

Chapter 7

Tourism liberalisation in southern and eastern Africa

Paul Kruger

Introduction

Given the increasingly important role of tourism and travel exports in African countries, and the traditional high barriers for trade in African goods (both within Africa and in the rest of the world), this paper investigates whether significant trade barriers exist in one of the fastest growing industries on the continent. The openness of the domestic industries will determine the policy parameters within which countries in southern and eastern Africa have to manoeuvre. Given that the reversal of liberalisation commitments is an elaborate and costly process, the following questions can be asked: How far have these countries liberalised their tourism industries and how much policy space remains for these countries? The main aim of the paper is to examine the conditions and restrictions concerning tourism and travel in the Southern African Development Community (SADC) and East African Community (EAC) countries. This collective represents all the countries – geographically speaking – in southern and eastern Africa, most of which have significant tourism potential.

The key question is how much freedom foreign tourist suppliers are afforded when investing and operating in each of the southern or eastern African states. The GATS schedules are used as the benchmark to determine the treatment of foreign suppliers in the tourism and travel sector because for many African countries, particularly those in the initial stages of services liberalization, the schedules are the most important benchmark to determine their degree of openness. Each sub-sector comprising the tourism and travel activities is examined individually to determine the degree of liberalisation. In addition, the examination evaluates the relative importance of the individual sub-sectors for foreign suppliers. Sometimes the schedules do not paint the complete picture, either because not all travel and tourism activities have been included in the schedule, or because unilateral changes have been made which are not reflected in the country schedules. Where applicable, domestic policies and legislation are taken into account to clarify commitments made at the multilateral

level. Finally, the paper also considers related legislation of general application which has an impact on the entry or operation of foreign suppliers.

Tourism growth and regulatory barriers

Tourism is one of the fastest growing industries worldwide. What is even more significant, over the last decade, is that African countries have exhibited the highest growth rates of all regions in the tourism industry, albeit from a low base. It is not only the strongest African economies that have grown; tiny, landlocked African countries, those that have for long struggled to find a non-resource intensive export, have shown strong growth.

For example, tourism expenditure (excluding transport) in Angola (11.4%), Cape Verde (25.2%), Ghana (39.1%), Libya (23.7%), Madagascar (11.7%), Sudan (11.8%), Tanzania (20.7%) and Zambia (14.4%) grew at higher rates than the average growth in the four leading tourism export countries (Egypt (6.2%), Morocco (10.1%), South Africa (9.5%) and Tunisia (5.1%)).¹

¹ Compounded annual growth rates from 1990 – 2006 available from the UNCTAD Handbook of Statistics 2008.

Table 1: Compound annual growth rates (1990 – 2006) for tourism expenditure in southern and eastern Africa (millions US\$)

Country	Tourism expenditure (including transport)	Tourism expenditure (excluding transport)
Angola	7.9%	11.4 %
Botswana	9.4 %	10.0%
Burundi	-6.7%	-5.8%
DR Congo	N/A	N/A
Kenya	4.6%	2.5%
Lesotho	N/A	3.0%
Madagascar	10.5%	11.7%
Malawi	3.1%	2.7%
Mozambique	N/A	6.8% ²
Mauritius	7.9%	7.2%
Namibia	N/A	9.8%
Rwanda	N/A	18.7% ³
South Africa	9.3%	9.5%
Swaziland	4.9%	5.9%
Tanzania	6.6% ⁴	20.3%
Uganda	N/A	16.8% ⁵
Zambia	N/A	14.4%
Zimbabwe	7.2%	N/A

Source: UNCTAD Handbook of Statistics 2008

The causes of such growth are not entirely clear: there are various demand- and supply-side factors which may influence the flow of goods and services⁶. However, trade restrictions may also influence the flow of goods and services, mainly because low trade barriers reduce transaction costs and enable freer trade. While this is often true for trade in goods, international trade in services is also constrained by trade barriers, in particular regulatory barriers which are maintained in domestic legislation. The General Agreement on Trade in Services (GATS), enacted with the establishment of the World Trade Organisation (WTO) in 1995,⁷ was the first

² Compound annual growth rates from 1995 – 2006.

³ Compound annual growth rates from 1995 – 2006.

⁴ Compound annual growth rates from 1997 – 2006.

⁵ Compound annual growth rates from 1993 – 2006.

⁶ See Fourie (2009) for an investigation into the sources of African countries' comparative advantage in tourism.

⁷ Under the GATS a universal template was adopted which provided member states with a framework to undertake liberalisation commitments in specific services sectors and modes of supply. These

multilateral agreement of its kind, aimed at reducing barriers that restrict international trade in services.⁸ Can there possibly be a correlation between the growth in tourism expenditure and the state of liberalisation in each of these countries? An examination of the barriers will also reveal the progress of services liberalisation in each of the countries, as well as provide insight into the amount of policy space available when conducting future negotiations.

