



Empowerment policies in SADC and their effect on agreement design

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Introduction

Economic empowerment can be understood as policies or programmes that are designed to benefit a specific segment of society, be that for historical, political or socioeconomic reasons. These measures can be broad-based covering a wide range of economic activities, or they can be sector-specific targeting certain sensitive industries or individuals. These can include, for example, measures such as preferential procurement practices from government and state institutions, the preferred employment of targeted citizens, specific activities that are reserved for targeted citizens, preferential concessionary licences or partnerships, the promotion of joint ventures and partnerships, and the establishment of empowerment funds.

As an advantage is conferred on these targeted citizens and companies, it may give rise to discrimination when local suppliers are treated more favourably, or perhaps even limit the market access opportunities for foreign suppliers, when, for example, the equity share of the foreign partner is limited. However, the flexible rules incorporated in services agreements provide countries with the ability to schedule the empowerment policies in order to legally maintain restrictions against foreign services and investors. This requires careful examination as none of the Southern African Development Community (SADC) member states have scheduled or inscribed empowerment policies during the General Agreement on Trade in Services (GATS) negotiations.

The paper distinguishes between the different kinds of empowerment policies in order to evaluate which measures should be included when drafting services schedules. SADC member states are in the early stages of negotiating on trade in services and certain member states are applying empowerment policies that are in danger of contravening the rules of the anticipated services agreement. It is necessary that these measures are clearly identified and accurately recorded in the schedules of the respective countries. The paper therefore considers the effect of the earlier GATS commitments on scheduling empowerment restrictions in the regional context and the challenges being posed by the SADC standstill clause and the requirements of GATS Article V. The paper also proposes some alternatives to safeguard local industries and concludes by evaluating the possible exceptions provided by the services agreements.

Empowerment policies and GATS

Market access measures generally restrict entry into a domestic sector while National Treatment measures become applicable once foreign suppliers operate in the domestic market. The market access provision in GATS and other services agreements is quite similar to the Most Favoured Nation (MFN) obligation, the only difference being that it deals with market access in the context of the specific commitments made in the schedules. In other words, a member country has to extend to each and every World Trade Organisation (WTO) member, without exception, at least those terms, conditions and limitations in respect of the specific commitments made in the schedules. The National Treatment principle demands that a country treat foreign services and suppliers no less favourably than it treats its own. Countries are therefore required to abstain from measures which modify the conditions of competition in favour of their own service industries. The key question is the following: Is there discrimination against foreign suppliers? The provision covers both *de facto* and *de jure* discrimination¹, but unlike the provision on market access, it does not contain an exhaustive list of the types of measures which would constitute limitations on National Treatment. In many instances, such discrimination is in line with trade policy which has the objective to develop certain industries; however, if the subsector and relevant mode² are fully liberalised, discrimination against foreign suppliers is prohibited. Then the same treatment afforded to domestic suppliers must also be extended to foreign suppliers when dealing with like services.

If we are dealing with trade in services, countries have the scope to discriminate or limit the access of foreign suppliers, as GATS (and subsequent services agreements) provides for a flexible framework that allows member states to adjust the conditions of market entry and participation in line with sector-specific objectives and constraints. It therefore creates space for these empowerment policies or practices to be scheduled as part of the services

¹ In other words, GATS Article XVII prohibits measures that are based directly and expressly on the origin of the services or the service provider (origin-based measures) as well as measures that are not based on origin (origin neutral measures) if they are found to modify the conditions of competition to the detriment of foreign services or service suppliers. For more information, see Ortino (2006).

² The liberalisation of commercial presence (Mode 3) is the most relevant when considering national treatment implications. There is no obligation in GATS which requires a member to take measures outside of its territorial jurisdiction. National treatment obligations do therefore not require a member to extend similar treatment to a services supplier located in the territory of another member. See WTO (2001).

negotiations in order to preserve the right of a government to apply these more restrictive measures.

