



Assessment of Linkages Between the SADC Protocol on Trade in Services and Other SADC Protocols and Legal Instruments

October 2012

Assessment of Linkages Between the SADC Protocol on Trade in- Services and Other SADC Protocols and Legal Instruments

Imprint

Published by:

Southern African Development community (SADC) Secretariat
SADC Headquarters
Plot No. 54385
Central Business District Gaborone

Botswana

<http://www.sadc.int/>

Author: Jennifer Hawkins

This study was supported by

- Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ)
GmbH on behalf of the German Government

October 2012

CONTENT

LIST OF TABLES	V
ABBREVIATIONS	VI
EXECUTIVE SUMMARY	1
1 INTRODUCTION	4
2 PROTOCOL ON TRADE IN SERVICES	5
2.1 Genesis of the Protocol on Trade in Services	5
2.2 Objectives of the Protocol on Trade in Services	6
2.3 Scope of the Protocol on Trade in Services	6
2.4 General obligations	8
2.5 Obligations upon liberalisation of specific service sectors	10
2.6 Policy space	12
2.7 Role of TNF services: the liberalisation agenda	12
3 OTHER PROTOCOLS CONTAINING PROVISIONS THAT RELATE TO TRADE IN SERVICES	13
3.1 Draft Protocol on the Facilitation of Movement of Persons	13
3.1.1 Objective	13
3.1.2 Freedoms of movement	14
3.1.3 Overview of the draft FMP Protocol and its relationship with the Protocol on Trade in Services	16
3.2 Charter of Fundamental Social Rights and the draft Protocol on Employment and Labour	20
3.3 Protocol on Finance and Investment	21
3.3.1 Objective	21
3.3.2 Coverage	21
3.3.3 Architecture of the FIP	22
3.3.4 Substantive provisions of the FIP: A focus on linkages with the Protocol on Trade in Services	22
3.3.5 Implementation	30
3.3.6 Linkages between BITs, the Protocol on Trade in Services and the FIP	31
3.4 Protocol on Transport, Communications and Meteorology	33
3.4.1 Overarching objectives of the TCM Protocol	33
3.4.2 Transport sector	34
3.4.3 Communications sector	43
3.4.4 TCM: Institutions and implementation	46
3.5 Protocol on Energy	47
3.5.1 Objectives	47

3.5.2	Activities under the Energy Protocol	47
3.5.3	Energy-related services: linkages	48
3.6	Protocol on Culture, Information and Sport	50
3.7	Protocol on Health	51
3.7.1	Activities under the Protocol on Health	53
3.8	Protocol on Education and Training	55
3.8.1	Objective and provisions	55
3.8.2	Education services	55
3.8.3	Activities under the Education Protocol: linkages	56
3.9	Protocol on Development of Tourism	58
3.9.1	Tourism services	59
3.9.2	Linkages: Tourism Protocol and other SADC instruments	59
3.9.3	Linkages: RETOSA and the Protocol on Trade in Services	60
3.9.4	Interconnected challenges	61
4	COORDINATION AND EXCHANGE OF INFORMATION	63
4.1	Exchange of information and coordination within SADC Secretariat	63
4.1.1	Existing mechanisms	63
4.1.2	Proposals	63
4.2	Coordination and exchange of information within member states	64
5	CONCLUSIONS	65
6	BIBLIOGRAPHY	66

LIST OF TABLES

Table 1:	Definition and Explanation of the Four Modes	6
Table 2:	Obligations and Overlap: Protocol on Trade in Services and the FIP	23
Table 3:	Examples of the Supply of Health Services	52
Table 4:	Examples of Trade in Education Services	55
Table 5:	Examples of the Provision of Tourism Services	59

ABBREVIATIONS

AASA	Airlines Association of Southern Africa
AFCAC	African Civil Aviation Commission
ASANRA	Association of Southern African National Road Agencies
BITs	Bilateral Investment Treaties
BOT	Build Operate and Transfer
Charter	Charter of Fundamental Social Rights
CIS Protocol	Protocol on Culture, Information and Sport
CMT	Committee of Ministers responsible for trade matters
COMESA	Common Market for Eastern and Southern Africa
CRASA	Communication Regulators' Association of Southern Africa
Draft FMP Protocol	Draft Protocol on the Facilitation of Movement of Persons
DRC	Democratic Republic of Congo
EAC	East African Community
Education Protocol	Protocol on Education and Training
Energy Protocol	Protocol on Energy
FANR	Food, Agriculture and Natural Resources
FCFASA	Federation of Clearing and Freight Forwarding Associations of Southern Africa
FESARTA	Federation of East and Southern African Road Transport Associations
FIP	Protocol on Finance and Investment
GATS	General Agreement on Trade in Services
IPP	Independent Power Producer
MFN	Most favoured nation
MRTA	Multilateral road transport agreement
NQFs	National Qualifications Frameworks
PMAESA	Ports Management Association of Eastern and Southern Africa
RERA	Regional Electricity Regulators Association of Southern Africa
RETOSA	Regional Tourism Organisation of Southern Africa

RETOSA Charter RISDP	Charter of the Regional Tourism Organisation of Southern Africa Regional Indicative Strategic Development Programme
RQF	Regional Qualifications Framework
SADC	Southern African Development Community
SADC Treaty	Treaty of the Southern African Development Community
SAPP	Southern African Power Pool
SAPRA	Southern Africa Postal Regulators' Association
SARA	Southern African Railways Association
SATCC	Southern Africa Transport and Communications Commission
SHD&SP	Services and Social and Human Development and Special Programmes
SNC	SADC National Committee
TB	Tuberculosis
TCM	Transport, communications and meteorology
TCM Protocol	Protocol on Transport, Communications and Meteorology
TCU	Tourism Coordinating Unit
TIFI	Trade, Industry, Finance, and Investment
TNF-Services	Trade Negotiating Forum in Services
Tourism Protocol	Protocol on Development of Tourism
TRASA	Telecommunications Regulators Associations of Southern Africa
SATA	Southern Africa Telecommunications Administrations
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization
Yamoussoukro Decision	Yamoussoukro Decision concerning the Liberalisation of Access to Air Transport Markets in Africa

EXECUTIVE SUMMARY

In order to ensure that the Protocol on Trade in Services is integrated coherently into the existing SADC legal framework, it is important to understand how this Protocol will interact with existing SADC legal instruments. This study examines the “linkages” between the Protocol on Trade in Services and some of the core SADC protocols and charters. While its scope is broader than an examination of the linkages pertaining to the six priority services sectors for which Member States have committed to negotiate liberalisation, this study covers issues which are immediately relevant to those six services sectors (namely communications, construction, energy-related, financial, tourism, and transport services).

This study demonstrates that linkages arise between a multitude of issues covered by existing instruments and the Protocol on Trade in Services, and that these “linkages” take different forms, are of differing natures and reflect different degrees of closeness or common space.

The main text of this study provides a guide to the Protocol on Trade in Services as well as recommendations on the exchange of information across the bodies seized with the implementation of the Protocol on Trade in Services and other legal instruments. However, the following summary is limited to setting out the principal linkages found to exist between the Protocol and the existing SADC instruments examined:

Draft Protocol on the Facilitation of Movement of Persons (*not yet in force*): There is some overlap between this Draft Protocol and the Protocol on Trade in Services. The former seeks to ensure the movement of a broader category of persons (including visitors and residents which may be service consumers) than the Protocol on Trade in Services, which only provides for the movement of service suppliers where specific commitments are made. It is possible for a party to both instruments to comply with the provisions of both of them. In addition, both instruments contain exceptions to their general obligations. These exceptions share some similarities although this study finds that, understandably, it would be more difficult to justify deviation from the specific commitments undertaken in the context of the Protocol on Trade in Services.

Charter of Fundamental Social Rights and the Draft Protocol on Employment and Labour: The Protocol on Trade in Services explicitly states that its provisions do *not* extend to measures concerning persons seeking access to the labour market of another Member State. Nevertheless, at a high level, this Charter supports—and the Draft Protocol on Employment and Labour which is currently being prepared will likely support—trade in services liberalisation by creating a positive environment that would facilitate the movement of workers, which service suppliers may employ.

Protocol on Finance and Investment: The objectives of this Protocol are of fundamental importance in supporting the objectives of the Protocol on Trade in Services and vice versa. The most substantial overlap between these two instruments is that “investments” as defined by the Protocol on Finance and Investment (“FIP”) also constitute trade in

services (in the form of a commercial presence). Only the Protocol on Trade in Services has provisions to ensure market access for these investments but, once those investments are admitted, they can benefit from the different guarantees contained in both instruments. For example, there is no equivalent under the Protocol on Trade in Services to the FIP's obligation to afford fair and equitable treatment. Having drawn some comparisons between the FIP and SADC Member States' bilateral investment treaties ("BITs"), this study also addresses the potential for the Protocol's most favoured nation clause to "regionalise" guarantees contained in Member States' BITs to the benefit of all parties to the Protocol on Trade in Services.

Protocol on Transport, Communications and Meteorology: Transport and communications services are both priority sectors in SADC's trade liberalisation agenda. The focus of the Protocol on Transport, Communications and Meteorology ("TCM Protocol") is the realisation of optimal infrastructure and operations for the communications (telecommunications and postal) and transport (comprising road; maritime and inland waterway; civil aviation transport) sectors.

It is of note, however, that parties to the TCM Protocol have already committed, and subsequently concluded agreements, to progressively liberalise their market access policies in respect of road transport. These existing agreements may not be exempted from the Protocol on Trade in Services' most favoured nation undertaking and Member States must consider whether they can list exemptions to prevent conflicts. Some synergy also exists. Specifically, initiatives grounded in the TCM Protocol, such as SADC carrier licences, may also support the movement of service suppliers and the mutual recognition sought by the Protocol on Trade in Services. Parties to the TCM Protocol also agreed to develop policies for the gradual liberalisation of the Region's air transport market, although little has been achieved in this regard.

The TCM Protocol does not contain any liberalisation commitments in respect of communications. Instead, it aims to ensure access to and quality of services. Significant progress has been made in establishing independent domestic regulators for telecommunications. Proposals have been made for reform of the provisions on postal and telecommunications services in order to, *inter alia*, reflect advances in ICT, develop standards for personnel, and attract private investment.

Protocol on Energy: This study finds that there is little common space between the Protocol on Energy, which contains no provisions on liberalisation and which primarily addresses co-operation among Member States with a view to securing energy supplies, and the Protocol on Trade in Services. Nevertheless, it is important to note the services required for the supply of energy and what constitutes "energy-related services" (one of the named priority services sectors) since these services will be subject to the disciplines of the Protocol on Trade in Services.

Protocol on Culture, Information and Sport: The subject matter of this Protocol may constitute trade in services. More particularly, there is some synergy and a potential tension between this Protocol and the Protocol on Trade in Services. The most straightforward synergy is that the Protocol on Culture, Information and Sport lays the foundation for the accreditation

of media practitioners, something which will complement the goals of the Protocol on Trade in Services in respect of mutual recognition of service suppliers' qualifications. Finally, while liberalised trade in services regimes and the protection of culture are not necessarily incompatible, this study suggests that there is a potential for tension between these two aims.

Protocol on Health: The Protocol on Health does not provide for the liberalisation of the sector but it does acknowledge a role for the private sector in supplying health services. Such "health services" may constitute trade in services for the purposes of the Protocol on Trade in Services (except where they are supplied in the exercise of governmental authority). This study also finds that the objectives of the Protocol on Trade in Services and the Protocol on Health are aligned as far as the mutual recognition of health care professionals is concerned.

Protocol on Education and Training: Trade in services related to education are encouraged by the Protocol on Education and Training. For example, it contains provisions on the movement of students and distant learning. This study also highlights the specific initiatives envisaged for the recognition and standardisation of qualifications, and how these initiatives will directly encourage the mutual recognition goal of the Protocol on Trade in Services, and indirectly further other goals of the Protocol on Trade in Services.

Protocol on the Development of Tourism: Tourism involves the supply of services covered by the Protocol on Trade in Services. The importance of the movement of persons for the development of tourism and its related services is also especially explored in this study.

1 INTRODUCTION

In order to ensure that the integration process with regard to the Protocol on Trade in Services is structured coherently and in a manner promoting development, it is necessary to examine the linkages between this Protocol and other Southern African Development Community (“SADC”) instruments. All of the instruments examined are related in that they play a part in the broader SADC regional economic integration agenda. However, this report seeks to highlight those closer connections and synergies between the Protocol on Trade in Services and the other instruments, so as to understand the practical impact that these instruments have on each other.

An awareness of the various linkages that may arise is not only important for the purpose of the upcoming round of liberalisation negotiations, it is also important for the coherent and mutually-supportive implementation of all instruments. The existing instruments do not have as their principal objectives the liberalisation of trade in services. They generally pertain to particular sectors, although many of them have implications outside their sectors (e.g. a framework for the recognition of qualifications does not only impact the education services sector, but will also enhance the openness of professional service sectors to foreign practitioners), and two of the legal instruments address issues that can touch on all sectors (i.e. investment and the free movement of people). This report demonstrates that connections may arise between a multitude of issues covered by existing instruments and the Protocol on Trade in Services. These connections may be of differing natures and degrees of closeness. Some connections come in the form of legal links and potential conflicts between the provisions of the instruments, while others may be synergies that can be anticipated in the concurrent implementation of the Protocol on Trade in Services and other instruments.

Given that the various instruments are proven to have implications for one another and that the responsibility for the implementation of the various instruments is spread among different (national and regional) institutions within the SADC structure, it is important that these institutions can exchange appropriate, relevant information on a timely basis. This paper explores to what extent this is currently the case and makes some suggestions for how this exchange of information might be improved.

This study is made up of three substantive parts. The study begins with an overview of the Protocol on Trade in Services in Part 2. In addition to reviewing the principal objectives and activities of several other SADC instruments, Part 3 also examines what their substantive relationship is to the Protocol on Trade in Services and what legal linkages are presented. Part 4 deals with coordination and exchange of information, both at the SADC and the Member State levels. Finally, Part 5 concludes with a summary of the key linkages.

2 PROTOCOL ON TRADE IN SERVICES

2.1 Genesis of the Protocol on Trade in Services

In the Preamble to the Protocol on Trade, Member States recognised that trade in services—in addition to trade in goods and the enhancement of cross-border investment—is a major area of co-operation among SADC Member States.¹ While Member States committed to “adopt policies and implement measures in accordance with their obligations [i]n terms of the WTO’s General Agreement on Trade in Services” with the objective of liberalising their services sector within the Community,² the Protocol on Trade did not impose any obligations in respect of trade in services.

By 2006, Member States had negotiated a draft annex on trade in services to the Protocol on Trade, setting out a framework for the liberalisation of trade in services between SADC Member States. The ultimate aim of this liberalisation process had been described as follows: “[that] each member will treat the services emanating from other members, and the suppliers of such services, in the same way as its own services suppliers, and the services they supply”.³

It was eventually decided to conclude an independent protocol covering trade in services. Article 22 of the Treaty of the Southern African Development Community (the “SADC Treaty”) provides the legal basis for the conclusion of protocols and sets out the modalities for their approval, ratification, and entry into force.⁴ The Protocol on Trade in Services was adopted by the Committee of Ministers responsible for trade matters (“CMT”) on 30 July 2009 in Johannesburg, South Africa.⁵

The Protocol on Trade in Services was approved by the SADC Summit on the recommendation of the Council on 18 August 2012 in Maputo, Mozambique⁶.

¹ The Protocol on Trade was opened for signature on 24 August 1996 and entered into force on 25 January 2000. Only the Democratic Republic of Congo (the “DRC”) is yet to accede, although Angola and the Seychelles have not finalized their tariff offers to date. The importance of trade in services for the development of the economies of SADC countries was again recognised by Member States in Article 23(1) of the Protocol on Trade and the further-liberalisation of intra-regional trade in services was one of the stated objectives of the Protocol (Article 2(1)).

² Article 23(2) of the Protocol on Trade. The Seychelles is the only SADC Member State which is not a WTO Member.

³ UNCTAD, *Implementation of SADC Protocols Affecting Trade in Services*, 2006, p. 13.

⁴ Although modalities for signature, ratification, accession, and entry into force tend to be set out in each distinct protocol. It is worth noting that these protocols are *not* integral parts of the SADC Treaty.

⁵ The Protocol on Trade in Services is yet to obtain clearance by the Ministers and/or Attorneys General of the SADC Member States before it can be submitted to the SADC Summit for signature. It is anticipated that it might be opened for signature at the August 2012 SADC Summit in Angola.

⁶ The Protocol was signed on 18 August 2012 by the Heads of State of the Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Seychelles, Swaziland, Tanzania, and Zambia. The Head of State of Botswana signed on 19 September 2012.

2.2 Objectives of the Protocol on Trade in Services

The Protocol on Trade in Services has six stated objectives, all of which support the objectives set out in Article 5 of the SADC Treaty. They are:

- the progressive liberalisation intra-regional trade in services in order to achieve the elimination of discrimination between State Parties and to achieve a liberal trade in services framework with a view to creating a single market for trade in services;
- the promotion of sustainable economic growth and development through regional integration in the area of services;
- the enhancement of economic development, diversification, local, regional and foreign investment in the services economies of the Region;
- enhancing the capacity and competitiveness of State Parties' services sectors;
- the pursuit of services trade liberalisation, while fully preserving the right to regulate and introduce new regulations; and, particularly relevant to the present study,
- ensuring consistency between liberalisation of trade in services and the various Protocols in specific services sectors.⁷

2.3 Scope of the Protocol on Trade in Services

The Protocol on Trade in Services provides that it “shall apply to all measures by State Parties affecting trade in services”,⁸ and like the World Trade Organization’s General Agreement on Trade in Services (“GATS”),⁹ it defines “trade in services” according to four modes of supply:

Mode	Definition and Explanation
Mode 1: Cross-border Supply (Article 3.2(a))	Defined as the supply of a service from the territory of a State Party into the territory of any other State Party, this mode entails the provision of a service across a border without the movement of the supplier.
Mode 2: Consumption Abroad (Article 3.2(b))	Defined as the supply of a service in the territory of a State Party to the service consumer of any other State Party, this mode typically involves a consumer crossing a border to receive a service.
Mode 3: Commercial Presence (Article 3.2(c))	Defined as the supply of a service by a service supplier of a State Party, through commercial presence in the territory of any other State Party. Services are traded through this mode where a service provider supplies services through a business or professional establishment set up in another State Party’s territory.
Mode 4: Presence of Natural	Defined as the supply of a service by a service supplier of a State Party, through presence of natural persons in the territory

⁷ See Article 2 of the Protocol on Trade in Services.

⁸ Article 3(1) of the Protocol on Trade in Services.

⁹ See Article I:2(a)-(d) of the GATS.

Persons (Article 3.2(d))	of any other State Party, this mode covers instances where natural persons enter the territory of another State Party and provide a service therein, or where a service supplier operating through a commercial presence employs personnel from a country other than the host country
-----------------------------	---

Certain measures and certain services are excluded from its scope. The Protocol on Trade in Services stipulates that:

- it applies to measures taken by central, regional or local governments and authorities and non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities.¹⁰
- it does *not* apply to specific measures relating to air transport¹¹ or to “measures affecting natural persons seeking or taking employment in the labour market of a State Party or confer a right of access to the labour market of another State Party”¹²
- “services” include any service in any sector except services supplied in the exercise of governmental authority.¹³
- services purchased for governmental purposes and not with a view to commercial resale or use in the supply of services for commercial sale are *not* covered.¹⁴

Finally, it is worth recalling that Article 1(1) of the Protocol specifies the meaning of “State Party” to be a SADC Member State that has “ratified or acceded to this Protocol”. Accordingly, the disciplines and many of the resulting benefits of the Protocol on Trade in Services—such as most favoured nation treatment—will not extend to Member States (in effect, their services and service suppliers) that do not either ratify or accede to the Protocol.

The following subsections survey the core provisions of the Protocol on Trade in Services: beginning with (i) those general obligations that apply unconditionally across the board to all services (and which cannot be limited); (ii) then those specific commitments that Member States *may* agree to accept in respect of a liberalised services sector or part of a sector (e.g. where they only accept to liberalise certain modes); and (iii) finally the obligations that apply generally and cannot be circumscribed, but for which application is contingent on the sector-specific commitments undertaken.

¹⁰ Article 3(4) of the Protocol on Trade in Services. (See GATS Article I:3(a))

¹¹ See Article 3(2) of the Protocol on Trade in Services. The carve-out relates specifically to measures affecting air traffic rights and services directly related to the exercise of air traffic rights, and is also found in the GATS Annex on Air Transport Services, para. 2.

¹² Article 17(2) of the Protocol. SADC initiatives concerning the labour market are discussed *infra* at paras. 40-42.

¹³ Article 3(5) of the Protocol on Trade in Services. “Services supplied in the exercise of governmental authority” should be understood as services which are supplied neither on a commercial basis, nor in competition with one or more service suppliers. (See GATS Article I:3(b) and (c))

¹⁴ Article 13 of the Protocol relating to government procurement. Cf. GATS Article XIII which only exempts services procured by government from the disciplines of MFN treatment (GATS Article II), market access (GATS Article XVI), and national treatment (GATS Article XVII).

2.4 General obligations

The central unconditional, general obligation, found in Article 4 of the Protocol on Trade in Services, provides that State Parties must adhere to the principle of most favoured nation (“MFN”) treatment¹⁵ by accord- ing immediately and unconditionally to services and service suppliers of any other State Party treatment no less favourable than it accords to like services and service suppliers of any other State Party or third country.¹⁶ The principal exceptions to this obligation of non-discrimination are as follows:

MFN Exemption List: Article 4(5) permits State Parties to maintain measures inconsistent with the MFN principle, provided that those measures are included in an agreed list of MFN exemptions to be an- nexed to the Protocol on Trade in Services¹⁷ from the date that they be- come State Parties. Such listed measures need not necessarily be the result of preferential agreements foreseen in Article 4 (discussed next). For example, they may be listed as a result of historical *de facto* reci- procity of certain preferences/benefits which the State Party listing the exemption does not wish to extend to all State Parties; or as a result of preferences extended on the basis of an international agreement which the listing State Party does not wish to extend to all State Parties.

Preferential Agreements: Article 4 foresees three types of preferential agreements that could be exempted from the obligation to extend MFN treatment to State Parties of the Protocol. The conditions to be met for exemption under Article 4 vary for each type of agreement. First, State Parties may enter new preferential agreements with other State Parties “in accordance with the objectives in [the] Protocol”.¹⁸ Second, subject to certain requirements of prior-notification, State Parties may enter into new preferential agreements with third countries. Such agreements must be “in accordance with Article V of GATS”¹⁹ and cannot “*impede or frus- trate the objectives of [the] Protocol*”.²⁰ Third, State Parties may maintain

¹⁵ This principle of non-discrimination is enshrined in the WTO covered agreements and, specifical- ly, in GATS Article II. In the SADC framework, the MFN principle is also contained in Article 28 of the Protocol on Trade.

¹⁶ Article 4(1) of the Protocol on Trade in Services.

