



**PROTOCOL**

**ON**

**TRADE IN SERVICES**

## **PREAMBLE**

**WE**, the Heads of State or Government of:

The Republic of Angola

The Republic of Botswana

The Democratic Republic of Congo

The Kingdom of Lesotho

The Republic of Madagascar

The Republic of Malawi

The Republic of Mauritius

The Republic of Mozambique

The Republic of Namibia

The Republic of Seychelles

The Republic of South Africa

The Kingdom of Swaziland

The United Republic of Tanzania

The Republic of Zambia

The Republic of Zimbabwe

**CONSIDERING** Article 21 of the Treaty of the Southern African Development Community (SADC) which provides for areas of cooperation and Article 22 which provides for conclusion of Protocols which may be necessary in agreed areas of cooperation;

**IN PURSUANCE** of the promotion of interdependence and integration of our national economies for the harmonious, balanced and equitable development of the Region;

**WITH A VIEW** to ensuring, through common action, the progress and well-being of the people of Southern Africa, including through poverty alleviation, with the ultimate objective of its eradication;

**DETERMINED** to achieve deeper regional integration and sustainable economic growth and development and to meet the challenges of globalization;

**RECOGNIZING** the importance of services trade for growth and development and mindful of the need to diversify SADC economies through greater services trade;

**CONVINCED** that an integrated regional market for services, complemented by cooperative mechanisms, will create new opportunities for a dynamic business sector, and strengthen the Region's services capacity, its efficiency, and competitiveness and expand the Region's services exports;

**ACKNOWLEDGING** the existence of asymmetry as some Member States are disadvantaged by reason of their size, structure, vulnerability and levels of development of their economies;

**REAFFIRMING** the right of Member States to regulate and to introduce new regulations to meet national policy objectives, and in light of asymmetry in terms of services regulation, recognising the particular need for least developed countries to use this right;

**MINDFUL** of the need to allow for the appropriate pacing and sequencing of reform (regulatory, institutional and administrative) and liberalisation in the services sectors of the Region;

**SEEKING** to achieve coherence in the Region's intra-regional, inter-regional and multilateral commitments and negotiations on trade in services;

**REAFFIRMING** the rights and obligations that Member States have under the World Trade Organisation's (WTO)\_General Agreement on Trade in Services (GATS); and

**HAVING DECIDED** upon the further liberalization of intra-regional trade in services on the basis of fair, mutually equitable and beneficial trade arrangements, complemented by and in consistency with Protocols in specific services sectors;

**HEREBY AGREE** as follows:

**PART ONE  
DEFINITIONS, OBJECTIVES AND SCOPE**

**ARTICLE 1  
Definitions**

1. In this Protocol, unless the context otherwise requires:

**"CMT"** means the Committee of Ministers responsible for trade matters;

**"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;

**"Member State"**

means a Member State of SADC;

**"National"**

means a natural person who is a national of one of the State Parties in accordance with their respective legislations. National includes a permanent resident treated as a national in accordance with the legislation of such State Party;

**"Region"**

means the geographical area of the Member States of SADC;

**"SADC juridical person"**

means 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 State Party or any other State Party;

"Substantial business operations" means, inter alia, operations carried out by an entity incorporated in and licensed by a State Party to provide services, and shall be further developed through negotiations after adoption of this Protocol. The results of such negotiations shall be annexed to this Protocol."

<b>"Service supplier"</b>	means any natural or juridical person of a State Party that supplies a service;
<b>"State Party"</b>	means a Member State that has ratified or acceded to this Protocol;
<b>"Subsidiary"</b>	means a juridical person that is effectively controlled by another juridical person;
<b>"Territory"</b>	means the geographical area of a State Party;
<b>"Third Country"</b>	means a country other than a State Party;
<b>"TNF-Services"</b>	means Trade Negotiating Forum for Services;
<b>"Treaty"</b>	refers to the Treaty of the Southern African Development Community.

2. All other terms relating to any matter directly regulated by this Protocol not defined herewith are deemed to have the same meaning as in the WTO General Agreement on Trade in Services (GATS).

## **ARTICLE 2 Objectives**

The objectives of this Protocol are to:

1. progressively liberalise intra-regional trade in services on the basis of equity, balance and mutual benefit with the objective of achieving the elimination of substantially all discrimination between State Parties and a liberal trading framework for trade in services with a view to creating a single market for trade in services;
2. promote sustainable economic growth and development, thereby raising the standard and quality of life of the people of Southern Africa, supporting the socially disadvantaged and alleviating poverty through regional integration in the area of services;
3. enhance economic development, diversification, local, regional and foreign investment in the services economies of the Region;
4. ensure consistency between liberalisation of trade in services and the various Protocols in specific services sectors;
5. pursue services trade liberalisation, while fully preserving the right to regulate and to introduce new regulations; and

6. enhance the capacity and competitiveness of the services sectors of State Parties.

### **ARTICLE 3 Scope and Coverage**

1. This Protocol shall apply to all measures by State Parties affecting trade in services.
2. For the purposes of this Protocol, trade in services means the supply of a service:
  - (a) from the territory of a State Party into the territory of any other State Party;
  - (b) in the territory of a State Party to the service consumer of any other State Party;
  - (c) by a service supplier of a State Party, through commercial presence in the territory of any other State Party;
  - (d) by a service supplier of a State Party, through presence of natural persons in the territory of any other State Party.
3.
  - (a) The Protocol shall not apply to the following measures affecting air transport:
    - (i) traffic rights, however granted; or
    - (ii) services directly related to the exercise of traffic rights.
  - (b) This Protocol shall apply to measures affecting:
    - (i) aircraft repair and maintenance services;
    - (ii) the selling and marketing of air transport services;
    - (iii) computer reservation system (CRS) services.
4. This Protocol shall apply to measures affecting trade in services taken by central, regional or local governments and authorities as well as by non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities. In fulfilling its obligations and commitments under this Protocol each State Party shall take such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory.
5.
  - (a) "Services" includes any service in any sector except services supplied in the exercise of governmental authority.