Empowerment policies of the SADC member states

In SADC, the best known example of empowerment policies in practice is the broad-based Black Economic Empowerment (BEE) applied in South Africa. The South African government defines BEE as an integrated and coherent socioeconomic process that directly contributes to economic transformation in South Africa to bring about significant increases in the numbers of black people that manage, own and control the country's economy, as well as significantly decreasing income inequalities (DTI 2003). To achieve these objectives an enabling legislative framework (the Broad-Based Black Economic Empowerment Act 53 of 2003) was introduced to promote and enable BEE in South Africa. The legislation allows government and various industries to issue guidelines and codes of good practice on BEE as well as sanctioning the use of regulatory means to achieve the purported objectives. In February 2007, the BEE Codes of Good Practice³ was published, to bring clarity and uniformity to compliance targets and the measurement methodology. The results of the BEE strategy has, however, not been as effective as the South African government has hoped for and it can be questioned if a broad enough base of historically disadvantaged people have benefited from the policy. It is likely that government will implement certain changes in its approach and execution in order to improve the delivery of the benefits. It can be argued that BEE is not a lasting solution for the South African economy; but at the moment it serves a specific and necessary purpose to realise the ambition of the government for a more equitable economic landscape. Certain BEE measures nevertheless have the potential to infringe international and regional services rules and therefore any changes and adjustments should be carefully monitored. The challenge for South Africa is the high number of commitments made during the GATS negotiations on services; this leaves more areas where domestic legislation can conflict with these GATS commitments.

Zimbabwe published the Indigenisation and Economic Empowerment Act 14 of 2007 to support the economic empowerment of indigenous Zimbabweans by securing a minimum

³ The codes of good practice provide a standard framework for the measurement of broad-based BEE across all sectors of the economy.

threshold of ownership equity for businesses operating in Zimbabwe.⁴ Article 3 of the Empowerment Act provides a mandate for government to impose regulations and measures aimed at ensuring that at least 51 percent of the shares in every public company and any other business are owned by indigenous Zimbabweans. The Act also basically prohibits any acquisition, merger or restructure unless 51 percent of the ownership and management rests in the hands of indigenous Zimbabweans. Zimbabwe recently published the Statutory Instrument 21 of 2010 to give effect to the obligations in the empowerment Act and to provide specific guidelines prescribing the transfer of foreign business shares and interests to indigenous Zimbabweans. Failure to comply with the regulations can lead to hefty fines or a withdrawal of operating licences. In the context of GATS, Zimbabwe undertook far fewer commitments than South Africa, meaning that this new law only raises conflicting concern in the sectors of telecommunications and tourism.

In Zambia, the Citizens Economic Empowerment Act of 2006 is principally aimed at promoting the economic empowerment of citizens, in particular, targeted citizens – defined as those who are or have been marginalised or disadvantaged and whose access to economic resources and development capacity has been constrained due to various factors including race, sex, educational background, status and disability. In terms of Article 21(I) of the Act, the Ministry of Commerce, Trade and Industry can reserve specific areas of commerce, trade and industry for targeted citizens, citizen empowered companies, citizen influenced companies and citizen owned companies. These reserved areas have not yet been published but it is possible that some of the empowerment reservations, depending on the way in which they are drafted, have the propensity to contradict WTO rules, especially in the areas where full commitments have already been made. It is, however, only the tourism sector which Zambia has substantially liberalised that might be affected.

⁴ Even before the promulgation of Act 14, Zimbabwe had restrictions in place to regulate foreign investment. Section 25 (2) of the Zimbabwe Investment Authority Act 2006 allows the Minister of Industry and International Trade to specify the sectors of the economy available for investment by domestic and foreign investors. The minister may also specify the sectors of the economy reserved exclusively for residents for the purpose of promoting equitable participation in the economy. Zimbabwe has identified three priority sectors in which foreign investors can acquire 100 percent ownership. The three sectors are manufacturing, mining, quarrying and mineral exploration, as well as the development of infrastructure for tourism. Investment in the services sector is restricted to a maximum of 70 percent, while specific reservations (Statutory Instrument 108 of 1994) are made for certain sensitive sectors. Foreign investors wishing to participate in any of these sensitive sectors can only do so by entering into a joint venture arrangement with a Zimbabwean, with the foreign partner only allowed to take a maximum of 35 percent shareholding in the venture.