¹⁷ GATS Article II:2 also provides for such a list of MFN-exemptions. Similar to paragraphs 3-6 of the GATS Annex on Article II Exemptions, Article 4(4) of the Protocol on Trade in Services specifi- cally foresees the eventual elimination of these exemptions by providing that the Trade Negotiating Forum (“TNF”) in Services “shall regularly review MFN exemptions, with a view to determining which MFN exemptions can be eliminated.” However, the GATS Annex is more detailed in that it provides, *inter alia*, a timeframe for when these exemptions must be reviewed (para. 3); for the addition of new exemptions (para. 2); that exemptions should (in principle) not exceed 10 years (para. 6). The Protocol on Trade in Services is less detailed with regard to the modalities for maintaining and terminating MFN exemptions. For example, it does not set any time-limit for the termination of these exemptions or any precise timeframe for their review.

¹⁸ Article 4(2) of the Protocol on Trade in Services. The exercise of this right to enter such agree- ments is also conditional on “[o]ther State Parties [being] afforded reasonable opportunity to negoti- ate the preferences granted therein on a reciprocal basis”.

¹⁹ Article 4(3) of the Protocol on Trade in Services. Article V of the GATS permits WTO Members to enter agreements liberalising trade in services, provided that the conditions set out therein are met. For example, in order for preferential agreements to qualify under GATS Article V it must adhere to requirements regarding sectoral coverage, non-discrimination in the sense of national treatment in the sectors liberalised, and the prohibition against raising external barriers to trade. (See GATS Articles V:1 and V:4)

²⁰ Article 4(3) of the Protocol on Trade in Services. (emphasis added)

any preferential agreements with “third parties” which existed prior to the adoption of the Protocol.²¹

Therefore, the conditions that must be met for agreements to come within Article 4 vary in stringency depending on the type of agreement. Pre-existing agreements with non-State Parties (third type) are subject to the least stringent conditions. It would appear that the conditions attaching to new preferential agreements between third countries and State Parties (second type) might be the most difficult to satisfy. Moreover, in determining the consistency of the first type of agreements (preferential agreements between State Parties), it could be argued that such agreements might fragment the SADC services markets rather than enhance integration towards one single regional services market. However, such agreements could also be said to deepen integration “in accordance with” the objectives of the Protocol. Such agreements can be tools for progressive liberalisation by facilitating variable geometry among State Parties. In contrast, new agreements between non-State Parties and State Parties (second type) must not only meet the requirements of GATS Article V but must *also* not frustrate or impede the objectives of the Protocol. Since the overarching objective of the Protocol is regional integration (indeed Article 2(1) of the Protocol speaks of “creating a single market for trade in services”), it might be difficult to imagine a situation where the second type of agreement would not frustrate the objectives of the Protocol. Finally, it is worth noting that Article 4 does *not* make provision for the maintenance of pre-existing preferential agreements between State Parties to the Protocol on Trade in Services.

The Protocol on Trade in Services also contains other unconditional, general obligations, many of which resemble various obligations that SADC Member States (except the Seychelles) are already bound to adhere to under the GATS. These include:

Transparency-related Obligations: Article 8 sets out various obligations pertaining to the dissemination of information and the publication of a broad array of instruments affecting trade in services.²² State Parties undertake to promptly publish their domestic legal instruments and procedures, as well as international agreements to which they are signatories, where those instruments/agreements relate to matters covered in the Protocol on Trade in Services.²³ State Parties also undertake to designate, within one year from entry into force of the Protocol, enquiry points for the provision of information relevant to matters covered by the Protocol.²⁴ In addition, unlike the GATS which contains no equivalent

²¹ Article 4(4) of the Protocol on Trade in Services. The only condition being a rather vague one that State Parties “shall afford reasonable opportunity to the other State Parties to negotiate the preferences granted therein on a reciprocal basis”.

²² Article 8(4) specifies that these obligations will not require the disclosure of certain confidential information.

²³ Article 8(1) of the Protocol on Trade in Services. This obligation does not apply “in emergency situations”. In addition, under Article 8(2), State Parties undertake to promptly and “at least annually” notify the TNF-Services of new, or modifications to existing, instruments which “significantly affect trade in services covered by its specific commitments under this Protocol”. Specific commitments are explored in the next subsection.

²⁴ Similar to the approach adopted in GATS Article III:4, Article 8(3) of the Protocol confirms that there will be “appropriate flexibility with respect to the time-limit within which such enquiry points are to be established for the disadvantaged economies of the region”. In addition, pursuant to Article 9(2) and 9(3), State Parties accept specific obligations to facilitate the effective and transparent regulation of trade in services by their authorities.

provision, Article 9(1) of the Protocol imposes an obligation of endeavour on each State Party to afford other State Parties an opportunity to comment on any measure that it proposes to adopt.

Monopolies, Exclusive Service Suppliers and Competitive Practices: Broadly stated, State Parties must, *inter alia*, ensure that any monopoly service suppliers and exclusive service suppliers in its territory act in a manner consistent with State Parties' MFN obligations and their specific liberalisation commitments.²⁵ State Parties also agree to adopt or maintain competition laws to proscribe anticompetitive business conduct and to apply such laws so as to avoid the benefits of the Protocol on Trade in Services being undermined or nullified by anticompetitive business conduct; and to take measures to strengthen co-operation between their national authorities with respect to competition policy.²⁶

Promotion of Trade and Investment in Services: State Parties undertake to promote an attractive and stable environment for the supply of services through the development of, *inter alia*, mechanisms for the identification of services business opportunities and for joint investment projects; and model laws and simplified administrative procedures.²⁷ These mechanisms would operate to facilitate intra-regional trade and investment in services. There is no such provision in the GATS. These mechanisms may also operate to create an environment in the SADC region which would attract investment in services from outside the Region.

Progressive Trade in Services Liberalisation: The Protocol on Trade in Services does not in and of itself mandate the liberalisation of any services sector but it provides a legal framework for such liberalisation, and Article 16 requires State Parties to negotiate the liberalisation of six priority services sectors (communication, construction, energy-related, financial, tourism, and transport).²⁸ The first round of negotiations must be concluded within three years of their commencement. Subsequent successive rounds of negotiations will occur at three year intervals and cover almost all services sectors.²⁹

2.5 Obligations upon liberalisation of specific service sectors

The following subsection outlines the undertakings which State Parties accept when they agree to liberalise a given services sector. Like the GATS, the two core commitments which State Parties *may* undertake to abide by when they liberalise a services sector are market access and national treatment. At the outset, it is worth recalling that State Parties are permitted to maintain any limitations on market access or national

²⁵ Article 12 of the Protocol on Trade in Services.

²⁶ Article 19 of the Protocol on Trade in Services.

²⁷ Article 18(1) of the Protocol on Trade in Services.

²⁸ Article 16(2) of the Protocol on Trade in Services.

²⁹ See Article 16(1) and 16(2) of the Protocol on Trade in Services. Coverage of the negotiations will be subject to the carve outs mentioned at para. 10 *supra*. (See Article 3 of the Protocol on Trade in Services) These rounds are also intended to be an opportunity for State Parties who are not parties to preferential agreements (discussed *supra* at para. 13) "to negotiate the preferences granted therein on a reciprocal basis". (See Articles 4(2)-(4) and 16(2) of the Protocol on Trade in Services)

treatment which they have included in their schedule of commitments. The partial liberalisation of a sector, or gradual phasing out of limitations, is a common practice in trade in services agreements, and is explicitly provided for in the SADC Services Protocol.³⁰

Market Access: In services sectors which State Parties commit to liberalise, Article 14 prohibits limitations of various types of numerical restrictions: i.e. on the number of service suppliers; limitations on the total value of service transactions or assets; limitations on the total number of service operations or on the total quantity of service output; limitations on the total number of persons that may be employed; restrictions on or requirements of specific types of legal structures for foreign service suppliers; and ceiling limitations on the participation of foreign capital in the supply of a service.

National Treatment: A State Party which chooses to liberalise specific services sectors, or parts thereof, commits to treating services and service suppliers of any other State Party no less favourably than its own domestic “like” services and service suppliers. Treatment is less favourable where it modifies the conditions of competition in favour of domestic services and service suppliers.³¹ This obligation extends to treatment with regard to entry and establishment of services/service suppliers, as well as post-establishment treatment.

In addition, with respect to *transactions relating to its specific commitments*, State Parties bear a general, conditional obligation not to apply restrictions to current and capital account transactions, into and out of their territories, and Article 20(1) provides an illustrative list of transactions covered. However, there is provision whereby State Parties “in serious balance of payments difficulties, or under imminent threat thereof” may adopt restrictions on transfers and payments relating to services and investment.³² This provision aims to protect the value of commitments.

³⁰ This is provided for in the provisions dealing with market access (Article 14(1)) and national treatment (Article 15(1)) by the inclusion of the important qualifying words: “[i]n those sectors and modes of supply which shall be liberalised [or, where specific commitments are undertaken] pursuant to Article 16” and “subject to any conditions and limitations stipulated in the State Parties’ lists of commitments”. See also Article 15(3).

³¹ See Article 15(3) of the Protocol on Trade in Services.

³² See Article 20 of the Protocol on Trade in Services. The GATS also provides for a similar prohibition of restrictions on current transactions (GATS Article XI.1); although GATS Article XI.2 relating to capital transactions is somewhat different in that it prohibits the imposition of restrictions on “any capital transactions *inconsistently* with its specific commitments regarding such transactions”. (emphasis added) GATS Article XII is an exception to both. However, Article 20(4) allows for the introduction of restrictions for a broader array of reasons than those permitted under the GATS provisions. Specifically, Article 20(4) suggests that State Parties “may delay or prevent a transfer through the equitable, non-discriminatory and good faith application of measures” taken for certain specified purposes. In addition, like footnote 8 to GATS Article XVI:1, footnote 1 to Article 14 (market access) of the Protocol on Trade in Services specifies that where transfers of capital are part of the service being supplied or essential thereto (i.e. Mode 1 and Mode 3 scenarios), and State Parties have committed to liberalising these services, they must allow the related transfers of capital into their territories.

2.6 Policy space

The Protocol also affirms the regulatory autonomy of State Parties in certain respects. For example:³³

The Right to Regulate: State Parties may introduce domestic regulation concerning services and service suppliers “in order to meet national policy objectives” *but* such regulation cannot impair any rights and obligations arising under the Protocol on Trade in Services.³⁴

General Exceptions: Article 10 resembles Article XIV of the GATS. A few differences are that measures that would be otherwise inconsistent with the Protocol on Trade in Services may be justified on the basis of State Parties’ “security interests”,³⁵ and the absence of an equivalent to the GATS Article XIV(d) exception relating to the collection of direct taxes.

2.7 Role of TNF services: the liberalisation agenda

In addition to State Parties’ undertakings, the Protocol also requires the Trade Negotiating Forum in Services (“TNF-Services”) to take a central role with regards to the negotiation of commitments under the Protocol on Trade in Services.³⁶ More specifically, it is required to establish “the necessary steps for the negotiation of an agreement providing for the mutual recognition of requirements, qualifications, licences and other regulations” within two years of the entry into force of the Protocol;³⁷ and to lay the foundation for the establishment of previously discussed mechanisms for the promotion of trade and investment in services.³⁸

³³ Other examples include: Article 11 (Subsidies); Article 21 (Labour Market Integration Agreements); and Article 22 (Denial of Benefits).

³⁴ Article 5(1) of the Protocol on Trade in Services.

³⁵ See Article 10(c)(iii) of the Protocol on Trade in Services which is less defined than GATS Article XIV *bis* pertaining to “Security Exceptions”. There is no separate provision dealing with security exceptions in the Protocol.

³⁶ For example, Article 16(4) of the Protocol states that the TNF-Services must adopt negotiating guidelines for each round of negotiations. Article 24(4) also establishes that the TNF-Services will be responsible for the conduct of negotiations.

³⁷ Article 7(1) of the Protocol. Of course the success of any such agreement is dependent on the State Parties and Article 7.3 imposes obligations of facilitation and co-operation on State Parties in this regard.

³⁸ Article 18(2) of the Protocol. See para. 14 *supra*.

3 OTHER PROTOCOLS CONTAINING PROVISIONS THAT RELATE TO TRADE IN SERVICES

This section explores various SADC instruments which are relevant to trade in services. In surveying these instruments, there is an effort to convey that—unlike the Protocol on Trade in Services—many of the principal provisions impose only obligations of endeavour or co-operation, or apparently strict obligations of result that are “softened” by the fact that they are to be achieved gradually with no specific time-limit set for their fulfilment. Where these instruments provide mechanisms for their implementation, these are described with regard to progress made in implementation to date. Importantly, this section also aims to highlight linkages, synergies, tensions and conflicts that these instruments present with regard to the Protocol on Trade in Services.

3.1 Draft Protocol on the Facilitation of Movement of Persons

As the requirement for ratification by two thirds of SADC Member States has not yet been met, the Draft Protocol on the Facilitation of Movement of Persons (“Draft FMP Protocol”) has not yet entered into force.³⁹ As of July 2011, two thirds of Member States (i.e. nine) had signed the Draft FMP Protocol but only four Member States had ratified it.⁴⁰ Despite having not ratified it, those signatory Member States are obliged under Article 18 of the Vienna Convention on the Law of Treaties (“VCLT”) to “refrain from acts which would defeat the object and purpose” of the Draft FMP Protocol until such a time as their intention not to become a party has been made clear.

3.1.1 Objective

The overarching objective of the Draft FMP Protocol is to “develop policies aimed at the progressive elimination of obstacles to the movement of persons of the Region generally into and within the territories of State Parties.”⁴¹ The rationale underlying this objective is that participation by SADC citizens is central to the process of building the SADC region into an integrated and inter-dependent Community and economy; and this participation is possible only where citizens enjoy freedom of movement, through visa-free entry; residence; and establishment in the territories of Member States.⁴²

³⁹ See Article 22(4) of the SADC Treaty.

⁴⁰ The Draft FMP Protocol was opened for signature on 18 August 2005 and the period for signature will close upon the Protocol’s entry into force. South Africa, Botswana, Swaziland, and Mozambique have signed and ratified. Lesotho, Namibia, Tanzania, the DRC, and Zimbabwe are signatories. Other SADC Member States may become signatories to the Draft FMP Protocol until such a time as it enters into force. Article 36 provides that this Protocol “shall enter into force thirty (30) days after the deposit of the instruments of ratification by two-thirds of the Member States”. This provision might be read as two thirds of the signatory Member States.

⁴¹ Article 2 of the Draft FMP Protocol, which directly recalls the language of SADC Treaty which provides that it will meet its objectives enumerated in Article 5.1 by “develop[ing] policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the people of the Region generally, among Member States”. (Article 5.2.d)

⁴² See Preamble and Article 11.1 of the Draft FMP Protocol.

3.1.2 Freedoms of movement

The Draft FMP Protocol provides for three different freedoms of movement for citizens of its State Parties:⁴³:

- Free entry of citizens into the territory of another State Party, “for a lawful purpose and without a visa, for bona fide visit and in accordance with the laws of the State Party concerned”, for a maximum of 90 days per year
- Permanent and temporary residence in the territory of another State Party
- Establishment and working in the territory of another State Party

It is anticipated that these freedoms of movement will be permitted in incremental phases⁴⁴ in accordance with an agreed timeframe.⁴⁵

Free entry for 90 days

State Parties must take steps, upon the entry into force of the FMP Protocol, to harmonise their laws and administrative practices so as to allow this free entry.⁴⁶ It is worth noting that, while certain provisions describe State Parties’ duty to “*facilitate*”⁴⁷ this free entry, the language of other provisions makes clear that State Parties would be obliged to allow such free entry in accordance with the aforementioned timeframe.⁴⁸

⁴³ Article 3 of the Draft FMP Protocol. As is usual, the benefits of the Draft FMP Protocol will only extend to the citizens of SADC Member States that ratify or accede to it, i.e. “State Parties”. (See Article 1.2 of the Draft FMP Protocol)

⁴⁴ Article 5 of the Draft FMP Protocol. Article 7 suggests that the harmonisation of national laws and regulations will be the key tool to achieving this.

⁴⁵ Interestingly, Article 4 of the Draft FMP Protocol states that this timeframe “shall be determined by the Implementation Framework to be agreed upon *by State Parties six months from the date of signature* of this Protocol, *by at least nine (9) Member States.*” (emphasis and underlining added) As noted previously, there are already nine signatories (including the four Member States which have also ratified). The curious choice of language in this provision renders its meaning unclear. Article 1 of the Draft FMP Protocol defines “State Party” as “a Member State that has ratified or acceded to [the] Protocol”; note, however, that the FMP Protocol would have to enter into force in order for these “Member States” or “State Parties” to be “parties” to the protocol (in the sense of Article 2(1)(g) of the VCLT). Article 4 appears to suggest that, within six months from the signing of the Draft FMP Protocol by nine “Member States”, “State Parties” then existing (irrespective of how many they number) should agree on an Implementation Framework. Nine Member States have signed the Draft FMP Protocol, thereby confirming their intention to be bound by the Draft FMP Protocol’s provisions. Four of those nine Member States have also expressed their consent to be bound (they are “State Parties” in the sense of Article 1 of the Draft FMP Protocol), but *none of the nine* is a “party” to the FMP Protocol/none is bound by its provisions since the Draft FMP Protocol is not in force (this requires ratification by two thirds of Member States, according to Article 30). The confusing language of this provision is further exacerbated by the incorrect use of “State Parties” in Article 34, which provides: “This Protocol shall be *signed* by the duly authorized representatives of *State Parties.*” (emphasis added) Accordingly, the meaning of Article 4 remains obscure and recourse could be had to supplemental means of interpretation in order to confirm its meaning. (See Article 32 of the VCLT) One might imagine that the intention of the negotiators was that *nine Member States* would agree on this Implementation Framework. This would have ensure that the number of Member States necessary for ratification could focus on progressing the objectives of the Draft FMP Protocol without having to wait for entry into force. This might also have given those Member States a sense of ownership over the direction of the Draft FMP Protocol so as to encourage them to ratify. Once the FMP Protocol enters into force, however, such recourse would be of little practical benefit given that there will necessarily be at least nine State Parties which could develop an implementation framework.

⁴⁶ Article 13(a) of the Draft FMP Protocol. Article 13 contains the steps that State Parties agree to take for implementation purposes.

⁴⁷ Article 3 of the Draft FMP Protocol. (emphasis added) See also Article 11.

⁴⁸ See, e.g., Article 13: “State Parties hereby *agree to take steps* to achieve...” and Article 14 “State Parties *agree to ensure...*” (emphasis added)

This right for visa-free admission would not appear to extend to persons entering for work or business purposes, given the ordinary meaning of the terms of Article 14 (which elaborates on the visa-free admission) in their context. Article 14 repeatedly employs the word “visitor”. The ordinary meaning of “visitor” suggests that this level of free movement was intended for persons entering another State Party’s territory socially or as a tourist.⁴⁹ This interpretation is confirmed by the conditions for visa-free admission which require, *inter alia*, “visitors” to have evidence of sufficient means for the duration of the “visit”.⁵⁰

It is of note that, on the basis of a web of bilateral agreements concluded between them, the majority of Member States (all except Angola and the DRC) allow for such visa-free admission to tourists which are SADC citizens.⁵¹

Permanent or temporary residence

The Draft FMP Protocol defines “residence” as “permission or authority *to live* in the territory of a State Party in accordance with the legislative and administrative provisions of that State Party.”⁵² Under the Draft FMP Protocol, State Parties commit to granting residence permits. However, the issuance of residence permits remains subject to the laws of the State Party to which the application is made.⁵³ This contrasts with State Parties’ obligation to grant visa-free admission once certain conditions set out in the Draft Protocol are met. This means that State Parties can set out the formalities and conditions to be met for the granting of residence permits. Nonetheless, the Draft Protocol obliges them to ensure, pursuant to Article 17.3, “that the processing of [applications for residence] is not unduly delayed”.

Whether a “residence permit” entails the possibility of working in the host Member State may depend on its domestic law and its classification of residence/work permits. The immigration laws of SADC Member States currently vary and it is conceivable that some “residence permits” may allow holders to work. The Draft FMP Protocol does not demand harmonisation of requirements for obtaining permits, or of the conditions attaching to them.⁵⁴ The provisions of the Draft FMP Protocol merely seek

⁴⁹ An ordinary meaning of “visitor” is “one who visits a place, country, etc., esp. as a sightseer or tourist. (*The Oxford English Dictionary, Vol. XII, V-Z*, Clarendon Press, 1978, p. 256) Moreover, Article 1 of the Tourism Protocol (which entered into force three years before the Draft FMP Protocol was opened for signature) provides some guidance on the meaning in its context. Article 1 defines “visitor” as “any person traveling to a place other than that of his/her usual environment for less than 12 months and whose main purpose of trip is other than the exercise of an activity remunerated from within the place visited”. (Related treaties may assist in contextual interpretations in accordance with Article 31(1) of the VCLT.)

⁵⁰ Other conditions set out in Article 14.2 include: (a) the possession of a valid travel document; (b) visitor is not a prohibited person in the host State; (c) entry through an official port of entry; (d) a limit of 90 days annually with the “right [of visitors] to apply for the extension of such period if a longer stay is deemed necessary subject to the laws of the State Party concerned.” This interpretation is also confirmed by an UNCTAD report that suggested such free entry was not for service providers. (See UNCTAD, above n 3, footnote 24)

⁵¹ See RETOSA, *Final Study Report on the Identification of Bottlenecks to Free Trade in Tourism Services in Southern Africa*, p. 49. Other Member States reciprocate by requiring citizens of Angola and the DRC to apply for visas. However, citizens of Namibia are exempted of this requirement by Angola; as are Zimbabweans exempted by the DRC.

⁵² Article 16 of the Draft FMP Protocol. (emphasis added)

⁵³ See generally Article 17 of the Draft FMP Protocol.

⁵⁴ Although Article 7 of the Draft FMP Protocol states State Parties “shall ensure that all relevant national laws, statutory rules and regulations are in harmony with and promotive of the objectives of [the] Protocol”, there is no requirement for harmonisation among State Parties.

to ensure that State Parties' legal systems make residence permits (and work permits, discussed next) *available*, but State Parties may maintain domestic laws on when and how to grant these permits.⁵⁵

Establishment (working)

The third freedom of movement entails the authorisation to “establish” in the territory of another State Party. “Establishment” encompasses permission for the “exercise of economic activity and profession either as an employee or a self-employed person; [and] establishing and managing a profession, trade, business or calling”.⁵⁶ State Parties must allow for the granting of permits to this effect. As with the second freedom of movement, “permission for the establishment” is granted according to the host State Party’s “national laws”.⁵⁷ While it is not specifically stated, one might assume that permission for establishment includes permission to reside and that it is not necessary for persons to be granted two separate permits. However, it is not clear from the Draft Protocol that this is necessarily so. As long as State Parties grant permits for “establishment” as defined above, they discharge their duty under Article 19 of the Draft Protocol. It is conceivable, however, that Member States’ domestic law provides that a grant of an establishment permit includes a right to reside.