- (b) A "service supplied in the exercise of governmental authority" means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers.
6. Nothing in this Protocol shall be construed to prevent a State Party from adopting and implementing measures aimed at ensuring universal access to essential services.

## **PART TWO GENERAL OBLIGATIONS**

### **ARTICLE 4 Most Favoured Nation Treatment**

1. Upon entry into force of this Protocol, with respect to any measure covered by the protocol, each State Party shall accord immediately and unconditionally to services and service suppliers of any other State Party treatment no less favourable than it accords to like services and service suppliers of any other State Party or Third Country.
2. Notwithstanding paragraph 1, two or more State Parties may conduct negotiations and agree to liberalise trade in services for specific sectors or sub-sectors in accordance with the objectives in this Protocol. Other State Parties shall be afforded reasonable opportunity to negotiate the preferences granted therein on a reciprocal basis.
3. Nothing in this Protocol shall prevent a State Party from entering into new preferential agreements with third countries in accordance with Article V of GATS provided such agreements do not impede or frustrate the objectives of this Protocol. Prior to negotiating such an agreement, a State Party shall duly inform the other State Parties of its intention to do so and shall afford reasonable opportunity to the other State Parties to negotiate the preferences granted therein on a reciprocal basis.
4. Nothing in this Protocol shall prevent a State Party from maintaining any preferential agreement entered into with a third party, prior to the adoption of this Protocol. A State Party shall afford reasonable opportunity to the other State Parties to negotiate the preferences granted therein on a reciprocal basis.
5. A State Party may maintain a measure which is inconsistent with paragraph 1, provided it is listed in the Most Favoured Nation (MFN) exemption list. The agreed list of MFN exemptions shall be annexed to this Protocol. The TNF Services shall regularly review MFN exemptions, with a view to determining which MFN exemptions can be eliminated.

**ARTICLE 5**  
**Right to Regulate**

1. Each State Party may regulate, and introduce new regulations, on services and services suppliers within its territory in order to meet national policy objectives, in so far as regulations do not impair any rights and obligations arising under this Protocol.
2. In light of the asymmetry in terms of State Parties services regulation, particular flexibility shall be granted to State Parties which are at a disadvantage by reason of size, structure, vulnerability and level of development of their economy to use this right. Specific measures shall be established by the CMT to ensure such flexibility.

**ARTICLE 6**  
**Domestic Regulation**

1. In sectors where specific commitments are undertaken, each State Party shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective, transparent and impartial manner.
2. Each State Party shall maintain or institute, as soon as practicable, judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services. Where such procedures are not independent of the agency entrusted with the administrative decision concerned, the State Party shall ensure that the procedures in fact provide for an objective and impartial review.
3. The provisions of paragraph 2 shall not be construed to require a State Party to institute such tribunals or procedures where this would be inconsistent with its constitutional structure or the nature of its legal system.
4. With a view to ensuring that measures relating to qualification requirements and procedures, technical standards, and licensing requirements and procedures allow for effective market access, the CMT shall develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, *inter alia*:
  - (a) based on objective and transparent criteria, such as competence and the ability to supply the service, ensuring the quality of the service;
  - (b) those required to achieve national policy objectives; and
  - (c) not in themselves a restriction on the supply of the service.



The disciplines developed shall seek to buttress the liberalisation commitments undertaken by State Parties while preserving their right to regulate and ensuring their continued capacity to use regulations for development purposes. In order to ensure consistency between liberalisation in the Region and their WTO obligations, State Parties will decide to take into account the disciplines developed under the GATS.

5. (a) Given the importance that a well operating professional services sector has for economic development, special attention is to be given to the management of the respective qualification requirements and procedures and licensing arrangements, with a view to ensuring that the respective requirements and procedures are not adopted or applied in a manner which creates obstacles to trade in services.
- (b) When developing future disciplines on domestic regulation, special priority will be given to disciplines for professional services.

## **ARTICLE 7**

### **Mutual Recognition**

1. No later than two (2) years following the entry into force of this Protocol, the TNF-Services shall establish the necessary steps for the negotiation of an agreement providing for the mutual recognition of requirements, qualifications, licences and other regulations, for the purpose of the fulfilment, in whole or in part, by service suppliers of the criteria applied by State Parties for the authorisation, licensing, operation and certification of service suppliers and, in particular, professional services.
2. Any such agreement shall be in conformity with the relevant provisions of the WTO and, in particular, Article VII of the GATS. In the development of such agreement, and any other possible arrangements or initiatives, account shall be taken of relevant processes and mechanisms under other SADC Protocols.
3. State Parties shall facilitate the access of Least Developed Country (LDC) State Parties to the Protocol. Recognizing the contribution technical assistance and capacity building can play in facilitating LDCs access to Mutual Recognition Agreements (MRAs), Members shall strive to provide such assistance, *inter alia* in accordance with mechanisms and initiatives carried out under other SADC Protocols.
4. In appropriate cases State Parties shall work in cooperation with relevant intergovernmental and professional bodies towards the establishment and adoption of common standards and criteria for mutual recognition for the practice of relevant services trades and professions.

