by the value a customer received.

⁷³ UN 2017 <http://unctad.org/en/Pages/DITC/Services/Global-importance-of-services.aspx>.

⁷⁴ Ministry of Trade and Industry 1998 <http://www.meti.go.jp/english/report/data/gCT9911e.html>.

⁷⁵ The current account records exports and imports of goods and services as well as unilateral transfers whereas the capital account records transactions of purchase and sale of foreign assets and liabilities during a specific year. Investopedia 2017 <http://www.investopedia.com/ask/answers/031615/whats-difference-between-current-account-and-capital-account.asp>.

reported on - in other words, transactions⁷⁶ that are not classified as goods or non-factor services as mentioned above.⁷⁷

2.3.3 *International Trade in Services*

Trade in Services forms part of international trade and involves all international dealings that result in the flow of resources between different countries. The balance of payments (BOP)⁷⁸ systematically captures all (or most) transactions that result in the flow of goods, services and funds between foreign countries. The BOP comprises of five sub-accounts which are: the current account, the capital transfer account, the financial account, unrecorded transactions and the official reserves account. Service transactions, along with all transactions involving trade in goods or primary income (as seen above), are recorded in the current account of the BOP.⁷⁹ The BOP is the main source for international trade data between specific countries, but there are still several flaws including a lack of consistent reporting, concordance and data analysis.⁸⁰

The reality is that the increasingly dominating factor for modern day economies is services' ability to boost its GDP. For this, national policy writers are relied upon to recognise the importance and operations of services that go hand in hand with the production of goods.⁸¹ Most developing countries

⁷⁶ Including transactions with non-residents by governments and their personnel abroad, as well as transactions by citizens of a specific country with foreign governments and government personnel stationed in the reporting country. Kang "Price impact of restrictions on maritime transport services" 19.

⁷⁷ Kang "Price impact of restrictions on maritime transport services" 19.

⁷⁸ The BOP is a systematic statistical account or record of all economic transactions between the residents of the reporting country (for example: South Africa) and the rest of the world in a specific period (usually quarter or year). It includes all transactions by individuals, firms and government agencies and covers the exchange of physical goods, services, assets, gifts and all financial claims. South African Reserve Bank 2016 <http://www2.resbank.co.za/internet/Glossary.nsf/0/b7b16cfe93bb024a42256b4300307c89?OpenDocument>.

⁷⁹ South African Reserve Bank 2016 <http://www2.resbank.co.za/internet/Glossary.nsf/0/b7b16cfe93bb024a42256b4300307c89?OpenDocument>.

⁸⁰ Kang "Price impact of restrictions on maritime transport services" 19.

⁸¹ Tideman and Hoekman 2010 *Journal of Economic Literature* 644. Which can be linked with the proposed mode 5 of ways services can be regarded as traded.

overlook the opportunities associated with diversifying trade, specifically the possibilities of job creation associated with the delivery of services.⁸² As the backbone for all trade, every commodity exporter requires some form of services to compete in regional and global markets.⁸³

2.4 The need for policy and guidance concerning Trade in Services within the SADC region

The problem with services, is that service providers cannot simply pack their services in boxes, load it into containers and ship it all around the world. Service providers cannot accumulate the amount of services necessary and store what is left or ship some to other branches as they wish. The exchangeability of services requires in most instances that the customer and supplier be in the same location which is known as the proximity of supplier and customer. This is problematic in every region, not just SADC.⁸⁴ Tideman and Hoekman⁸⁵ refers to the proximity burden as giving effect to the need for proximity and, as such, service providers have the burden of overcoming the increase in cost associated with the distances they need to cross to deliver services to a wider customer base. It is safe to assume that Trade in Services is mainly found in both persons and goods,⁸⁶ and its practicability rests in the ability of enterprises to get as much of both, to as many customers as possible.⁸⁷ This can be described as the splintering of services to regional markets and markets around the world.⁸⁸ Trade in Services and trade in goods, therefore, both rely on the same inputs, namely persons, and are more than often interrelated and interdependent.⁸⁹

⁸² ITC 2016 <http://www.tradeforum.org/TradeinServicesAwarenesstheFirstStep/>.

⁸³ This requires a proper sector examination by negotiators as seen in the transport and travel example found in Sandrey *Services trade in Africa* 11.

⁸⁴ Hoekman *Liberalizing trade in services* 4.

⁸⁵ Tideman and Hoekman 2010 *Journal of Economic Literature* 647.

⁸⁶ The production of goods requires the consumption of a service.

⁸⁷ Hoekman *Liberalizing trade in services* 4.

⁸⁸ Hoekman *Liberalizing trade in services* 4.

⁸⁹ Hoekman *Liberalizing trade in services* 5.

Considering this, the SADC community has a major opportunity to integrate regional Trade in Services. SADC states have the opportunity to implement a platform where SADC states can establish intra-regional Trade in Services. If successfully implemented, such integration will provide a platform from which SADC states can effectively engage with the global services economy as independent economies that form one regional market.⁹⁰ SADC member states have to standardise and incorporate liberal trade policies (regulatory coherence) into their respective national legislations, which will lower prices/costs and expand the range of public procurement of quality goods and services within the SADC region. The channelling of resources to the highest return outputs and the diversification of possible risks,⁹¹ where enterprises can actually benefit when trade is liberalised, must be accompanied and supported by suitable domestic and regional policies as mentioned above. For this to be implemented, trade openness will be key, which will in turn facilitate competition, entreat investors and, ultimately, increase production of goods and services within the SADC region.⁹² It is, therefore, vital to increase public and private sector activism that will advance policy attention and enhance the sector's impact on economic growth and development. Services' multifaceted influence on economies and the growth that complements it, relies on the planning and implementation of services-driven development strategies with a wide-ranging policy framework that links to other sector policies within the region which will enable the sector to grow and cater to a broader public.⁹³

The SADC PTIS stipulates in its preamble that the desire is to create an integrated regional market for services that will achieve continued growth

⁹⁰ SADC 2012 https://www.thedti.gov.za/parliament/2013/Note_SADC_Trade_Protocol_29102013_3.

⁹¹ Such as foreign exchange fluctuations and undue political influence.

⁹² OECD 2016 <http://www.oecd.org/tad/tradeliberalisation.htm>.

⁹³ UN 2017 <http://unctad.org/en/Pages/DITC/Services/Global-importance-of-services.aspx>.

and development. Economic growth and regional development is the purpose of the PTIS. It also states that:

... An integrated market for services, complemented by cooperative mechanisms, will create new opportunities for a dynamic business sector, and strengthen the region's services capacity, its efficiency, and competitiveness and expand the region's services exports.⁹⁴

SADC members realised that in order for the PTIS to be of any value, an acknowledgement of the need for reform was required. That is reform on regulatory, institutional and administrative level.⁹⁵ The SADC region, which includes South Africa, face the reality of stagnant economic growth within its domestic economies which goes hand in hand with the problem of redundancy. SADC needs to start approaching services from an employment perspective that focuses equally on the importance of manufacturing and the importance of services. SADC can definitely benefit from an integrated regional market that focuses on establishing linkages between the manufacturing of goods and trading in services. The geographic layout of the SADC region and its diversity and abundant resources, contain major economic growth possibilities. The gaps can thus be filled by focusing on different member's strengths and allowing it to enhance the others' weaknesses.

Trade in Services will assist with the eradication of poverty by establishing better employment possibilities and by providing access to a wider range of services at competitive prices.⁹⁶ An effective SADC service sector with a competitive service market can generate better investments, lower prices and improved output for services with benefits rolling over to the wider domestic and regional economy of SADC.⁹⁷ For SA, this means that local firms can contribute to the development of the SADC region's economies.

⁹⁴ PTIS PREAMBLE.

⁹⁵ Cronjé *SADC Trade in Services Negotiations* 1.

⁹⁶ Cattaneo *Services trade liberalisation* 18.

⁹⁷ Stern, Truen and Ramkolowan *SADC Trade in Services* 5.

Regional integration will afford SA firms an advantage over other services suppliers from outside the SADC region. The PTIS is part of the foundation for the establishment of a wider services market in future under the Tripartite Free Trade agreement and the Continental Free Trade Area.⁹⁸

2.5 Conclusion

It is important to comprehend that Trade in Services is not a western concept, idealised and imposed on developing countries. It is crucial that SADC member states must understand that, by opening its markets to other SADC members to provide specific service requirements, an opportunity arises to exploit the economic growth possibilities which exist within SADC.

Services, in broad terms, cover a wide spectrum of economic and social activities that include communications, transport logistics, finance, energy distribution, construction and business services to mention only a few. It relates to final-demand services such as tourism, recreation, education, health and environmental services. Services cannot be seen in isolation from goods, even though it functions and exists separately. Trade in Services, and the liberalisation thereof, require drastic reformation within the SADC region in order to expand and create a regional market with reasonable access that will entice other SADC services providers to enter member state markets on equal footing. This will assist with diminishing discrimination against other members' services providers and add to the greater good of developing the SADC region with its own resources. Such access will thus contribute to individual economic growth of member states and stimulate the regional market value of consumable services. SADC will benefit greatly from an integrated regional market relating to Trade in Services as it establishes development of both the manufacturing/industrial sector, as well as the

⁹⁸ Kruger 2017 *Update on South Africa's Trade Negotiations* 10-11.

services sector. In the following chapters, an examination of the PTIS and TPP will follow.