Namibia is also set to start implementation of its own black economic empowerment policies as set out in the Transformation and Empowerment Socioeconomic Framework document. The legislation has not yet been tabled but according to the strategy document, the plan is to transfer 50 percent of company ownership and management structures to historically disadvantaged Namibians. In terms of the document, implementation in the public and private sector is scheduled to start in 2012 and will be phased in over several years (Namibian Office of the Prime Minister 2010). Again, Namibia has also made limited commitments under GATS, only scheduling the two subsectors of 'Hotels and Restaurants' (CPC 641 – 643) and 'Travel Agencies and Tour Operator Services' (CPC 7471) in the tourism sector. No other SADC member states have immediate plans to implement empowerment policies, although some other members such as Botswana⁵ and Tanzania are contemplating the possibility of securing certain services activities for locals.

The impact of empowerment policies on trade rules

It is necessary to briefly distinguish between the broad categories of empowerment measures and their impact on trade rules in order to understand how to deal with these issues in future negotiations. Firstly, certain empowerment measures are exempt from services rules – such as those relating to government procurement – as services supplied in the exercise of governmental authority is explicitly excluded from the scope of application. This is the case with GATS and also with the services agreement of SADC. Article 3(5) of the draft SADC Services Protocol defines 'services' to include any services in any sector except services supplied in the exercise of governmental authority. It is further defined as any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers. Accordingly, for all practical purposes, government procurement and discrimination in this context are exempt from international and regional services rules.

A second category comprises measures that do not violate trade rules because both foreign and local suppliers are subject to the same set of rules. Particularly, in the South African context one can argue that foreign suppliers are in certain instances treated more (and not less) favourably than South African suppliers of services. For example, some BEE charters

⁵ Although Botswana does not have any specific empowerment legislation, the Minister of Trade and Industry is authorized to introduce regulations declaring any trade activity or business to be reserved for Botswana citizens and companies wholly owned by Botswana citizens.

encourage foreign suppliers to sell equity in their local operations. However, companies that are wholly owned offshore and are unable to sell equity can consider using enterprise development or equity equivalents to set off the ownership requirement. There are also general measures dealing with the ownership elements in respect of multinationals as gazetted in Statement 103: The recognition of equity equivalents for multinationals (South Africa 2007). This provides guidelines for foreign investors on how to structure their investments in order to qualify for recognition of Equity Equivalent Programmes. Foreign companies typically have global policies in place restricting the level of ownership and control that can be transferred to local minority shareholders, making certain BEE targets difficult to achieve. Statement 103 can be seen as an effort to accommodate foreign investment while also securing some advantages for local suppliers.

A third category which can arguably have an impact on the liberalisation of services is the domino effect created by empowerment legislation. In South Africa, BEE principles have a spill-over effect that makes it a commercial imperative for many foreign companies to transfer equity and/or assets to BEE groups. In other words, because state-owned entities and government departments are legally obliged (and allowed) to apply BEE legislation in evaluating tenders or in granting licences, permits or concessions, those firms that rely on government business become obliged to comply with BEE requirements. These same firms then demand that their suppliers become BEE compliant so that they can meet their own BEE targets, which creates a domino effect (Davids and Hale 2006). The defining characteristic here will be if the measures have been created by government action or if they are required by virtue of the private transaction. This category is closely related to the final category which includes measures that are in danger of discriminating in favour of local suppliers, either directly or indirectly.

In South African one example of possible indirect discrimination is found in the National Ports Regulations of 2007. Section 3 of these regulations basically states that a certain percentage of agreements for the supply of services, licences, concessions, and partnerships has to be entered into with a Level Four BEE contributor. Read together with relevant sections of the National Ports Authority Act, the provisions practically span all the services that can be provided at the port terminal or facility. During the first four years of implementation 25 percent of these services are reserved for BEE compliant companies or

persons, but after five years the allocation rises to 75 percent. A Level Four BEE Contributor must accumulate between 65 and 75 points when adding the scores achieved in ownership, management control, employment equity, skills development, preferential procurement, enterprise development and socioeconomic development. In terms of this calculation, enterprise development is only one component of the overall assessment and may accordingly exclude many multinationals from contending. If foreign suppliers are indeed excluded from tendering or participating on the basis of their composition, the BEE regulations are discriminatory. If no equivalent rating for foreign suppliers is included⁶, the conditions of competition have been modified in favour of the domestic suppliers and should be noted as such in the service schedules. It is provisions such as these that require careful consideration when formulating a services liberalisation strategy or drafting a schedule of services commitments.⁷