**ARTICLE 8**  
**Transparency**

1. Each State Party shall promptly publish, and except in emergency situations, through printed or electronic media, any law, regulation, judicial decision, administrative ruling of general application and any procedure relating to matters covered by this Protocol. International agreements pertaining to or affecting trade in services to which a Member is a signatory shall also be published.
2. Each State Party shall promptly and at least annually inform the TNF-Services of the introduction of any new, or any changes to existing, laws, regulations or administrative guidelines which significantly affect trade in services covered by its specific commitments under this Protocol.
3. (a) Each State Party shall designate within one (1) year from the date of entry into force of this Protocol an enquiry point to:
  - (i) facilitate communication between the State Parties;
  - (ii) answer all reasonable inquiries from any other State Party; and
  - (iii) provide relevant information on matters covered by this Protocol.
- (b) There is appropriate flexibility with respect to the time-limit within which such enquiry points are to be established for the disadvantaged economies of the region. Enquiry points need not be depositories of laws and regulations.
4. Nothing in this Protocol shall require any State Party to provide confidential information, the disclosure of which would impede law enforcement, or otherwise be contrary to the public interest, or which would prejudice legitimate commercial interests of particular enterprises, public or private.
5. Any State Party may notify to the TNF-Services any measure, taken by any other State Party, which it considers affects the operation of this Protocol.

**ARTICLE 9**  
**Effective and Transparent Regulation**

1. Each State Party shall make its best endeavours to provide in advance to all State Parties to this Protocol any measure of general application that the State Party proposes to adopt in order to allow an opportunity for each State Party to comment on the measure. Such measure shall be provided:

- (a) by means of an official publication; or
  - (b) in other written or electronic form.
2. Each State Party's competent authorities shall make available, within a reasonable period of time to interested Members, its requirements relating to the supply of services.
3. In the context of a licensing, registration or similar procedure, on the request of an applicant, the competent authorities shall inform the applicant of the status of its application. If such authorities require additional information from the applicant, they shall notify the applicant without undue delay. Members shall strive to ensure prompt decision making with a view to ensuring due process.

### **ARTICLE 10 General Exceptions**

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Protocol shall be construed to prevent the adoption or enforcement by any State Party of measures:

- (a) necessary to protect public morals or to maintain public order and essential security interests;
- (b) necessary to protect human, animal or plant life or health;
- (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Protocol including those relating to:
  - (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;
  - (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; and
  - (iii) safety and security interests of State Parties.
- (d) inconsistent with 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.

**ARTICLE 11**  
**Subsidies**

1. Nothing in this Protocol shall be construed to prevent State Parties from using subsidies in relation to their development programmes.
2. The CMT shall decide on mechanisms for information exchange and review of all subsidies related to trade in services that State Parties provide to their domestic service suppliers and shall negotiate disciplines to avoid any trade-distortive effects of subsidies.

**ARTICLE 12**  
**Monopolies and Exclusive Service Suppliers**

1. Each State Party shall ensure that any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that State Party's MFN obligations and liberalisation commitments.
2. State Parties recognize the importance of cooperative mechanisms for enhancing State Parties institutional and regulatory capacities on competition related issues and State Parties shall enhance such cooperation, *inter alia* in accordance with mechanisms and initiatives carried out under other SADC Protocols.
3. Where a State Party's monopoly supplier competes, either directly or through an affiliated company, in the supply of a service outside the scope of its monopoly rights and which is subject to that State Party's liberalisation commitments, the State Party shall ensure that such a supplier does not abuse its monopoly position to act in its territory in a manner inconsistent with such commitments.
4. The CMT, at the request of a State Party which has a reason to believe that a monopoly supplier of a service of any other State Party is acting in a manner inconsistent with paragraph 1 or 2, shall request the State Party establishing, maintaining or authorizing such supplier to provide specific information concerning the relevant operations. If required, dispute settlement mechanisms provided for in Annex 1 shall apply.
5. The provisions of this Article shall also apply to cases of exclusive service suppliers, where a State Party, formally or in effect, (a) authorizes or establishes a small number of service suppliers and (b) substantially prevents competition among those suppliers in its territory.

**ARTICLE 13**  
**Government Procurement**

Procurements by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the supply of services for commercial sale are not covered by this Protocol.

**PART THREE**  
**TRADE IN SERVICES**

**ARTICLE 14**  
**Market Access**

In those sectors and modes of supply where specific commitments are undertaken pursuant to Article 16, in line with individual countries' levels of development, and subject to any conditions and limitations stipulated in the State Parties' lists of commitments<sup>1</sup>, no State Party shall adopt or maintain:

- (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
- (b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
- (c) limitations on the total number of service operations or on the total quantity of service output expressed in the terms of designated numerical units in the form of quotas or the requirement of an economic needs test<sup>2</sup>;
- (d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or a requirement of an economic needs test;
- (e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier of any other State Party may supply a service; and

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<sup>1</sup> If a State Party undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2 (a) of Article 3 and if the cross-border movement of capital is an essential part of the service itself, that State Party is thereby committed to allow such movement of capital. If a State Party undertakes a market-access commitment in relation to the supply of a service through the mode of supply referred to in subparagraph 2 (c) of Article 3, it is thereby committed to allow related transfers of capital into its territory.

<sup>2</sup> Subparagraph (c) does not cover measures of a State Party which limit inputs for the supply of services.