3 The SADC Protocol on Trade in Services

3.1 Introduction

SADC members have only scratched the surface of regional integration of Trade in Services with the introduction of the PTIS. It almost incorporates GATS in a "copy and paste" method, as a manner of speaking. This policy's role is to guide governments in decision-making and implementation of national regulations, once negotiated.

Notwithstanding the fact that there is a need for the establishment of international standards and policies to complement the momentum that Trade in Services is experiencing all around the world,⁹⁹ there is no one-size-fits-all approach, regardless of the best endeavours of politicians.¹⁰⁰ For now, regional services sector integration seems to be the best way to promote Trade in Services. Enterprises need to be able to first reach regional consumers to establish credibility in international markets.¹⁰¹ This, in itself, puts SADC at a disadvantage with its current way of trading among member states. Thus, there are still many opportunities to establish good trade relations among SADC members in order to improve the regional market of SADC that can compete with other regions of the world. The lack of openness to competition among SADC members in this regard, is one aspect prohibiting the procurement of Trade in Services in SADC.¹⁰² Welcoming competition may lead to a higher standard of productivity in services enterprises if accompanied by appropriate domestic regulation.¹⁰³

This obstruction, along with the current delay of regional integration, can be seen in the outcome of the current negotiations between its members.¹⁰⁴

⁹⁹ WTO 2016 https://www.wto.org/English/tratop_E/serv_e/gatsqa_e.htm.

¹⁰⁰ Sandrey *Services trade in Africa* 21.

¹⁰¹ Tideman and Hoekman 2010 *Journal of Economic Literature* 648.

¹⁰² Tideman and Hoekman 2010 *Journal of Economic Literature* 648.

¹⁰³ Evenett and Hoekman "Introduction and overview" 1.

¹⁰⁴ Cronjé *SADC Protocol on Trade in Services* 8.

For the PTIS to work, it requires that the SADC member states negotiate the terms of Trade in Services integration throughout the region on a reciprocal benefit basis with the intention to better the regions' market.¹⁰⁵ This will enable such countries to add value as required by its economic needs and within its economic means. The mobilisation of political, along with economical support of the SADC region, is therefore important to determine what services require importation, while establishing what services can be exported in return. This has to be done to establish a give-and-take system with favourable rates among SADC members (almost like in the trading of goods). From an economic perspective, this may benefit domestic firms in that it establishes access to necessary high quality services at competitive prices which assists in building the regional market.¹⁰⁶

This chapter will focus mainly on the PTIS which is SADC's chosen structure to liberalise and integrate Trade in Services throughout the region. It will focus on how the PTIS is written and structured to establish the integration of Trade in Services in the SADC region.

3.2 Establishment of the PTIS

The SADC Protocol on Trade in Services is a result of years of interconnected strategies and protocols by the African Economic Community (AEC), the African Union (AU), and the SADC region, more specifically. The Southern African regional development plan contains objectives that strive to create economic liberalisation in the SADC region. This plan was implemented by a declaration of the Governments of Independent States of Southern Africa, at Lusaka, on 1 April 1980.¹⁰⁷ Its objectives are to pursue policies that will give effect to economic liberalisation and the establishment of developed national economies - economies that can function in and on their own,

¹⁰⁵ Cronjé *SADC Protocol on Trade in Services* 8.

¹⁰⁶ Hoekman and Mattoo *Liberalizing trade in services* 1.

¹⁰⁷ Treaty of the Southern African Development Community - Preamble.

without dependence on South Africa or any other singular state.¹⁰⁸ These strategies and policies specifically relate to, among others, the free movement of services, the promotion of economic, social and cultural development, and the free movement of services through the African Economy.

The establishment of the AEC, by the Abuja Treaty (AT) in 1991, clearly states that its objectives are to see to the gradual removal of obstacles to establish free movement of persons, goods, services, capital and the right to residency among member states.¹⁰⁹ Article 107 of the AT recognises the potential of the diversity of existing industries throughout Africa. It calls for the utilisation of the physical infrastructure, natural and human resources, energy and commercial services found throughout Africa. The biggest restraints Africa faces, is its ability to realise and exploit its own resources financially and the deficiency in development relating to the use of technology to do so.¹¹⁰

The PTIS is also a product of a treaty, the Treaty of the Southern African Development Community (TSADC), 1992. Both the TSADC and the PTIS flow from the above mentioned mandate (1980) that SADC states agreed to integrate Trade in Services in the region. It is important to know that, although the PTIS imposes a mandate on signatory states to gradually see to negotiations for the removal of barriers to establish free movement of services, the PTIS does not establish the integration of regional markets in and by itself.¹¹¹ Despite this lack, the PTIS is the SADC's attempt to integrate access to services throughout the SADC region by establishing forums to facilitate negotiations and regional integration. It is a good attempt for Trade in Services liberalisation, regional integration, alleviation of poverty, and

¹⁰⁸ Southern Africa toward economic liberation: a declaration by the Governments of independent states of Southern Africa 1-8.

¹⁰⁹ Sawere *Pro-competitive services sector regulation* 1.

¹¹⁰ Article 107 *Abuja Treaty* 1991.

¹¹¹ SADC 2016 <https://tis.sadc.int/>.

sustainable economic growth and development, while meeting the challenge of globalisation.¹¹² It was formed from the TSADC which aims to develop policies that will gradually remove barriers and establish the free movement of capital, labour, goods, services and people across the SADC region.¹¹³ Against this background, the drafting of the PTIS was done to record the way in which the movement of services would be done within the SADC region. Considering the primary objectives of the PTIS, SADC Ministers have branded the six priority sectors recognised by GATS to establish legal certainty for Trade in Services and to encourage investment.¹¹⁴ These priority sectors are communication services, construction services, energy-related services, financial services, tourism services and transport services.¹¹⁵

Negotiations relating to the liberalisation and establishment of regional commitments in these six priority sectors commenced at the beginning of April 2012. The objective of the negotiations is to develop a roadmap that can offer legal certainty and guidance for the integration of a regional services sector. The estimate was that the first round of negotiations would have been concluded in three years following April 2012. Those negotiations are still on-going and despite delayed expectations of closing by the end of September 2016, it will most probably only be available to the public early in 2018. The aim of these negotiations is to endorse an integrated regional market for Trade in Services. The objective is to create new opportunities, with an active business sector and an expansion of the region's services exports.¹¹⁶

¹¹² TSADC Preamble and Art 5.

¹¹³ Article 5(2)(d) of TSADC.

¹¹⁴ SADC 2016 <https://tis.sadc.int/>.

¹¹⁵ Article 16 of PTIS.

¹¹⁶ Negotiating and Scheduling Guidelines for the 1st Round of SADC Trade in Services Negotiations.

3.3 Trade in Services in the SADC Region

SADC member states have acknowledged that the services sector in the SADC region have been, to a large extent, embodied by modest investment, fairly high cost and restricted procurement of services by the general population. These member states also recognised that the improvement of their services sectors will play a crucial role in establishing economic growth and competitiveness in the region as a whole.¹¹⁷ Most SADC states wish to reduce their economic dependence on specifically South Africa; mobilise resources to implement regional policies; and secure international support.¹¹⁸ To reach these goals, a healthy integrated regional economy, managed by established rules amongst its members, is key. In this regard member states' commitment to regulatory, administrative and institutional reforms is currently receiving very little attention. It is perhaps due to the lack of devotion to these matters that the PTIS negotiations are moving ahead at such uninspiring and disappointing levels of ambition.¹¹⁹

3.4 Protocol on Trade in Services

SADC's policy to address the regional integration of Trade in Services entails the following:

3.4.1 Part one - objectives of the PTIS

Part one of the PTIS stipulates the objectives established by the Protocol. These objectives are to: liberalise intra-regional Trade in Services which is based on equity, balance and mutual benefit; to eliminate all discrimination between the State Parties by means of a liberal trading framework for Trade in Services; to establish a single market for Trade in Services that will enhance sustainable economic growth and development; to diversify

¹¹⁷ SADC 2016 <https://tis.sadc.int/>.

¹¹⁸ SADC *Declaration Southern Africa towards Economic Liberalisation* 4-5.

¹¹⁹ Cronjé *SADC Trade in Services Negotiations* 1.

national, regional and foreign investment in SADC service economies; to ensure consistency between liberalisation of Trade in Services and the various SADC Protocols in specific services sectors; and to pursue services liberalisation, while preserving the right to regulate and introduce new regulations.

The goal is ultimately to enhance the capacity and competitiveness of the services sectors of SADC State Parties.¹²⁰ The PTIS, with its objectives, acts as the official structure to liberalise Trade in Services within the SADC region. It is the starting point for negotiations to implement market access and national commitments in specific service sectors in order to establish regional integration of the Trade in Services.¹²¹ It is based on GATS¹²² which regulate the standards that negotiated outcomes must conform with.¹²³

3.4.1.1 Objectives of the PTIS and regional integration

Subsequently, the question is: how does the objectives of the PTIS link services and economic transformation (regional integration)? On paper, these objectives are good, but this is only the starting point of what SADC states wish to accomplish. In terms of regional integration, services are each important by virtue of its share in global exports and revenue generation capacity. The PTIS must establish a conducive environment and develop a policy that supports services according to its own potential in order to give effect to these objectives.¹²⁴ The current data limitations on services flows, influences the quality of a policy and a policy is the foundation for building a conducive environment that can assist specific service sectors.¹²⁵ The objectives must, therefore, not be too broad that it leads to no action or positive ends. It seems that the PTIS objectives lack a strategic focus to link

¹²⁰ Article 2(1)-(6).

¹²¹ Article 16.

¹²² Article V.

¹²³ Cronjé *SADC Trade in Services Negotiations* 3.