3.1.3 Overview of the draft FMP Protocol and its relationship with the Protocol on Trade in Services

The Draft FMP Protocol sets out a framework for facilitating the movement of SADC citizens by setting out steps all State Parties must take, such as: the harmonisation of laws; the standardisation of immigration forms; and the establishment of a separate “SADC DESK” at major ports of entry between State Parties.⁵⁸ As regards any conferral of rights, the Draft FMP Protocol only assures citizens of visa-free admission for a time-limited visit (i.e. the first freedom) and that they have the possibility of obtaining residence and establishment permits. The latter two freedoms of movement are guaranteed in the Draft Protocol but remain subject the conditions attaching them as set out in State Parties’ domestic laws. In requiring that it be possible to obtain residence and establishment, the provisions relating to the granting of permits (both residence and establishment) do not specify the duration for which permits should be granted. However, it appears from Article 3(b)—which sets out the specific objectives of the Draft FMP Protocol—that both permanent and temporary residence rights/permits are intended.⁵⁹ Given the purpose

⁵⁵ The Draft FMP Protocol does seek to impose some disciplines on unreasonable expulsion, and thus circumscribes State Parties’ discretion in that regard. For example, Article 22 offers the assurance that no citizen or their family member, who has been permitted residence/establishment may be expelled from the host State except in certain circumstances. (See also Articles 23-25 on expulsion)

⁵⁶ Article 18 of the Draft FMP Protocol.

⁵⁷ Article 19 of the Draft FMP Protocol. Similarly, as with permission to reside, the “rights and privileges” enjoyed by the SADC citizen during the stay in the host State Party are determined by the law of the latter. (See Article 20)

⁵⁸ Article 13 of the Draft FMP Protocol. To date, Mozambique, Namibia, Tanzania and Zambia have introduced SADC counters at their arrival and departure points.

⁵⁹ Article 3(b) states that the Draft FMP Protocol seeks to facilitate “permanent and temporary residence in the territory of another State Party”. (emphasis added) In this regard, it is worth noting that while there is a general prohibition on expulsion once a person has been permitted residence or establishment, Article 22(b) also provides that a person may be expelled where “an important essential condition of the issue or validity of such person’s residence or establishment permit has

for which establishment permits may be granted, it seems logical that a temporal limit would not be applied to their granting.

The movement of natural persons is important to trade in services. With the exception of Mode 1, all other modes of supply defined in the Protocol on Trade in Services may involve the movement of natural persons as either service suppliers or service consumers. Accordingly, the Protocol on Trade in Services contains a provision on the *temporary* movement of “natural persons”—which does not appear to be confined to SADC citizens as is the case with the Draft FMP Protocol.⁶⁰ It reads:

Nothing in this Protocol shall prevent a State Party from applying its laws, regulations and requirements regarding entry and stay, work, labour conditions, and establishment of natural persons *provided that, in so doing, it does not apply them in a manner as to nullify or impair the benefits accruing to another State Party* under the terms of a specific provision or specific market access or national treatment commitment under this Protocol.⁶¹

Movement of persons as addressed in the two draft FMP and the Protocol on Trade in Services

A concern therefore arises to ensure that the framework contemplated in the Draft FMP Protocol is not in conflict with this provision, as it applies to SADC citizens. The focus of the Protocol on Trade in Services is the treatment of services and service suppliers. Therefore, it is reasonable to assert that the article quoted above is aimed at ensuring that treatment of Mode 4 service suppliers as to entry and stay, work, labour conditions, and establishment will not give rise to nullification or impairment of benefits.⁶² Given that the third freedom under the Draft FMP Protocol (and potentially the second freedom) may concern persons who would be considered Mode 4 service suppliers under the Protocol on Trade in Services, these aspects of the two protocols concern the same subject matter.

The Draft FMP Protocol confers on State Parties a right to regulate the entry and stay of persons (who may be service suppliers) in accordance with their domestic laws. The Protocol on Trade in Services also allows State Parties this right to regulate but *on the condition* that, in applying their domestic laws, State Parties do not nullify or impair the benefits of another State Party. State Parties can take action compatible with both protocols—by abiding by their specific commitments and their obligation under Article 17 of the Protocol on Trade in Services (quoted at para-

ceased to exist or cannot be fulfilled or complied with any longer”. One might imagine a situation where the duration of a permit might constitute such an essential condition of validity.

⁶⁰ While “juridical person” is confined to those of SADC Member States, nothing in Article 1 of the Protocol on Trade in Services implies that “natural persons” should be limited to SADC nationals. Indeed the definition provided for “national” would appear to confirm this —“a natural person who is a national of one of the State Parties”—by highlighting that “nationals” are a specific subset of “natural persons”.

⁶¹ Article 17(1) of the Protocol on Trade in Services. (emphasis added)

⁶² Admittedly, a Mode 2 supply of service is also contingent on a service consumer’s entry into the territory of another State Party. It is imaginable that a State Party’s immigration policies might deter the entry of service consumers into their territory. However, this deterrence of potential service consumers would not be covered by the obligations of the Protocol on Trade in Services, which establishes rights for service suppliers, but not service consumers.

graph 30 *supra*).⁶³ Therefore, the provisions of the Protocol on Trade in Services and the Draft FMP Protocol do not present a conflict of obligations because it is possible for a State Party to both protocols to apply its domestic laws in a manner that is consistent with both. Indeed, it is the established principle of *pacta sunt servanda*, codified in Article 26 of the VCLT, that might be relied upon to require State Parties to act in a manner that is *both* consistent with the Protocol on Trade in Services and the Draft FMP Protocol. Therefore, State Parties to both protocols should ensure that their domestic laws are consistent with *all* treaty obligations.

If a State Party's domestic laws were found to be inconsistent with of its specific commitment(s) as regards Mode 4 service suppliers under the Protocol on Trade in Services, that State Party could not rely on the Draft FMP Protocol as a defence (i.e. by arguing that it had the right under the latter to apply its national laws with regards to the granting of permits). Indeed, the dispute settlement provisions of the Protocol on Trade in Services only apply to the examination of disputes arising under the State Parties' rights and obligations *under that protocol*.⁶⁴

Treatment of persons permitted entry: Expulsion

As for the treatment of natural persons post-establishment/entry, State Parties will be bound by their commitments under both protocols. It is worth recalling whether State Parties owe such commitments under the Protocol on Trade in Services depends what they have undertaken. Under the Protocol on Trade in Services, Mode 4 service suppliers do not automatically have access to the markets of another State Party—but only in those sectors inscribed in the schedule of the relevant State Party, and subject to the qualifications listed therein. On the contrary, the commitments in the Draft FMP Protocol do not require that State Parties specifically assume them. They apply once the timeframe for implementation of the Draft FMP Protocol (mentioned *supra* at paragraph 22) so provides.

There is some overlap in the treatment demanded of State Parties to both protocols. Article 17 of the Protocol on Trade in Services permits State Parties to apply their domestic laws as to the *stay* of natural persons as long as the application of those laws does not nullify or impair the benefits of another State Party. The Draft FMP Protocol sets out a more narrow prohibition on the expulsion of natural persons (which would include service suppliers). It is reasonable to assert that expulsion of Mode 4 service suppliers is an action that would be *generally* prohibited under the Protocol on Trade in Services on the basis that it would nullify and impair benefits.

Both protocols also set out specific circumstances in which State Parties may legitimately derogate from these general obligations not to expel/nullify or impair benefits. These circumstances are not identical and therefore the rights and obligations of State Parties under the respective protocols differ but it is possible for State Parties to act in a manner compatible with both protocols. The exceptional circumstances in which a State Party may expel a natural person (service supplier) are as fol-

⁶³ In order to take action compatible with both protocols, this may mean that State Parties would decline to make use of their right under the Draft FMP Protocol to apply their domestic laws as they wish with regards to the granting of permits.

⁶⁴ See Article 1 of Annex 1 to the Protocol on Trade in Services

lows: (a) where “reasons of national security, public order or public health of the host State so dictate”; (b) an essential condition of validity of the person’s permit can no longer be fulfilled; (c) the person acts contrary to the conditions attaching to the permit; or (d) “the person refuses to comply with a lawful order of an appropriate public health authority issued for the protection of public health in circumstances where the consequences of such refusal have been explained”.⁶⁵

As discussed at paragraph 17 *supra*, the Protocol on Trade in Services also provides that State Parties may maintain measures otherwise inconsistent with their specific commitments for certain specified objectives (“general exceptions”). Some of the exceptional grounds justifying otherwise inconsistent measures under the Protocol on Trade in Services recall those set out as grounds for expulsion in the Draft FMP Protocol—e.g. where such measures are necessary for the maintenance of public order and essential security interests;⁶⁶ or for the protection of human, animal or plant life or health;⁶⁷ or “to secure compliance with laws or regulations which are not inconsistent with the provisions of [the Trade in Services] Protocol”.⁶⁸ There are other exceptional grounds set out in the Protocol on Trade in Services which find no reflection in the Draft FMP Protocol, perhaps the most relevant for the purposes of expulsion being the justification of otherwise inconsistent measures as necessary to protect public morals.⁶⁹

Despite this subject matter overlap and the fact that one can perceive the attainment of certain similar legitimate objectives as the foundation for such derogations under both protocols, it would be more difficult to justify otherwise-inconsistent measures (such as expulsion) under the Protocol on Trade in Services. This is because, in addition to the measures coming within one of the listed exceptions set out in Article 10, they must be “necessary” for the attainment of the legitimate objective in question.⁷⁰ Moreover, the chapeau of Article 10 indicates that these otherwise inconsistent measures cannot be protectionist—i.e. they cannot be applied in a discriminatory manner (a requirement of even-handedness) or represent “a disguised restriction on trade in services”. The higher threshold to be met in order to satisfy the exceptions under the Protocol on Trade in Services can be understood on the basis that its application to the movement of persons is of narrower scope than the Draft FMP Protocol—and it only applies where Member States have made specific commitments in negotiations with other Member States.

Accordingly, while the Draft FMP Protocol sets out certain circumstances in which expulsion is permitted, State Parties to the Protocol on Trade in

⁶⁵ Article 22 of the Draft FMP Protocol. Article 23 then sets out the modalities for how such orders of expulsion should be made, including the requirement to consult with the State Party of the affected person. Article 25 also provides certain principles governing expulsion (including the requirement to provide notice and the right to have the expulsion order reviewed by the domestic courts/tribunals) which apply in all circumstances except those envisaged in Article 22(a) (where national security, public order or public health is at issue).

⁶⁶ Article 10(a) of the Protocol on Trade in Services.

⁶⁷ Article 10(b) of the Protocol on Trade in Services.

⁶⁸ Article 10(c) of the Protocol on Trade in Services.

⁶⁹ Article 10(a) of the Protocol on Trade in Services.

⁷⁰ I.e. there should be no reasonably available less trade restrictive alternative.

Services would need to meet the more stringent requirements of Article 10 for such expulsion to be permitted under the latter.

3.2 Charter of Fundamental Social Rights and the draft Protocol on Employment and Labour

The SADC Charter of Fundamental Social Rights (the “Charter”) was opened for signature and entered into force on 26 August 2003.⁷¹ The Charter seeks to facilitate, through discussion and information sharing among Member States, *inter alia*, programmes which “contribute to the creation of productive employment opportunities”; the promotion of “labour policies, practices and measures, which facilitate labour mobility”; and the “development of institutional capacities as well as vocational and technical skills in the Region”.⁷² Member States affirm their commitment to certain human rights and labour conventions under the Charter. Member States agree to endeavour to, *inter alia*, ensure social security and improve working conditions (such as equitable wages and study leave). On the basis of the Charter, codes and guidelines on health and workplace safety; social security; child labour; and HIV have been developed.

Using this Charter as a foundation, a Draft Protocol on Employment and Labour is being prepared which will replace the Charter. This Draft Protocol will seek to, *inter alia*, promote employment opportunities (including for vulnerable persons) and improve labour conditions (in accordance with international standards). Like the Charter, the draft protocol will encourage the harmonisation of employment and labour (and related) laws and policies. There is a focus on migration which is absent from the Charter. The Draft Protocol will promote the creation of a regional framework conducive to labour migration by requiring domestic action on matters including the facilitation of the movement of persons, the portability of social security benefits,⁷³ the protection of migrant rights, and systems for sharing regional labour market information. The Draft Protocol will likely establish institutional arrangements dedicated to its implementation, something which the Charter did not do.

Since the Protocol on Trade in Services explicitly provides that its provisions do not extend to measures concerning persons seeking access to the labour market of another State Party,⁷⁴ it may be unlikely that a conflict will arise between these instruments. It may be, however, that the eventual implementation of the Draft Protocol on Employment and Labour will indirectly complement trade in services liberalisation by creating an environment that would facilitate the movement of workers which service suppliers may employ.

⁷¹ Article 17 of the Charter provided that it would enter into force “upon signature by Member States”. As at July 2011, the Seychelles, Angola, Botswana and Madagascar had not signed the Charter. The Charter does not state how long it would remain open for signature or make any provision for accession.

⁷² Article 2 of the Charter.

⁷³ Currently social security benefits are not easily transferable when a person moves from one SADC state to another.

⁷⁴ See Article 17(2) of the Protocol on Trade in Services.

3.3 Protocol on Finance and Investment

The Protocol on Finance and Investment (“FIP”) was opened for signature on 18 August 2006 and entered into force on 16 April 2010.⁷⁵

3.3.1 Objective

Article 2.1 of the FIP sets out its principal objective, which is to “foster the harmonisation of the financial and investment policies of the State Parties in order to make them consistent with objectives of SADC and ensure that any changes to financial and investment policies in one State Party do not necessitate undesirable adjustments in other State Parties.” This is to be achieved “through facilitation of regional integration, co-operation and co-ordination within finance and investment sectors” with the aim of diversifying and expanding the “productive sectors of the economy” and enhancing trade in the Region in order to “achieve sustainable economic development and growth and eradication of poverty”.⁷⁶

3.3.2 Coverage

The FIP has a broad scope of coverage relating to State Parties’ financial and investment policies, and macroeconomic policies more generally. State Parties to the FIP undertake various types of obligations (e.g., “hard” obligations of result; obligations of co-operation; obligations of best endeavour) in these areas in order to achieve the overarching objective of fostering harmonisation of financial and investment policies. For example, the more defined obligations include: co-operation on investment;⁷⁷ attainment of macroeconomic convergence;⁷⁸ co-operation in taxation and related matters;⁷⁹ co-operation and coordination of exchange control policies;⁸⁰ harmonisation of legal and operational frameworks (of central banks);⁸¹ co-operation on payment, clearing and settlement systems;⁸² co-operation in the area of information and communication technology amongst central banks;⁸³ co-operation and coordination in the area of banking regulatory and supervisory matters;⁸⁴ co-operation in respect of development finance institutions;⁸⁵ co-operation on non-banking financial institutions;⁸⁶ and co-operation in SADC stock

⁷⁵ As of July 2011, six SADC Member States had yet to accede to the FIP, namely, the DRC, Madagascar, the Seychelles, Swaziland, Tanzania and Zimbabwe. There has been some debate over whether the necessary number of ratifications for entry into force has been reached. Article 29 requires ratification by two thirds of Member States, namely 9.3 Member States. In sum, the SADC Secretariat takes the position that this number can be rounded down to 9, whereas others believe that 10 ratifications are required. (See Mahnaz Malik, International Institute for Sustainable Development (“IISD”), *Commentary on the Critical Shortcomings in Annex 1 (Co-Operation on Investment) of the SADC Protocol on Finance and Investment*, 24 August 2011, pp. 6-7)

⁷⁶ Article 2(2) of the FIP.

⁷⁷ FIP Article 3 and FIP Annex 1.

⁷⁸ FIP Article 4 and FIP Annex 2.

⁷⁹ FIP Article 5 and FIP Annex 3.

⁸⁰ FIP Article 6 and FIP Annex 4.

⁸¹ FIP Article 7 and FIP Annex 5.

⁸² FIP Article 8 and FIP Annex 6.

⁸³ FIP Article 9 and FIP Annex 7.

⁸⁴ FIP Article 10 and FIP Annex 8.

⁸⁵ FIP Article 11 and FIP Annex 9.

⁸⁶ FIP Article 12; and FIP Annex 10.

exchanges.⁸⁷ Moreover, the FIP also includes some obligations which remain less defined, for example those relating to: co-operation with regard to anti-money laundering;⁸⁸ and the establishment of a project preparation and development fund.⁸⁹ Finally, it is of note that, as an agreement built primarily on co-operation, the FIP also includes a catch-all obligation for State Parties to co-operate on any matters affecting finance and investment which are not addressed in the FIP.⁹⁰

3.3.3 Architecture of the FIP

The structure of the FIP is as follows: It consists of an anchor text and many annexes which form integral parts of the Protocol. Article 2 of the anchor text lists 14 specific goals for the achievement of its objectives,⁹¹ most of which are framed as substantive obligations on State Parties later in the FIP anchor text. Many of these obligations are in turn given greater definitional content in the annexes to the FIP which contain specific obligations and modalities for the obligations which are broadly-stated in the anchor text.⁹²

3.3.4 Substantive provisions of the FIP: A focus on linkages with the Protocol on Trade in Services

The FIP (including its annexes) provides for a broad range of consultative mechanisms among State Parties' authorities relevant to bringing about meaningful convergence in regulatory activities so as to ensure stability in the finance and investment fields. The FIP does not include provisions to ensure market access to State Parties' services sectors, which is one of the main objectives of the Protocol on Trade in Services. Therefore, the two are complementary. Stability in finance and investment structures (as envisaged by the FIP) is fundamental to integration in the services area and the attraction of service suppliers. Similarly, the liberalisation of services sectors enhances private sector participation therein, and the attraction of such service suppliers can be tantamount to the attraction of investment.

In order to appreciate the legal linkages operative between the Protocol on Trade in Services and the FIP, it is necessary to examine the FIP Annexes which contain the more detailed obligations. The following table summarises the principal provisions and overlap between both the FIP and the Protocol on Trade in Services, which are explored in more detail below.

⁸⁷ FIP Articles 13 and 14; and FIP Annexes 10 and 11.

⁸⁸ FIP Article 15.

⁸⁹ FIP Article 16.

⁹⁰ FIP Article 25.

⁹¹ Article 2(2)(a)-(n) of the FIP.

⁹² The following example illustrates this structure: Article 2(2)(a) lists one of the goals as the promotion and attraction of investment in the Region through the creation of a favourable investment climate. Article 3 of the FIP then sets out State Parties' substantive obligation to "co-ordinate their investment regimes" and co-operate to create such a favourable investment climate "as set out in Annex 1". As we will see below, Annex 1 titled "Co-operation on Investment", in turn contains the specific obligations which State Parties undertake for the attainment of such a favourable investment climate. Articles 2(2)(m) and (n) place obligations on State Parties to co-operate with regard to anti-money laundering (Article 15) and to establish a Project Preparation and Development Fund (Article 16), but neither are not further-expanded upon in any annex to the FIP.

Table 2: Obligations and Overlap: Protocol on Trade in Services and the FIP	
<u>Protocol on Trade in Services</u> (obligations owed to State Parties' services / service suppliers)	<u>FIP</u> (obligations owed to all investors / investments)
Article 16 (obligation to negotiate liberalisation of services sectors)	No equivalent
No direct equivalent	Article 6(1) of Annex 1 (non-contingent obligation to afford fair and equitable treatment ("FET"))
Article 4 (relative obligation to afford MFN treatment except where an exemption is listed or a permitted preferential agreement exists)	No direct equivalent; however Article 6(2) of Annex 1 requires that the FET afforded to investors of State Parties should not be "less favourable than that granted to investors of the third State". Thus, it introduces an MFN dimension to the accordence of FET.
Article 14 (specific commitments to allow market access—optional undertaking)	No equivalent [only protections once investment admitted]
Article 15 (specific commitments for national treatment—optional undertaking)	No equivalent
No direct equivalent	Article 5 of Annex 1 (obligation not to expropriate)
Article 20 (where specific commitments made, free transfer of funds except in specified circumstances)	Articles 9 and 15(2) of Annex 1 [broader coverage but subject to domestic laws] & Article 3 of Annex 4 [seeks exchange control convergence]
Article 17 (movement of persons: where specific commitments made cannot nullify/impair benefits by applying domestic laws)	Article 11 of Annex 1 (movement of persons: merely subject to domestic laws)
Article 18(1)(a) (promotion of business opportunities)	Article 3 of Annex 1 (promotion of business opportunities)

Annex 1 to the FIP on Co-operation in Investment and the Protocol on Trade in Services

Synergy expressly recognised: Textual link

Both the Protocol on Trade in Services and Annex 1 to the FIP confirm the important link between trade and investment. We recall that Article 18 of the Protocol on Trade in Services seeks the promotion of an “attractive and stable environment for the supply of services”. Moreover, Article 18(2) explicitly foresees that mechanisms for such promotion will leverage the “mechanisms and initiatives carried out under other SADC Protocols, such as the Finance and Investment Protocol”. Annex 1 to the FIP also acknowledges this link by declaring that State Parties will pursue “trade openness” and reduce barriers to trade in light of the importance of investment.⁹³

Synergy in goals and substantive disciplines imposed

The goals of both FIP Annex 1 and the Protocol on Trade in Services are mutually-supportive. While the former is primarily focused at creating an environment which attracts investment, this investment may come in the form of “trade in services” (as defined by the Protocol on Trade in Services) and the treatment of such investment once admitted would then be subject to the disciplines contained in both instruments.

The most substantial overlap arises where a service supplier of a State Party supplies a service through its commercial presence in the territory of any other State Party (i.e., Mode 3 in the Protocol) because this establishment of commercial presence constitutes an “investment” for the purposes of Annex 1 to the FIP.⁹⁴ Therefore, *once this presence is established, or investment is made*, service suppliers/investors will benefit from MFN treatment pursuant to Article 4 of the Protocol on Trade in Services as well as the general (but qualified) prohibition on expropriation and nationalisation (Article 5 of FIP Annex 1) and fair and equitable treatment to service suppliers/investors (Article 6 of FIP Annex 1).

The requirement to afford investments and investors fair and equitable treatment refers to a “non-contingent” or “absolute” standard widely seen in international investment law, which refers to specific circumstances, as opposed to “relative” standards such as MFN treatment embodied in the Protocol on Trade in Services.⁹⁵ Standards are relative where the

⁹³ Article 18 of Annex 1 to the FIP.

⁹⁴ An examination of the two different definitions demonstrates this overlap: Article 1(2) of FIP Annex 1 defines “investment” as “the purchase, acquisition or establishment of productive and portfolio investment assets, and in particular, though not exclusively, includes: (a) movable and immovable property and any other property rights such as mortgages, liens or pledges; (b) shares, stocks and debentures of companies or interest in the property of such companies; (c) claims to money or to any performance under contract having a financial value, and loans; (d) copyrights, know-how (goodwill) and industrial property rights such as patents for inventions, trademarks, industrial designs and trade names; (e) rights conferred by law or under contract, including licenses to search for, cultivate, extract or exploit natural resources[.]” According to Article 1 of the Protocol on Trade in Services, “Commercial presence” means: “(i) In respect of nationals, setting up, acquiring and managing undertakings, which they effectively control in the territory of a State Party for the purpose of supplying a service[.] (ii) In respect of SADC juridical persons, taking up, acquiring and pursuing the economic activities covered by this Protocol, including by means of the setting up and managing of subsidiaries, branches or any other form of secondary establishment in the territory of a State Party for the purpose of supplying a service”.