- (f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

## **ARTICLE 15**

### **National Treatment**

1. In those sectors and modes of supply which shall be liberalised pursuant to Article 16, in line with individual countries' levels of development, and subject to any conditions and limitations stipulated in the State Parties' lists of commitments, each State Party shall grant to services and service suppliers of another State Party, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.
2. A State Party may meet the requirement of paragraph 1 by according to services and service suppliers of another State Party, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.
3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services and service suppliers of a State Party compared to like services and service suppliers of another State Party.
4. State Parties may maintain conditions and qualifications to national treatment provided that these conditions and qualifications are set out in their lists of commitments.

## **ARTICLE 16**

### **Progressive Trade Liberalisation**

- 1 State Parties shall enter into successive rounds of negotiations three years after completion of the previous one with a view to achieving an integrated regional market for services. Such negotiations shall be in conformity with Article V of the GATS and aim at promoting economic growth and development for all Member States.
- 2 State Parties shall negotiate the liberalisation of the six priority services sectors (communication, construction, energy-related, financial, tourism and transport services). Subsequent negotiations shall cover all services sectors subject to Article 3. These negotiations shall also include negotiations under Article 4.
3. This first round of negotiations shall be concluded no later than three (3) years after the commencement of such negotiations.
- 4 Negotiations shall be in conformity with the principle of asymmetry, reflecting individual State Parties' disadvantages by reason of size, structure, vulnerability and level of development of their economy.

During the negotiations, State Parties shall not introduce new and more discriminatory barriers to trade in services. For each round of negotiations, the TNF-Services shall adopt negotiating guidelines.

- 5 State Parties' lists of commitments, upon adoption, shall be an integral part of this Protocol. Individual State Parties, which are disadvantaged by reason of size, structure, vulnerability and level of development of their economy shall benefit from flexibility for the implementation of the commitments negotiated under each round of negotiations.

**ARTICLE 17**  
**Temporary Movement of Natural Persons**

1. 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.
2. This Protocol shall not extend 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.

**PART FOUR**  
**MATTERS RELATED TO TRADE IN SERVICES**

**ARTICLE 18**  
**Promotion of Trade and Investment in Services**

1. The State Parties shall aim to promote an attractive and stable environment for the supply of services. Such promotion should take the form, in particular, of:
  - (a) mechanisms for information on, and identification and dissemination of, services business opportunities;
  - (b) development of model laws, regulations and uniform and simplified administrative procedures;
  - (c) development of mechanisms for joint investments, in particular with the small and medium-sized service suppliers of the State Parties.
2. No later than three (3) years following the entry into force of this Protocol, the TNF-Services shall establish the necessary steps for the development of such mechanisms. State Parties recognize the importance of cooperative mechanisms, technical assistance and capacity building, and Members shall enhance such cooperation *inter*

*alia* in accordance with mechanisms and initiatives carried out under other SADC Protocols, such as the Finance and Investment Protocol.

## **ARTICLE 19**

### **Business Practices**

1. The State Parties agree that anticompetitive business conduct can hinder the fulfilment of the objectives of this Protocol. Accordingly, each State Party shall adopt or maintain measures to proscribe such conduct and take appropriate action with respect thereto.
2. The State Parties undertake to apply their respective competition laws so as to avoid the benefits of this Protocol being undermined or nullified by anticompetitive business conduct. The State Parties shall give particular attention to anti-competitive agreements, abuse of market position, cartel and anticompetitive mergers and acquisitions, in accordance with their respective competition laws. Nothing in this article shall prevent State Parties from putting in place their respective measures to combat anti-competitive practices.
3. State Parties recognize the importance effective competition frameworks for the development of services sectors and agree to take measures to strengthen cooperation between the national organs and authorities responsible for developing the competition laws of members.
4. The State Parties recognise the importance of co-operation on issues concerning competition law enforcement policy, such as notification, consultation and exchange of information related to the enforcement of their competition laws and policies. A State Party shall notify any other State Party of competition enforcement activities that may affect important interests of such State Party or State Parties, and it shall accord State Parties sympathetic consideration and afford adequate opportunity for, any matter affecting the operation of this Protocol.
5. State Parties recognize the importance of cooperative mechanisms, technical assistance and capacity building, and State Parties shall enhance such cooperation, *inter alia* in accordance with mechanisms and initiatives carried out under other SADC Protocols.

## **ARTICLE 20**

### **Transfers**

1. With regard to transactions covered by commitments under this Protocol, a State Party shall not apply restrictions to the right of free transfer, into and out of its territory, including of initial plus any additional capital, returns, payments under contract, royalties and fees, proceeds from the sale or liquidation of all or any part of an investment.
2. Where a State Party is in serious balance of payments difficulties, or under imminent threat thereof, the State Party concerned may adopt



restrictive measures with regard to transfers and payments relating to services and investment. Such measures shall be equitable, non-discriminatory, in good faith, of limited duration; they may not go beyond what is necessary to remedy the balance of payments situation and shall be fully consistent with the provisions of GATS Articles XI and XII.

3. The State Party concerned shall inform all other State Parties forthwith and present, as soon as possible, a timetable for their removal. Such measures shall be taken in accordance with other international obligations of the State Party concerned.
4. Notwithstanding paragraph 1 a State Party may delay or prevent a transfer through the equitable, non-discriminatory and good faith application of measures:
  - (a) taken to protect the rights of creditors in case of bankruptcy, insolvency or other legal actions;
  - (b) relating to or ensuring compliance with the laws and regulations:
    - (i) on the issuing, trading and dealing in securities, futures and derivatives,
    - (ii) concerning reports or records of transfers, or
  - (c) in connection with criminal offences and orders or judgements in administrative and adjudicatory proceedings.

#### **ARTICLE 21**

#### **Labour Market Integration Agreements**

Nothing in this Protocol prevents the conclusion of Labour Market Integration Agreements as provided for in Article V *bis* of the GATS.