¹²⁴ Balchin "Trade preferences for services from developing countries" 8.

¹²⁵ Aggarwal, Jansen and Skidmore "Services for economic transformation" 15-16.

Trade in Services integration and economic transformation on a national regulation level, which is where all policies must be incorporated to actually have an effect.¹²⁶

3.4.1.2 Achieving the objectives of the PTIS

The PTIS achieves its objectives by identifying and removing measures that affect trade in any of the six mentioned priority services sectors. This can be measures that either restrict market access by other member states, and/or discriminate against services and service suppliers from other member states.¹²⁷ This is practically achieved by the negotiations between member states. The outcome of the negotiations will determine whether the PTIS either adds value and integrate regional procurement of Trade in Services, or just remains another policy waiting to be implemented. The current status of negotiations is that progress has been made on the communication, financial, tourism and transport services sectors. The problem is that the way in which current negotiations are taking place, is in conflict with the predicted objectives of the Protocol. It is clear that the level of ambition in the negotiations is hampered by the principle of asymmetry¹²⁸ and its provisions¹²⁹ resulting in limited commitments being offered by member states. This is unfortunately a reality that is in contrast with the objective of the members to establish an integrated services market that provides for separate implementation time-frames amongst members.¹³⁰

The realisation of the objectives of the PTIS will enable member states to unlock SADC's services sector. Unfortunately, the PTIS does not stipulate a specific date for implementation thereof, but even if it did, implementation without any consistent effort to achieve the objectives would be as good as

¹²⁶ Aggarwal, Jansen and Skidmore "Services for economic transformation" 15.

¹²⁷ Cronjé *SADC Trade in Services Negotiations* 1.

¹²⁸ Reflecting individual State Parties' disadvantages by reason of size, structure, vulnerability and level of development of their economy.

¹²⁹ Article 16 of PTIS.

¹³⁰ Cronjé *SADC Trade in Services Negotiations* 1.

the PTIS not being implemented to begin with. It is only once commitments are made between member states, that the obligation arises to combine legislation with practical procedures to establish legal certainty and procurement of the benefits deriving from the PTIS.¹³¹ The implementation of commitments will require member states to either remove current national legislation, or adopt supplementing legislation to give effect to the undertakings stipulated in the PTIS. This is the only practical way that SADC members will actually establish an integrated regional market that will boost the economies of the SADC states.¹³²

3.4.2 Part two - general obligations imposed by the PTIS¹³³

In part two of the PTIS, it imposes some general obligations to promote regional integration of Trade in Services that member states accept once it undertakes to implement the PTIS. It provides for the Most Favoured Nation Treatment (MFN) principle, which imposes the obligation that each SADC member state has to treat all SADC member states the same and in accordance with the best treatment it accords to any of the other state(s).¹³⁴ This means that, should two or more states enter into further negotiations to liberalise Trade in Services for specific sectors or other sub-sectors, such negotiations must be in accordance with the objectives of the PTIS. Negotiating States must afford reasonable opportunity to other members to negotiate such preferences granted on a reciprocal basis.¹³⁵

This does not, however, affect a state's capacity to regulate services within its borders. Each member state has the right to regulate services and can do so by introducing new regulations to meet national policy objectives with regard to services and service suppliers within a state's territory. Such

¹³¹ Cronjé *SADC Protocol on Trade in Services* 19.

¹³² Cronjé *SADC Protocol on Trade in Services* 19.

¹³³ Part Two, Articles 4-13.

¹³⁴ Article 4.

¹³⁵ Article 4.

regulations are, however, subject to the rights and obligations arising from the PTIS.¹³⁶ Provision is accordingly made for the treatment of national regulation under specific commitments, in that administration of all measures of general application affecting Trade in Services, must be reasonable, objective, transparent and impartial.¹³⁷ Should two or more countries agree to negotiate agreements to provide for the recognition of the other's qualifications, licenses, requirements or other regulations, such states must give other member states the opportunity to become party to such an agreement.¹³⁸ The only requirement is that states who wish to become a party to such agreements, must show that they conform to the relevant processes and measures under other SADC Protocols which relate to any such agreement.¹³⁹ Members can, therefore, still maintain any measures that is inconsistent with the MFN principle, provided that it be incorporated in the annex to the PTIS as an exemption, due to a preferential trade agreement adopted before the PTIS.¹⁴⁰

The inclusion of effectiveness and transparency of regulations imposes the obligation on member states to publish any law, regulation, judicial decision, administrative ruling of general application, and any procedure relating to matters covered by the PTIS.¹⁴¹ This includes international agreements relating to Trade in Services, but excludes confidential information that could hinder law enforcement or otherwise prejudice public or commercial interests.¹⁴² Each member state must regulate monopoly service providers to ensure that it is not inconsistent with article 4 agreements.¹⁴³ This means that, if a monopoly supplier of services competes outside the scope of its monopoly, that member state must then ensure that such a supplier does

¹³⁶ Article 5.

¹³⁷ Article 6.

¹³⁸ Cronjé *SADC Protocol on Trade in Services* 9.

¹³⁹ Article 7.

¹⁴⁰ Cronjé *SADC Protocol on Trade in Services* 9.

¹⁴¹ Article 8.

¹⁴² Articles 8-9.

¹⁴³ Most Favoured Nation Treatment agreements.

not abuse its monopoly position and does not act outside the scope of the PTIS.¹⁴⁴ The PTIS does, however, not give authority to other member states to stop a member from adopting and implementing, removing, or changing any measure relating to the reporting and monitoring of measures used to establish transparency or legal certainty.¹⁴⁵

As with any general obligation, there are some exceptions to these general commitments imposed by the PTIS. These exceptions hold that each member state may adopt any measure necessary to protect and maintain public morals. It may protect human, animal, or plant life or health and it may implement measures necessary to prevent fraud and protect individual privacy. It may also implement measures to protect the security of member states and to do away with inconsistencies¹⁴⁶ in terms of Article 4, provided that such measures are to avoid double taxation.¹⁴⁷ There is also no provision that excludes states to accept subsidies to implement development programs. The only stipulation is that such subsidies shall be subject to the discretion of the Ministers of the member states to decide which negotiation mechanisms or regulations will be allowed to avoid disastrous trade effects that can be associated with the acceptance of subsidies.¹⁴⁸ It is also clear that government procurement transactions are specifically excluded from the obligations of the PTIS.¹⁴⁹

These obligations and exceptions are relevant to the general application of the PTIS within the SADC region which applies to the procurement of and integration of Trade in Services. Part two of the PTIS is, therefore, relevant in a wide-ranging sense and can be described as the broad commitments

¹⁴⁴ Articles 12, 16 and 2.

¹⁴⁵ Cronjé *SADC Protocol on Trade in Services* 23.

¹⁴⁶ Which places a duty on every signatory state to treat all member states the same and afford reasonable opportunity to negotiate the preferences granted to other member states or third-party countries on a reciprocal basis.

¹⁴⁷ Article 10.

¹⁴⁸ Article 11.

¹⁴⁹ Article 13.

which each signatory state has undertaken to give effect to the widespread integration of Trade in Services, subject to some discretion that each member state has to protect its own interests relating to trade.

3.4.3 Part three - specific obligations relating to Trade in Services

In pursuance of article 16,¹⁵⁰ member states committed to not negatively impede market access, promote national treatment, progressively liberalise trade and allow the temporary movement of people.¹⁵¹

By undertaking to promote market access, it places a negative obligation on SADC states, which restrains it from adopting or maintaining limitations relating to the number of service suppliers. It prohibits the implementation of measures relating to the total value of service transactions or assets and stipulates that there can be no restrictions on the total number of service operations. No limit may be placed on the amount of natural persons that may be employed; neither may any state place restrictions on or only require that specific types of legal entities be established. Lastly, to effectively promote market access, no state may limit the participation of foreign capital i.e. to place a limitation on foreign shareholding, unless such limitations or measures are stipulated in specific negotiations.¹⁵² The provision of national treatment requires that member states treat both foreign service providers and domestic service providers the same, unless a specific limitation or condition is agreed in specific negotiations.¹⁵³

At the heart of the PTIS, the progressive trade liberalisation article¹⁵⁴ provides for successive rounds of negotiations that must be completed within three (3) years after signing of the PTIS (it is clear, as explained above, that there is no drive within SADC to stick to these time frames). Asymmetric

¹⁵⁰ SADC *Declaration Southern Africa Towards Economic Liberalisation* 4-5.

¹⁵¹ Cronjé *SADC Protocol on Trade in Services* 13-14.

¹⁵² Article 14.

¹⁵³ Article 15.

¹⁵⁴ Article 16(3).

treatment of individual states is allowed to take into account size, structure, vulnerability and level of economic development to refrain from establishing further or new trade barriers. As an integral part of the PTIS, the adoption of trade liberalisation commitments, negotiated under each round of negotiations, should benefit disadvantaged member states.¹⁵⁵

Finally, part three provides for the promotion of the procurement and integration of services within the SADC region. It provides for the temporary movement of natural persons. This entails that member states can apply its own laws and regulations regarding entry and stay, work, labour conditions, and the establishment of legal persons without contradicting the provisions of the PTIS. The PTIS does not apply to persons seeking employment and does not grant the right of access to a labour market of another member state.¹⁵⁶

3.4.4 Part four – matters related to Trade in Services

Unfortunately, the PTIS only stipulates that member states must aim to promote an attractive and stable environment for the supply of services in order to encourage trade and investment in services.¹⁵⁷ With regard to business practices, member states agreed to adopt or maintain anti-competitive business practices that are in accordance with the respective members' anti-competition laws, in order to avoid nullification of the benefits of the PTIS.¹⁵⁸ Member states also agreed that, subject to certain exceptions, a member state shall not restrict transfers into and out of the territory of a state with regard to transactions provided for by other SADC protocols. Such transfers include initial, as well as additional capital transfers, returns, payments, royalties and proceeds of the sale or liquidation

¹⁵⁵ Article 16.