⁹⁵ National treatment is another example of a relative standard found in the Protocol on Trade in Services. Unlike MFN treatment, State Parties must specifically commit to extending national treatment.

treatment which they require is defined by reference to the treatment accorded to other like services or service suppliers. A rich literature on the meaning of “fair and equitable treatment” exists and demonstrates the challenges attached to interpreting this term (which has been the most successful basis for claims under international investment agreements). It is not clear whether the fair and equitable treatment clause contained in Article 6 of FIP Annex 1 should be interpreted: (1) as the minimum standard of treatment to be afforded to aliens under customary international law; or (2) in its context and in light of the FIP’s object and purpose, as a potentially higher standard.⁹⁶ The addition, in Article 6(2), to the effect that such treatment “shall be no less favourable than that granted to investors” of any state which is not a State Party to the FIP—which thereby introduces a relative MFN aspect to determining the fair and equitable standard of treatment—may have a role in determining its meaning.

In addition to these obligations of general applicability, when State Parties to the Protocol on Trade in Services liberalise Mode 3 supply of services in specific services sectors, persons constituting SADC investors/service suppliers will also benefit from the State Parties’ specific commitments, e.g. market access guarantees and/or national treatment, and the contingent rights of free transfer.⁹⁷ Therefore, whereas the FIP also does not provide investors with a right to have their investments admitted by State Parties to the FIP—but does require certain standards of treatment to investments and investors once admitted—in services sectors for which State Parties to the Protocol on Trade in Services liberalise Mode 3 supplies of services, service suppliers of other State Parties to this Protocol will have a right to establish a commercial presence to the extent of the agreed liberalisation.

Finally, we recall that, even before the entry into force of the Protocol on Trade in Services, investors into SADC Member States which are also WTO Members already benefit from their multilateral commitments pursuant to the GATS. The parallel application of investment and trade in services rules is not a phenomenon unique to the FIP—the WTO’s multilateral rules on trade in services co-exist with a myriad of bilateral investment treaties (discussed at paragraph 72 below) which typically provide for, *inter alia*, fair and equitable treatment.

The Protocol on Trade in Services’ narrower scope of application

It is worth restating that, under the Protocol on Trade in Services, specific guarantees provided to Mode 3 service suppliers are only extended in those specific services sectors in which a State Party undertakes commitments, whereas the obligations under the FIP apply *prima facie* to all admitted investments.⁹⁸ The scope of the Protocol’s application appears to be much narrower than the FIP. In addition to its *ex ante* exclusion of certain services and measures, Article 1(1) of the Protocol on Trade in

⁹⁶ See Articles 31 (“General rule of interpretation”) and 32 (“Supplementary means of interpretation”) of the VCLT.

⁹⁷ See Article 14 and footnote 1 thereto and Articles 15 and 20 of the Protocol on Trade in Services. These specific liberalisation commitments stand in contrast with Article 2(1) of FIP Annex 1 which merely states that Parties States shall admit investments “in accordance with [their] laws and regulations”.

⁹⁸ Article 1(2) of FIP Annex 1 does allow State Parties to exclude certain harmful investments, specifically “short-term portfolio investments of a speculative nature or any sector sensitive to its development or which would have a negative effect on its economy”.

Services defines a “service supplier” as “any natural or juridical person of a State Party that supplies a service”.⁹⁹ The FIP appears to present a broader definition of “investor” as a “person [either a natural person or a company] that has been admitted to make or has made an investment”.¹⁰⁰ Therefore, the substantive disciplines contained in the FIP appear to apply to all investors and investments irrespective of origin,¹⁰¹ whereas those of the Protocol only benefit SADC Member States (their services and service suppliers) which ratify or accede to it.¹⁰² There appears to be good reason for these differing scopes. Given that Member States retain a right not to admit investors and that the protections of the FIP only apply post-admittance, the broad definition of “investor” seems appropriate. On the other hand, a narrower definition of “service supplier” in the Protocol on Trade in Services may be appropriate in light of the fact that some of its disciplines apply irrespective of specific commitments being made.

One explanation for the differing scope of these instruments might be that the FIP wishes to maximise investments regardless of their origin—thereby seeking to promote an attractive investment climate generally—whereas the Protocol on Trade in Services specifically desires to foster regional integration through trade preferences and thereby provides for deeper and “harder” commitments from State Parties for the benefit of other State Parties.¹⁰³ It is questionable, however, whether the Protocol on Trade in Services’ apparently more restrictive delimitation of service suppliers capable of benefiting from its disciplines makes much of a difference in practice. The Protocol on Trade in Services adopts a liberal rule of origin for “SADC juridical persons” as a “legal entity *set up* in accordance with the laws of a State Party, and engaged in ‘substantial business operations’ in the territory” of a State Party.¹⁰⁴ The definition of “substantial business operations” provides little more by way of requirements that service suppliers must meet in order to qualify for treatment under the Protocol on Trade in Services, simply restating that they are “*inter alia*, operations carried out by an entity *incorporated in*” a State Party and adding only that they must be “licensed by a State Party to provide services”.¹⁰⁵ Therefore, service suppliers/investors which are

⁹⁹ In turn, Article 1(1) defines (a) “SADC juridical person” as “a legal entity set up in accordance with the laws of a State Party, and engaged in ‘substantial business operations’ in the territory of that Member or any other State Party” and (b) “substantial business operations” to include, *inter alia*, “operations carried out by an entity incorporated in and licensed by a State Party to provide services.”

¹⁰⁰ Article 1(2) of FIP Annex 1. See also the definition of “person” and “company” in the same provision.

¹⁰¹ It might be argued that while the definition of “company” as “any entity constituted or organised under the applicable laws of *any State*” implies that the non-SADC investors and investments qualify for treatment under the FIP; when read with the definition of “State entity” as “any agency, department or instrumentality of the Government of a State Party and any corporation, juristic person, institution, undertaking or entity which is directly or indirectly owned or controlled by that State Party” its intended scope may have been more limited. (emphasis added) Nonetheless, the title to Article 6 of FIP Annex 1 confirms that fair and equitable treatment was intended to extend to “Investors of the Third State” (which, according to Article 1(1), means “any state that is not a State Party”).

¹⁰² Indeed Article 22 of the Protocol on Trade in Services makes particular provision for the denial of benefits in this regard.

¹⁰³ It has also been suggested that the FIP’s extension of guarantees to all “investors” regardless of origin was a “drafting oversight”. (Mahnaz Malik, above n 74, p. 12)

¹⁰⁴ Article 1(1) of the Protocol on Trade in Services. (emphasis added)

¹⁰⁵ Article 1(1) of the Protocol on Trade in Services. (emphasis added) The meaning of “substantial business operations” is not yet settled, however, and Article 1(1) provides that it “shall be further developed through negotiations after adoption of [the] Protocol”

wholly-owned subsidiaries of a non-State Party parent company, but incorporated and licensed in a State Party, come within this definition of “SADC juridical person”. Importantly, however, Article 22 of the Protocol on Trade in Services allows for the denial of benefits by the host State Party in certain circumstances, namely where it is established that the service is being provided by an enterprise that (a) “is owned or controlled by persons of a non-State Party” and (b) “has no substantial business operations in the economy of a State Party”.¹⁰⁶

Employment of Personnel

Both instruments envisage the possibility of persons entering another Member State’s territory with respect to the provision of a service. Article 11 of FIP Annex 1 provides that State Parties shall permit, “subject to their national laws and regulations”, investors to engage “key personnel and other necessary human resources of their choice” where (a) the skills required do not exist in the SADC Region; (b) State Parties to the FIP are satisfied that the sourcing of such skills will be in compliance with regional policies; and (c) such sourcing would enhance the development of local capacity through the transfer of skills.

Such sourcing of persons (potentially from outside the SADC Region) is also covered by Mode 4 in the Protocol on Trade in Services, and specific commitments for its liberalisation will be negotiated on a sector-by-sector basis. Where such commitments relating to Mode 4 have been negotiated by SADC Member States under the GATS, they are typically limited to specifically prescribed categories of “key personnel”, but do not allow service suppliers to employ “other necessary human resources of their choice” (as permitted under the FIP). Since Article 11 of FIP Annex 1 subjects the sourcing of such persons to national laws and regulations, it would appear to be of a more programmatic nature.

Similarities between the Protocol’s Mode 4 commitments and Article 11 exist with regard to subjecting entry of foreign personnel to the availability of personnel from the Region. Many specific Mode 4 commitments made under the GATS contain such labour market tests, albeit with a specification that the requisite skills would not be available domestically (rather than in the Region). Finally, the concept of skill transfer as expressed in Article 11(c) of FIP Annex 1 is reflected in numerous GATS Mode 4 commitments of Member States.

¹⁰⁶ Such denial of benefits is “subject to prior notification and consultation”. One might foresee difficulties in denying benefits to a service supplier which a host State Party has already licensed to provide a service (unless there are changes in control/ownership of the service supplier).

Other linkages: Transparency and harmonisation resulting in business opportunities

In addition to some rather patent parallels between the provisions of both the Protocol on Trade in Services and FIP Annex 1,¹⁰⁷ there is a less apparent but strong synergy between both. As mentioned previously, the overarching aims of both FIP (policy harmonisation for the creation of conditions favourable to attracting investment) and the Protocol (creation of an integrated trade in services region) are mutually-reinforcing and this is reflected in various provisions of both instruments. A commitment to promote regional business opportunities and capacities is evident in Article 3 of FIP Annex 1 and Article 18(1)(a) of the Protocol on Trade in Services. Both instruments also seem to recognise that, in order to meaningfully promote business opportunities, there is a need for transparent, effective and expeditious administrative frameworks.¹⁰⁸

Perhaps most importantly, both instruments acknowledge that regional harmonisation of policies and laws would aid the attraction of investment and trade in services in the Region.¹⁰⁹ Since many of the provisions in FIP Annex 1 are framed as obligations of co-operation, it might be expected that the “harder” positive obligations imposed by the Protocol might indirectly progress co-operation in these areas.

Annex 3 to the FIP on Co-operation in Taxation and Related Matters and the Protocol on Trade in Services

The principal linkage between these two instruments is that one of the general exceptions contained in the Protocol on Trade in Services explicitly permits State parties to introduce measures “inconsistent with [the MFN principle contained in] Article 4, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which a State Party is bound, or domestic fiscal legislation.”¹¹⁰ Such agreements are provided for by Article 5(3) of FIP Annex 3 whereby State Parties to the FIP are already required to, collectively, establish “a comprehensive network of agreements for the avoidance of double taxation that will assist in expediting the effective exchange of information, mutual agreement procedures and co-operation amongst themselves.” The stated rationale for the conclusion of such agreements is the encouragement of the movement of capital within the Region, particularly to least developed countries.¹¹¹

Transfers of funds and macroeconomic stability

¹⁰⁷ For example, both Article 5 of the Protocol and Article 14 of FIP Annex 1 affirm State parties’ “right to regulate” in order to achieve public objectives (although the former is explicitly constrained by the fact that such “regulations [must] not impair any rights and obligations” arising under the Protocol on Trade in Services); and both Article 19 of the Protocol and Article 16 of FIP Annex 1 recognise the importance of advancing a competition policy in the Region (although the former contains more specific provisions regarding the enforcement of and co-operation on competition laws).

¹⁰⁸ See FIP Annex 1: Article 2(2) (“The Host State shall facilitate and create favourable conditions to attract investments in its territory through suitable administrative measures and in particular in the matter of expeditious clearance of authorisations in accordance with its laws and regulations”). See also the Protocol on Trade in Services, Article 8 and Article 18(1)(b).

¹⁰⁹ Article 19 of FIP Annex 1; and Articles 9(1) and 18(1)(b) of the Protocol on Trade in Services.

¹¹⁰ Article 10(d) of the Protocol on Trade in Services.

¹¹¹ See Article 17 of FIP Annex 1.

1. Transfers of funds

Article 9 of FIP Annex 1 and Article 20 of the Protocol on Trade in Services also bear some similarities in that they both seek to ensure that investors/service suppliers can make investment- and service-related transfers from the host state. However, except for the fact that it is limited to “transactions covered by commitments”,¹¹² Article 20 is more comprehensive and demands more of State Parties. Whereas Annex 1 merely requires State Parties to “ensure that investors are allowed facilities in relation to repatriation of investments and returns *in accordance with the rules and regulations stipulated by the Host State*”,¹¹³ the Protocol imposes a stricter prohibition on restrictions affecting a much wider array of transactions both out of *and into* State Parties’ territories.¹¹⁴ While this obligation is not absolute, it offers a stronger assurance that neither the home nor the host State Party may frustrate the supply of a service by imposing restrictions on transfers.

A concern regarding speculative investments (which are necessarily accompanied by speculative capital flows) is evident in Article 1(2) of FIP Annex 1—which permits State Parties to exclude such investments. Indeed, while State Parties to the FIP undertake to “*encourage* the free movement of capital”,¹¹⁵ the obligation contained in Article 20 of the Protocol is more concrete but also more targeted by *requiring* the free movement of capital but only for transactions covered by State Parties’ commitments. Furthermore, both provisions anticipate the possibility that Member States may need to regulate the movement of capital in certain circumstances. Whereas FIP Annex 1 allows State Parties broad discretion to do so in rather undefined circumstances¹¹⁶ and merely requires them to “notify the Secretariat for information purposes within a period of three (3) months”,¹¹⁷ the Protocol provides an exhaustive list of circumstances in which restrictions will be permitted¹¹⁸ and emphasises their temporary nature by requiring State Parties not only to “inform all other State Parties forthwith and present, as soon as possible” but also to provide “a timetable for their removal”.¹¹⁹

These different approaches may be explained by the fact that the Protocol seeks to ensure a single trade in services market by ensuring particularly preferential treatment to service suppliers/investors of SADC origin—especially with respect to liberalised services sectors—whereas the aim of the FIP is the wider attraction of investment and, accordingly, provides for undertakings which are more diffused but less deep.

¹¹² Article 20(1) of the Protocol on Trade in Services.

¹¹³ Article 9 of FIP Annex 1. (emphasis added)

¹¹⁴ Furthermore, we recall that footnote 1 to Article 14 of the Protocol requires State Parties which have undertaken specific market access commitments to allow for the free transfer of capital where it is either an integral part of the service or where it is essential to the supply of the service; whereas Article 15 of FIP Annex 1 places (a rather soft) obligation on State Parties to generally “encourage” the free movement of capital.

¹¹⁵ Article 15 of FIP Annex 1. (emphasis added)

¹¹⁶ Article 15(2) of FIP Annex 1: State Parties may regulate “subject to their domestic laws and regulations, when necessitated by economic concerns”.

¹¹⁷ Article 15(3) of FIP Annex 1.

¹¹⁸ For example, the State Parties may impose restrictions for balance of payments purposes (Article 20(2) and 20(3)); and for several other listed legitimate purposes (Article 20(4)).

¹¹⁹ Article 20(3) of FIP Annex 1.

2. Coordination and stability

A number of other FIP provisions are specifically aimed at promoting a common policy among SADC Member States with regard to current account and capital account transactions. FIP Annex 4 on the “Cooperation and Coordination of Exchange Control Policies” seeks exchange control convergence in the Region with respect to transactions.¹²⁰ This provision supports, in particular, Article 20 of the Protocol because State Parties have committed under Annex 4 to co-operate and coordinate their exchange control policies in order to liberalise current account and capital account transactions “between [FIP] State Parties”.¹²¹

FIP Annex 2 on “Macroeconomic Convergence” also plays an important role in ensuring that underlying conditions exist for FIP State Parties to maintain a liberalised movement of capital and current account transactions. For example, the monitoring and surveillance of FIP State Parties (pursuant to Article 7 of FIP Annex 2) and the information that they agree to provide (pursuant to Article 5) appears to have macroeconomic stability as the end goal—so that the need to resort to the imposition of restrictions on transactions would not arise.¹²²

3.3.5 Implementation

As at July 2010, it was perceived that implementation of the FIP had been slow and that most State Parties had not yet developed a national policy for its implementation. Accordingly, it was agreed that a “matrix” for guiding and monitoring Member States’ implementation of the FIP should be developed.¹²³ A Baseline Study assessing the implementation of the FIP, at both the country- and regional-level, was conducted between April and August 2011.¹²⁴ The Study found that there had been much more progress in implementing at a country-level (involving the easier to achieve goals of preparation and co-operation) than at the regional-level (which requires harmonisation). It also found that State Parties could be separated into three groups on the basis of their progress in implementing the FIP at a country-level: (i) from those which have achieved nearly full implementation, (ii) to those where over 60 per cent had been achieved, and finally (iii) those with progress from about 33-60 per cent. A few regional-level achievements were acknowledged, including the signing of a model SADC Bank Law and Double Taxation Avoidance Agreement. With regard to the implementation of Annex 1 in particular, the Baseline Study found that there was evidence suggesting that regional initiatives (such as the development of a regional invest-

¹²⁰ See Article 2 of FIP Annex 4.

¹²¹ Article 3(1) of FIP Annex 4.

¹²² The effect of such macroeconomic convergence and stability may be less in preventing the need to resort to restrictions in circumstances such as those outlined in Article 20(4) of the Protocol on Trade in Services.

¹²³ See SADC, *Matrix of Commitments Undertaken by Member States within the Context of the Protocol on Finance and Investment and Implementation Roadmap*, 12 January 2011 (revised).

¹²⁴ See SADC, *Protocol on Finance and Investment Baseline Study: Regional Report*, August 2011. This study assessed implementation by FIP annex as well as by Member State (although for Angola, the DRC and Swaziland, it was agreed that an assessment using primary resources was yet to be undertaken). A number of obstacles to implementation were noted, including the absence of deadlines in the FIP, a lack of co-ordination among the relevant departments in Member States, a low level of understanding about the FIP in some departments. The study made a number of recommendations for speeding up FIP implementation, including the adoption of specific indicators for assessing implementation and enhanced reporting at the country- and regional-level.

ment policy framework and the establishment of an online SADC Investment Portal) may not have progressed well on account of the fact that competition among State Parties to attract investment remains high (i.e. due to national interests) and regional harmonisation of investment of investment policies is not a priority for State Parties.¹²⁵

3.3.6 Linkages between BITs, the Protocol on Trade in Services and the FIP

There is a nexus between the FIP— particularly Annex 1 which seeks to create in the Region an environment which attracts investment and which contains some substantive provisions on the treatment of investments and investors¹²⁶—and numerous bilateral investment treaties (“BITs”) to which SADC Member States are parties.¹²⁷

As established above, there is a synergy between both the Protocol on Trade in Services and the FIP. Specifically, the establishment of commercial presence (Mode 3) constitutes an “investment” for the purposes of Annex 1 to the FIP and therefore investors/service suppliers of State Parties to both the Protocol on Trade in Services¹²⁸ and the FIP may benefit from guarantees pursuant to the two agreements.

SADC BITs & the FIP

The co-existence of the FIP and BITs entered into by individual Member States means that FIP State Parties are already bound by obligations, which can have subject-matter overlap and be substantively interconnected in practice.¹²⁹ The commitments under FIP Annex 1 and Member States’ BITs differ somewhat, and this difference may be explained by the deeper and reciprocal nature of BITs commitments. Broadly stated,¹³⁰ the principal differences between the FIP Annex 1 and Member States’ BITs are as follows:

Standards of Treatment: FIP Annex 1 does not contain a national treatment clause whereas Member States’ BITs generally do.¹³¹ Moreover, Member States’ BITs tend to require MFN treatment.¹³² As mentioned previously, there is an MFN aspect to Article 6(2) of FIP Annex 1, however its application is limited by its reference to fair and equitable treatment in Article 6(1).¹³³

¹²⁵ SADC, above n 123, pp. 37-38.

¹²⁶ Namely the prohibition on expropriation and nationalisation (Article 5 of FIP Annex 1) and the requirement of fair and equitable treatment (Article 6). Comparable provisions tend to be found in BITs.

¹²⁷ As of March 2011, SADC Member States had signed 211 BITs, of which about 101 were in force. (Howard Mann, IISD, *Rethinking the International Investment Law Framework in the SADC Region: Making Investment Law Consistent with SADC Development Objectives*, Draft of 2 March 2011, p. 8)

¹²⁸ See the discussion above at paragraphs 55-56 for which investors/investments qualify for treatment under the respective agreements.

¹²⁹ This is not unexpected. Indeed, Article 26 of FIP Annex 1 affirms State Parties’ right to conclude BITs with non-State Parties.

¹³⁰ In order to undertake a true comparison, one should examine each individual BIT in order to account for differences between BITs.

¹³¹ Mahnaz Malik, IISD, *The International Investment Treaty Framework in SADC and SADC Member States*, Draft of 21 February 2011, p. 18.

¹³² *Ibid.*

¹³³ Article 7(3) of FIP Annex 1 provides: “The provisions of Article 3 shall not apply to advantages, concessions or exemptions which may result from a bilateral investment treaty, Free Trade Area, Customs Union, Monetary Union or other multilateral arrangement for economic integration in which

Policy Space: Article 14 of FIP Annex 1 recognises a rather broad right to regulate. It reads: “Nothing in this Annex shall be construed as preventing a State Party from exercising its right to regulate in the public interest and to adopt, maintain or enforce any measure that it considers appropriate to ensure that investment activity is undertaken in a manner sensitive to health, safety or environmental concerns.” While this right may not appear to be constrained by State Parties’ obligations under Annex 1, it must be read in its context and in light of the object and purpose of the FIP. Accordingly, in line with the fact that State Parties have exercised their right to regulate by entering the FIP, this right will need to be balanced with the standards of treatment undertaken in Annex 1. The Member States’ BITs do not typically provide for the right to regulate, although a “minority of SADC BITs contain limited exceptions for measures taken for public health and safety”.¹³⁴

Dispute Settlement: FIP Annex 1 requires the exhaustion of local remedies before pursuing investor-State arbitration,¹³⁵ whereas SADC BITs do not usually require such exhaustion.¹³⁶

BITs & Trade in Services Agreements

Upon the entry into force of the SADC Protocol on Trade in Services, the web of obligations described above will become more intricate. This is most-readily illustrated by reference to the existing relationship between the GATS and Member States’ BITs. To the extent that service suppliers under the GATS also meet the definitional requirements in SADC BITs for “investors”, the GATS MFN obligation for “treatment no less favorable” between such service suppliers/investors (irrespective of nationality) will apply.¹³⁷ It appears that no SADC Member State has listed exemptions to the GATS MFN obligation.¹³⁸ Accordingly, the GATS MFN provision would appear to already “multilateralise” the benefits of Member States’ BITs—and the MFN provision contained in the Protocol on Trade in Services will operate in the same way *between State Parties*¹³⁹—so that the BITs’ guarantees which do not have counterparts in the GATS/Protocol (or which go beyond what is provided therein)¹⁴⁰ must be extended on an MFN-basis. Accordingly, where Member States’ BITs require national treatment in a sector that is not subject to specific commitments for example, this commitment would be “multilaterised” to all WTO Members pursuant to the GATS MFN clause. Similarly, such a commitment may be “regionalised” pursuant to the MFN clause in the

a State Party is participating or may participate.” (emphasis added) This may have been intended as a limitation on the MFN-like obligation in Article 6(2)—in which case the reference to Article 3 is incorrect. This apparent failure to exclude other agreements such as BITs from the scope of Article 6(2) could lead to more advantageous provisions in a State Party’s BIT with a “third State” to apply.