#### **ARTICLE 22**

#### **Denial of Benefits**

In accordance with the definitions set out in Article 1 and subject to prior notification and consultation, a State Party may deny the benefits of this Protocol to a service supplier of another State Party, where the State Party establishes that the service is being provided by an enterprise that is owned or controlled by persons of a non-State Party and that has no substantial business operations in the economy of a State Party.

**ARTICLE 23**  
**Waiver of Obligations**

1. Notwithstanding any provision in this Protocol, and in case of an emergency, a State Party may apply to the CMT for a waiver of the obligations under this Protocol.
2. An application for a waiver within the meaning of paragraph 1 of this Article shall:
  - (a) identify the obligations in respect of which the waiver is required;
  - (b) set out the circumstances justifying the grant of the waiver; and
  - (c) indicate the period for which the waiver is required.
3. The CMT may require the applicant to furnish such additional information as it may specify.
4. Where the CMT agrees by consensus that the waiver should be granted, it shall, within 90 days, determine the maximum duration of the waiver, subject to such terms and conditions as the CMT may determine.
5. A State Party which has been granted a waiver within the meaning of paragraph 1 of this Article shall:
  - (a) at the termination of the period of the waiver, remove the restrictions and notify the CMT, or
  - (b) where the State Party removes the restrictions before the end of the period of the waiver, notify the CMT accordingly.

**PART FIVE**  
**Institutional Arrangements and Dispute Settlement Provisions**

**ARTICLE 24**  
**Institutional Arrangements**

1. The institutional mechanisms for the implementation of this Protocol shall comprise the CMT, the Committee of Senior Officials and the TNF-Services.
2. The CMT shall be responsible for trade matters including the following:
  - (a) supervision of the implementation of this Protocol;
  - (b) supervision of the work of any committee or sub-committee established under this Protocol.

3. The Committee of Senior Officials shall:
  - (a) report to the CMT on matters relating to the implementation of the provisions contained in this Protocol;
  - (b) monitor the implementation of this Protocol;
  - (c) supervise the work of the TNF-Services.
  
4. The TNF-Services shall be responsible for the conduct of trade negotiations and shall report to the Committee of Senior Officials. Its functions shall include:
  - (a) regular reviews in which offers shall be made and where the removal of restrictions and conditions shall be requested or offered;
  - (b) the creation of a research capacity of experts to monitor the impact of measures already implemented, and offer advice on the potential impact of offers under discussion; and
  - (c) the monitoring of the services integration process, with a view to ensuring that, in the process of liberalisation of services, due account shall be taken of sectoral Protocols.

**ARTICLE 25**  
**Consultations and Dispute Settlement**

The dispute settlement procedures of Annex 1 to this Protocol shall apply to any disputes regarding the interpretation or application of this Protocol.

**PART SIX**  
**FINAL PROVISIONS**

**ARTICLE 26**  
**Annexes**

State Parties may develop Annexes for the implementation of this Protocol for adoption by the CMT. Upon adoption by the CMT, such Annexes shall be an integral part of this Protocol.

**ARTICLE 27**  
**Amendments**

1. Any State Party may propose amendments to this Protocol.
2. Proposals for amendments to this Protocol shall be made to the Executive Secretary who shall duly notify all Member States of the proposed amendments at least thirty (30) days in advance of consideration of the amendments by the States Parties. Such notice may be waived by the Member States.
3. Amendments to this Protocol shall be adopted by a decision of three quarters of all the State Parties and shall become effective thirty (30) days after such adoption.

**ARTICLE 28**  
**Signature**

This Protocol shall be signed by the duly authorised representatives of the Member States.

**ARTICLE 29**  
**Ratification**

This Protocol shall be subject to ratification by the Member States in accordance with their respective constitutional procedures.

**ARTICLE 30**  
**Entry into Force**

This Protocol shall enter into force thirty (30) days after the deposit of instruments of ratification by two-thirds of the Member States.

**ARTICLE 31**  
**Accession**

This Protocol shall remain open for accession by any Member State.

**ARTICLE 32**  
**Withdrawal**

1. Any State Party may withdraw from this Protocol upon the expiration of twelve (12) months from the date of giving written notice to the Executive Secretary to that effect.
2. Any State Party that has withdrawn pursuant to paragraph 1 shall cease to enjoy all rights and benefits under this Protocol upon the withdrawal becoming effective.

3. Any State Party that has withdrawn pursuant to paragraph 1 shall remain bound by the obligations under this Protocol for a period of twelve (12) months from the date of giving notice.

**ARTICLE 33**  
**Depositary**

1. The original texts of this Protocol and all instruments of ratification and accession shall be deposited with the SADC Executive Secretary, who shall transmit certified copies to all State Parties.
2. The Executive Secretary shall register this Protocol with the United Nations, African Union Commission and any other relevant organisations, which the Council of SADC may determine.

IN WITNESS WHEREOF, WE, the Heads of State and Government, or our duly Authorised Representatives have signed this Protocol.

DONE at MAPUTO, Mozambique this 18<sup>th</sup> day of August, 2012, in three originals, in English, French and Portuguese, all texts being equally authentic.