The flexible rules of GATS and other services agreements

At the start of the services negotiations, governments need to carefully identify all the restrictive empowerment measures which have the potential to discriminate against foreign suppliers or impede their access. The flexible services rules offers a range of development strategy options to maintain empowerment practices, and governments are basically only limited by their current GATS commitments. To explain this, one can consider the proposal by the parties opposing the Walmart/Massmart merger to impose a preferential quota to source a certain percentage of products locally. As South Africa fully liberalised the wholesale and retail sectors under GATS, one can argue that any empowerment policy in those sectors like the 'buy local' proposal would fall foul of South Africa's WTO obligations (Erasmus & Kruger 2011).

South Africa's situation can be compared to that of Malaysia where the participation of foreign suppliers in the distribution sector is severely regulated. In addition to equity thresholds on foreign participation, foreign suppliers operating in the distribution sector must comply with requirements as set out in the 'Guidelines on foreign participation in the

⁶ See last paragraph of Section 3 of the National Ports Authority Regulations 2007: '...or an equivalent rating in terms of the Sector Code if any'.

⁷ South Africa has, however, not scheduled this particular sector under GATS, with the result that Transnet is allowed to prescribe such quotas regardless of discrimination or not.

distributive trade services Malaysia'. The document was revised in 2010 and includes discriminatory measures such as: a) the appointment of Bumiputera⁸ director/directors; b) the hiring of personnel at all levels including management to reflect the racial composition of the Malaysian population; c) formulating clear policies and plans to assist Bumiputera participation in the distributive trade sector; d) the hiring of at least one percent of the total hypermarket workforce from persons with disabilities; e) increasing the use of local airports and ports in the export and import of the goods; and f) utilisation of local companies for legal and other professional services which are available in Malaysia (Malaysia, 2010). Regarding local procurement, the guidelines require department stores, supermarkets and hypermarkets to allocate at least 30 percent of their shelf space to products manufactured by Bumiputera owned small and medium-sized industries.⁹ Malaysia is allowed to maintain these discriminatory measures because the country did not schedule the sector of distribution services under GATS. This means that Malaysia has the policy space to maintain or introduce discriminatory measures in the area of wholesale and retail trade services due to scope of their commitments made at the multilateral level. South Africa, on the other hand, did schedule the distribution sector and made certain commitments which restrict its policy space and freedom to discriminate against foreign suppliers.

This open approach in the multilateral level allowed Malaysia to include strict reservations at the regional services negotiations of the Association of South East Asian Nations (ASEAN). Under the distribution sector, Malaysia scheduled the National Treatment column in Mode 3 (commercial presence) as unbound, meaning it would be able to maintain or introduce discriminatory restrictions on the operations of foreign suppliers after establishment. In the market access column under Mode 3, Malaysia specified legal entity, equity structure and minimum capital requirements, and under Mode 4 it specified certain key position requirements. Due to the manner in which Malaysia scheduled its GATS commitments, it was possible to safeguard its empowerment policies in the regional services negotiations. As South Africa has fully liberalised the distribution sector, it will not be able to schedule more

⁸ The definition refers to ethnic Malays and other indigenous ethnic groups.

⁹ It is unlikely that this kind of local content or performance requirements would be tolerated under the General Agreement on Tariffs and Trade (GATT) and the Agreement on Trade-related Investment Measures (TRIMs), but the flexible framework of the GATS allows for exceptions when dealing with services or service suppliers.

restrictive measures in regional negotiations. Countries that have not committed a certain sector or mode of supply would, however, be able to schedule empowerment restrictions in those sectors.

Including empowerment policies in regional agreements will therefore be a greater challenge for South Africa than for its regional counterparts as it has committed substantially more services subsectors than any of the other SADC member states. South Africa committed around 56 percent of its services lines (Kruger 2011), and therefore scheduling empowerment measures in those lines will not be possible, except if they go through the process of modifying South Africa's GATS commitments. GATS Article V: 5 provides for the modification of specific commitments in the context of regional agreements, but the process in GATS Article XXI (modification of schedules) still have to be followed and this will likely involve compensatory adjustments to the affected countries. Compare this to other SADC members such as Namibia, Zambia and Zimbabwe which also have empowerment policies in place (or are contemplating implementing them) and one will find that they have only committed between 10 and 12 percent of their services sectors. The scope for these countries to schedule empowerment restrictions is far wider and it will mainly be their tourism sectors (which are fairly liberalised) that will be affected (Kruger 2009).