¹⁵⁶ Article 17.

¹⁵⁷ Article 18.

¹⁵⁸ Article 19.

of all investments.¹⁵⁹ There are no restrictions on labour market integration agreements¹⁶⁰ and subject to prior notification and consultation, a member state may deny benefits under the PTIS to a service provider of another member state if it is established that such a service is being provided by an enterprise, owned or controlled by persons of a non-SADC country.¹⁶¹

3.4.4.1 Regional integration and trade negotiations

Logical interlinked policies, together with coherent services strategies, regulation and manufacturing structures, are required to make the service sector work. The PTIS complements current SADC protocols which is still in force and relevant. The goal must be to negotiate in such a way as to build supply ability and access to markets.¹⁶² In order to support Trade in Services negotiations within the SADC region, each state must identify and address any regulatory weaknesses that prevent cooperation between governments to establish cross-border trade and investment. It is also important that member states and other stake holders introduce and put together platforms where experts of specific services sectors and industries that use particular services as input, can work together to identify strategies to transform priority sections and improve integration.¹⁶³ In order to liberalise SADC's Trade in Services, members will have to go beyond schedules for market access and national treatment commitments. Despite the fact that cooperation stipulations of the PTIS are based on a non-binding structure, contracting parties must focus on regulatory cooperation of domestic laws and coherence with other SADC protocols to establish regional integration of

¹⁵⁹ Article 20.

¹⁶⁰ Article 21.

¹⁶¹ Articles 1 and 22.

¹⁶² Mashayekhi "Preferential treatment in services for developing countries" 37-39.

¹⁶³ An example of this is trade facilitation. Trade facilitation goes beyond the operations of border crossings and customs, it consists of far more than that, such as effective international road corridors and transit regimes and competitive logistics services. Mechanisms that bring together the government, regulators, logistics providers, transport companies, shippers and donor agencies that all have an interest in facilitating trade can help governments better understand why specific reforms matter and where joint action by governments is needed.

Trade in Services.¹⁶⁴ The focus must be on demolishing barriers that prevent the procurement and establishment of business and professional services, communications, education, financial services, tourism and logistics, as well as the utilisation of such human driven resources.¹⁶⁵

3.4.5 Part five - institutional arrangements and dispute settlement provisions

The PTIS agreement provides that three¹⁶⁶ institutional mechanisms shall each play a role in the implementation and maintenance of the PTIS. The Committee of Ministers responsible for Trade (CMT), is overall responsible to see to the implementation of the PTIS and supervision of any committee or sub-committee established by the provisions of the PTIS. The Committee of Senior Officials (COS) must report directly to the CMT while ensuring that the provisions of the PTIS are implemented and upheld. The Trade Negotiating Forum for Services (TNFS), who actually conduct the trade negotiations, report to the COS who reports back to the CMT. The TNFS, who is responsible to monitor the services integration process on a ground level must ensure that services are integrated within the SADC region by means of provisions of the PTIS agreement.¹⁶⁷

Any disputes (regarding implementation and application) that may occur under the PTIS will be dealt with according to the provisions of Annexure 1 which is attached to the PTIS agreement. This annexure provides for an in depth discussion of how disputes will be addressed and that the CMT are responsible to adopt regulations that will see to the facilitation and implementation of the annexure.¹⁶⁸

¹⁶⁴ Cronjé *SADC Protocol on Trade in Services* 10-11.

¹⁶⁵ Hoekman "Supporting services trade negotiations" 35-36.

¹⁶⁶ Committee of Ministers responsible for trade (CMT), the Committee of senior officials (COS) and the Trade Negotiating Forum for Services (TNFS).

¹⁶⁷ Article 24.

¹⁶⁸ Article 25 and Annexure 1 23-32.

3.4.6 Part six – final provisions of the PTIS

Member states are encouraged to draft further annexes to the PTIS that will encourage and advance the implementation of the PTIS. The CMT has the authority to adopt such annexes and once adopted, it will form an integral part of the PTIS.¹⁶⁹ Article 27 provides that member states may propose amendments to the Executive Secretary who must inform all the other member states of the proposed amendments, and shall be adopted if three quarters of member states agree to such amendment within the prescribed period.¹⁷⁰ Further provisions of the PTIS, involve: the signature of the protocol which will be effective once signed by a duly authorised representative; ratification of the PTIS which is subject to each member state's national laws; commencement of the PTIS; entry into (accession of the PTIS and its provisions); withdrawal from and the registration of the PTIS at the United Nations, African Union Commission and any other relevant structures.¹⁷¹

3.5 Trade in Services integration

3.5.1 Trade in Services integration within SADC

Considering the abovementioned stipulations as found in the text of the PTIS, an important question remains: how does the PTIS establish the procurement and integration of Trade in Services? Its effectiveness rests in the expansion of the primary service sectors, as incorporated in the PTIS from GATS. It is well known that the effect of the service sectors relates to the portion of the economy that produces indefinable goods, although it is specifically linked to the production of tangible goods. Consider the following statement:

¹⁶⁹ Article 26.

¹⁷⁰ Article 27.

¹⁷¹ Articles 28-32.

Countries with primarily service-based economies are considered to be more advanced than countries with primarily industrial or agricultural economies. Examples of countries with a heavy emphasis on the service sector include the United States, Australia, Japan and the United Kingdom. In the U.S., the Institute for Supply Management's (ISM) monthly index provides a measure of the general state of business in the non-manufacturing sector. Because approximately two-thirds of U.S. economic activity resides in the service sector, the index is considered a measure of the country's overall economic health.¹⁷²

3.5.1.1 What principles are required to promote Trade in Services and regional integration throughout SADC?

At a meeting held by the SADC Committee of Ministers of Trade on the 5th of July 2016 at Gaborone, Botswana, the Ministers reviewed the progress made relating to the implementation of the Protocol on Trade. The outcome of the results meant that these Ministers had to make necessary decisions to enhance trading relations within the SADC region, while finding better ways to improve the SADC trade environment. The Ministerial Task Force on Regional Economic Integration¹⁷³ agreed to combine the Free Trade Area to make it more constructive for SADC member states. Ministers emphasised the need to bring to a close the negotiations relating to the PTIS among member states which will inject the necessary forward motion to entrepreneurship and industrialisation within the SADC region. Ministers agreed upon an extended deadline of the end of September 2016 to deal with the outstanding issues delaying conclusion of the negotiations under the PTIS. To date, the results have not been made available.¹⁷⁴

Since the signing of the PTIS in 2012 and with the current delay in negotiations to effect the integration of services within the SADC region, the effectiveness of the PTIS remains to be seen. As Jelitto frankly puts it: *Is*

¹⁷² Investopedia 2017 <http://www.investopedia.com/terms/s/service-sector.asp#ixzz4BewhVtcj>.

¹⁷³ The SADC Ministers responsible to see to the implantation regional economic integration.

¹⁷⁴ SADC 2012 <http://www.sadc.int/news-events/news/28th-meeting-committee-ministers-trade-gaborone-5th-july/>.

*the PTIS agreement with the purpose of liberalising Trade in Services within the SADC region, a vehicle without a driver, or is it just getting started?*¹⁷⁵

Only time will tell what the effect of the liberalisation negotiations will be and if it will improve and create an effective platform for Trade in Services within the region.¹⁷⁶ Its success will depend on members addressing hindrances that service enterprises face to access the SADC market. The focus should be on allowing SADC enterprises to build the SADC economy which is in line with the SADC Regional Infrastructure Master Plan.¹⁷⁷ The CMT must also focus on the regulatory, tax and administrative measures that is tied together with the establishment of support mechanisms to help enterprises achieve such ends.¹⁷⁸

3.5.1.1.1 Practical implementation

Member states must each categorise and evaluate its current legislation that relates to the PTIS. In doing so, it can be established if specific laws need to be abrogated or amended. In itself, this is a colossal task but for regional implementation to take effect for SADC's benefit, members will have to co-work to make this a reality.¹⁷⁹ This can even stimulate growth in the decolonisation of some regulations that are irrelevant to SADC and hindering its actual growth. The systematic implementation of the PTIS requires relevant and efficient administrative processes and techniques.¹⁸⁰ The PTIS provides measures¹⁸¹ which members (the CMT) must develop in article 6. These measures are required to ensure less authorisation constraints, better transparency and predictable regulation. This entails, in broad terms, the

¹⁷⁵ The International Centre for Trade and Sustainable Development's Markus Jelitto poses this question.

¹⁷⁶ Jelitto 2012 *Bridges Africa* 5.

¹⁷⁷ This plan was adopted to act as the blueprint to establish an environment that will cater for the region's infrastructure necessities. Cronjé *SADC Protocol on Trade in Services* 15.

¹⁷⁸ Schloemann "Trade preferences for services from developing countries" 42-43.

¹⁷⁹ Cronjé *SADC Protocol on Trade in Services* 19.

¹⁸⁰ Cronjé *SADC Protocol on Trade in Services* 19.