¹³⁴ Mahnaz Malik, above n 130, p. 27.

¹³⁵ See Articles 27 and 28 of FIP Annex 1 for details.

¹³⁶ Mahnaz Malik, above n 130, p. 28.

¹³⁷ This obligation is found in GATS Article II and Article 4 of the Protocol on Trade in Services.

¹³⁸ GATS Article II:2 provides for such exemptions, as does Article 4(5) of the Protocol on Trade in Services.

¹³⁹ This may therefore be most significant in the case of the Seychelles which is not a WTO Member.

¹⁴⁰ Such disciplines that affect trade in services and go beyond what is provided in the GATS/Protocol include: fair and equitable treatment; expropriation/nationalisation; and dispute settlement. All SADC BITs provide for such post-establishment investors rights, although at least three such BITs also provide for pre-establishment rights, i.e. investment entry rights. (See Mahnaz Malik, above n 130, p. 14)

SADC Protocol on Trade in Services to all of its State Parties. It is arguable however that the wording of Article 4(4) of the Protocol on Trade in Services means that existing BITs between State Parties and non-State Parties to the Protocol on Trade in Services are carved out from the application of the MFN obligation.¹⁴¹ Thus, those particular BITs might not be “regionalised” under the Protocol on Trade in Services but might be “multilateralised” to the benefit of all WTO Members (including SADC Member States) under the GATS MFN clause. Therefore, in undertaking specific commitments under the Protocol on Trade in Services, Member States might consider the cost of administering different sets of obligations and the fact that commitments under BITs appear to be already “multilateralised” by the GATS MFN clause.

3.4 Protocol on Transport, Communications and Meteorology

The Protocol on Transport, Communications and Meteorology (“TCM Protocol”), which entered into force on 6 July 1998,¹⁴² provides a legal and broad policy framework for co-operation, and defines the strategic goals for the transport, communications and meteorology sectors. The following subsections examine its substantive provisions, assess how implementation has progressed, and explore potential overlaps and synergies with the Protocol on Trade in Services.

3.4.1 Overarching objectives of the TCM Protocol

The TCM Protocol’s “general objective”: the establishment of transport, communications and meteorology (“TCM”) systems which provide “efficient, cost-effective and fully integrated infrastructure and operations, which best meet the needs of customers and promote economic and social development while being environmentally and economically sustainable”.¹⁴³ Developed transport and communications sectors can have many positive spillover effects in that they can benefit other sectors (e.g. tourism and energy sectors) and they can promote complementarities between SADC Member States so as to improve trade. Indeed, SADC Member States concluded the TCM Protocol expressly recognising, *inter*

¹⁴¹ As mentioned at para. 13 *supra*, the Protocol on Trade in Services also allows for certain “preferential agreements” as not subject to the obligation to extend MFN treatment. The wording of this provision may be contrasted with the analogous provision of the GATS which, it has been suggested, would not exempt BITs from the obligation of MFN treatment contained in the GATS. Specifically, it is argued that BITs would not meet the requirements of GATS Article V in order to qualify for the MFN exception for economic integration agreements which liberalise trade in services because, *inter alia*, they do not have the required “substantial sector coverage”. (See Rudolf Adlung and Martín Molinuevo, *Bilateralism in Services Trade: Is there Fire Behind the (BIT-)Smoke?* 11(2) *Journal of International Economic Law* 2008, 365-409 at 393-394). Article 4(4) allows for the maintenance of existing “preferential agreements” between State Parties and non-State Parties. In contrast to Article 4(3) which sets out specific requirements for future preferential agreements, there is a notable absence in Article 4(4) of any requirements similar to those contained in GATS Article V. Indeed, beyond the requirement to afford other State Parties an opportunity to negotiate the preferences contained therein, there are no requirements imposed on existing preferential agreements with non-State Parties in order to benefit from the exception contained in Article 4(4). However, as mentioned at para. 13 *supra*, Article 4 does not appear to make any provision for existing preferential agreements between State Parties and therefore any BITs between State Parties cannot be exempted from the application of Protocol’s MFN clause.

¹⁴² The TCM Protocol was opened for signature on 24 August 1996 and has been ratified by 12 SADC Member States. The DRC, the Seychelles and Madagascar are not signatories but may accede pursuant to Article 14.1(3) of the Protocol.

¹⁴³ Article 2.3 of the TCM Protocol.

alia, that the TCM sectors are interdependent and that a collective benefit would flow from greater co-operation, and the appropriate roles of both private and public sector service providers in achieving this.¹⁴⁴

The TCM Protocol sets out 15 mutually-supportive, interrelated “strategic goals” which State Parties¹⁴⁵ undertake to promote by engaging all stakeholders in the sectors.¹⁴⁶ Some of these goals are particularly relevant for the purpose of this study because they pertain either explicitly to the reduction of services trade barriers, or to related matters such as sectoral harmonisation; the attraction of investment/investors; and the promotion of competition. Some of the goals promoted include:

- the elimination or reduction of hindrances and impediments to the movement of persons, goods, equipment and services
- the integration of regional TCM networks through the implementation of compatible policies and regulation
- greater diversity of services and the promotion of competition between service providers through transparent, flexible, predictable and streamlined regulatory frameworks
- the achievement of economies of scale between SADC service providers of varying size, increasing their global and regional competitiveness
- broad-based investment to develop, preserve and improve strategic TCM infrastructure within an investor-friendly environment which facilitates commercial activity
- restructured state enterprises and public utilities which are financially independent and commercially viable

As the discussion below demonstrates, the principal focus of the TCM Protocol is the integration of regional systems through compatible policies and legislation, but it also contains some commitments pertaining to liberalisation.

3.4.2 Transport sector

Coverage, Objectives & Architecture

The TCM Protocol provides that its scope of application is the whole of the national and regional TCM sectors (public and private) and does not provide for any carve-outs.¹⁴⁷ As for the transport sector, its overarching objective has been described as the establishment of “transport systems which provide efficient, cost effective and fully integrated infrastructure and operations, which best meet the needs of the customers and promote economic and social development while being environmentally and economically sustainable”.¹⁴⁸ Chapter 3 sets out the TCM Protocol’s

¹⁴⁴ See Preamble of the TCM Protocol. Indeed, private sector involvement in the development of these sectors can *per se* bring much investment into the Region.

¹⁴⁵ Although Article 1.1 of the TCM Protocol provides that “Member State” means a “State Party” to the Protocol, to avoid confusion “State Party” is used in this section to indicate a party to the Protocol.

¹⁴⁶ See Article 2.4 of the TCM Protocol.

¹⁴⁷ Article 2.1 of the TCM Protocol provides the following illustrative list of subject-areas that it covers: “all policy, legal, regulatory, institutional, operational, logistical, technical, commercial, administrative, financial, human resource and other issues” from an “international, continental, regional and national” perspective. This is also true in respect of its scope of application for the communications sector.

¹⁴⁸ UNCTAD, above n 3, p. 17.

specific objectives—as the encouragement of, *inter alia*, multimodal transport¹⁴⁹ and travel between SADC territories—as well as an “integrated transport policy”. The TCM Protocol expressly requires State Parties to treat equally “the nationals and passenger service providers of [State Parties] with regard to the provision, access and use of infrastructure and immigration and clearance procedures”¹⁵⁰—thus recalling the (albeit much more inclusive) non-discriminatory MFN standard of treatment required by Article 4 of the Protocol on Trade in Services.

In sum, a framework for co-operation on various types of transport is set out in the TCM Protocol, namely: road transport (Chapters 4-6); railways (Chapter 7); maritime and inland waterway transport (Chapter 8); and civil aviation (Chapter 9).¹⁵¹ The following sub-sections examine the principal provisions of these Chapters as well as their linkages to the Protocol on Trade in Services.

Road transport (Chapters 4-6)

Chapter 5 of the TCM Protocol addresses road transport, and two other chapters are dedicated to road infrastructure and traffic.¹⁵² The following objective can be discerned from these chapters: to facilitate the flow of goods and passengers in the Region, as well as access to centres of population and economic activity, by promoting the development of a competitive commercial road transport industry which provides safe, cost-effective transport services to consumers while minimising negative environmental impacts.¹⁵³

In order to achieve this objective, State Parties undertake various obligations, some of which give rise to linkages with the trade in services liberalisation agenda.

Undertakings on Market Liberalisation and Regulatory Matters

Under Article 5.1, State Parties undertake to “facilitate the unimpeded flow of goods and passengers between and across their respective territories by promoting the development of a strong and competitive commercial road transport industry which provides effective transport services to consumers”.

State Parties undertake to progressively liberalise their “market access policies in respect of the cross-border carriage of goods”.¹⁵⁴ Three “liberalisation phases” are foreseen in order to achieve this end¹⁵⁵ and the aim of this provision seems to be that State Parties should achieve the

¹⁴⁹ Which may in practice involve cross-border supply of services given that certain SADC Member States are landlocked. With respect to the promotion of intermodal transport operations, see also Article 3.4 of the TCM Protocol.

¹⁵⁰ Article 3.2(2) of the TCM Protocol. Article 1.1 provides that a “Service provider” is a “public or private sector provider of a transport, communications or meteorology facility and/or operational service”. The overlap with “service supplier”, defined in Article 1(1) of the Protocol on Trade in Services as a “natural or juridical person of a State Party that supplies a service” is apparent.

¹⁵¹ Chapter 13 of the TCM Protocol deals with institutional aspects pertaining to all sectors.

¹⁵² Chapters 4 and 6, respectively.

¹⁵³ See Articles 4.1, 5.1 and 6.1 of the TCM Protocol.

¹⁵⁴ Article 5.3(1) of the TCM Protocol (titled “Market Access in Respect of International Transport”). There is also a rather “soft” commitment for State Parties to “consider the possibilities of future liberalisation of road passenger services” as “guided by regional and national policy reforms”. (Article 5.3(12) of the TCM Protocol (emphasis added))

¹⁵⁵ Article 5.3(7) of the TCM Protocol.

“same levels of liberalisation”.¹⁵⁶ There is, however, provision for State Parties which have the capacity to move ahead with liberalisation to do so on a bilateral basis.¹⁵⁷ In addition, there is an emphasis on the centrality of reciprocity of benefits for State Parties’ carriers¹⁵⁸ and a State Party is explicitly permitted *not* to introduce liberalisation measures to benefit other State Parties which do not “accord equal market access [to its] carriers”.¹⁵⁹

Therefore, the TCM Protocol binds State Parties to liberalise their markets for the international carriage of goods. The connection between the move away from regulation—or at least towards harmonisation of regulatory mechanisms—and the move towards free and open transport market access is important. In order to comply with their obligations on road transport, the TCM Protocol envisages the conclusion of “*standardised* bilateral or multilateral agreements based on the principles of non-discrimination, reciprocity and extra-territorial jurisdiction” and which address various “regulatory matters”, *inter alia*, (a) single SADC carrier permits or licences (discussed below); (b) carrier registration; (c) quota and capacity management systems; (d) harmonised administrative (including consultative) procedures, documentation and fees; and (e) information management, including a harmonised format of supporting information systems and exchange of information procedures.¹⁶⁰

¹⁵⁶ Article 5.3(6) of the TCM Protocol. It is curious that Article 5.3(6) of the TCM Protocol provides that State Parties may “formalise[]” their intention to reach the same levels of liberalisation by concluding “a multilateral agreement”, despite the fact that they undertake to do exactly that in this article. An agreement is currently being developed pursuant to this provision.

¹⁵⁷ Article 5.3(4) of the TCM Protocol.

¹⁵⁸ Article 5.3(3) of the TCM Protocol.

¹⁵⁹ Article 5.3(9) of the TCM Protocol.

¹⁶⁰ Article 5.4 of the TCM Protocol. (emphasis added)

Interactions with the Protocol on Trade in Services

In order to fully appreciate how the above-mentioned agreements provided for under Article 5.4 of the TCM Protocol may conflict or complement the Protocol on Trade in Services, or constrain Member States' options for negotiations under the Protocol, there is a need to study such agreements. It has been highlighted that "bilateral agreements [] provide the current framework for coordination of road transport among Member States".¹⁶¹ Indeed, the purpose of these bilateral road transport agreements is ostensibly to achieve the progressive liberalisation of Member States' market access policies (pursuant to Article 5.3). It is possible that activities carried out pursuant to these agreements might already support various provisions of the Protocol on Trade in Services. For example, single licenses for carriers would go some way to achieve the mutual recognition objective in the Protocol on Trade in Services (Article 7). Agreements addressing the harmonisation of administrative procedures, documentation and fees would certainly support Article 18 of the Protocol on Trade in Services which urges State Parties to promote an attractive and stable environment for the supply of services through, *inter alia*, the development of simplified administrative procedures. However, as discussed in the following paragraphs, it seems that overall, these agreements are in fact at odds with the objectives of the TCM Protocol.¹⁶²

While the liberalisation undertaking (discussed at paragraph 82 *supra*) demonstrates that a commitment has existed on the part of State Parties to liberalise this sector for almost 15 years, consideration should also be given to the manner in which this commitment is framed and potential conflicts that might arise with the Protocol on Trade in Services. Indeed, Article 5.3 of the TCM Protocol's emphasis on reciprocity, depending on how this is interpreted, may be inconsistent with the Protocol on Trade in Services' central general obligation of MFN treatment. MFN exemptions cannot be used to diminish specific commitments made (i.e., including those of market access) but can be listed so that preferential treatment can be accorded to some Members over others. Accordingly, Member States should consider whether they may make use of MFN exemptions in order to circumvent this conflict.¹⁶³

Other possible tensions with the Protocol on Trade in Services may exist. Article 5.4 also indicates that State Parties to the TCM Protocol may be maintaining "quota and capacity management systems". Member States, when negotiating their commitments under the Protocol on Trade in Services, should be mindful of this and, should they agree to liberalise road transport (which would have to be done on an MFN basis), might consider either doing away with quota/capacity conditions or listing specific limitations in order to be consistent with Article 14 of the Protocol on Trade in Services ("market access").

¹⁶¹ SADC, *Facilitation of Road Transport Market Liberalisation in the SADC Region*, March 2010, p. 5. This report provides, *inter alia*, an overview of the evolution of agreements in this area—challenges they have posed as well as perceived obstacles to their implementation (*ibid.*, pp. 5-7).

¹⁶² *Ibid.*, pp. 15-24 reviews the subject matter of these bilateral agreements.

¹⁶³ The TCM Protocol would not constitute an MFN-exempt preferential agreement under Article 4 of the Protocol on Trade in Services because it would likely be viewed as a pre-existing preferential agreement between State Parties which does not appear to be covered by Article 4.

Implementation

Liberalisation of the Regional Road Transport Market: As mentioned, the relationships between Member States are regulated by bilateral road transport agreements¹⁶⁴ which are “defensive” and protectionist rather than promoting market access and are “contributing to the inefficiency of road transport”.¹⁶⁵ Accordingly, it was recommended that these be replaced with a multilateral agreement. The SADC Regional Indicative Strategic Development Plan (“RISDP”) sets out “ambitious target objectives” for liberalisation of the market and for harmonisation of transport rules, standards and policies.¹⁶⁶ The first target, to be achieved by 2008 was the liberalisation of regional transport markets.¹⁶⁷ As at September 2011, this liberalisation was not achieved. However, plans are in place to gradually fulfil this objective through the “Facilitation of Road Transport Market Liberalisation Project” and using a multilateral road transport agreement (“MRTA”), which is yet to be developed as part of the aforementioned project.¹⁶⁸ Harmonisation between instruments of the SADC, East African Community (“EAC”) and Common Market for Eastern and Southern Africa (“COMESA”) is apparently also part of this process.¹⁶⁹

Liberalising Market Access for International Transport: Little progress was reported, as of September 2011, in achieving implementation of the three phases mentioned *supra* at paragraph 82. However, “competition regulations” are being developed for cross-border road transport so as to facilitate such transport opportunities and reduce the cost of road transport services in the Region.¹⁷⁰ It is understood that these regulations will accompany the MRTA that is also to be developed.

Agreements on Regulatory Matters: Model bilateral road transport agreements for (i) passenger and (ii) freight transport have been adopted, and a multilateral agreement is being drafted to address other matters.¹⁷¹

Broader Regional Context

This SADC agreement to harmonise road transport market liberalisation should be placed in the broader regional context, namely the efforts for harmonisation of market access in the wider Eastern and Southern African (“ESA”) Region. COMESA, EAC and SADC delegates met in August 2011 regarding the liberalisation of road transport in the ESA region, with the objective of providing “a common approach amongst the countries of SADC, COMESA and EAC and lay[ing] a suitable foundation for

¹⁶⁴ See SADC, above n 160, p. 8. See also SADC Secretariat Infrastructure and Services Directorate Transport Division, *Progress and Status of Implementation Road Infrastructure, Transport and Traffic Sector Regional Policies, Legal Instruments, Regulations, Technical Standards and Systems in the SADC Region* (23 September 2011, Draft Discussion Paper), Table 2.

¹⁶⁵ SADC, above n 160, p. 27.

¹⁶⁶ *Ibid.*, p. 7.

¹⁶⁷ See SADC Secretariat Infrastructure and Services Directorate Transport Division, above n 163, p. 5.

¹⁶⁸ *Ibid.*: “The MRTA will remove regulatory restrictions such as the ‘third country rule’ and cabotage and introduce competition.” The intention is that the MRTA will address all matters mentioned in Article 5.4 of the TCM Protocol (see, e.g., para. 83 *supra*).

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*, pp. 6-7.

¹⁷¹ *Ibid.*, p. 7.

[a] proposed [free trade area] to be implemented right through the region".¹⁷²

This project envisages phases of liberalisation similar to those set out in the TCM Protocol but goes further by providing for eventual permission to transport goods and passengers within the territory of another Member State (cabotage). This project appears to be in phase two of its five-phase plan. Phase two concerns the examination of the "quantity regulation in all the countries of the ESA region with a view to producing recommendations for a unified approach to be adopted by all countries".¹⁷³

In sum, Member States might be mindful when proceeding with SADC negotiations under the Protocol of the broader framework—Member States' existing agreements/memoranda of understanding as well as the prospect of an ESA region-wide agreement.

Other Relevant Obligations

Although not as directly connected to the liberalisation agenda, it is of note that State Parties undertook to establish national roads authorities—as representatives of the public and private sector—with responsibilities for, *inter alia*, promoting public awareness on the importance of roads for mobility and trade purposes. These would thereby ensure accountability to stakeholders for the provision, operation and management of road transport infrastructure (which can have many positive knock on effects for trade in other sectors).¹⁷⁴

Also of note is State Parties' obligation to recognise driving licences issued by other State Parties "according to the agreed SADC codes and format"¹⁷⁵ and that this recognition extends to professional driving permits.¹⁷⁶ In order to facilitate this mutual recognition, State Parties have also agreed to adopt a harmonised format of driving licence,¹⁷⁷ and to harmonise learner drivers' testing and codes.¹⁷⁸ Angola, Botswana, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, and Zambia have begun issuing the "SADC Drivers License".

Railways (Chapter 7)

The objective of the TCM as to rail transport is also that State Parties "shall facilitate the provision of a seamless, efficient, predictable, cost-effective, safe and environmentally-friendly railway service which is responsive to market needs and provides access to major centres of population and economic activity".¹⁷⁹ To this end the TCM Protocol provides for, *inter alia*, the development of a harmonised regional railway policy; monitoring the adequacy of railway infrastructure; co-operation on routes

¹⁷² COMESA, EAC and SADC, *Liberalisation of Road Transport in the Eastern and Southern African (ESA) Region*, Minutes of the Kick-Off Meeting held at Lusaka on the 22 August 2011, available at <http://www.trademarksa.org/sites/default/files/publications/Minutes%20%7C%20COMESA%20Task%20Force%20Meeting%20on%20Transport%20Liberalisation.pdf> (visited 22 April 2012), p. 2.

¹⁷³ *Ibid.*

¹⁷⁴ Article 4.4 of the TCM Protocol.

¹⁷⁵ Article 6.10(3) of the TCM Protocol.

¹⁷⁶ Article 6.10(5) of the TCM Protocol.

¹⁷⁷ Article 6.10(2) of the TCM Protocol.

¹⁷⁸ Article 6.10(4) of the TCM Protocol.

¹⁷⁹ Article 7.1 of the TCM Protocol.

and operational matters; promoting the development and implementation of compatible technical standards in respect of infrastructure and equipment; and the development of a common syllabus for the training of personnel. Much of this would facilitate trade in services.

Maritime and Inland Waterway Transport (Chapter 8)

Maritime and inland waterway transport is regarded as an area of strategic importance to regional economic growth.¹⁸⁰ State Parties' objective for maritime transport is to promote regional development by implementing "harmonised international and regional transport policies" which, amongst other things, "*maximize regional and international trade and exchange*".¹⁸¹ In addition to developing a harmonised maritime and inland waterway transport policy, State Parties have also undertaken to develop "common understanding[s]" on specific matters, such as, "the role of coastal shipping and the encouragement of joint ventures and alliances between ship-owners to promote economies of scale"; and "the role of maritime transport in regional trade within the Region while maintaining its role in international transport through the conclusion of bilateral agreements with SADC's main trading partners".¹⁸² The former recalls Article 18 of the Protocol on Trade in Services which urges the development of mechanisms for the identification of services business opportunities and joint investment projects and Member States might consider what has been completed under the TCM Protocol in this regard.

When negotiating their specific commitments under the Protocol on Trade in Services, SADC Member States which are parties to the TCM Protocol should note that they have in principle already committed not to restrict cabotage (i.e. shipping between ports in the same country) by ships registered in another party to the TCM Protocol.¹⁸³ Another provision of the TCM Protocol which complements the Protocol on Trade in Services is Article 8.3 whereby State Parties—with the overarching aim of ensuring the effective movement of goods and persons through regional ports—have agreed to adopt measures to promote competition in the provision of port services and related services.¹⁸⁴ Not only does this reinforce one of the stated objectives of the Protocol on Trade in Services—the enhancement of services sectors' competitiveness¹⁸⁵—it also supports State Parties' obligation under Article 19 of the Protocol, and provides an example of a specific collective undertaking to take measures to proscribe anticompetitive business practices.

While the TCM Protocol does not provide for the liberalisation of port and landside services, State Parties' specific undertaking to adopt measures for harmonised tariff structures and regulation of charges so as to "avoid monopolistic exploitation"¹⁸⁶ is in line with the Protocol's prohibition of abuse of dominant positions by monopoly service suppli-

¹⁸⁰ UNCTAD, above n 3, p. 19.

¹⁸¹ Article 8.1 of the TCM Protocol. (emphasis added)

¹⁸² Article 8.2(1) of the TCM Protocol.

¹⁸³ Article 8.2(2) of the TCM Protocol ("progressively remove restrictions on cabotage") and Article 8.2(3) ("retain open policy").

¹⁸⁴ Article 8.3(1) of the TCM Protocol.

¹⁸⁵ See Article 2 of the Protocol on Trade in Services.