The impact of GATS Article V and the standstill clause

Regional negotiations on trade in services will have to be designed to comply with GATS Article V, something which is specifically stated in Article 16(1) of the draft SADC Services Protocol. GATS Article V states two internal requirements for economic integration agreements: First, the integration agreement must have 'substantial sectoral coverage', meaning that member states will have to address and negotiate large parts of their services industries, and second, it must provide for the absence or elimination of substantially all discrimination, within the meaning of National Treatment. There are, of course, different views on what this means: the elimination of existing discriminatory measures, the prohibition of new or more discriminatory measures, or both (Mathis and Breaton 2011). The draft SADC Services Protocol refers to both: one of the objectives in Article 2 is 'achieving the elimination of substantially all discrimination between State Parties'. It also contains a basic standstill clause in Article 16 (4) which states that 'during the negotiations,

State Parties shall not introduce new and more discriminatory barriers to trade in services'. If this standstill clause is similar to the contentious one found in the SADC Economic Partnership Agreement (EPA) negotiations which refer to a freeze in all services sectors, or one similar to the standstill clause in GATS Article V which only refers to the committed sectors, is unclear (McCarthy et al. 2007). This distinction may prevent countries that do not currently have empowerment legislation from scheduling future restrictive measures in this regard. If the standstill clause refers to the immediate liberalisation of all services sectors, whether committed or not, then countries which do not currently have empowerment policies in place can be prohibited from introducing restrictive empowerment policies in the future. In the regional context, it is likely that some member states would find it an unfair advantage that the country in the region with the strongest services industry is allowed to maintain preferential policies protecting its own industries, for whatever the reason, while other less developed countries are not in the position to maintain similar policies.

So how will these countries be accommodated? Certain flexibility is provided under GATS Article V but that is in accordance with the levels of development within the configurations. The flexibility with regard to the National Treatment principle and empowerment policies is something that needs to be clarified at the beginning of the negotiations. A regionwide solution potentially exist in Paragraph 3(b) of GATS Article V where more favourable treatment may be granted to juridical persons owned or controlled by natural persons of the member states. However, it implies that empowerment policies will have to be for the benefit of all the participating member states, and not only for the individual countries.

Empowerment policies in the horizontal section

The horizontal section of the GATS schedules must be carefully considered when determining the specific conditions in each of the committed subsectors, as this section intentionally applies to all commitments made in a schedule. It is in effect binding, either as a measure which constitutes a limitation on market access or National Treatment; or alternatively it refers to a situation in which there are no such limitations (WTO 2001). These measures can therefore either include horizontal commitments (going beyond what was agreed in the specific commitments) or horizontal limitations (further restricting the

specific commitments). None of the SADC member states have mentioned empowerment or similar policies in their horizontal sections. In the case of Malaysia, the empowerment strategy is clearly set out in its schedule, by stating the following reservation in its horizontal section: 'Any measure and special preference granted to Bumiputera, Bumiputera status companies, trust companies and institutions set up to meet the objectives of the New Economic Policy (NEP) and the National Development Policy (NDP) shall be unbound'. If a country scheduled a horizontal limitation like the Malaysian one in the horizontal section, those empowerment measures would be exempt from the services rules.

Practical problems will arise when countries that have already made full commitments under the GATS, modify or add market access or National Treatment limitations such as empowerment policies to their horizontal section. Will these additional obligations as inscribed in the horizontal section be applicable to the committed subsectors and modes of supply, even if already fully liberalised? If so, can this not be a means to evade the fully liberalized sectoral inscriptions ('none') by introducing new and related restrictions in the horizontal section. One would assume that if countries insert a new horizontal commitment in the regional negotiations to accommodate certain empowerment policies which have not been scheduled under the WTO, these will not be applicable to the sectors and modes that have already been liberalised. Otherwise SADC can be left with a situation where the empowerment policies only have to be observed by SADC member states while the rest of the WTO members can still trade services under the more favourable commitments of the WTO country schedules which contain no reference to the empowerment policies. This situation will also clash with the requirement stated in GATS Article V:4 which obliges countries to design the services agreement to facilitate trade between member states and not raise the overall barriers to trade in services with respect to non-members of the regional agreement.