¹⁸¹ Qualification requirements, procedures, technical standards, licensing requirements and procedures that must allow for effective market access.

development of codes of good practises that establish minimum rules of conduct within the territory of members and the region. Thus, establishing a standard that sets the minimum quality to which services must adhere that protects the regions consumers.¹⁸² The task of implementing the PTIS and such measures will not be an easy process. It will require neighbouring cooperation, deeper transparency, simple administration procedures and clear requirements. Noticeable integration of the SADC region will also require members to assess current regulation applicable to market access and national treatment, and understand how it currently adds to the realisation of the objectives of the PTIS. This will have to go hand in hand with practical policy conditions that have to be echoed in the respective member's commitments.

Trade in Services transactions already range beyond the scope of a single mode of Trade in Service and GATS, as a framework for regional integration is already insufficient. It seems that the requirement for good administrative practices and standards of good practice among competent authorities might be too daunting of a task for SADC members.¹⁸³

3.6 Conclusion

The structure and approach of the PTIS is cumulative. In other words, it strives to achieve progressive Trade in Services liberalisation. The effect of the PTIS still remains to be seen and will only become known once the first round of negotiations is made public. There are still a number of challenges remaining such as the negotiation mandate, to name but one. This mandate has a severe lack of ambition in that the official objective of the first round of negotiations is to improve on the GATS commitments that are already implemented and in place within the identified six priority services sectors

¹⁸² Cronjé *SADC Protocol on Trade in Services* 19-20.

¹⁸³ Cronjé *SADC Protocol on Trade in Services* 25-26.

for each member state.¹⁸⁴ The argument is that this can be accomplished without changes to current regulations and policies as most member states (excluding Lesotho and South Africa) have few GATS commitments and have to some extent liberalised many of its services sectors. Critics argue that, should we settle for an outcome that reflects the current mandate's lack of ambition, the effect would be that the region's trade-crippling barriers will still remain, and no new opportunities for service enterprises will take place.¹⁸⁵

South Africa still dominates the key services sectors within the SADC region. Other countries like Mauritius, which still mainly trade in services outside the SADC region (in Europe and Asia), are increasingly focusing on moving its attention towards Africa. As for most other SADC Member States, they still have a self-protective mind-set in the give-and-take negotiations.

A major obstacle is that the Ministers, who conduct these trade negotiations under the PTIS, do not have enough data and oftentimes expertise, to negotiate on integrating services. It is important, therefore, to involve sector experts in order to address the current legal frameworks, competition-restricting policies on national level, and the promotion of access to finance and other primary services to create a favourable business environment for all enterprises within the SADC region. Service sectors can no longer be seen in isolation and the wording of policies must provide legal certainty for member state's services providers and investors to stimulate the regional market. The problem is that the lack of regional ambition and the shift in focus to the quality of foreign investment proposals, rather than its origin, is affecting the regional integration of SADC's Trade in Services market.¹⁸⁶

¹⁸⁴ SADC 2016 <http://www.sadc.int/news-events/news/28th-meeting-committee-ministers-trade-gaborone-5th-july/>.

¹⁸⁵ Jelitto 2012 *Bridges Africa* 5.

¹⁸⁶ Jelitto 2012 *Bridges Africa* 4.

The key to economic transformation and the regional integration of services within the SADC region requires alignment with other sectors - thus the liberalisation of domestic regulatory frameworks throughout SADC states. Unfortunately, the PTIS is not noteworthy as it contains the standard obligations of transparency, approaches to domestic regulation such as convergence and recognition, competition clauses, institutional implementation aspiring for better cooperation and dispute settlement provisions. These provisions are necessary because of the domestic regulation aspects which can be rather restrictive, but the PTIS's non-binding structure and lack of ambition, leaves its impact uncertain at this stage.

4 Trans-Pacific Partnership Agreement (TPP)

4.1 Introduction

The TPP is a projected Free Trade Agreement (FTA) that was negotiated by some pacific nations, which include Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore, the United States (US) and Vietnam. These states announced the closing of their negotiations on 6 October 2015.¹⁸⁷ The TPP was negotiated to create new investment opportunities for its member states by means of establishing a predictable and transparent regulatory environment that will provide enhanced certainty for businesses and facilitate participation within regional trade. The expectation was that the TPP would establish a shift in the way negotiations will be conducted in future.¹⁸⁸ That it would give effect to regional trade liberalisation agreements as a substitute for bilateral FTAs and broader multilateral trade liberalisation throughout the World Trade Organization (WTO).¹⁸⁹ This may still be the case as future agreements can only build on the work already completed and standards set by the TPP negotiations. The TPP's services section has been welcomed as one of the agreement's major accomplishments.¹⁹⁰

The US, while it was still part of the group, considered the negotiations to be of a high-standard, ambitious, wide-ranging and balanced because of the fact that it would lead to economic growth throughout the region. The TPP has five features that make it the milestone agreement of the 21st century,¹⁹¹ which are the establishment of wide-ranging market access, negotiation of commitments on regional basis, addressing new trade challenges, inclusive trade approach, and the establishment of a regional integrated platform.

¹⁸⁷ AUS 2016 <http://dfat.gov.au/trade/agreements/tpp/Pages/trans-pacific-partnership-agreement-tpp.aspx>.

¹⁸⁸ Gootiiz and Mattoo *Services in the trans-pacific partnership* 1.

¹⁸⁹ CRS *The Trans-Pacific Partnership (TPP) Key Provisions and Issues for Congress* 1.

¹⁹⁰ Gootiiz and Mattoo *Services in the trans-pacific partnership* 1.

¹⁹¹ Sandrey *Services trade in Africa* 16.

The TPP has specific outcomes which provide TPP investors with new prospects and it has superior transparency regarding the investment screening process for prospective investments between its member states. These outcomes aim to open considerable new trade and investment opportunities, to promote job creation, integration of the TPP states' economies, and the promotion and facilitation of regional supply chains throughout the region.¹⁹²

Even though the TPP is non-operational and may be considered obsolete with the withdrawal of the US, it still serves as a good standard of an agreed trade agreement to which other trade agreements can aspire.¹⁹³ This chapter will focus mainly on the relevant impact¹⁹⁴ that the TPP¹⁹⁵ has on Trade in Services, in comparison with the PTIS.¹⁹⁶

4.2 Impact on Trade in Services

There are three important basic provisions for services liberalisation provided for in the TPP. These provisions were implemented to have significant reductions in trade costs for member states. The first provision is the implementation of a negative list approach,¹⁹⁷ which means that the TPP covers all services, present and future, unless specific exceptions were listed by a member state known as non-conforming measures (NCMs). The second provision is that there will be fewer NCMs (exceptions to trade negotiations)

¹⁹² AUS 2016 <http://dfat.gov.au/trade/agreements/tpp/Pages/trans-pacific-partnership-agreement-tpp.aspx>.

¹⁹³ Gootiiz and Mattoo *Services in the trans-pacific partnership 2*.

¹⁹⁴ Sandrey *Services trade in Africa* 15-20.

¹⁹⁵ CRS *The Trans-Pacific Partnership (TPP): In Brief 2*.

¹⁹⁶ For a summary of the TPP, broader than trade in services, the reader is referred to the working paper of Sandrey and the CRS's summary for a full background on the TPP.

¹⁹⁷ A negative list means that the signatories of the TPP promise to provide full access to their services markets unless they specifically list an exception, or NCM. These NCMs appear in three separate annexes to the agreement: the first lists existing measures that do not conform to a party's obligations under the agreement, the second specifies activities and sectors that a party could subject to new or more stringent limitations in the future, and the third lists NCMs relating to financial services. See appendix E of the TPP for a list of each country's NCMs.

compared to other current free trade agreements and member states' WTO commitments. The third provision is the horizontal liberalisation of industries by means of the data provisions found in the TPP's Electronic Commerce chapter, which allows for greater freedom and flow of data between members.¹⁹⁸ These basic provisions are further expanded in five features that define the TPP as the current benchmark trade agreement. These features include: establishing wide-ranging market access, negotiating commitments on regional basis, addressing new trade challenges, inclusive trade, and the establishment of a regional integrated platform.¹⁹⁹

4.2.1 Negative list approach implementation

The importance of the negative-list approach introduced in chapters 10 to 13, advocates two important aspects. Firstly, it identifies that developing members will most probably require several flexibilities to enter into the TPP agreement. The second aspect is that it will lead to more successful negotiations that will establish corresponding trade agreements among members.²⁰⁰ Services enterprises enjoy an important benefit from the negative-list approach²⁰¹ in the cross-border Trade in Services, and in the investment chapters. In practical terms this means that the negative-list approach's provisions apply to all services, unless specifically excluded by states. This is known as a non-conforming measure (NCM). It entails an important source of liberalising Trade in Services: when a new product or service is invented in future, no new negotiations will have to be made and

¹⁹⁸ USITC *TPP Agreement Likely Impact on the US Economy and on Specific Industry Sectors* report 24.

¹⁹⁹ Sandrey *Services trade in Africa* 18.

²⁰⁰ Sandrey *Services trade in Africa* 20.

²⁰¹ A negative list means that the signatories of the TPP promise to provide full access to their services markets unless they specifically list an exception, or NCM. These NCMs appear in three separate annexes to the agreement: the first lists existing measures that do not conform to a party's obligations under the agreement, the second specifies activities and sectors that a party could subject to new or more stringent limitations in the future, and the third lists NCMs relating to financial services. See appendix E for a list of each country's NCMs.

such new services will automatically fall under the TPP.²⁰² This is different from GATS, which employs a positive approach and means that when Trade in Services commitments are made, it will only apply to the specific trading of services as concluded between countries.