.....  
REPUBLIC OF ANGOLA

  
.....  
DEMOCRATIC REPUBLIC OF CONGO

.....  
REPUBLIC OF MADAGASCAR

  
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REPUBLIC OF MAURITIUS

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REPUBLIC OF NAMIBIA

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REPUBLIC OF SOUTH AFRICA

  
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UNITED REPUBLIC OF TANZANIA

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REPUBLIC OF ZIMBABWE

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REPUBLIC OF BOTSWANA

  
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KINGDOM OF LESOTHO

  
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REPUBLIC OF MALAWI

  
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REPUBLIC OF MOZAMBIQUE

  
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REPUBLIC OF SEYCHELLES

  
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SWAZILAND

  
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REPUBLIC OF ZAMBIA

## **ANNEX 1**

### **CONCERNING THE SETTLEMENT OF DISPUTES BETWEEN THE STATE PARTIES**

#### **PREAMBLE**

The State Parties

**HAVING UNDERTAKEN** to progressively liberalise intra-regional trade in services on the basis of fair, mutually equitable and beneficial arrangements;

**AND HAVING REGARD** to the provisions of Article 25 of this Protocol on the settlement of disputes;

**HEREBY AGREE** as follows;

#### **ARTICLE 1**

##### **Scope and Application**

The Rules and Procedures of this Annex shall apply to the settlement of disputes between State Parties concerning their rights and obligations under this Protocol.

#### **ARTICLE 2**

##### **Forum Shopping**

If a State Party has invoked the Rules and Procedures of this Annex or any other applicable international dispute settlement mechanism with respect to any matter, that State Party shall not invoke another dispute settlement mechanism on the matter.

#### **ARTICLE 3**

##### **Cooperation**

The State Parties shall:

- (a) at all times endeavour to agree on the interpretation and application of this Protocol;
- (b) make every attempt through cooperation to arrive at a mutually satisfactory resolution of any matter that may affect the operation of this Protocol; and
- (c) make use of the rules and procedures of this Annex to resolve disputes in a speedy, cost effective and equitable manner.

## **ARTICLE 4**

### **Consultations**

1. A State Party may request in writing consultations with any other State Party regarding any measure that it considers might affect its rights and obligations under the provisions of this Protocol.
2. The requesting State Party shall notify the other State Parties and the CMT of the request, through the Registrar of the Tribunal. Any request for consultations shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis of the complaint.
3. The requested State Party shall accord reasonable consideration to and afford adequate opportunity for consultations regarding any representations made by another State Party.
4. The requested State Party shall, unless otherwise mutually agreed, reply to the request within 10 days after the date of its receipt and shall enter into consultations in good faith within a period of no more than 30 days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution. If the requested State Party does not respond within 10 days after the date of receipt of the request, or does not enter into consultations within a period of no more than 30 days, or a period otherwise mutually agreed, after the date of receipt of the request, then the requesting State Party may proceed directly to request the establishment of a panel.
5. Whenever a State Party other than the consulting State Parties considers that it has a substantial interest in consultations being held pursuant to a request made under paragraph 1, such State Party may notify the consulting State Parties and the Registrar of the Tribunal, within 10 days after the date of circulation of the request for consultations, of its desire to be joined in the consultations. Such State Party shall be joined in the consultations, provided that the requested State Party agrees that the claim of substantial interest is well founded. In that event, the consulting State Parties shall also inform the CMT through the Registrar of the Tribunal. If the request to be joined in the consultations is not accepted, the applicant State Party shall be free to request consultations under this Article.
6. The consulting State Parties shall make every attempt to arrive at a mutually satisfactory resolution of any matter and, to this end, they shall
  - (a) provide sufficient information to enable a full examination of how the actual or proposed measure or other matter may affect the operation of this Protocol;



- (b) treat any confidential or proprietary information exchanged in the course of consultations on the same basis as the State Party providing the information; and
  - (c) seek to avoid any resolution that adversely affects the interests of any other State Party under this Protocol.
7. If the consulting State Parties fail to resolve a matter pursuant to this Article within:
- (a) 60 days after the date of receipt of the request for consultations; or
  - (b) such other period as they may agree,
- any such State Party may request in writing the establishment of a panel. The requesting State Party shall notify the other State Parties and the CMT of the request through the Registrar of the Tribunal.
8. In cases of urgency, State Parties shall enter into consultations within a period of no more than 10 days after the date of receipt of the request. If the consultations have failed to settle the dispute within a period of 20 days after the date of receipt of the request, the requesting State Party may request the establishment of a panel.

**ARTICLE 5**  
**Good Offices, Conciliation and Mediation**

- 1. Good offices, conciliation and mediation are procedures that are undertaken voluntarily if the disputing State Parties so agree.
- 2. Procedures involving good offices, conciliation and mediation shall be confidential, and may be requested at any time by a disputing State Party. These procedures may begin at any time and be terminated at any time.
- 3. The Chairperson of the CMT, or any other Member of the CMT designated by the Chairperson who is not a national of a disputing State Party, may offer good offices, conciliation or mediation with a view to assisting the disputing State Parties.

**ARTICLE 6**  
**Establishment of Panel**

- 1. The Registrar of the Tribunal shall establish a panel within 20 days from the date of receipt of a request made pursuant to paragraph 4, 7 or 8 of Article 4.
- 2. The request for the establishment of a panel shall be made in writing to the Registrar of the Tribunal and shall indicate whether consultations were held, indicate the specific measures at issue and provide a brief

summary of the legal basis of the complaint in the light of the relevant provisions of this Protocol sufficient to present the problem clearly.

## **ARTICLE 7 Roster of Panellists**

The Registrar of the Tribunal shall maintain an indicative roster of panellists nominated by State Parties on the basis of their relevant expertise and qualifications as stipulated in Article 8. The roster, as well as any modifications thereto, shall be made known by the Secretariat to the State Parties.