¹⁸⁶ Article 8.3(2)(e) of the TCM Protocol.

ers.¹⁸⁷ Finally, it is of particular interest that, with regard to “the provision of or access to any port services including the freedom to establish facilities”, Member States which are party to the TCM Protocol have already essentially agreed to extend MFN treatment to other parties to the TCM Protocol.¹⁸⁸

In 2006, it was reported that “[s]ignificant progress” had been made in implementing the TCM Protocol to date and that the former Southern Africa Transport and Communications Commission (“SATCC”) had been co-coordinating the development of facilities of 12 ports in Southern Africa as well as upgrading ports in Angola and Mozambique.¹⁸⁹ In addition, a study commissioned in 2007 on the concessions in SADC ports and port terminals found that a number of concessions had been made in Angola, Mozambique and Tanzania.

Civil Aviation (Chapter 9)

As for the other modes of transport discussed above, the main objective as regards air transport is to ensure the provision of safe, reliable and cost-efficient services in support of socio-economic development in the SADC region. In the TCM Protocol, Member States have recognised the need for co-operation in the Region in order to overcome “the constraints of small national markets, market restrictions and the small size of some SADC airlines and further to ensure the competitiveness of regional air services in a global context”,¹⁹⁰ something which immediately indicates a need to open up markets.

Liberalisation

In order to achieve these objectives, Member States agreed to develop a harmonised regional civil aviation policy for the gradual liberalisation of intra-regional air transport markets for the SADC airlines.¹⁹¹ As of 2002, it was reported that market liberalisation efforts had been “slow and government-owned airlines dominate[d] the airline sub-sector”.¹⁹² There has been some progress towards liberalisation of the airline industry however.

The most significant progress towards liberalisation appears to be the adoption of the *Yamoussoukro Decision Concerning the Liberalisation of Access to Air Transport Markets in Africa* (“Yamoussoukro Decision”) which came into effect on 12 August 2000.¹⁹³ The aim of the Yamous-

¹⁸⁷ See Article 12(2) of the Protocol on Trade in Services.

¹⁸⁸ Article 8.3(4) of the TCM Protocol. An examination might be made to gauge whether there is a tension between this obligation and State Parties’ bilateral agreements on inland waterway transport, and also whether Member States’ agreement will necessitate them to list MFN exemptions under the Protocol on Trade in Services. For some information on bilateral and other agreements in place regarding inland waterway transport, see UNCTAD, above n 3, p. 20.

¹⁸⁹ UNCTAD, above n 3, p. 19.

¹⁹⁰ Article 9.1(2) of the TCM Protocol.

¹⁹¹ Article 9.2(a) of the TCM Protocol.

¹⁹² Lolette Kritzinger-van Niekerk and Emmanuel Pinto Moreira, The World Bank, *Regional Integration in Southern Africa: Overview of Recent Developments* (Washington, DC: World Bank, 2002), pp. 19-20.

¹⁹³ ECA/RCID/CM.CIVAC/99/RPT Annex 1. This Decision elaborated upon the Yamoussoukro Declaration of 1988. The Decision was adopted by a conference of African Ministers responsible for Civil Aviation, convened under the auspices of the United Nations Economic Commission for Africa in Yamoussoukro, Côte d’Ivoire in November 1999. The Decision was endorsed by the Assembly of Heads of State and Government of the African Economic Community in July 2000 pursuant to Article 10 of the Abuja Treaty. The Decision is therefore binding on all Abuja Treaty states. Mada-

soukro Decision is to establish arrangements for the gradual liberalisation of scheduled and non-scheduled intra-Africa air transport services and, importantly, it purports to have “precedence over any [incompatible] multilateral or bilateral agreements on air services between State Parties”.¹⁹⁴ Elements of the Yamoussoukro Decision—specifically those relating to the granting “traffic rights”—would *not* appear to be relevant for forthcoming negotiations given that traffic rights and services directly related to the exercise of traffic rights are expressly outside the scope of the Protocol on Trade in Services.¹⁹⁵ However, the Yamoussoukro Decision framework also provides for other matters such as: capacity and frequency; tariffs; the development of competition rules; the settlement of disputes; the right of airlines to establish offices; and the creation of a monitoring body to follow up on implementation as well as an executing agency to supervise liberalisation. Implementation of the framework has apparently been poor to date. Regional groupings were charged with implementing competition regulations in air transport services. Joint draft regulations for competition within COMESA, the EAC, and SADC were prepared and discussed (by 2005) but have never been adopted.¹⁹⁶ The executing agency was created in 2007 in Addis Ababa during the Third Session of African Union Ministers Responsible for Air Transport but has met infrequently since then. Its duties were assigned to the African Civil Aviation Commission (“AFCAC”). It has been suggested that the AFCAC—to which all SADC Member States are parties—will play a “leading role” in establishing the Decision’s dispute settlement mechanism.¹⁹⁷ Finally, implementation of safety requirements has been particularly poor.¹⁹⁸ Correspondence with the relevant SADC unit has confirmed that most Member States have not in fact implemented their commitments under the Yamoussoukro Decision but that nearly all Member States maintain policies *endorsing* its implementation and efforts are underway to reform policies, laws and institutions, in order to facilitate the liberalisation process. Moreover, autonomous civil aviation authorities have been established in almost all Member States but most suffer from a shortage of skilled workers, principally because of the modest conditions of service which are not sufficiently competitive to attract and retain such skills.

Ownership Options

State Parties also undertook under the TCM Protocol to develop a common policy for the staggered and co-ordinated restructuring of the sector that would necessarily cover, *inter alia*, “the development of ownership options”—possibly entailing the attraction of investors from within and

gasar signed but never ratified the Abuja Treaty. It is also questionable whether, of the other SADC Member States, Swaziland and South Africa are part of the Decision’s framework—on the basis that they only ratified and/or deposited the instruments of ratification after the Abuja Treaty was replaced by the constitutive act of the African Union on 26 May 2001. (For an explanation of why these Member States may not be parties to the Decision, see: Charles E. Schlumberger, *The World Bank, Open Skies for Africa: Implementing the Yamoussoukro Decision* (Washington, DC: World Bank, 2010), pp. 23-27)

¹⁹⁴ Article 2 of the Yamoussoukro Decision. Agreements which are compatible with the Decision, and implement its framework on a bilateral or other basis, could be said to supplement it even though the Decision itself sets out particular modalities for its implementation.

¹⁹⁵ Article 3(3)(a) of the Protocol on Trade in Services.

¹⁹⁶ Moreover, the African Union drafted competition rules with special provisions on air transportation. These were due to be adopted at the Ninth Ordinary Session of the Assembly of the African Union, held in Ghana on 1–3 July 2007, but they were not adopted.

¹⁹⁷ See Schlumberger, above n 192, p. 34.

¹⁹⁸ *Ibid.*, pp. 42-52.

outside the Region—and the promotion of competition among service providers.¹⁹⁹ With regards to the latter, State Parties' commitment was further defined as one to foster an environment which would encourage the formation of viable joint venture operations.²⁰⁰ State Parties also undertook to encourage the mutual recognition of licences and certificates of airworthiness which are in compliance with international standards²⁰¹ and progress has been made in this regard.²⁰² These initiatives complement the disciplines on mutual recognition and competition contained in the Protocol on Trade in Services. It is also most notable that, in the context of air transport, the TCM Protocol appears to recognise the potentially important role of investment from outside the Region but only imposes “soft” obligations in this regard, and there have been little cooperative ventures concluded to this end.

3.4.3 Communications sector

Telecommunications (Chapter 10) and postal services (Chapter 11) are addressed in the TCM Protocol. The long-term goal of SADC for communications has been described as the development of communications systems for the transformation of the Region into a knowledge economy.²⁰³

Telecommunications

State Parties have agreed to leverage off international technological developments and to develop national telecommunications networks in order to ensure the provision of reliable, effective and affordable telecommunications services in order to meet the needs of industry and for the achievement of a universal service/access to advanced information services in the Region.²⁰⁴ To this end, the TCM Protocol provides: for regional co-operation; for certain obligations of result (but as for other sub-sectors discussed, no deadlines are imposed for the achievement of these results, thereby making them “soft”); and guidelines for a regulatory framework in this sector.

State Parties have also agreed to develop a harmonised regional telecommunications policy “aimed at” the staggered restructuring of telecommunications. Such restructuring should consider, *inter alia*, ownership options and the extent to which “strategic public and private investors could be introduced” and the promotion of competition between telecommunications service providers.²⁰⁵

¹⁹⁹ See Article 9.2(c)(ii) and (iii) of the TCM Protocol. The TCM Protocol specifically provides for the restructuring of “SADC airlines, airports and the provision of air traffic and navigation services” and expressly anticipated that competitiveness might be enhanced by the “*participation*” of foreign investors in the ownership of airlines. (See Article 9.3(3) of the TCM Protocol)

²⁰⁰ The TCM Protocol specifically foresaw that this might involve the “integration” of some SADC airlines. (Article 9.3(2) of the TCM Protocol)

²⁰¹ Article 9.4(3) of the TCM Protocol.

²⁰² SADC is implementing a SADC-Cooperative Development of Operational Safety and Continuing Airworthiness Program project aimed at enhancing the safety of air transport operations, and at exploring the viability of establishing a SADC Aviation Safety Organization to be manned by Regional Flight Safety Inspectors which would have the mandate to maintain the certification, surveillance, airline audit and training functions. This project intends to address the deficiencies in Member States' aviation legislation and regulations in respect of personnel licensing, flight operations and airworthiness certification/surveillance. The harmonisation of regulations will also be sought.

²⁰³ UNCTAD, above n 3, p. 27.

²⁰⁴ Article 10.1 of the TCM Protocol.

²⁰⁵ See Article 10.2 of the TCM Protocol. Interestingly, Article 10.2(e) specifies that this policy should be aimed at, *inter alia*, encouraging indigenous participation” in the telecommunications

State Parties are also to co-operate for the development of human resources in the Region with the end goal being increased mobility of personnel and the maintenance of “similar and adequate standards of performance”.²⁰⁶ State Parties undertook to achieve certain results in order fulfil this aim, including *the development of* common curriculum frameworks; common standards for competence evaluation and certification of personnel as well as the joint provision of training; and a regional directory of training specialisation and centres. State Parties also undertook *to conclude* regional certification agreements to support reciprocal recognition of qualifications. The development of common curricula and evaluation methods might clearly support the aims of the Protocol on Education and Training (discussed *infra*). As previously indicated the movement of natural persons is explicitly acknowledged by the Protocol on Trade in Services as important and the conclusion of such certification agreements would go some way to aiding the Protocol’s approach to mutual recognition issues.

Implementation

As of 2006, considerable progress was being made with the number operators increasing and internet connectivity expanding. In line with Article 10.7 of the TCM Protocol which *requires* State Parties to ensure the separation of telecommunications services regulation and operation through the establishment of independent domestic regulatory bodies, such institutional reform had also been achieved in various countries.²⁰⁷ In order to strengthen regional co-operation processes, associations for regulators and service providers were formed.²⁰⁸ Finally, while liberalisation of the telecommunications sector is not mandated as part of its restructuring, privatisation processes has been undertaken in various State Parties.²⁰⁹

sector. Given the context, it would appear that “indigenous to the Region” was intended here and not a preference for domestic participation which might be at odds with the objectives of the Protocol on Trade in Services.

²⁰⁶ Article 10.10(1) of the TCM Protocol.

²⁰⁷ See UNCTAD, above n 3, p. 28.

²⁰⁸ Namely the Southern Africa Telecommunications Administrations (“SATA”), and Telecommunications Regulators Associations of Southern Africa (“TRASA”). See UNCTAD, above n 3, p. 28. Article 10.6 of the TCM Protocol calls for this co-operation.

²⁰⁹ See UNCTAD, above n 3, p. 28.

Responses to Changing Technologies: ICT Declaration (2001) and Reform of Chapter 10 (“Telecommunications”)

The Preamble to the ICT Declaration (2001) conveys some of the obstacles in this sector. Member States underlined persistent “capacity limitations in the Region, in particular shortage of skilled ICT personnel, high cost of development of ICT infrastructure, slow progress towards the deregulation of the telecommunications sectors leading to monopolies, unaffordability of universal access due to high tariffs and internet charges, lack of economic commerce readiness, reluctance of acceptance for ICT culture and innovations”.

The reason for adopting the ICT Declaration appears to have been Member States’ commitment to reforming the broader ICT sector and to “bridging the digital divide” in the Region.²¹⁰ The Declaration laid out Members’ broad obligations of best effort with regard to certain priority action areas identified: including regulation, human resource development, infrastructure and business opportunities through market access. However, while this Declaration demonstrated “unanimous consensus to adopt ICT as a tool to speed up development ... no serious implementation [had taken] place” by 2006.²¹¹

Recent proposals for amendment of Chapter 10 (telecommunications) have been made whereby it would address the *whole* ICT sector. These amendments seek to reflect changes in the sector due to by digitisation of technologies and the liberalisation of markets. Proposed reforms focus on, *inter alia*: attracting private sector investment; encouraging competition and redress for anti-competitive behaviour; the development of regulatory policies allowing service providers access to other Member States’ networks; common policies as to licensing and market entry; and the conclusion of regional certification agreements for reciprocal recognition of qualifications.²¹²

Postal Services

As for other sectors, the TCM Protocol focuses on efficiency, affordability, and quality in the provision of postal services.²¹³ State Parties have undertaken to develop harmonised policies on issues including: institutional reform, regulation and operation, and restructuring of the sector.²¹⁴ State Parties have also accepted to “endeavour” to adopt harmonised operating regulations, procedures and standards based on Universal Postal Union norms with regard to, *inter alia*, international postal services and financial services (which includes money order services).²¹⁵

Proposals for reform of Chapter 11 have been tabled which aim to reflect changes in the market and advances in ICT. These proposals focus on, *inter alia*, the need to standardise certification processes in the context

²¹⁰ Article 1 of the ICT Declaration.

²¹¹ UNCTAD, above n 3, Box 2.

²¹² See generally, SADC, *TCM Protocol: Revision and Proposals* (Version 25 August 2010; after validation workshop).

²¹³ See Article 11.1 of the TCM Protocol.

²¹⁴ See Article 11.2 of the TCM Protocol. Interestingly, the TCM Protocol acknowledges a dependence on transportation services for the improvement of speed and security of mail services. (Article 11.2(f))

²¹⁵ Article 11.5 of the TCM Protocol.

of human resource development. Interestingly, while the proposals highlight business mailer needs on the one hand, they also emphasise access to communications as a human right and suggest the inclusion of a new article on “universal service”. The insertion of new articles addressing the convergence of postal services and ICTs more broadly, and the need for co-operation among stakeholders, has also been proposed.²¹⁶

Recent merger of communications’ regulators

The Communication Regulators’ Association of Southern Africa (“CRASA”), a consultative body of regulators and other stakeholders dealing in telecommunications, broadcasting and postal sectors, came into being on 16 June 2011. It is the result of a merger between the regional ICT regulators’ association (also formerly known as “CRASA”) and the postal regulators’ association (formerly known as the Southern Africa Postal Regulators’ Association or “SAPRA”). A June 2009 directive of the SADC Ministers responsible for telecommunications, postal and information communications technologies mandated this merger with a view to allowing the “maximisation of value and benefits of a converged policy and regulatory environment as well as to strengthening the harmonisation of the Postal and ICT regulatory environment in the SADC region.”²¹⁷

CRASA was established pursuant to the TCM Protocol which encourages the formation of industry-based bodies/fora to encourage participation by industries in telecommunications and postal policy development. Indeed the membership of CRASA includes both national regulatory authorities and private sector actors.²¹⁸ The CRASA website states the core reason for its establishment as the facilitation of harmonisation of ICT and postal policy and regulatory frameworks in SADC. The rationale for its establishment is that economies of scale will accompany market integration.

3.4.4 TCM: Institutions and implementation

Institutions, implementation and monitoring are addressed in Chapter 13 which affirms State Parties’ primary responsibility to take measures necessary to implement its provisions.²¹⁹ There is also a role for State Parties acting collectively through regional bodies including the SATCC.²²⁰ Article 13 confirms that SATCC is the commission constituted for TCM matters and provides details on its composition and functions. The TCM Protocol also foresees some room for the involvement of private sector actors in the SATCC.²²¹ More specifically, the creation of regional bodies is encouraged, “where required to provide a framework for collaboration and inter-action between and amongst service providers, users, regulators, labour and other stakeholders”.²²²

²¹⁶ On these proposals for reform, see Juan B. Ianni, *Proposed Revisions to Chapter 11 – TCM Protocol, SADC ICT Ministers and Senior Officials*, Gaborone, Botswana, 14-15 June 2011 (power-point presentation).

²¹⁷ See the CRASA website: <http://www.crasa.org/crasa-content.php?cid=31>

²¹⁸ See CRASA Member Listing at <http://www.crasa.org/crasa-member-list.php?page=2&sorton=&sortby=> (visited 17 April 2012)

²¹⁹ Article 13.1(1) of the TCM Protocol.

²²⁰ Article 13.1(3) of the TCM Protocol.

²²¹ See Articles 13.3(2) and 13.6 of the TCM Protocol.

²²² Article 13.13(1) of the TCM Protocol.

Some of the regional associations in place and already connected in some way with the implementation of the TCM Protocol include: the Federation of East and Southern African Road Transport Associations (“FESARTA”); and the Association of Southern African National Road Agencies (“ASANRA”); Airlines Association of Southern Africa (“AASA”); Ports Management Association of Eastern and Southern Africa (“PMAESA”); Southern African Railways Association (“SARA”); and Federation of Clearing and Freight Forwarding Associations of Southern Africa (“FCFASA”).

3.5 Protocol on Energy

3.5.1 Objectives

The principal aim of the Protocol on Energy (“Energy Protocol”), which entered into force on 17 April 1998,²²³ is to secure energy supplies for the Region in a sustainable way. To this end, it seeks to promote co-operation among Member States for, *inter alia*, the harmonisation of national and regional energy policies; the development and utilisation of energy and energy pooling;²²⁴ the provision of reliable and sustainable energy services in the most efficient and cost-effective manner; the promotion of the joint development of human resources and organisational capacity building in the energy sector; the achievement standardisation in energy development and application; and co-operative research, development, adaptation, dissemination and transfer of low-cost energy technologies.²²⁵

3.5.2 Activities under the Energy Protocol

The Energy Protocol lays out a framework for co-operation²²⁶ and charges various institutions with its implementation. The Energy Commission was established with the responsibility of implementing the Protocol, i.e. policy formulation and coordination of activities, and is comprised of a Committee of Ministers, Committee of Senior Officials, Technical Unit, and sub-committees.²²⁷ Unfortunately, most of these committees are no longer functional due to a lack of personnel and funding in SADC.

Nevertheless, some progress has been made—mainly in the context of the power sector. The Southern African Power Pool (“SAPP”) was established in 1995.²²⁸ Its purpose is the trading and pooling of Member States’ electricity.²²⁹ Only three Member States in the mainland remain

²²³ As of July 2011, only the DRC and Madagascar were yet to accede.

²²⁴ Energy pooling is defined as “co-operation among parties or entities in development, transmission, conveyance and storage of energy in order to obtain optimum reliability of service, economy of operation, and equitable sharing of costs and benefits”. (Article 1 of the Energy Protocol)

²²⁵ See Article 3 of the Energy Protocol.

²²⁶ See Annex 1 (“Guidelines for Co-operation”) to the Energy Protocol which sets out priority issues for the whole sector in addition to specific disciplines relating to sub-sectors.

²²⁷ See Article 4 of the Energy Protocol.

²²⁸ The SAPP group is constituted of SADC Member States as well as their energy utility corporations. Institutionally, it falls under the SADC Trade, Industry, Finance and Investment cluster.

²²⁹ These SAPP activities were expressly endorsed in paragraph 1(a) to Annex 1 to the Energy Protocol.

unconnected to the grid, namely Angola, Malawi and Tanzania; all other Member States in the mainland now trade in electricity (as a good, see footnote 234 *infra*). There are some private actor SAPP members and, in line with the goals of the Energy Protocol,²³⁰ there are efforts underway to increase competition among power producers.²³¹

The Regional Electricity Regulators Association of Southern Africa (“RERA”) was established in 2002. It is a platform for co-operation among energy regulators²³² and furthers the objectives of the Energy Protocol by seeking to facilitate the harmonisation of regulatory policies, legislation, standards and practices. In addition to promoting capacity building and information sharing, the RERA seeks to increase the integration of systems and promote electricity trade in the SADC region through the facilitation of harmonised supply policies for cross-border trading, and by focusing on terms and conditions for access to transmission capacity and cross-border tariffs.

3.5.3 Energy-related services: linkages

As mentioned previously, although the Protocol on Trade in Services covers almost all services sectors, “energy-related services”²³³ is one of the priority sectors for intra-regional liberalisation.²³⁴ Consequently, it is appropriate to examine potential linkages between the Energy Protocol and the Protocol on Trade in Services but, first, one must identify what constitutes energy-related services.

Energy-related services

Many energy sources and products are goods (e.g. oil, gas, and coal)²³⁵ which, once extracted, can be traded using of a variety of ancillary services, such as engineering and transport services. Unlike for other sectors in the WTO’s W/120 classification²³⁶—which will form the basis for the SADC services negotiations²³⁷—“energy-related services” are not

²³⁰ See, e.g. Article 2(9) on the participation of the private sector; and Annex 1 to the Energy Protocol also explicitly states the need to address competition issues (although this is not elaborated upon).

²³¹ These producers include independent power generators which are independent of government as they are neither government-owned entities nor public utility businesses. Depending on their licenses, they may also transmit and distribute power in addition to generating and selling it.

²³² The regulators of five SADC Member States are not yet members of the RERA. They are Botswana, the DRC, Seychelles, Mauritius, and Swaziland. See “About RERA”, <http://www.rerasadc.com/about.cfm> (visited 22 April 2012).

²³³ For a general discussion on energy related services and classifications thereof see WTO, *Background Note by the Secretariat: Energy Services* (S/C/W/311, January 2010); and UNCTAD, *Energy and Environmental Services: Negotiating Objectives and Development Priorities* (United Nations, New York and Geneva, 2003).

²³⁴ See Article 16(2) of the Protocol on Trade in Services.

²³⁵ Indeed, electricity is also classified as a good in the Harmonized Commodity Description and Coding System. Most SADC Member States included electricity in their SADC tariff schedules and have phased out any customs duties on electricity traded between them.

²³⁶ WTO, *Services Sectoral Classification List* (MTN.GNS/W/120, 10 July 1991).

²³⁷ See SADC, *Negotiating & Scheduling Guidelines for the 1st Round of SADC Trade in Services Negotiations* (Adopted by TNF Services on 11 November 2009, Approved by CMT on 12 February 2011), para. 5.

classified as an independent sector.²³⁸ Instead, energy-related services exist mainly in three classification categories,²³⁹ namely:

- **“services incidental to mining”**, which covers "services rendered on a fee or contract basis at oil and gas fields, e.g., drilling services, derrick building, repair and dismantling services, oil and gas well casings cementing services";²⁴⁰ and site preparation work for mining including "tunnelling, overburden removal and other development and preparation work of mineral properties and sites, except for mining oil and gas"²⁴¹
- **“services incidental to energy distribution”**, which are "transmission and distribution services on a fee or contract basis of electricity, gaseous fuels and steam and hot water to household, industrial, commercial and other users"²⁴²
- **“transportation of fuels”**, which includes “transportation via pipeline of crude or refined petroleum and petroleum products and of natural gas”²⁴³

It is widely accepted, however, that energy-related services refer to a much wider range of ancillary services than this. They include other types of transport services for energy (other than via pipelines); construction; distribution; professional/consulting; engineering; and environmental services. It should be noted that several other services, such as professional/consulting; distribution; and environmental services are frequently required during the energy development process but are not specifically prioritised in the upcoming SADC negotiations. Member States must decide how to address these services in the context of subsequent rounds of negotiations.