4.2.2 Establishment of member websites and regulation updates

In order to ensure that small and medium enterprises take full advantage of the trade opportunities offered by the TPP, each member state must establish a dedicated website to help overcome common challenges facing small and medium enterprises. These challenges include complex paperwork, unclear registration processes and customs administration, weak logistical services, and limits on data flows (which might be the biggest challenge). The purpose of these websites are to assist enterprises to overcome these common challenges by providing information on procedures relating to business registration, employment regulation, up to date taxation regulation, and up to date intellectual property rights which include relevant standards and new regulations applicable in other member states.

The regulatory standard practice principles are very useful, as it includes the following: impact assessments for projected regulatory measures; the announcement of new regulatory decisions to members; online publication of new regulations if possible; random reviews of existing regulatory measures; implementation of annual notices for probable regulatory actions; objectivity; due processing; and the synchronisation of governmental approaches to such principles. This approach will ensure a consistent regulatory approach and keep all members up to date on the latest developments which affect their trading relationships.²⁰³ These regulatory practices will force member states to implement, maintain and enforce anti-

²⁰² USITC *TPP Agreement Likely Impact on the US Economy and on Specific Industry Sectors USITC report 328.*

²⁰³ Tralac 2016 <https://www.tralac.org/discussions/article/9466-international-regulatory-cooperation-and-domestic-regulatory-coherence.html>.

corruption legislation and measures that uphold, or at least adopt a code of conduct for public officials.²⁰⁴

4.3 Trade in Services covered by the TPP

Trade in Services as found in the TPP, is primarily incorporated in chapters 9 to 14.²⁰⁵ These chapters each deal with specific service related aspects namely: cross-border investment in services, Chapter 9; Cross-border Trade in Services, Chapter 10; Specific responsibilities/obligations that relate to financial services, Chapter 11; Chapter 12 regulates the temporary entry of business persons; Chapter 13 deals with services relating to telecommunication; and Chapter 14²⁰⁶ regulates electronic commerce.

4.3.1 Cross border investment in services

The TPP implemented core obligations which correspond with GATS's national treatment - most-favoured-nation treatment and the permission funds transfers related to investments covered under the TPP subject to certain exceptions. However, it goes further than GATS as it includes provisions setting a minimum standard of treatment for investments, banning of specified performance requirements,²⁰⁷ and ensuring that investors may appoint senior managers without regard to nationality. Thus, any nationality-based restrictions such as the appointment of board members, will not impair the investor's control over its investment, which encourages investment in the region. The WTO covers investment only in services found under mode 3 of GATS, commercial presence, but the TPP investment stipulations cover goods and services.²⁰⁸

²⁰⁴ Tralac 2016 <https://www.tralac.org/discussions/article/9466-international-regulatory-cooperation-and-domestic-regulatory-coherence.html>.

²⁰⁵ Gootiiz and Mattoo *Services in the trans-pacific partnership* 3.

²⁰⁶ Which will not be discussed in this study as it relates to capturing data and the flow thereof.

²⁰⁷ Local content requirements, export requirements, and technology transfer or technology localisation requirements.

²⁰⁸ Gootiiz and Mattoo *Services in the trans-pacific partnership* 5.

4.3.2 Cross-border Trade in Services

Chapter 10 covers a wide range of services including the supply of a service (such as market access), movement of payments, restrictions on the service provider's location, and access to distribution networks within the region. Chapter 10 encompasses cross-border supply, mode 1, consumption abroad, mode 2 and presence of natural persons, and mode 4. It does not apply to services supplied through commercial presence of an enterprise in another member state (as found in mode 3 of GATS or such services that relate to sales and purchases through foreign affiliates).²⁰⁹

4.3.2.1 Relevant provisions Chapter 10

The Cross-border Trade in Services chapter of the TPP established rules that will govern the rendering of services among member states. This chapter provides three core obligations which reflect those found in GATS, namely: national treatment, most-favoured nation treatment, and market access. The TPP improves on GATS with the inclusion of article 10.6 on local presence which stipulates that no country may require a supplier from another country to establish an office or affiliate, or be resident, in its territory to supply the service.²¹⁰ The provisions on such market access allow enterprises within this region to supply services in the way that it may choose, without having to face geographic or quantitative restrictions.²¹¹ The market access provisions also provide for transparency in licensing requirements,²¹² movement of payments and transfers across borders²¹³, and the recognition of qualifications.²¹⁴ It allows member states to deny

²⁰⁹ Gootiiz and Mattoo *Services in the trans-pacific partnership* 4.

²¹⁰ Gootiiz and Mattoo *Services in the trans-pacific partnership* 4.

²¹¹ Implication in practise is that there are no limitations on the number of service suppliers, the total value or volume of services provided, the number of persons employed, or the types of legal entities or joint ventures that a foreign service supplier may employ.

²¹² Article 10(8) of TPP.

²¹³ Article 10(12) of TPP.

²¹⁴ Article 10(9) of TPP.

benefits to services enterprises owned by parties in non-TPP member states, and it contains a differential instrument (a so-called ratchet mechanism) that automatically incorporates any additional independent liberalisations made by a member. This includes liberalisations made on a member's own account after TPP enters into force. The purpose of this instrument is to prevent member states from cancelling any such changes at a later stage, if services enterprises are using them to conduct business.²¹⁵

The national treatment stipulation prevents member states from treating foreign and domestic services (including trademarks, copyrights, and patents) differently once they have entered the market. This is important because it allows enterprises to do business with other domestic enterprises that is also a TPP member state, on an equal basis. This must be read with the Most Favoured Nation (MFN) treatment principal, which flows from GATS.²¹⁶ The MFN treatment prohibits TPP members from discerning between trading partners, with certain exceptions (such as FTAs). This allows all suppliers of member states to trade on an equal basis with other suppliers and/or consumers of member states.²¹⁷ This prohibits members from offering favourable treatment to services and service providers of states outside the TPP, when enterprises from member states can provide similar services.²¹⁸

Market access provides that member states cannot impose limitations on the number of service suppliers, the value of services transactions, the number of services operations, or the number of citizens of a certain country who may be employed within the services sector. This means that foreign services enterprises are able to supply services in the manner which they

²¹⁵ USITC *TPP Agreement Likely Impact on the US Economy and on Specific Industry Sectors* USITC report 329.

²¹⁶ Article 10(3) of TPP.

²¹⁷ Article 10(4) of TPP.

²¹⁸ Sandrey *Services trade in Africa* 20.

may choose, but clearly within the scope of the negotiations reached.²¹⁹ The local presence provision does not require service enterprises to establish a local entity, office/affiliate, or to be resident within a territory in order to supply services there. This implies that foreign enterprises are able to supply services from wherever it may choose,²²⁰ and member states cannot implement measures that refute market access to services and service providers of other members.²²¹ Member states are, however, allowed to deny benefits to any services provider that is owned or controlled by a non-member state. This means that TPP member states are not obligated to extend any TPP benefits to enterprises owned by non-TPP members.²²²

The non-conforming measures (ratchet mechanism) found in the annexes to Chapter 10, provide that if or when any TPP member state autonomously liberalises any regulations or policies, such liberalisation would become part of TPP and cannot be revoked later if enterprises of other member states are found to be using them to conduct their business. This provides certainty and predictability to enterprises which take advantage of new and more favourable regulations to conduct business within the region.²²³ This provision is of particular importance in that it permits member states to exclude certain industries or practices from the provisions contained in Chapter 10. The impact of listed non-conforming measures stipulated, will vary from industry to industry. This means that professional services, retail and audio-visual services industries will most likely benefit more from liberalisation under the TPP than the transportation and telecommunications industries, because members have imposed more non-conforming measures

²¹⁹ Article 10(5) of TPP.

²²⁰ Article 10(6) of TPP.

²²¹ Sandrey *Services trade in Africa* 20.

²²² Article 10(10) of TPP.

²²³ Article 10, annex 10-C of TPP.

in those specific industries.²²⁴ Examples of non-conforming measures can be found in the footnote below.²²⁵

4.3.2.2 Essence of Chapter 10

Member states negotiated cross-border Trade in Services based on the negative-list approach. The significance of this is that services sectors will be open as negotiated, subject to members recording measures where a member commits to not make its processes more restrictive in the future that will bind any future liberalisation. This also relates to other sectors and policies to which a member applies full discretion in future. TPP members are also WTO members and, thus, bound by GATS - this means that for any agreement to be significant, it must go beyond the GATS agreement (be an improvement of GATS).²²⁶

4.3.3 *Financial services chapter*

4.3.3.1 Relevant provisions Chapter 11

There are relevant provisions copied from the foreign investment chapter and the cross-border Trade in Services chapter, which are also incorporated in the financial services chapter. In practice, this entails that members are not restricted from imposing measures that will ensure the integrity and stability of the financial system throughout the region as it relates to members.²²⁷ Financial services throughout the TPP are not protected by the e-commerce chapter's new obligations, such as the exclusion of localisation requirements that data servers and computing services must comply with. This can be problematic to the financial service sector of the TPP region, because new localisation requirements enforced by members may require

²²⁴ USITC *TPP Agreement Likely Impact on the US Economy and on Specific Industry Sectors* USITC report 331.

²²⁵ CRS *The Trans-Pacific Partnership (TPP): Key Provisions and Issues for Congress* 32.

²²⁶ Sandrey *Services trade in Africa* 18.

²²⁷ CRS *The Trans-Pacific Partnership (TPP): Key Provisions and Issues for Congress* 33.

enterprises to have servers and data storage facilities.²²⁸ This is due to their importance for the future of Trade in Services data and the drafting of relevant policies concerning services.