## **ARTICLE 8 Qualifications of Panellists**

All panellists shall:

- (a) have expertise or experience in international trade or international law, or international economics and other matters covered by this Protocol or the resolution of disputes arising under international trade agreements, and shall be chosen strictly on the basis of objectivity, reliability and sound judgment;
- (b) be composed of governmental and/or non-governmental individuals;
- (c) serve in their individual capacities and not as government representatives, nor as representatives of any organization. State Parties shall therefore not give them instructions nor seek to influence them as individuals with regard to matters before a panel; and
- (d) comply with a code of conduct and rules of procedures to be established by the CMT.

## **ARTICLE 9 Panel Selection**

1. A panel shall be composed of three panellists.
2. The following procedures shall apply in the selection of panellists:
  - (a) The disputing State Parties shall endeavour to agree on the chair of the panel within 15 days of the delivery of the request for the establishment of a panel.
  - (b) Within 10 days of selection of the chair, each disputing State Party shall select one Panellist who is not a citizen of such State Party.

- (c) Where there are more than two disputing State Parties, the State Party complained against shall select one panellist who is not a citizen of such State Party. The complaining State Parties shall jointly select one panellist who is not a citizen of such State Parties. This shall take place within 10 days of the selection of the chair.
3. When a State Party or Parties, in the selection of panellists pursuant to paragraph 2 fails to agree on the chair of the panel or to select a panellist in the prescribed time, the Registrar of the Tribunal shall refer the matter to the Executive Secretary of SADC. Such chair or panellist shall be selected by lot by the Executive Secretary of SADC from a list of panellists nominated in the roster referred to in Article 7 who are not citizens of the disputing State Parties. The Executive Secretary shall select the chair or panellist, as the case may be, within 5 days after the expiry of the prescribed time referred to in paragraph 2.
4. When a disputing State Party is of the opinion that a panellist does not comply with the requirements set out in Article 8, the disputing State Parties shall consult and, if they agree, the panellist shall be removed and another panellist shall be selected in accordance with this Article.
5. Panellists shall, as far as possible, be selected from the roster contemplated in Article 7.

#### **ARTICLE 10**

##### **Terms of Reference of the Panel**

Unless the disputing State Parties otherwise agree within 20 days from the date of establishment of the panel, the terms of reference for the panel shall be:

- (a) To examine, in the light of the relevant provisions of this Protocol, the matter referred to the Registrar of the Tribunal and to make findings, determinations and recommendations.
- (b) To determine whether the matter under dispute has nullified or impaired benefits of the disputing State Parties according to the provisions of this Protocol.
- (c) To make findings as and when appropriate on the degree of adverse effects on any State Party of any measure found not to conform to the provisions of this Protocol or to have caused nullification or impairment of the complaining State Party.
- (d) To recommend that the State Party complained against brings a measure into conformity with this Protocol where such a measure is found to be inconsistent with this Protocol.

**ARTICLE 11**  
**Panel Procedures**

Unless the disputing State Parties otherwise agree, the Panel shall conduct its proceedings in accordance with the following rules of procedure:

- (a) the disputing State Parties shall have a right to at least one hearing before the panel as well as the opportunity to provide initial and rebuttal written submissions;
- (b) the Panel's hearings, deliberations and initial report, and all written submissions to and communications with the Panel shall be confidential; and
- (c) the disputing State Parties may be represented during the Panel procedures by legal representatives or other experts.

**ARTICLE 12**  
**Procedures for Multiple Complaints**

- 1. Where more than one State Party requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints taking into account the rights of all State Parties concerned. A single panel should be established to examine such complaints whenever feasible.
- 2. The single panel shall organize its examination and present its findings to the CMT in such a manner that the rights which the disputing State Parties would have enjoyed, had separate panels examined the complaints, are in no way impaired. If one of the disputing State Parties so requests, the panel shall submit separate reports on the dispute concerned. The written submissions by each of the complaining State Parties shall be made available to the other complaining State Parties and each complaining State Parties shall have the right to be present when any one of the other complaining State Parties presents its views to the panel.
- 3. If more than one panel is established to examine the complaints related to the same matter, to the greatest extent possible, the same persons shall serve as panellists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonised.

**ARTICLE 13**  
**Third Party Participation**

A State Party that is not a disputing State Party having a substantial trade interest in a matter before a panel and having notified its interest in writing to the CMT, through the Registrar of the Tribunal, shall have an opportunity to attend all hearings, to make written and oral submissions to the panel and to receive the written submissions of the disputing State Parties.

**ARTICLE 14**  
**Role of Experts**

On request of a disputing State Party, or on its own initiative, the panel may seek information and technical advice from any person or body that it deems appropriate.

**ARTICLE 15**  
**Initial Report**

1. Unless the disputing State Parties otherwise agree, the panel shall base its initial report on the submissions of the participating State Parties and on any information before it pursuant to Article 14.
2. Unless the disputing State Parties otherwise agree, the panel shall, within 90 days after the last panellist is selected or 45 days in the case of urgency, present to the disputing State Parties an initial report containing:
  - (a) findings of fact;
  - (b) its determination as to whether the measure at issue is or would be inconsistent with the obligations of this Protocol or cause nullification or impairment, or any other determination requested in the terms of reference; and
  - (c) its recommendations for resolution of the dispute.
3. The disputing State Parties may submit written comments to the panel on its initial report within 15 days of presentation of the initial report. In such an event, and after considering such written comments, the panel, on its own initiative or on the request of any disputing State Party, may:
  - (a) request the views of any participating State Party;
  - (b) reconsider its initial report; and
  - (c) make any further examination that it considers appropriate.