Travel and tourism under GATS

In contrast to other services industries, travel and tourism services are characterised by the consumer of the service. The suppliers of the service are bound to the host country and it is the consumer (tourist in this case) who travels to that country in order to enjoy the services and facilities. The industry should therefore include all goods and services that are consumed by tourists during their stay. Considering the scope of the travel and tourism sector, the classification accorded under the W120 Classification system⁹ is, however, limited. The core sector entitled '*Tourism and travel related services*' includes the sub-sectors:

- A. Hotels and restaurants (including catering);
- B. Travel agencies and tour operator services;
- C. Tourist guide services; and
- D. Other.

Tourism activities which are part of the more general services activities (most notably transport services, but also including certain business, distribution and recreational, cultural and sporting services) have typically been placed within those general services categories (WTO Secretariat 2000).

specific commitments would only apply to the services sectors and sub-sectors listed in each member's schedule and to the extent to which the countries committed themselves.

⁸ For many African countries, the GATS is the only example of their progress in services liberalisation. Liberalisation efforts at the regional and bilateral level have, however, intensified with the completion of the EAC Common Market Protocol and its schedule of commitments on the progressive liberalisation of services. Implementation, or elimination as stated in the schedules, will, however, only happen from 2010 onwards. Liberalisation in the context of the Economic Partnership Agreements (EPAs) is also ongoing with services being part of the second phase of the negotiations.

⁹ WTO Secretariat (1991).

9.	Tourism and travel related services	
A.	Hotels and restaurants (including catering)	CPC 641 - 643
B.	Travel agencies and tour operator services	CPC 7471
C.	Tourist guide services	CPC 7472
D.	Other	

Initially compiled in 1991 to identify the various services sectors during the GATS negotiations, the sectoral classification list became generally known as the W/120 List. It is a condensed version of the United Nations Central Product Classification (CPC)¹⁰ listing for services which was regarded as too comprehensive at that time. The vast CPC list was reduced to twelve core services sectors with some 160 sub-sectors classified under the W/120 system. This was then applied when negotiating the GATS and other subsequent trade agreements which contained a services component. Negotiating partners have no obligation to use a specific set of classifications when negotiating trade in services; parties only need to be in agreement regarding the description of the supplied services and the agreement must be expressed in clear and unambiguous language. Parties are therefore free to include any services, regardless whether these are contained in the W/120 of CPC lists.

At the time of services negotiation in the Uruguay Round, it was unclear to most of the developing world exactly what services liberalisation entailed and how it should be implemented. Few countries included additional sub-sectors under the W/120 system, despite the cardinal importance of those unstated activities. Of the SADC countries, only Mauritius included new sub-sectors under the travel and tourism sector. 'Car rental', 'Yacht chartering and cruising' and 'Tourist duty-free shops' were categories created by Mauritius to regulate these associated tourism activities. Tanzania made slight changes to the 'A. Hotels and restaurant (including catering)' sub-sector by adding 'Hotels of four stars and above'. The commitments would then exclusively apply to four-star hotels and above as defined by Tanzanian legislation.

¹⁰ The CPC was the first international classification covering the whole spectrum of outputs from the various services sectors.