4.3.3.2 Essence of Chapter 11

The financial services chapter offers opportunities for market access opportunities in both cross-border and investment, while also protecting members' ability to regulate their financial markets and enterprises. It also enables members to take disaster management measures in the event of a financial crisis. On paper, this chapter seems very multi-dimensional and complicated, but that is because the TPP's financial services provisions improved on the minimum achievement level required by GATS. That being said, Sandrey²²⁹ argues that the TPP's financial chapter contains some drive to liberalise the financial service sector. These liberalisation efforts consist of specific commitments relating to portfolio organisation, electronic card payment services, the transfer of information for data handling, and investment dispute settlement.

The negative-list approach followed in negotiations relating to financial services limited specific banking and insurance services coverage as identified by each member. According to the US's Congressional Research Service, the long list of NCMs was problematic and was criticised by several critics.²³⁰

²²⁸ CRS *The Trans-Pacific Partnership (TPP): Key Provisions and Issues for Congress* 34.

²²⁹ Sandrey *Services trade in Africa* 18.

²³⁰ For a discussion and examples of the list of NCM's, refer to the CRS *The Trans-Pacific Partnership (TPP): Key Provisions and Issues for Congress* 33.

4.3.4 Temporary entry for business persons chapter

4.3.4.1 Relevant provisions Chapter 12

The TPP also provides for the trading of services by persons travelling to different areas throughout the TPP region while rendering services. The temporary movement of business persons is stipulated in mode 4 of GATS and the TPP provides for the temporary entry of business persons in order to facilitate Trade in Services between member states.²³¹ This chapter intends to improve member states' ability to handle requests for temporary entry of business persons. It does so by stipulating that members must implement structures to be able to provide data on request for temporary entry of business persons, and those members must ensure that application fees are reasonable. It also assists member states to make decisions once applications are received and supports members in making all relevant information available regarding decisions in terms of the prompt approval of temporary entry of business persons. Recommendations for cooperation considerations between member states relating to temporary entry issues, such as visa processing, are also provided. Most members have made commitments on access for each other's business persons.²³²

4.3.4.2 Essence of Chapter 12

This chapter's main purpose is to help businesses establish and develop business opportunities across the TPP region. It does so by ensuring effective visa processing practices and transparency relating to any requirements for the temporary entry of a business person. The TPP members have agreed to implement country-specific give-and-take

²³¹ CRS *The Trans-Pacific Partnership (TPP): Key Provisions and Issues for Congress* 34.

²³² Sandrey *Services trade in Africa* 19.

commitments that will give non-discriminatory entry for each other's business persons.²³³

4.3.5 Telecommunications chapter

4.3.5.1 Relevant provisions Chapter 13

The TPP is the first FTA that extends a positive approach for network access competition rules to mobile providers. This extension closed a gap that prevented trade discipline implementation in markets where a predominant mobile operator hindered competition and market entry of smaller and upcoming mobile providers. Member states considered this to be an important improvement as it is in the interest of modern day consumers to gain access to new products at competitive prices. Adding to that, customer complaints relating to unreasonable mobile roaming rates, affecting both voice and data services, encouraged members to seek better collaboration in helping bring dominant mobile suppliers to abide to such rates. This affects both the tourist and business travellers which are, as consumers often deterred from using telecommunications services.²³⁴

4.3.5.2 Essence of Chapter 13

This chapter will help establish trade rules which will ensure competitive supply of telecommunications services across the TPP region. This chapter warrants competition and discourages anticompetitive conduct. It inspires new market solutions and the experimentation with new technologies that will establish faster, more effective and more economical services delivery. This applies to both the traditional telecommunications and mobile services.²³⁵ This chapter requires regulatory transparency, interconnection between service providers, establishment of reasonable and non-

²³³ USTR *TPP Chapter Summary: Temporary Entry for Business Persons* 1.

²³⁴ USTR *TPP Chapter Summary: Telecommunications* 1-5.

²³⁵ CRS *The Trans-Pacific Partnership (TPP): Key Provisions and Issues for Congress* 35.

discriminatory access to telecommunication and mobile networks. This also includes access to infrastructure and government controlled resources (like spectrum bandwidth) at reasonable rates and the protection of the provider's preferences for employing technology.²³⁶

4.4 Comparison of TPP and PTIS

Considering the abovementioned stipulations of the TPP, it is clear how the TPP has improved on aspects of transparency and legal certainty in services policy. In comparison to the PTIS, the TPP also includes other services-related rules which contributes to transparency, predictability and enhanced market access. These are found in article 14 (data flows and cross-border Trade in Services), article 15 (government procurement), article 16 (competition policy), article 17 (state owned enterprises, SOEs), and article 25 (regulatory coherence).²³⁷

GATS, implies that member states will agree on data flows to co-exist with the exceptions provision²³⁸ which allows WTO members to implement necessary procedures to prevent deception and fraud and protect the privacy of individuals. This can only be done if members do not arbitrarily or unjustifiably categorise or restrict Trade in Services by implementation of such procedures. In article 14, the TPP places the obligation on exporting countries to prevent the occurrence of fraud and to protect the personal information of consumers. It is argued that by placing such an obligation on the exporting state, it establishes regulatory cooperation which ensures importing states that their consumers and national regulations will not be at the mercy of foreign regulation.²³⁹ Article 15 relates to government procurement of both goods and services which the PTIS does not cover.²⁴⁰

²³⁶ Sandrey *Services trade in Africa* 19.

²³⁷ Gootiiz and Mattoo *Services in the trans-pacific partnership* 20-24.

²³⁸ Article XIV(c).

²³⁹ Gootiiz and Mattoo *Services in the trans-pacific partnership* 20-22.

²⁴⁰ Article 13 of PTIS.

The competition policy (article 16) stipulations build on the operation of the services market. This involves numerous procedural fairness obligations relating to implementation of the agreement and the adoption and maintenance of national competition laws. Article 17 imposes subsidy rules relating to services exports of SOEs. It stipulates that no member may give non-commercial assistance to its SOEs. Article 25 of the TPP is the first of its kind in a trade agreement. Considering the influence of regulations on Trade in Services, this chapter only acts with good intentions due to its non-binding nature and the fact that it is not subject to dispute settlement.²⁴¹

The PTIS can benefit from the innovation found in the TPP and it should be considered an opportunity to grow and develop. This is because commitments made under both the TPP and PTIS, seldom go beyond national policies, and liberalisation benefits are often limited to a handful of members of the regions. The TPP and the PTIS enhance transparency and policy certainty because of the amount of trading partners, sectors covered, and improvement of current agreements and protocols. The PTIS can benefit by implementing some of the new rules found in the TPP relating to SOEs, government procurement, competition stipulations and data flow enhancement; all of which contribute to the enhancement of market access. The TPP is ground breaking because it assists to achieve greater services liberalisation of the TPP region due to the banning of restrictions placed on cross-border data flow. The TPP established the *quid pro quo* obligation on all members to protect the regions consumers from fraud and to protect their privacy. Such mutual obligations on both importing and exporting states, establish a regulatory cooperation model for future services negotiations.²⁴²

²⁴¹ Gootiiz and Mattoo *Services in the trans-pacific partnership* 20-24.

²⁴² Gootiiz and Mattoo *Services in the trans-pacific partnership* 2, 3, 24.

4.5 Conclusion

Ultimately the ratification of the TPP remains the most important aspect of the TPP gaining any ground. As explained above, this will not become a reality soon. However, the negotiations as they currently stand, are already a major achievement that sets new standards for trade agreements and show what can be achieved with diligent and purpose-driven negotiations. The TPP's establishment of primary obligations sets a new standard for Trade in Services agreement provisions. The TPP implemented and improved on the national treatment, Most Favoured Nation obligations, and market access; the principles of which are commonly found in trade agreements. On the contrary, its negative-list approach, unlike the positive approach found in GATS and the PTIS, makes the TPP a pioneering trade agreement and establishes a new approach to trade negotiations. There are still many challenges for diversity on an international scale within the TPP's services sectors that ranges from unsophisticated and underdeveloped to sophisticated and developed economies, developmental status and national regulations. The TPP shows that the negotiation of service provisions on a regional basis, can establish an inclusive policy that can contribute to the development of services sectors. The TPP shows that it is possible to negotiate and establish a balance in a modern, detailed, rule-based trade governance instrument. There is no one-size-fits-all policy, and policy will vary from region to region. The TPP is an improvement and a positive development of new standards.

5 Conclusion

Trade in Services has an important impact on the SADC region's economic growth²⁴³ overall development, and job creation.²⁴⁴ This is found on the priority lists of most African politicians. The theory behind Trade in Services involves various aspects, and Trade in Services is currently recognised in four modes of trade, with new modes emerging. The principles established that regional trade agreements must incorporate the promotion of Trade in Services and regional integration throughout SADC are as follows: a policy must be established for better flow of data across regional borders, governments must be enabled to procure services, implementation of competition guidelines, and the establishment of regulatory coherence. The PTIS follows a rather conservative approach and neglects to incorporate such principles. The recommendation of this study is that the PTIS must implement a dual obligation model that relates to importing and exporting members that calls for regulatory coherence.