It can, however, be useful to review what has happened in other services agreements. In 2004, the Dominican Republic-Central America-United States Free Trade Agreement (FTA) was concluded between the United States of America (US) and Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua. All participating countries including the United States included the following reservation in their schedules: 'We reserve the right to adopt or maintain any measure according to rights or preferences to socially or economically

disadvantaged minorities'. This was undertaken in the context of future reservations in the negative list approach, and therefore the effect of the earlier GATS commitments is not quite clear. Also in the US-Chile FTA, both parties entered exceptions respecting 'the right to adopt or maintain any measure according rights or preferences to socially or economically disadvantaged minorities'. It can further be questioned if reference to the minority groups would change the interpretation, as the empowerment policies in the case of SADC mainly concern the majority of society and not the minority. The negotiating group on the Multilateral Agreement on Investment (MAI) made the following observation in this regard: 'In the current Consolidated Text, National Treatment remains defined as treatment no less favourable than the treatment accorded to a Party's own investors. It does not require "treatment no less favourable than the most favourable treatment", for instance treatment accorded to instate- residents or to ethnic minorities. Neither a general exception nor open-ended country-specific exceptions would be required for preferential treatment of aborigines. If parties deemed it necessary, this could, however, be clarified through an interpretative note' (OECD 2008).

A partial solution exists in the way in which Mode 4 commitments are traditionally scheduled. In the regional negotiations, many countries are moving towards detailed, and in some instances, more restrictive descriptions in their horizontal sections, but one can argue that this is allowed as Mode 4 inscriptions are typically left unbound. This leaves government with more flexibility to schedule and implement empowerment policies through the movement of people.

Effectiveness of empowerment policies

To a large extent the impact and operation of the empowerment policies are determined by the countries themselves. For example, Article 15 of the Botswana Trade Act authorises the Minister to make regulations declaring any trade activity or business to be reserved for Botswana citizens and companies wholly owned by Botswana citizens. A similar situation exists in Article 21(1) of the Citizens Economic Empowerment Act 2006 where the Ministry can reserve specific areas of commerce, trade and industry for targeted citizens, citizen empowered companies, citizen influenced companies and citizen owned companies. Also in Zimbabwe, Section 25(2) of the Investment Authority Act 2006 allows the Minister of

Industry and International Trade to specify the economic sectors available for investment by domestic and foreign investors.

It gives the minister broad powers to determine the scope of protection which can shift from time to time. What if newly promulgated restrictions violate the commitments made under GATS, or perhaps in the future under regional rules? This happened in Botswana where the government in 2006 promulgated a new set of tourism regulations in which a number of tourism activities were reserved for Botswana citizens. Some of these reservations were, however, in conflict with Botswana's GATS commitments in the tourism sector. Soon after this inconsistency was pointed out to Botswana, it revoked the whole contradictory section without stipulating additional commitments. So it also comes down to legislating and regulating in good faith and making an effort to remain in line with the trade rules. This can be compared to the approach of the parties opposing the Walmart/Massmart merger. Imposing discriminatory measures in the form of preferential procurement conditions on only one entity would violate the GATS commitments SA made in the distribution sector. Despite this potential conflict, the preferential procurement option was pursued by government and the labour unions. One can question if the relationship between the proposed measures and South Africa's GATS commitments was investigated and the effect that such a condition would have on South Africa's international obligations considered. It therefore also comes down to being aware of the impact of your own legislation and the framework of trade rules within which services are traded, and this may require some self-policing.

Ideas to design empowerment policies in the regional context

In its Walmart and Massmart merger decision the Competition Tribunal identified a number of administration and enforcement challenges that can arise when implementing a local procurement policy and found the R100 million suppliers fund as proposed by the merging parties to be a more practical solution. The Tribunal stated that the investment undertaking (the suppliers' fund) is a positive response to the domestic procurement concern; instead of insulating local industry from international competition, it seeks to make local industry more competitive to meet international competition. So perhaps in the regional context, because the objective is an integrated and liberalised market, one approach would be to seek out

less intrusive and more sustainable means of safeguarding local industries or implementing development strategies.