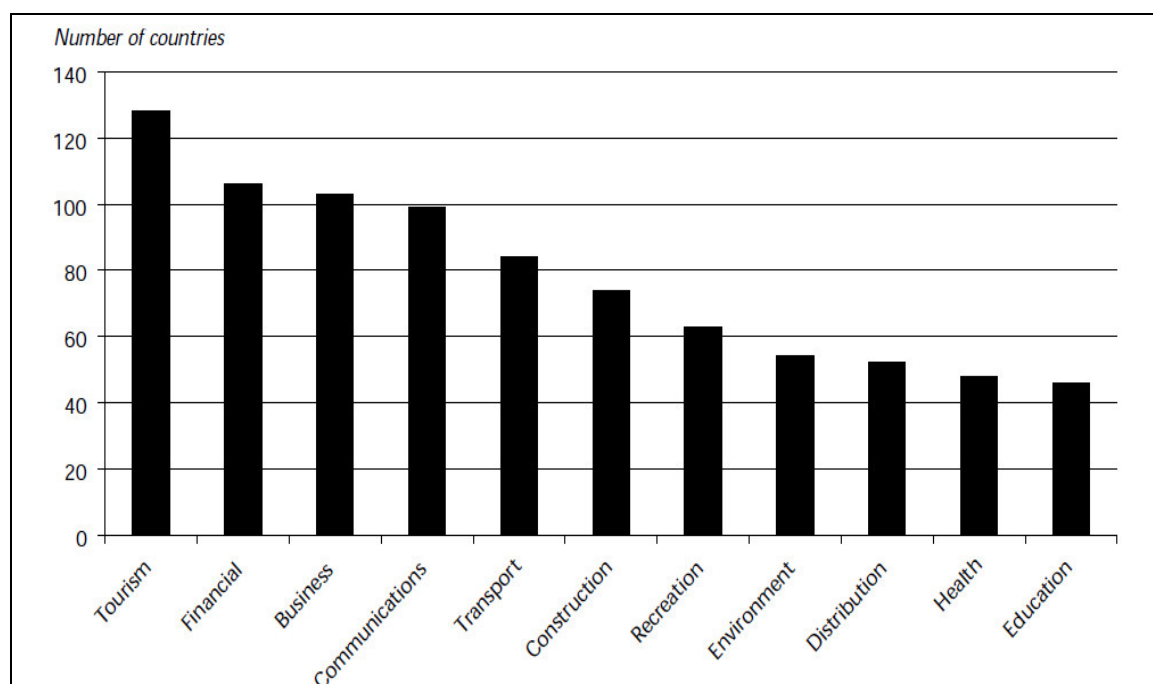
As countries grow more aware of the significance of regulating specific tourism activities, these new headings will be more clearly defined¹¹. This is evident from the services negotiations of the recently concluded CARIFORUM Economic Partnership Agreement (EPA). In addition to the traditional tourism activities¹² the parties also specifically listed the following tourism related activities: hotel development; hotel management; marina and spa services. The EAC schedule on services also included categories such as hunting and sport fishing. These examples are consistent with a trend towards a clearer and more detailed description of services activities. The tourism sector is the focus of this paper, but these issues also hold true for other services sectors. As services industries evolve and the understanding thereof is deepened, countries will strive for more detailed descriptions in an effort to regulate their industries more efficiently.

Tourism commitments under the GATS have been made by 128 WTO members, more than in any other services sector. The graph below illustrates the number of WTO members that made at least one commitment in each of the relevant sectors. Given the membership composition, these scheduling preferences largely reflect the negotiating position of developing countries. This move towards scheduling tourism commitments comes as no surprise since those activities are the most important foreign exchange earners in many developing countries. It can be argued that developing countries made the large number of tourism commitments in order to encourage and facilitate foreign investment in the sector and to stimulate travel and tourism activities. This is consistent with the rationale for the GATS to create a more transparent and predictable legal framework in order to improve the investment climate and attract foreign investors in the services sectors. Another argument is that the sector traditionally carried low levels of protection and that certain segments, particularly hotels, have already been open to foreign investment¹³.

¹¹ The World Tourism Organisation has also indicated that it is not satisfied with the current GATS definition of the travel and tourism sector and has tried to revise it in the successive rounds of services negotiations.

¹² The travel and tourism activities are set out in the W/120 classification system of A. Hotels and restaurants (including catering); B. Travel agencies and tour operator services; C. Tourist guide services; and D. Other.

¹³ Adlung et al. (2005).



Source: Hoekman et al 2002

The graph, however, presents only part of the picture. WTO members just have to make a partial commitment in any of the tourism sub-sectors to be included in the results of the graph. It is therefore impossible to ascertain the depth and importance of the commitments without examining the individual schedules of the selected WTO members.

SADC and EAC Countries ¹⁴	A. Hotels and restaurants	B. Travel agencies and tour operators	C. Travel guides	D. Other
Angola	X (extensive)			
Botswana	X (partial)	X (partial)		
Burundi	X (extensive)	X (extensive)	X (extensive)	X(extensive)
DR Congo	X (extensive)	X (extensive)	X (extensive)	
Kenya	X (extensive)	X (extensive)	X (extensive)	
Lesotho	X (partial)		X (extensive)	
Madagascar				
Malawi	X (extensive)	X (extensive)	X (extensive)	X (extensive)
Mozambique				
Mauritius	X (partial)	X (partial)	X (partial)	X (partial)
Namibia	X (full)	X (full)		
Rwanda	X (extensive)			
South Africa	X (partial)	X (extensive)	X (partial)	
Swaziland	X (extensive)			
Tanzania	X (partial)			
Uganda	X (partial)	X (partial)		
Zambia	X (extensive)	X (extensive)	X (extensive)	X (extensive)
Zimbabwe	X (extensive)	X (partial)	X (partial)	

All of the examined countries, except Madagascar and Mozambique, made some kind of tourism commitment under the GATS. The countries that made tourism commitments clearly favoured the hotels and restaurant sub-sector with ten of them making 'extensive' or 'full' commitments. In this context an 'extensive commitment' means that the scheduled sub-sector is completely liberalised in Mode 1, Mode 2 and Mode 3 and that there are no restrictions on market access and national treatment in these modes. See example below:

¹⁴ Seychelles is not a WTO member and therefore made no specific commitments under the GATS. Seychelles is, however, in the process of acceding to the WTO.