The way in which the PTIS promotes and integrates Trade in Services throughout the SADC region, is by means of various committees and forums that must see to the implementation and functioning of the PTIS.²⁴⁵ The PTIS is currently without any clear purpose of implementation and without drive to liberalise Trade in Services. It has no coordinated data collection targets or knowledge-sharing structures.²⁴⁶ Regional integration of Trade in Services has to start with an effective regional reform plan²⁴⁷ that requires national actions and regional cooperation between member states. Not only will a change in the approach to trade be necessary, but also a change in

²⁴³ For a detailed discussion about the unexplored potential of African services trade and the issues that prevent liberalisation of services trade, refer to Dihel and Goswami *The unexplored potential* 1-207 and UNCTAD *African Continental Free Trade Area: Some Issues in Liberalizing Trade in Services* 1-32.

²⁴⁴ Sandrey *Services trade in Africa* 20.

²⁴⁵ Article 24 of PTIS.

²⁴⁶ Dihel and Goswami *The unexplored potential* 22.

²⁴⁷ Sandrey *Services trade in Africa* 21.

the approach to the drafting of relevant services policies that can promote the development and integration of the SADC region's services market. SADC members should consider implementing steps that reduce the amount of restrictions on, for example, the entry of foreign professionals that discourages the establishment of foreign enterprises and further discourages the supply of cross-border services. Members can implement detailed modifications that consist of: reducing restrictions on specific kinds of businesses allowed, establish a transparent structure that can be used for accepting foreign-qualified professionals, and reduce prohibitions for foreign participation in local enterprises. Discriminatory procurement regulations must be minimised as far as possible and the restructuring of immigration regulations may actually complement the integration of services.

The most important measure will be the ability of SADC members to reform domestic regulation that, for example, simplifies temporary entry of business persons and eliminates unbalanced restraints on competition. This includes price guidelines, restrictions on business administration and advertisement bans.²⁴⁸ For SADC members to establish a regional services market, regional cooperation will be required that will enable enterprises to benefit from more standardised regulations which will lead to an increase in access to, and the procurement of a larger volume and diversity of services.²⁴⁹ Services negotiations are already difficult to set in stone and to ratify in national legislation; even for developed countries as seen in the TPP. Currently, many Trade in Services negotiations' targets, are based upon speculation because of limited data.

Moreover, liberalisation of Trade in Services on a mere mutual benefit basis does not seem to lead anywhere. For purposes of regional integration, policy makers may consider the focus of the TPP services practice that is based on regulatory coherence. This approach is also preferred by both the Asia-

²⁴⁸ Dihel and Goswami *The unexplored potential* 22.

²⁴⁹ Dihel and Goswami *The unexplored potential* 24.

Pacific Economic Cooperation (APEC) and the Organisation for Economic and Cooperation Development.²⁵⁰ This practice promotes the coordination of national regulations and practices using international trade rules that apply beyond national borders. Its purpose and inclusion in the TPP was to assist in ensuring an open, fair and predictable regulatory trade environment for member's enterprises operating throughout the TPP markets. Its purpose is to encourage transparency, impartiality and the coordination of trade between TPP members. The TPP's text is a good point of departure for policy makers.

What is the SADC's Protocol on Trade in Services contributing to regional integration? The introduction and signing of the PTIS in August 2012 by SADC member states, provide for progressive liberalisation of Trade in Services through different rounds of negotiations. The first round covered the six priority services sectors i.e. communication, construction, finance, energy, tourism and transport. These negotiations were scheduled to be concluded by March 2015, but were further extended to September 2016. Nevertheless, by March 2015, only eleven (11) SADC members submitted offers of which most covered only communication, finance, tourism and transport services. Further negotiations, along with Mutual Recognition Agreements (MRAs), will only be addressed in the successive rounds of negotiations planned to start within three (3) years after the conclusion of the first round of negotiations.²⁵¹

In addition to the PTIS, members signed several other Protocols i.e.: transport, communication and meteorology, education and training, health, information, sports and culture, tourism development and the facilitation of movement of persons, which is not yet in force due to insufficient ratification

²⁵⁰ OECD 2017 <http://www.oecd.org/about/>. The mission of the Organisation for Economic Co-operation and Development (OECD) is to promote policies that will improve the economic and social well-being of people around the world.

²⁵¹ UNCTAD *African Continental Free Trade Area: Some Issues in Liberalising Trade in Services* 16.

by various members. Even though these additional protocols aim to provide for regulatory reform and synchronisation of regional market standards; the protocol on the facilitation of movement of persons offers, for example, the gradual liberalisation of immigration between members that will allow for visa free movement, either temporary (up to 90 days) or permanent, such as obtaining of residence status.²⁵² This will directly liberalise Trade in Services and will promote its regional integration if member states would ratify it. As it currently stands, only the Ministers and parties involved, knows when such results will be made available and what the results will mean for the SADC region. The SADC PTIS offers several flexibilities for member states to have determined market access without the fear of discrimination based on its imported and locally produced services to be subject to internal taxation or other members' government regulations.²⁵³

The problem is that there is no way to fast-track the ambitious establishment of a regional market that aims to markedly improve Trade in Services among SADC members. This is due to the fact that the SADC Scheduling and Negotiations Guidelines only provide that the starting point for liberalisation of trade commitments, is based on the existing GATS commitments.²⁵⁴ This indicates that the only drive for services liberalisation in the SADC region, is to slowly create and establish liberalisation commitments that are somewhat better and more liberal than its predecessors, such as the drafting of the PTIS and implementation thereof at some stage, if it gets ratified.²⁵⁵ For SADC regional services integration and procurement, the only real proof will be the outcome of each separate round of negotiations as it becomes public knowledge. Should other SADC Protocols such as the Protocol on Transport, Communication and Meteorology be ratified, it will also cooperatively provide

²⁵² UNCTAD *African Continental Free Trade Area: Some Issues in Liberalising Trade in Services* 16.

²⁵³ The national treatment limitation.

²⁵⁴ UNCTAD *African Continental Free Trade Area: Some Issues in Liberalising Trade in Services* 16.

²⁵⁵ For example that of the SADC member States' existing GATS commitment.

for the liberalisation of cross-border road transport services through bilateral agreements among member states,²⁵⁶ being one of the modes by which Trade in Services is established. This shows that the problem does not seem to lie in the current texts of regional agreements, but rather in the drive to ratify it as seen in the cases of the TPP and the PTIS, and the long list of unratified SADC protocols that affect regional integration of services. Trade in Services and the establishment of regional markets in the SADC region, still has a long way to go before it will become a reality.

Considering the scope of this study, it was established that the theory behind Trade in Services cover a wide spectrum, but to understand what it entails, the focus should remain on the modes of delivery of such services. Regional trade agreements promote Trade in Services and regional integration by means of establishing regional standards and principles that regulate the way in which Trade in Services will be conducted in that region. The principles required to promote Trade in Services and regional integration throughout SADC, is consistency in regulation, cooperation among member states working towards the same goal, and proper communication. The PTIS has established various forums to take responsibility in steering SADC towards establishment of a regional integrated services market. The PTIS, however, does not incorporate the abovementioned principles, as there is no obligation to establish regulatory coherence and cooperation.

Compared with a modern trade agreement like the TPP, the PTIS is already out-dated. The recommendation in this regard and lesson learned from the TPP approach, is that regulatory coherence should be the main focus. The PTIS can learn from the TPP's central coordination and review mechanisms for regulation that will follow on good regulatory practices such as assessing regulatory impact on specifically Trade in Services, assistance in achieving domestic policy objectives, and the promotion of regulatory cooperation

²⁵⁶ UNCTAD *African Continental Free Trade Area: Some Issues in Liberalising Trade in Services* 16.

among member states. To establish regional integration of Trade in Services throughout SADC, members must strive to bring about regulatory coherence.

Members must go beyond the scope of negotiations set out in Article 16 of PTIS. The first round of negotiations' focus was principally on the six priority services sectors for liberalisation of the SADC region which are: communication, construction, energy related, financial, tourism and transport services. Going beyond means understanding how the PTIS actually fits in to the bigger picture. The TNFS, COS and CMT must all be on the same page. The approach that the TNFS (whom is responsible for the negotiations) should have taken, in light of the first round of negotiations in order to achieve the establishment of an integrated services market, is the following:

- (a) Identify all the current policies, protocols and or trade agreements which are applicable to Trade in Services on a global, regional and national scale. That is for all SADC members taking part in the negotiations.
- (b) Identify how the context and stipulations of such policies, protocols and or trade agreements are either restricting or promoting the end goal of the current negotiations. There are far too many protocols and sub-agreements, which adds to more uncertainty and regulatory inconsistency.
- (c) Identify which of those policies, protocols and or trade agreements must be declared redundant due to lack of relevancy and use.
- (d) Identify which policies, protocols and or trade agreements are applicable and currently binding on all members in regional terms but also on a national level. This is to achieve regulatory coherence and consistency throughout the SADC region's

intra-regional, inter-regional and multilateral commitments and Trade in Services negotiations.

- (e) After establishing this, the negotiations should commence as stipulated by the PTIS to establish interdependence and integration of national economies where the region can benefit from a regional integrated market.
- (f) Mere compliance with the rights and obligations that Member States have under GATS including their obligations stemming from commitments accepted in specific sectors and the four modes of supply is inadequate for the establishment of an integrated regional market.
- (g) There must be less scope for exemptions.
- (h) The focus of negotiations must stay on the six identified sectors.
- (i) The method of negotiation should not be limited to the request-offer approach. The formula approach which is focused on rapid liberalisation and negative list approach as used in the TPP are more proactive. The formula approach is also more focused on uniformity of regulations and trade schedules which can lead to better regulatory coherence.
- (j) Timeframes must strictly be adhered to.

The establishment of an integrated SADC regional services market, which allows for its members and the public in general to compete with global and other regional markets must be the order of the day.

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