Permitted measures could include subsidies which are allowed under the regional services agreement of SADC¹⁰, while empowerment funds to support targeted citizens or citizen owned companies can be utilised to achieve similar objectives. Implementing empowerment strategies through Mode 4 (movement of people) can perhaps provide a more flexible option as most countries leave Mode 4 unbound in any event. A good starting point is a regulatory assessment to identify all empowerment policies, practices and measures that can possibly discriminate against foreign suppliers or impede their access to the local markets. These are restrictions that will somehow have to be incorporated within the regional services rules, and this will give countries an accurate idea of the regulatory framework and parameters within which they will have to negotiate.

GATS exceptions for empowerment policies

GATS Article XIV contains a number of general exceptions which permit WTO member states in certain instances to take legitimate measures necessary to guarantee a member's best interest, provided that the measures are not designed to circumvent the GATS rules. If WTO members act inconsistently with obligations set out in the schedules, the exception clause affirms the right of member states to pursue the listed objectives provided that all the conditions set out in the provision are satisfied (WTO 2005A Paragraph 291). An important chapeau is also provided in the introductory paragraph to GATT Article XIV to ensure that 'measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on trade in services'. Article 10 of the draft SADC Services Protocol contains similar general exceptions including the same chapeau as the GATS provision.

The most relevant exception concerning empowerment policies is found in GATT Article XIV(a) where measures are allowed as 'necessary to protect public morals or to maintain public order'. A footnote to the exceptions states that '[t]he public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the

¹⁰ Article 11(1) of the draft SADC Services Protocol states: 'Nothing in this Protocol shall be construed to prevent State Parties from using subsidies in relation to their development programmes'.

fundamental interests of society'.¹¹ Since GATS Article XIV sets out the general exceptions in the same manner as GATT Article XX (General Exceptions), the same two-tier test can be applied to justify the inconsistent measure. For the first part of the test, the inconsistent measure must fall within the scope of one of the exceptions listed in GATS Article XIV and there must be a sufficient relationship between the inconsistent measure and the interest protected. The second part of the test will determine whether the measure in issues also satisfies the opening chapeau of GATS Article XIV (WTO 2005A Paragraph 292).

The 'public morals' exception set out in GATS Article XIV(a) was part of the United States' defence in the US-Gambling case. It was instituted against the US by Antigua to challenge the US prohibition on the cross-border supply of gambling.¹² The US argued that the ban on remote gambling was necessary because the service posed an increased threat for organised crime, money laundering, fraud and other consumer crimes, public health (for example pathological gambling), and children and youth (for example, underage gambling). It submitted that these posed 'a grave threat to the maintenance of the public order and the protection of public morals'. The Panel in US-Gambling found that the terms 'public morals' denotes 'standards of right and wrong conduct maintained by or on behalf of a community or nation' while 'public order' refers to 'the preservation of the fundamental interests of a society, as reflected in public policy and law'(WTO 2005B). This exception will be easier for a country like South Africa to invoke as its BEE legislation has been specifically designed to readdress injustices from the past and to advance broad-based economic transformation. According to the DTI, the BEE strategy is a necessary government intervention to address the systematic exclusion of the majority of South Africans from full participation in the economy (DTI 2003). It has therefore been designed with a specific purpose in mind which will likely satisfy the requirement that the BEE measures seek to address concerns falling within the scope of 'public morals' and/or 'public order' under GATS Article XIV(a).

The next part of the investigation examines the necessity of the measure through a 'process of weighing and balancing a series of factors'. These can include factors such as (i) the importance of the societal interests and values that the measure is intended to protect, (ii) the extent to which the challenged measure contributes to the realisation of the ends

¹¹ Article 10(1) of the draft SADC Services Protocol reflects this GATS exception as '(a) necessary to protect public morals or to maintain public order and essential security interest...'

¹² For more information on the dispute, see Wohl (2009).

pursued by the measures, and (iii) the trade impact of the challenged measure, including 'whether a reasonably available WTO-consistent alternative measure' exists. The Historically Disadvantaged Individuals (HDI) are the group of people being protected by the measures, and on behalf of the government one can argue that it is an important socioeconomic process that directly contributes to the economic transformation in South Africa and to a decrease in income inequalities. One can, however, question how effective the process was and whether it actually led to achieving the objectives intended at the outset. Considering the trade impact of the measure, it can be argued that the effect on services trade is minimal, as the South African government specifically manages foreign investment through certain offset mechanisms. It is therefore also more likely that any discrimination in the context of BEE measures will be indirect.