The supply of energy-related services may take the form of any of the modes set out in the Protocol on Trade in Services. For example, online trading and brokerage services, and professional services such as energy consulting (delivered by mail or electronically) are often supplied cross-border. Similarly, the transmission of electricity and gas through pipes and interconnected grids often occurs across borders (Mode 1). An example of services consumed abroad would be the repair of equipment in another country (Mode 2). Mode 3 deals with all forms of foreign commercial presence such as Build Operate and Transfer (“BOT”) projects and Independent Power Producer (“IPP”) entities. Mode 4 would occur in instances such as the movement of skilled professionals delivering technical and managerial services in another territory; and the movement of semi-skilled and unskilled personnel needed for the construction and upgrading of facilities and grids. It is important to note, however, that for the purpose of liberalisation under the Protocol on Trade in Services, a service would be deemed to be supplied *only when*

²³⁸ An added complication to drawing distinctions in this context is that there is no consensus as to whether certain activities, such as refining or liquefaction and gasification, are production activities or services related to production.

²³⁹ This has been specifically confirmed with regard to the first round of SADC services negotiations: See SADC, above n 236, footnote 1 to para. 5.

²⁴⁰ CPC 883. This excludes prospecting services, exploration or surveying services.

²⁴¹ CPC 5115. This does not include construction services incidental to mining.

²⁴² CPC 887.

²⁴³ CPC 7131.

an activity is contracted to a service supplier but *not* if a company carries out an activity in-house.²⁴⁴

Relationship between the Protocol on Trade in Services and the Energy Protocol

There is little common space between the Protocol on Trade in Services and the Energy Protocol. While the Protocol on Trade in Services Protocol addresses the commercial supply of certain ancillary services in the energy development value chain, the Energy Protocol primarily emphasises co-operation among Member States with a view to securing energy supplies. They are not unrelated however and the former may support the latter in one potentially significant respect. One of the obligations of result State Parties to the Energy Protocol have accepted is to create a “conducive environment for the private sector to participate fully in energy development in the Region”.²⁴⁵ Implementation of the Protocol on Trade in Services—and particularly liberalisation of relevant services sectors—would contribute to the achievement of this.

Finally, as mentioned previously, power pooling is specifically encouraged by the Energy Protocol and is already being done by the SAPP. Liberalisation of “services incidental to energy distribution” may enhance options for transmission and conveyance, which are defined as aspects of energy pooling by the Energy Protocol.²⁴⁶

3.6 Protocol on Culture, Information and Sport

The Protocol on Culture, Information and Sport (“CIS Protocol”) entered into force on 7 January 2006.²⁴⁷ The CIS Protocol emphasises regional integration and co-operation in these sectors by setting out principles for the guidance of State Parties. These principles include, *inter alia*, the pooling of resources “such as expertise and infrastructural facilities” and the right of all SADC citizens to access information and participate in cultural and sporting activities.²⁴⁸

Article 3 of the CIS Protocol provides for the following general areas of co-operation that are relevant to all sectors: policy harmonisation; training, capacity-building and research; resource mobilisation and utilisation; flow and exchange of information; regional interaction among stakeholders; gender equality and equity; and persons with disabilities. Each of these areas of co-operation is given greater content in the provisions that immediately follow.²⁴⁹ It is of note that these provisions do not only contain obligations of co-operation, there are also some obligations to achieve specific results. For example, State Parties have undertaken “to

²⁴⁴ For example, where a concessionaire for a gas field contracts specialist drilling out to an expert firm, an energy-related service takes place; but if that concessionaire company uses its own employees to do the work, no service supply would occur.

²⁴⁵ Article 2(9) of the Energy Protocol.

²⁴⁶ See Article 1 of the Energy Protocol.

²⁴⁷ As at December 2011, the DRC, Madagascar and Zimbabwe had yet to accede.

²⁴⁸ See Article 2 of the CIS Protocol.

²⁴⁹ See Articles 4-10 of the CIS Protocol. Chapter 3 which follows then also elaborates by providing specific objectives in respect of, and State Parties’ undertakings with regard to, culture, information and sport matters.

review and formulate policies, strategies and programmes”²⁵⁰ in these three areas so as to provide a framework for action at the national level and a basis for regional co-operation.

While the CIS Protocol does not envisage liberalisation of these areas, its provisions may be complemented by the Protocol on Trade in Services, and this is not limited to general clauses for co-operation.²⁵¹ For example:

- Article 5.2 of the CIS Protocol which mandates the establishment of “Centres of Excellence” for sport²⁵² and cultural purposes may entail cross-border trade in services—as service consumers come to them from abroad for training (Mode 2) or researchers in those centres come as workers from another State Party (Mode 4)—and may consequently benefit from trade in services liberalisation
- Article 15 which mandates the organisation of festivals may similarly require, encourage or benefit from trade in services
- Article 22 of the CIS Protocol on SADC accreditation of media practitioners and Article 7 of the Protocol on Trade in Services on mutual recognition of service suppliers’ qualifications are mutually supportive.

The co-operation and integration sought by the CIS Protocol may overall (albeit indirectly) enhance trade in services liberalisation efforts. However, the goal of preserving the Region’s cultural heritage,²⁵³ and the CIS Protocol’s provision that SADC projects should be assessed in order to gauge their impact on culture,²⁵⁴ may give rise to tensions. The protection of culture and liberalisation of trade in services are not necessarily incompatible²⁵⁵ but may *potentially* be. For example, it could be argued that a cross-border audiovisual service may negatively impact on the preservation of culture or vitiate the promotion of indigenous languages.²⁵⁶ The balance between, or the approach to be taken to, the protection of culture and the promotion of a liberalised trade regimes is a complex issue that has received some attention in academic and other commentary, particularly due to advances in digital technologies.

3.7 Protocol on Health

The provision of an acceptable level of public health services is acknowledged to be a fundamental government function. Many of the core services are provided through publicly administered and funded institutions. To the extent that such services are provided neither on a

²⁵⁰ Article 4 of the CIS Protocol. Other examples include Articles 5.2 and 6.1 and more examples are found in Chapter 3 which sets out more specific objectives in respect of each area and which provides specific undertakings.

²⁵¹ Articles 18(2) and 19(5) of the Protocol on Trade in Services confirm that State Parties must enhance co-operative mechanisms, technical assistance and capacity building in accordance with mechanisms and initiatives carried out under other SADC Protocols.

²⁵² See also Article 29 on the establishment of a sports academy.

²⁵³ See Article 13 of the CIS Protocol.

²⁵⁴ See, e.g. Article 11(e) of the CIS Protocol.

²⁵⁵ Indeed, culture can be the basis of the service traded. For example, the promotion of cultural industries including eco-tourism is generally sought by Article 14 of the CIS Protocol—although Article 14(2) permits the protection of “infant cultural industries”.

²⁵⁶ See Articles 12 and 17(e) of the CIS Protocol.

commercial basis nor in competition with other service suppliers, they are considered to be “services supplied in the exercise of governmental authority”²⁵⁷ and are as such not within the scope of application of the Protocol on Trade in Services. Despite the foregoing, private service suppliers operating on a commercial basis offer a wide range of health services in most countries and may thus be subject to the provisions of the Protocol on Trade in Services (see table 3 *infra*).

It is widely recognised that private investment in health services can have beneficial effects on access to health services to the general public, and some countries have been able to establish successful health-tourism centres. However, due to the sensitive nature of the health sector and the large amount of public funding it depends on, most countries which have liberalised health services multilaterally have clearly indicated that this liberalisation *only* extends to private health services outside the public system.

Mode 1: Cross-border Supply	Telemedicine (advice) and tele-diagnosis
Mode 2: Consumption Abroad	“Health-tourism”, where patients travel to another country to receive medical treatment
Mode 3: Commercial Presence	Establishment of a hospital or clinic in another country
Mode 4: Presence of Natural Persons	Medical personnel or independent medical practitioners work in another country

The SADC Protocol on Health, which entered into force on 18 August 2004,²⁵⁸ does not provide for the liberalisation of the sector but it does acknowledge a role for the private sector.²⁵⁹ The Protocol not only envisages effective collaboration and mutual support among State Parties in order to improve the health of the population within the Region, it also explicitly foresees collaboration and co-operation across other relevant SADC sectors.²⁶⁰ Among other issues, regional co-operation is intended to address:²⁶¹

- epidemic preparedness, mapping, prevention, control, and the eradication of communicable and non-communicable diseases;
- the coordination of laboratory services;
- the development, education, training and effective utilisation of health personnel and facilities;
- the establishment of a mechanism for the referral of patients for tertiary care; and

²⁵⁷ Article 3(5) of the Protocol on Trade in Services.

²⁵⁸ As of July 2011, Madagascar and the DRC were the only Member States yet to accede to the Protocol on Health.

²⁵⁹ See Article 4(10)(d) of the Protocol on Health.

²⁶⁰ Article 3(i) of the Protocol on Health. Article 18 expressly acknowledges a synergy with the Protocol on Education and Training in the context of the development of health personnel.

²⁶¹ See Article 3 of the Protocol on Health lists these objectives which are then elaborated upon in later provisions.

- the progressive achievement of equivalence, harmonisation and standardisation in the provision of health services in the Region.

3.7.1 Activities under the Protocol on Health

Meeting Health and Personnel Challenges

Some progress has been made with regard to the formulation of regional policies. For example, State Parties are in the process of implementing strategic plans which have been developed in order to address HIV/AIDS, sexual and reproductive health,²⁶² tuberculosis (“TB”),²⁶³ malaria elimination²⁶⁴ and the use of traditional medicines.

A framework for the implementation of a plan to address human resources for health has been in the process of being developed since 2006.²⁶⁵ This framework is intended to facilitate, *inter alia*, the mobility of health professionals in the SADC region. This is currently done through bilateral agreements or the bilateral recognition of qualifications such as that between Botswana and South Africa regarding health professionals trained in South Africa. These bilateral agreements are targeted at curbing human capital flight (or “brain drain”) within the region. The regional framework which is being developed is also meant to rationalise the movement of health professionals in the SADC region.

Member States established institutional mechanisms for the effective implementation of this protocol, namely: the Health Sector Co-ordinating Unit; the Health Sector Committee of Ministers; the Health Sector Committee of Senior Officials; and technical sub-committees.²⁶⁶

Mutual Recognition

There is no Region-wide agreement for the mutual recognition of qualifications for health professionals. One of the components to the matrix for implementation of the strategic plan addressing human resources for health concerned the facilitation of the harmonisation of a regional qualification framework on health.²⁶⁷ The timeframe proposed for reviewing existing frameworks and establishing working teams for this purpose was 2007-2008. It does not appear, however, that any steps have been taken to date. Regardless of which is realised first, the broader initiative on mutual recognition envisaged in the Protocol on Trade in Services,²⁶⁸

²⁶² SADC, *Sexual and Reproductive Health Strategy for the SADC Region: 2006-2015* (November 2008). See Article 16 of the Protocol on Health.

²⁶³ SADC, *Strategic Framework for the Control of Tuberculosis in the SADC Region: 2007-2015* (July 2007). See Articles 9 and 12 of the Protocol on Health.

²⁶⁴ SADC, *SADC Malaria Strategic Plan: 2007-2015* (March 2007); and SADC, *SADC Malaria Elimination Framework* (draft available at http://www.sadc.int/files/9613/1823/7132/SADC_Malaria_Elimination_Strategic_Framework_.pdf (visited 22 July 2012)). See Article 11 of the Protocol on Health.

²⁶⁵ See SADC, *SADC Human Resources for Health Strategic Plan: 2007-2019* (November 2006), and Annex 1 thereto which had proposed a timeframe for implementation. The utilisation of health personnel is addressed in Article 18 of the Protocol on Health.

²⁶⁶ See Article 4 of the Protocol on Health.

²⁶⁷ Article 18(e) of the Protocol on Health requires State Parties to co-operate on the accreditation of health professionals.

²⁶⁸ We recall that Article 7 of the Protocol on Trade in Services envisages that the commencement of negotiations on an agreement concerning mutual recognition will not even occur for several years after the protocol enters into force.

or the health sector-focused qualification framework envisaged in the strategic plan, one would complement and progress the other.²⁶⁹ The benefits of such a development would certainly be great. While there are some bilateral agreements, health professionals are not covered by these and generally endure lengthy processes—sometimes including examinations—in order to register with professional bodies in other Member States, and there is no uniform approach to deciding upon their applications.

Referral Hospitals and Uniform Referral Documents

Progress is ongoing with regards to the identification and establishment of referral hospitals in the Region.²⁷⁰ It is anticipated that there will be several such centres of excellence or specialisation in the Region. Their establishment will obviously have trade in services implications. All modes of supply could potentially be represented in the functioning of these centres. For example, telemedicine and telediagnosis (Mode 1) could be carried out; patients will certainly be referred from other State Parties for treatment (Mode 2); private sector involvement in the establishment of the centres cannot be dismissed (Mode 3); and medical professionals may come from other territories in order to work in a particular centre (Mode 4).

Related to the establishment of referral hospitals is the referral documentation system. This involves the development of a standard document which patients carry to other hospitals in the Region, thereby primarily facilitating Mode 2 supply. This project is being given priority and a pilot TB referral document is currently underway. There has also been progress with regard to the establishment of supranational laboratories in the Region.²⁷¹ These will provide quality services within the Region through the sharing of technical expertise.

Other Provisions

Several other provisions of the Protocol on Health stand out. First, the requirement to develop harmonised policies with respect to “tele-health applications” has clear implications for the cross-border supply of this rather novel service (Mode 1).²⁷² Second, in contrast to other SADC protocols, Article 31 provides for sanctioning where a State Party “persistently fails, without good reason” to fulfil its obligations under Protocol on Health, or implements policies which undermine its object and purpose.

Finally, it is of note that since the private health sector is not yet fully regulated in many Member States, harmonisation of the regulatory framework for the private sector in the Region has not begun.

²⁶⁹ Such a development would also complement the Draft FMP Protocol and the Protocol on Education and Training.

²⁷⁰ See Article 28 of the Protocol on Health. It was foreseen that potential and existing centres would be identified by 2009 and that staff categories on which to focus will be decided by 2012. (See SADC, above n 264, p. 28)

²⁷¹ See Article 9(2) of the Protocol on Health. An inventory report was due to be completed by November 2007 according to SADC’s *Strategic Framework for the Control of Tuberculosis*, above n 262, p. 21.

²⁷² Article 7(e) of the Protocol on Health mandates this. Tele-health is defined as “telemedicine together with distance learning”. (See Article 1)

3.8 Protocol on Education and Training

3.8.1 Objective and provisions

The Protocol on Education and Training (“Education Protocol”), which entered into force on 31 July 2000,²⁷³ pursues a variety of objectives with a view to enhancing access to education, educational standards and co-operation with regards to qualifications and education. Its “ultimate objective”—to be realised gradually but within 20 years of its entry into force—is the achievement of equivalence, harmonisation, and standardisation of education and training systems in the SADC region.²⁷⁴

The Education Protocol is the basis for co-operation between Member States on many matters relating to all levels of education and training. Issues range from the improvement of teaching materials,²⁷⁵ to the relaxation and eventual elimination of immigration formalities for students and staff within the Region for the specific purposes of pursuits relating to education and training.²⁷⁶ The Protocol also mandates the attainment of certain results. For example, it provides for the establishment of distance learning institutions and a SADC Distance Education Centre;²⁷⁷ the establishment of centres of excellence and specialisation;²⁷⁸ and the “national treatment” of students from other SADC Member States for the purposes of fees and accommodation within 10 years from the entry into force of the Education Protocol.²⁷⁹

3.8.2 Education services

The attainment of many of the protocol’s goals would facilitate trade in education services via various modes of supply. As Table 4 below illustrates, education and training services are services that can be traded in their own right.

Mode 1: Cross-border Supply	Distance learning by a student residing in country A and obtaining education from a university in country B
Mode 2: Consumption Abroad	A student from country A moves to a boarding school in country B
Mode 3: Commercial Presence	A university from country A establishes a campus in country B
Mode 4: Presence of Natural Persons	The university from country A also moves its dean and 2 professors to its new campus in country B

²⁷³ As at July 2011, Angola, the DRC, and Madagascar had yet to accede.

²⁷⁴ Article 3(j) and (k) of the Education Protocol.

²⁷⁵ See, e.g. Articles 5(6)(b) and 6(3)(b)(ii) of the Education Protocol.

²⁷⁶ See Articles 3(g), 7(A)(6), 7(E)(11), 8(B)(3) of the Education Protocol.

²⁷⁷ Article 9(2)(A) of the Education Protocol.

²⁷⁸ See Articles 8(B) and 7(E) respectively.

²⁷⁹ Several provisions of the Education Protocol require that students of other Member States be treated “as home students”. Article 7(A)(5) which requires such treatment at universities by 2010; and Article 7(E)(10) requires the immediate extension of such treatment in the context of centres of specialisation.

3.8.3 Activities under the Education Protocol: linkages

Mode 2 Student Service Consumers

The relaxation and eventual abolition of immigration requirements for students and education staff envisaged by the Education Protocol could increase the educational options of students as well as their movement as service consumers because student visa requirements remain barriers to mobility in the Region. This movement which the Education Protocol seeks to foster—even foreseeing that higher education institutions might reserve at least 5% of places for students from other Member States²⁸⁰—is not without a potential cost to students' home countries. Upon completion of their studies, many students seek employment in their host Member State. Consequently, some Member States are contemplating the development of a compensatory mechanism to benefit the home countries for the loss of the benefit of their investment in large parts of such students' education.

Mode 1 Distant Learning

As previously highlighted, the Education Protocol mandates the establishment of distance learning institutions and a SADC Distance Education Centre, whereby students in one Member State may access education and training in another (Mode 1). The SADC's *Open and Distance Learning Policy* was conceived in 2010 and is still at a draft stage. Its principal focus is on private sector involvement, the quality of education provided under open and distance learning, and the credibility and recognition of qualifications.

Mutual recognition and credit transfers

The Protocol on Trade in Services and the Education Protocol both touch on mutual recognition issues, but with different aims. The former is specifically aimed at achieving mutual recognition of a broader range of matters: it is that service suppliers (particularly professionals) may fulfil the criteria applied by State Parties for their authorisation, licensing, operation and certification by requiring necessary steps to be taken for the negotiation of an agreement providing for the mutual recognition of, *inter alia*, qualifications and licences.²⁸¹

In contrast, the aim of the Education Protocol with regards to mutual recognition seems to be narrower in that it is focused on *qualifications*. One might deduct that mutual recognition would naturally flow from the achievement of the Education Protocol's ultimate aim—of achieving “equivalence, harmonisation and standardisation” of education systems—whereas the achievement of a mutual recognition agreement would be an important component to attaining the ultimate objective. Article 7 is the only provision of the Education Protocol that explicitly references “mutual recognition” and it does so in the context of encouraging universities to devise mechanisms to facilitate credit transfers between regional universities with the view to enabling the movement of SADC students from one university to a university in another Member State (Mode 2).²⁸² While such credit transfer systems do not equate to

²⁸⁰ Article 7(A)(1) of the Education Protocol.

²⁸¹ We recall that Article 7(1) of the Protocol on Trade in Services provides that such steps should commence no later than two years after the entry into force of that protocol.

²⁸² Article 7(A)(3) of the Education Protocol.

the mutual recognition of qualifications, they may encourage progress towards the latter since they acknowledge the compatibility of qualifications obtained elsewhere thereby allowing for their portability.

Implementation of the Education Protocol

Efforts are being made for the formation of a SADC regional credit accumulation and transfer system, under the auspices of the Regional Association of University Vice Chancellors. However, the universities of many Member States have yet to develop systems for even recognising the programs of other universities within the same country. This can be explained by the fact that well-established and well-resourced universities, with highly-qualified staff, are loathe to recognise credits transferred from other less prestigious and lowly-ranked universities. The same obstacle resurfaces at the regional level, where some universities will not recognise credits earned at others universities in the Region. It might be suggested that approaching this issue discipline by discipline might yield greater progress, and the same might be said for the initiatives aimed at achieving mutual recognition of qualifications.

Not only would the mutual recognition of qualifications facilitate the movement of students, as previously mentioned, it would also encourage and facilitate the movement of personnel, as envisaged by the Education Protocol,²⁸³ and is very closely linked to the realisation of the Education Protocol's ultimate objective. Mutual recognition of qualifications would also support, albeit not fully achieve,²⁸⁴ the recognition objectives contained in the Protocol on Trade in Services. Several initiatives have been launched in this regard. In 2005, the SADC Technical Committee for Certification and Accreditation²⁸⁵ proposed the development of the Regional Qualifications Framework as a mechanism for establishing comparability and equivalency of qualifications. Some Member States already have well-established National Qualifications Frameworks ("NQFs") and others are currently in the process of developing their NQFs. There is a convergence among Member States towards the same ten-level model of NQF—covering all levels of education from primary to tertiary—which will then feed into the concurrent development of the regional qualifications framework ("RQF"). Delays in this process are caused by the fact that NQFs are at different stages of development—some are already fully operational whereas in other Member States, certain national qualifications do not yet even exist.

Another initiative which complements the RQF is the SADC Qualifications Portal. It appears that, once developed, this portal will include, *inter alia*, the qualification title, the level of the qualification (according to the relevant country's NQF), and the regionally-agreed level (according to the SADC RQF).²⁸⁶ Progress in its development has been slow, however, due to a lack of adequate resources.

²⁸³ For example, such movement would be expected with the establishment of centres of excellence and specialisation, and would likely entail at least Mode 2 and Mode 4 supplies of services.

²⁸⁴ Since the Protocol on Trade in Services envisages more than the mutual recognition of *qualifications*.

²⁸⁵ Established under Article 11(4)(a)(vi) of the Education Protocol.

²⁸⁶ The qualifications portal is a system that will be able to channel information on qualifications, learners and education and training providers from various sources in SADC Member States. There will be different levels of access to the portal—for governments, industry, education and training providers as well as individual learners.

The mutual recognition of qualifications is a large step towards the achievement of the ultimate objective of the Education Protocol and it would help to ensure the portability of qualifications and, hence, facilitate the supply of professional services such as accounting or engineering services (mainly through Modes 1, 2 or 4) within the Region. Not only might this allow for a better allocation of skills so to increase employment levels in the Region, it would also encourage students to study at centres of excellence outside their own Member State (Mode 2).

As the discussion above illustrates, some institutions established under the Education Protocol²⁸⁷ are functional—e.g. the technical committees which are charged with discrete aspects of the protocol—and are making progress which may complement the future objectives of the Protocol on Trade in Services. However, if mutual recognition of qualifications is to be achieved soon, there is a need for coordination among units in the SADC Secretariat and for the investment of more resources to expedite the process.