**ARTICLE 16**  
**Final Report**

1. A panel shall present to the disputing State Parties a final report within 30 days of presentation of the initial report, unless the disputing State Parties otherwise agree.
2. No panel shall, either in its initial report or its final report, disclose which panellists are associated with majority or minority opinions.

3. A panel shall transmit to the CMT, through the Registrar of the Tribunal, its final report.
4. Unless the CMT decides by consensus not to adopt the report, or a disputing State Party notifies the CMT of its decision to appeal, the final report of the panel shall be adopted by the CMT within 15 days after it is transmitted to the CMT and shall promptly be made public thereafter by the Registrar of the Tribunal. If a disputing State Party has notified the CMT of its decision to appeal, the report of the panel shall not be considered for adoption by the CMT until after completion of the appeal.

#### **ARTICLE 17**

##### **Appellate Review of Panel Report**

1. Only disputing State Parties may appeal a panel report. Third parties which have notified the CMT of a substantial interest in the matter pursuant to Article 13 may make written submissions to, and be given an opportunity to be heard, by the Tribunal.
2. Subject to Paragraph 4, the length of the appeal shall not exceed 90 days.
3. An appeal shall be limited to issues of law covered in the Panel Report and legal interpretations developed by the panel.
4. Working procedures for appellate review provided for under this Article shall be drawn up by the Tribunal in consultation with the Executive Secretary of SADC and shall not be less restrictive than the Working Procedures of the Appellate Body under the WTO "Understanding on the Rules and Procedures Governing the Settlement of Disputes".

#### **ARTICLE 18**

##### **Panel Recommendations**

Where a panel concludes that a measure is not consistent with this Protocol, it shall recommend that the State Party complained against brings the measure into conformity with this Protocol. In addition, the panel may suggest ways in which the State Party complained against may implement the recommendations.

#### **ARTICLE 19**

##### **Implementation of Panel Recommendations**

1. The State Party complained against shall inform the Registrar of the tribunal of its intentions in respect of implementation of the recommendations of the panel. If it is impracticable to comply immediately with the recommendations, the State Party complained against shall have a reasonable period of time in which to do so. The reasonable period of time shall be the period of time proposed by the State Party complained against or a period mutually agreed by the

disputing State Parties. In any case, the period shall not exceed 6 months from the date of adoption of the panel report.

2. The provisions of paragraph 1 and Article 21 shall apply *mutatis mutandis* to decisions taken by the Tribunal pursuant to Article 17.

## **ARTICLE 20**

### **Compensation and Suspension of Concessions**

1. Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations of the panel, as adopted, or the decisions of the tribunal in terms of Article 17, as the case may be are not implemented within a reasonable period of time determined in accordance with Article 19. Full implementation of the panel recommendations or the decisions of the Tribunal in terms of Article 17, as the case may be, to bring a measure into conformity with this Protocol shall always be preferred.
2. If the State Party complained against fails to bring the measure found to be inconsistent with this Protocol into compliance within the reasonable period of time determined in accordance with Article 19, it shall enter into negotiations with the complaining State Party with a view to developing a mutually satisfactory solution. If no satisfactory solution has been agreed within 20 days after the expiry of the reasonable period of time determined in accordance with Article 19, the complaining State Party may request authorization from the CMT, through the Registrar of the Tribunal, to suspend concessions or other obligations of equivalent effect to the level of the nullification or impairment.
3. Unless the CMT decides by consensus otherwise within 20 days from the date of receipt of the request for authorization to suspend concessions or obligations, such authorization shall be granted.
4. In considering what benefits to suspend, a complaining State Party shall first seek to suspend benefits in the same sector or sectors as that affected by the measure or other matter that the panel has found to be inconsistent with the obligations of this Protocol. A complaining State Party that considers it is not practicable or effective to suspend benefits in the same sector or sectors may suspend benefits in other sectors.
5. If the State Party complained against objects to the level of suspension proposed, the matter shall as far as possible be referred for arbitration to the original panel. Should the original panel not be available, the Executive Secretary of the SADC shall appoint a panellist. The original panel or panellist, as the case may be, shall be appointed within 10 days from the date of receipt of the request for arbitration. The arbitration shall be completed within 30 days after the date of appointment of the original panel or panellist, as the case may be. Concessions or other obligations may not be suspended during the course of arbitration.

6. The panel or panellist acting pursuant to paragraph 5 shall determine whether the level of the proposed suspension is equivalent to the level of impairment as a result of a measure not complying with this Protocol. The CMT shall be informed, through the Registrar of the Tribunal, of the decision of the panel or panellist and shall within 20 days after the date of receipt of the decision of the panel or panellist, unless it decides by consensus otherwise, grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the panel or panellist.

#### **ARTICLE 21 Expenses**

1. The CMT shall determine the amounts of remuneration and expenses that will be paid to panellists and experts appointed in terms of this Annex.
2. The remuneration of panellists and experts, their travel and lodging expenses and all other general expenses of panels shall be funded through the regular budget of the Community, in accordance with the criteria that the CMT may from time to time determine, and from such other sources as may be determined by the CMT.
3. Each panellist or expert shall keep a record and render a final account of his or her time and expenses and the panel shall keep a record and render an account of all general expenses. The Secretariat shall control such accounts and make all payments against the accounts of the disputing State Parties.
4. Each disputing State Party shall be responsible for payment of its own costs arising from litigation. Where the panel determines that a disputing State Party has abused the process of the panel, it may require from that disputing State Party to pay for the costs reasonably incurred under the circumstances of the particular case by the other disputing State Party arising from the litigation.

#### **ARTICLE 22 Regulations**

The CMT shall adopt Regulations to facilitate the implementation of this Annex.