The final part of the investigation refers back to the chapeau of the provision to ensure that the measure is applied in a manner that does not constitute arbitrary or unjustifiable discrimination or is designed as a disguised restriction on trade in services. In this case, it is not the measure or contents that are questioned but rather the manner in which the measure is applied (WTO 1996). It is difficult to evaluate empowerment policies or more specifically BEE measures against the requirements of GATS Article XIV, but the brief analysis above shows that there is a possibility that it can be raised as a legitimate defence in dispute settlement proceedings. The likelihood of South Africa succeeding with the public moral exceptions is higher than in other countries with empowerment policies in place, as the empowerment process in South Africa is based on correcting imbalances that were the consequence of historical injustices. The relevant nature of the exception coupled with the political sensitivity of the South African situation can be advanced as possible reasons why BEE measures are unlikely to surface in WTO dispute settlement.¹³ Previous dispute settlement cases have, however, shown that any exception is interpreted narrowly as it constitutes a derogation from an obligation proving such a defence will not be simple.

¹³ There has, however, been one instance where BEE measures were the subject of international arbitration. The claimants in the arbitration case alleged that certain obligations contained in the Mineral and Petroleum Resources Development Act and BEE Mining Charter violate bilateral investment protection treaties with Italy and Luxembourg by unfairly discriminating against Italian investors. The Mining Charter is one of those charters that do not distinguish between foreign and domestic firms. In a Request for Arbitration filed in 2007, the European investors allege that they have suffered an 'expropriation' of the companies' pre-existing mining rights, and have suffered 'unfair and inequitable treatment at the hands of state officials'. See Peterson (2008).

Conclusion

The flexible framework of services agreements creates the necessary policy space for governments to schedule empowerment policies as part of their regional negotiations. It is therefore important that countries identify all empowerment policies, practices and measures that have the potential to discriminate against foreign suppliers or impede their access to the local markets as these restrictions have to be incorporated in the regional services schedules. Following the Malaysian example, it is advisable that reference be made to the empowerment policies in the horizontal section as well as specifically inscribing the restrictions in the schedule itself, or alternatively leaving the reserved area unbound. This requires countries to have meticulous knowledge of the current impact and extent of the empowerment policies in order to schedule these accurately.

The standstill clause as contained in the draft SADC Services Protocol can have a profound effect on the implementation of empowerment policies; immediate liberalisation in line with the standstill clause could mean that countries which do not currently have empowerment policies in place can be prohibited from introducing restrictive empowerment policies in the future. This could be seen as an unfair advantage as the SADC member state with the most sophisticated empowerment policies is also the most developed in economic terms. This advantage can, however, be balanced by the fact that South Africa has liberalised large parts of its services sectors under GATS. Scheduling more restrictive measures in the regional negotiations will not be possible in the sectors that have already been committed under GATS, which will be more of an issue for South Africa than for the other SADC member states that committed far fewer services sectors under GATS. How the empowerment policies will be accommodated must be clarified at the outset of the negotiations. A regionwide solution potentially exists in Paragraph 3(b) of GATS Article V where more favourable treatment may be granted to juridical persons owned or controlled by natural persons of the member states. But a solution like this seems unlikely as it implies that country-specific empowerment policies will have to be for the benefit of all the participating member states.

The possibility exists that some of the empowerment policies can be exempt from the services rules by virtue of the general exception contained in Article 10 of the draft SADC

Services Protocol, but this should not be used as a reason to neglect comprehensive scheduling of the empowerment policies in the regional negotiations. Empowerment policies, even those that countries are aiming to introduce in the coming years should be put on the negotiating table. A regional strategy to deal with empowerment must be formulated as certain broad policies, such as in the case of Zimbabwe, have the potential to harm regional integration in SADC. As the objective should be an integrated and liberalised market, it is the responsibility of the member states to seek out less intrusive and more sustainable means of safeguarding local industries, rather than to simply treat their regional counterparts like the rest of the world.

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