RQF and the Protocol on trade in Services may be complementary

Finally, Article 7 of the Protocol on Trade in Services foresees a practical way in which State Parties should adopt common standards and criteria for mutual recognition of “services trades and professions”, namely by co-operating with “with relevant intergovernmental and professional bodies”.²⁸⁸ It is not clear how this provision is intended to relate to another paragraph in the same article of the Protocol on Trade in Services mandating at least the commencement of negotiations for an agreement on mutual recognition. It would appear that this provision implies that State Parties should work with domestic and other bodies in order to reach an understanding on what criteria should form the basis of a mutual recognition agreement. Consequently, it is likely that any progress made on agreeing the classification of qualifications across the Region—particularly under the RQF—may be of great practical assistance.

3.9 Protocol on Development of Tourism

The Protocol on Development of Tourism (“Tourism Protocol”) entered into force on 26 November 2002.²⁸⁹ Its objectives are, *inter alia*, to develop the Region’s tourism industry; to promote and market the Region as a single but multifaceted tourism destination; to improve the quality, competitiveness and standards of service of the tourism industry in the SADC region; to create a favourable investment climate for tourism within the Region for both the public and private sectors, including small and medium scale tourist establishment; and to facilitate intra-regional travel through the reduction/elimination of travel and visa restrictions and harmonisation of immigration procedures.²⁹⁰

²⁸⁷ Chapter 4 of the Education Protocol covers institutional aspects.

²⁸⁸ Article 7(4) of the Protocol on Trade in Services.

²⁸⁹ As of July 2011, Angola, the DRC, Madagascar and Zambia were yet to accede.

²⁹⁰ See Article 3 of the Tourism Protocol.

3.9.1 Tourism services

While many transport-related and other services may be ancillary to tourism, tourism-related services *per se* are also numerous.

Mode 1: Cross-border Supply	Marketing of tourism activities, travel agency and tour operator advice, sales, reservations/bookings
Mode 2: Consumption Abroad	Where a resident of country A goes to country B as a tourist
Mode 3: Commercial Presence	Establishment of tour and safari operations in another country
Mode 4: Presence of Natural Persons	Movement of tourism personnel, such as tour guides to work on safaris, or hotel workers

The core obligations of the Tourism Protocol are contained in its Chapter IV. These undertakings pertain to, *inter alia*, travel facilitation (Article 5); tourism training and education (Article 6); marketing and promotion (Article 7); tourism research and statistics (Article 8); service standards (Article 9); transportation (Article 10); environmentally sustainable tourism (Article 11); and investment incentives and development (Article 12).

3.9.2 Linkages: Tourism Protocol and other SADC instruments

The provisions of the Tourism Protocol dealing with travel facilitation issues have obvious overlaps with the Draft FMP Protocol and the TCM Protocol.²⁹¹ The Tourism Protocol supports the former's objective of visa-free admission for regional tourists (i.e. SADC citizens) and, as previously noted, most Member States already do not require SADC citizen visitors to obtain a visa due to bilateral treaties concluded between them.²⁹² Interestingly, the Tourism Protocol goes further by also envisaging a "UNIVISA" system for international tourists, which would facilitate their movement within the whole Region. This has been hailed as critical to the development of cross-border tourism in the Region. The underlying rationale appears to be that reducing the difficulty of meeting multiple visa requirements will enhance the capabilities and efficiencies of cross-border tourism operations which will benefit the whole of the SADC tourism sector. Regional Tourism Organisation of Southern Africa ("RETOSA") has been lobbying for the introduction of this UNIVISA system and, as of April 2011, a number of Member States had taken steps towards implementing the system on a pilot basis.²⁹³

The Tourism Protocol's provisions for the harmonisation of tourism training and education in the SADC region may aid the movement of tourism personnel (Mode 4); and the development of exchange programmes (Mode 2) is also specifically foreseen. This Protocol does not provide for

²⁹¹ See Article 5(2) of the Tourism Protocol. Article 10 also expressly underscores Member States' commitment to implement the provisions of the TCM Protocol.

²⁹² Para. 25 *supra*.

²⁹³ They are Mozambique, Namibia, Swaziland and Zimbabwe. The UNIVISA working group had also agreed, as of April 2011, to recommend that Botswana and South Africa be persuaded to join the pilot, given that they are both key destinations in the majority of tour packages to the SADC region.

the entry, stay or establishment of *non-tourists* however. Accordingly, on the movement of service suppliers, regard should be had to the preceding discussion on the Draft FMP Protocol and the Protocol on Trade in Services' coverage of the movement of natural persons.²⁹⁴

Member States have undertaken to regionally "harmonise the standards for registration, classification, accreditation and grading of service providers".²⁹⁵ It is not clear what/if any progress has been made in this regard but such common standards and criteria in respect of service providers/suppliers are specifically foreseen by the Protocol on Trade in Services as playing a role in mutual recognition matters,²⁹⁶ which in turn play an important role in enhancing trade in services.

Article 12 of the Tourism Protocol recalls the provisions of other instruments relating to the promotion of investment into the Region.²⁹⁷ Under Article 12, Member States commit to "create the necessary enabling environment so as to enhance the competitiveness of the Region as an attractive investment location and to encourage the growth of private sector initiatives in the tourism sector". As mentioned previously, the trade in services liberalisation agenda can facilitate intra-regional investment, although the Tourism Protocol does not appear to uniquely seek to attract investment from within the Region. Like other SADC instruments containing general statements concerning the promotion of an attractive investment environment, the Tourism Protocol does not include any disciplines on the protection of investment (such as those found in the FIP).

3.9.3 Linkages: RETOSA and the Protocol on Trade in Services

The institutional mechanisms for the implementation of the Tourism Protocol comprise the SADC Summit, the SADC Committee of Tourism Ministers, the Committee of Senior Officials, the Tourism Coordinating Unit ("TCU", which has been absorbed into the SADC Secretariat through restructuring) and, significantly, the RETOSA.²⁹⁸ In September 2009, a number of Member States agreed to amendments of the Tourism Protocol. The most noteworthy amendment appears to be that all references to the TCU be eliminated and that all duties previously assigned to it now be the responsibility of the SADC Secretariat.

Article 7 of the Tourism Protocol confirms that RETOSA, which was established under and is governed by a Charter predating the Protocol,²⁹⁹ is the promotional and marketing arm of SADC tourism sector.

The principal aim of RETOSA is to develop consumer-driven tourism through effective marketing of the Region in collaboration with the public and private sector, and with due regard for the overall development of

²⁹⁴ Namely, Article 17 of the Protocol on Trade in Services. See paras. 29-33 *supra*.

²⁹⁵ Article 9(2) of the Tourism Protocol.

²⁹⁶ See Article 7(4) of the Protocol on Trade in Services.

²⁹⁷ Article 18(2) of the Protocol on Trade in Services and FIP Annex 1.

²⁹⁸ Article 13 of the Tourism Protocol.

²⁹⁹ The Charter of the Regional Tourism Organisation of Southern Africa ("RETOSA Charter") entered into force on 8 September 1997 upon the signature of its parties, which include all Member States except for the DRC and Madagascar.

the people, the Region and the Region's natural and cultural resources.³⁰⁰ Current proposals for amendment of this Charter would see RETOSA's "operational programme" further-defined as a vehicle to lobby for the removal of barriers to tourism development and growth. One of the specific objectives of the RETOSA is to encourage and facilitate the movement of tourists into the Region by applying regional and national policies and mechanisms contributing to the liberalisation of exchange control regulations.³⁰¹ This specific objective appears to recognise that not only is it important to ensure the free movement of tourists, but these regional tourists must also be in a position to spend money (Mode 2) and to book their holidays in advance from another Member State (Mode 1). Accordingly, Article 20 of the Protocol and FIP Annex 4 which (broadly stated) seek to liberalise current account transactions support this objective, particularly relevant for transactions associated with Mode 1.

3.9.4 Interconnected challenges

The large "bottlenecks" to the provision of tourism services in the SADC region that have been recently identified demonstrate the degree to which this sector is linked to other major sectors and parts of the economy. The bottlenecks identified include, *inter alia*, (i) a lack of policy and regulatory framework harmonisation (e.g. a lack of harmonisation of tour guides training, certification and work permits application procedures); (ii) a negative and uncompetitive operating environment; and (iii) uncoordinated market demand challenges (e.g. poor transport connectivity and infrastructure).

RETOSA seeks to market the Region as a destination for consumers (tourists) and the actions that Member States endeavour to take under the Tourism Protocol support this end. Liberalisation of the tourism services sector and related sectors (such as transport) might aid the creation of a more competitive and profitable single tourism services market. Therefore, negotiations under the Protocol on Trade in Services may be an opportunity to overcome some of the bottlenecks facing the tourism sector. The "hard" nature of the obligations which Member States might undertake pursuant to the Protocol on Trade in Services could encourage progress in respect of implementing some other "softer" undertakings already set out in other instruments.

Member States should also be aware of the provisions relevant to addressing many "bottlenecks" in providing quality tourism services already existing and how they relate to the service liberalisation agenda. Some examples relating to the principal bottlenecks follow: The TCM Protocol calls for liberalisation of civil aviation.³⁰² Despite the fact that provision of tourism services in the SADC region suffers from expensive airfares and poor connectivity—due to the protection of inefficient national carriers—implementation of the Yamoussoukro Decision has been slow.³⁰³ The movement of tourists from one Member State to another is impeded by the lack of a uniform system for entry. This issue is already addressed in

³⁰⁰ See Articles 2 and 3.1 of the RETOSA Charter.

³⁰¹ Article 3(2)(a) of the RETOSA Charter.

³⁰² The TCM Protocol also addressed improvement of infrastructure which is seen as another impediment to tourism services in the Region.

³⁰³ See paras. 101-102 *supra*.

the Draft FMP Protocol³⁰⁴ and the Tourism Protocol.³⁰⁵ Tour operators face obstacles to offering services in other Member States due, *inter alia*, to the need for work permits. This matter is addressed in the Draft FMP Protocol and (indirectly) in the Protocol on Trade in Services.³⁰⁶ The Protocol on Trade in Services and the Education Protocol are relevant to addressing the recognition of tour guides certified in other Member States.³⁰⁷ Overcoming challenges facing the tourism services sector therefore requires careful consideration of many interconnected issues (including the possible need to liberalise certain sectors) that implicate diverse instruments and undertakings.

³⁰⁴ See paras. 23-25 *supra*.

³⁰⁵ See para. 158 *supra*.

³⁰⁶ See paras. 28-33 *supra*.

³⁰⁷ See paras. 147-153 *supra*.

4 COORDINATION AND EXCHANGE OF INFORMATION

4.1 Exchange of information and coordination within SADC Secretariat

From the discussion above, it is apparent that there are some potential links and synergies between the Protocol on Trade in Services and other SADC instruments. Accordingly, a need for an efficient and effective mechanism for coordination and exchange of information results because the activities undertaken pursuant to the various SADC instruments relate to each other.

From the interviews conducted, it appears that many parallel activities are currently undertaken by the respective divisions within the SADC Secretariat. However, as no system for information sharing is operational within SADC Directorates, awareness of activities being carried out is generally low, regardless of the relevance of the information. For example, with regards to the Protocol on Trade in Services, Secretariat officers interviewed for the purposes of this study displayed varying levels of appreciation of its content and its impact on their work. Such examples underscore the need for a sustainable mechanism to exchange relevant information within the SADC Secretariat.

4.1.1 Existing mechanisms

The SADC Secretariat generally shares, upon request, hard copies of reports, minutes and any other documents. Some divisions also exchange information through emails. In addition, some officers, especially those within the same directorate, hold joint meetings at regular intervals, and exchange reports, annotated agendas, and other documents where one has attended a pertinent meeting outside the SADC Secretariat.

4.1.2 Proposals

For the purposes of the negotiations on services in the six priority sectors (Communications, Construction, Energy-related, Financial, Tourism, and Transport Services), the involvement and advice of relevant SADC Units will be indispensable. At the same time, it is important that regular information flows from the relevant Units to the Trade, Industry, Finance and Investment ("TIFI") Directorate Services team are regularised. While personal contacts and e-mails will be a useful method for ad hoc interaction, a more institutionalised approach would be needed to maintain the links between different SADC Units. It is suggested that SADC could develop a portal on its intranet where relevant documents, such as meeting reports, quarterly and annual reports, would be posted for sharing. This method is safe and secure since its access can be limited to SADC Secretariat officers and other authorised persons. An alternative approach would be to expand the access to the different Directorates' LAN-drives Secretariat-wide to allow for access to all documentation. Access to any confidential information can easily be restricted to the relevant authorised persons in such a system. The TIFI Directorate has recently implemented a system to rationalise the information contained on its TIFI-drive, with the result that all officers are able to access and

easily find meeting and mission reports of their colleagues. A necessary prerequisite for such a system to work on a Secretariat-wide basis would be the existence of rationalised Directorate-drives throughout the Secretariat. Thirdly, the TIFI Directorate has set up a Trade in Services website (www.sadc.int/tis), for the benefit of Member States as well as the general public to disseminate important information with regard to the SADC trade in services negotiations. The website provides password-protected access to meeting documents for Member States and the Secretariat. Similar websites by other Units in the Secretariat, would facilitate the easy access to information.

4.2 Coordination and exchange of information within member states

A need for coordination within Member States also exists because it is at the national level that implementation of SADC policies and decisions occur. A mechanism already exists for coordinating SADC issues through SADC National Committees (“SNCs”). SNCs were established by the SADC Summit at its Extraordinary meeting in Windhoek, Namibia, on 9 March 2001, and their purpose is to ensure that Member States effectively participate in SADC affairs so as to derive maximum benefits from the process of regional integration. More generally, they also promote and broaden stakeholder participation in SADC affairs at the Member State level.

SNCs are composed of representatives of ministries, agencies and organisations involved in the core areas of regional integration and co-operation. The SADC Contact Point for each Member State chairs the SNC. There are four sub-committees in each Member State which deal with issues pertaining to the core areas, namely: TIFI; Food, Agriculture and Natural Resources (“FANR”); Services and Social and Human Development and Special Programmes (“SHD&SP”). In addition, each Member State is expected to have an established National Secretariat which should be structured according to the core areas and facilitate the operation of the SNCs.

In light of this already well-established structure, it is suggested that these institutions could be used effectively to exchange information. It is also suggested that the SADC National Secretariats should develop, maintain and update websites with portals into which they may deposit relevant information for sharing with stakeholders.

5 CONCLUSIONS

The Protocol on Trade in Services takes its place among an intricate web of obligations of various types. While the preceding examination showed that the existing SADC instruments may interact in various ways to the Protocol on Trade in Services, the Protocol is unique (to the SADC) for its primary aim of trade in services liberalisation. Nonetheless, the existing instruments might support the Protocol or vice versa.

Obviously the Protocol on Trade in Services is not yet in force and neither is the Draft FMP Protocol. This highlights several important, practical points: When examining a particular instance for some inter-connection between the instruments generally, one must take account of the differing memberships to these instruments and the bearing that might have on determining the nature of the linkage. The integration sought in the SADC region is occurring in various discrete areas at an uneven pace.

The delay in implementing SADC legal instruments touching on trade in services has been a major stumbling block to the liberalisation of intra-SADC trade in services. Inadequate human resources has compounded this problem because of the inability to ensure the effective negotiations, adoptions, implementation and revisions of the various SADC legal instruments. Perhaps more than ever before, there is now a need for co-ordination of these various processes within the SADC Secretariat so that outcomes are compatible. Strengthening the exchange of information mechanisms within the SADC Secretariat and within SADC Member States contribute to the achievement of this coordination.

6 BIBLIOGRAPHY

- Adlung, R. and Molinuevo, M., *Bilateralism in Services Trade: Is there Fire Behind the (BIT-)Smoke?* 11(2) Journal of International Economic Law 2008, 365-409
- Bester, H., *Review of the Structures for Implementing the SADC Protocol on Finance and Investment*, SADC/MMFI 1/2011/7 (Draft Report, January 2011)
- Bingandadi, L., *Progress and Status of Implementation of Road Infrastructure, Transport and Traffic Sector Policies , Legal, Regulations, Technical Standards in SADC* (Draft Discussion Paper 23 September 2011)
- Bosl, A. et al., *Monitoring Regional Integration in Southern Africa* (tralac, 2010 Yearbook)
- COMESA, EAC, SADC, *Road Transport Market Liberalization in the ESA Region: Phase 2 Harmonization of Market Access (Synopsis)* (Draft Report)
- COMESA, EAC and SADC, *Liberalisation of Road Transport in the Eastern and Southern African (ESA) Region*, Minutes of the Kick-Off Meeting (Lusaka, 22 August 2011)
- GFA and DNA Economics, *Draft SADC Regional Action Programme and Investment Policy Framework* (November 2011)
- Hartzenberg et al., *Cape to Cairo: Making the Tripartite Free Trade Area Work* (Trade Law Centre for Southern Africa, Danish International Development Assistance, Swedish International Cooperation Agency, 2011)
- Hoekman, B. and Kostecki, M., *The Political Economy of the World Trading System*, 2nd ed. (Oxford, 2001)
- Ianni, J.B., *Proposed Revisions to Chapter 11 – TCM Protocol, SADC ICT Ministers and Senior Officials* (14-15 June 2011, Gaborone, Botswana) (Powerpoint presentation)
- Jackson, J. H., *The World Trading System*, 2nd ed. (Massachusetts, MA: MIT Press, 1999)
- Kritzinger-van Niekerk, L. and Moreira, E.P., *Regional Integration in Southern Africa: Overview of Recent Developments* (Washington, DC: World Bank, 2002)
- Kruger, P., *Managing the Process of Services Liberalization* (Stellenbosch: tralac, 2011)
- Kruger, P., *Services Negotiations under the Tripartite Agreement: Issues to Consider* (Stellenbosch: tralac, 2011)
- Kruger, P., *You've Got Mail: The Postal and Courier Sector in South Africa*, Working Paper No 3/2009 (Stellenbosch: tralac, 2011)
- Malik, M., *Commentary on the Critical Shortcomings in Annex 1 (Co-operation on Investment) of the SADC Protocol on Finance and Investment* (International Institute for Sustainable Development, August 2011)
- Malik, M., *The International Investment Treaty Framework in SADC and SADC Member States* (International Institute for Sustainable Development, Draft of February 2011)
- Mann, H., *Rethinking the International Investment Law Framework in the SADC Region: Making Investment Law Consistent with SADC Develop-*

ment Objectives (International Institute for Sustainable Development, Draft of 2 March 2011)

Matsushita, M. Et al., *The World Trade Organization: Law Practice and Policy* (Oxford University Press, 2003)

Ndulo M. et al., *State of Trade in Services and Trade Reform in Southern Africa* (NEPRU Research Report No. 31, May 2005)

RETOSA, *Final Study Report on the Identification of Bottlenecks to Free Trade in Tourism Services in Southern Africa*

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

SADC, *Information on Qualifications in the SADC Region and Discussion of a Mechanism and Criteria for Establishing Comparability and Equivalence of Qualification* (Revised February 2010)

SADC, *Malaria Elimination Framework*

SADC, *Matrix of Commitments Undertaken by Member States within the Context of the Protocol on Finance and Investment and Implementation Roadmap* (12 January 2011, revised)

SADC, *Meeting of the Technical Committee on Accreditation and Certification* (Gaborone, Botswana, 9-11 December 2009)

SADC, *Negotiating & Scheduling Guidelines for the 1st Round of SADC Trade in Services Negotiations* (Adopted by TNF Services on 11 November 2009, Approved by CMT on 12 February 2011)

SADC, *Promoting Public-Private Dialogue in the Southern African Development Community: A strategy for Greater Private Sector Involvement*, Presented for Adoption by the SADC Ministerial Taskforce for Regional Integration (Draft of 30 September 2011)

SADC, *Proposed Common Guidelines for Coordinating Education Quality Assurance in the SADC Region* (Technical Committee on Certification and Accreditation (TCCA), prepared William Sabaya and Prof. Yohanna J.S Mashalla)

SADC, *Protocol on Finance and Investments Baseline Study: Regional Report* (August 2011)

SADC, *SADC Human Resources for Health Strategic Plan: 2007-2019* (November 2006)

SADC, *SADC Malaria Strategic Plan: 2007-2015* (March 2007)

SADC, *Sexual and Reproductive Health Strategy For the SADC Region: 2006-2015* (November 2008)

SADC, *Strategic Framework for the Control of Tuberculosis in the SADC Region: 2007-2015* (July 2007)

SADC, *Summary Report on the Baseline Study on the Implementation of the Protocol and Finance and Investments SADC MMF 1/2/2011/8A*

SADC, *TCM Protocol: Revision and Proposals* (after validation workshop, Draft of 25 August 2010)

SADC, *Towards a Framework for the Improvement of Quality Assurance Systems in Member States*, Technical Committee on Accreditation and Certification (June 2007)

SADC, *Towards a Southern African Development Community Qualifications Framework: Concept Papers and Implementation Plan*, SADC/ SO E and T 1/ 2006/6, Technical Committee on Certificate and Accreditation (Maseru, March 2005)

SADC Secretariat Infrastructure and Services Directorate Transport Division, *Progress and Status of Implementation Road Infrastructure, Transport and Traffic Sector Regional Policies, Legal Instruments, Regulations, Technical Standards and Systems in the SADC Region* (Draft Discussion Paper, 23 September 2011)

Schlumberger, C. E., *Open Skies for Africa: Implementing the Yamoussoukro Decision* (Washington, DC: World Bank, 2010)

The Oxford English Dictionary, Vol. XII, V-Z (Clarendon Press, 1978)

Trebilcock, M. and Howse, R., *The Regulation of International Trade*, 2nd ed. (Routledge, London 1999)

UNCTAD, *Energy and Environmental Services: Negotiating Objectives and Development Priorities* (United Nations, New York and Geneva, 2003)

UNCTAD, *Implementation of SADC Protocols Affecting Trade in Services* (2006)

UNCTAD, *Towards SADC Services Liberalisation: Balancing Multiple Imperatives* (United Nations, New York and Geneva, 2009)

Van den Bossche, P., *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, 2nd ed. (Cambridge, 2009)

Van Roessel, H., *The SADC Protocol on Finance and Investment: A Summary of a Comparison with Bilateral Investment Treaties* (Draft dated 10 February 2011)

World Bank, *The Business Environment in Southern Africa: Issues in Trade and Market Integration*, Volumes I and II, Report No.58717-AFR (December 2010)

World Trade Organization, *Background Note by the Secretariat: Energy Services*, S/CW/311 (January 2010)

World Trade Organization, *Services Sectoral Classification List*, MTN.GNS/W/120 (10 July 1991)

World Trade Organization, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (Cambridge University Press, 1999)

World Trade Organization, *WTO Analytical Index, Guide to WTO Law and Practice*, Volumes 1 & 2 (Geneva, 2003)

Yamoussoukro Decision Concerning the Liberalisation of Access to Air Transport Markets in Africa, ECA/RCID/CM.CIVAC/99/RPT Annex 1

Zarrilli, S., *Moving Professionals Beyond National Borders: Mutual Recognition Agreements and the GATS* (UNCTAD, 2005)