11.TOURIST GUIDE SERVICES – <i>Example of 'extensive' commitment</i>	Limitations on Market Access	Limitations on National Treatment
<u>A. Hotel and restaurant services (including catering)</u>	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section	1) None 2) None 3) None 4) Unbound except as indicated in the horizontal section

This is in contrast to a 'full commitment' which would denote the complete liberalisation of a sub-sector in Mode 1, Mode 2, Mode 3 *and* Mode 4. See example below:

11.TOURIST GUIDE SERVICES – <i>Example of 'full' commitment</i>	Limitations on Market Access	Limitations on National Treatment
<u>A. Hotel and restaurant services (including catering)</u>	1) None 2) None 3) None 4) None	1) None 2) None 3) None 4) None

This is an important theoretical distinction to make but can be argued that the current practical consequences, especially when dealing with Mode 4, are insignificant.¹⁵ On

¹⁵ Horizontal disciplines have an important role to play in the liberalisation of Mode 4 and in most cases govern the coverage, definitions, categories, measures and criteria of natural persons when moving to a host country. Even when 'None' is indicated in a sectoral section, this must be read as meaning '*none except the conditions set out in the horizontal section*' (WTO 2001). So the horizontal section will be applicable regardless of the inscription in the schedule. This is of particular relevance in Mode 4 where most of the restrictions and conditions relating to the movement of natural persons are typically inscribed in the horizontal section. It can be argued that there is little difference between the general approach and the more liberal one, since the horizontal commitments will nevertheless be applicable to all the committed sectors and modes, even despite full liberalisation. The theoretical distinction between the two approaches is clear – a country stipulating 'unbound' (no liberalisation) in its schedule wishes to remain free to introduce or maintain market access or national treatment restrictions while an inscription of 'None' (full liberalisation) denotes no limitations or restrictions in the given sub-sector or mode of supply. Practical problems will arise when countries that made full

the other hand, 'Partial' commitments refer to the situation where countries left certain modes of supply unbound¹⁶ or where specific commitments were made, either under GATS Art. XVI (market access) or GATS Art. XVII (national treatment).

Hotel and restaurant services (CPC 641 – 643)

In the 'Hotel and restaurant' sub-sector, almost all of the countries fully liberalised Mode 1. It was only South Africa and Lesotho that left hotels and restaurants 'Unbound' in Mode 1; both countries, however, fully liberalised the sub-sector of 'Catering'.¹⁷ The technical feasibility of Mode 1 (cross-border) supply of hotels and restaurants services can nevertheless be questioned. The promotion and advertising of hotels and restaurants can be supplied cross-border, but these services should rather be classified under 'Advertising services' (CPC 871) under the core sector of 'Business services'. Some countries, for example Kenya, recorded an inscription of 'Unbound*' in Mode 1. The asterisk as a rule refers to a footnote which states 'Unbound due to a lack of technical feasibility'. Many European Union (EU) countries made the same inscription of 'Unbound*' in their initial GATS schedules. In their revised GATS offer of 2005 and in the CARIFORUM EPA negotiations this was changed to 'Unbound'. Clearly EU countries are of the opinion that these services can be supplied to through Mode 1. Supply in this mode can possibly refer to

commitments – like Namibia in the example above – modify or add market access or national treatment limitations to their horizontal section. Will these additional obligations as inscribed in the horizontal section be applicable to the committed sub-sectors and modes of supply, even if already fully liberalised? If so, can this not be a means to evade the fully liberalised sectoral inscriptions ('None') by introducing new and related restrictions in the horizontal section? As seen from the EPA negotiations, countries are moving towards detailed, and in some instances, more restrictive descriptions in their horizontal sections. How will this process of horizontal additions be managed? The GATS schedules in some examined countries (Angola, Mozambique, Swaziland, Rwanda, Tanzania, Uganda, and Madagascar) have no horizontal sections, making the effective management and understanding of these overall measures still more relevant.

¹⁶ If a government enters the word 'Unbound' in its schedule, it wishes to remain free in that given sector and mode of supply. This means that a country can introduce or maintain measures inconsistent with market access or national treatment in the sub-sector where the government indicated 'Unbound'.

¹⁷ Despite its Least Developed Country (LDC) status Lesotho made extensive initial commitments during the Uruguay Round. Lesotho only joined the Uruguay negotiations at a late stage after it was recognised that it would become more difficult to negotiate favourable terms of accession after the establishment of the WTO. Manduna (2005) argues that at that time Lesotho had no clear idea what the WTO was about and did not put forward specific proposals to address national concerns. Manduna's research reveals that there was a lack of understanding on the technical aspects of scheduling while the responsible branch of government had limited capacity to deal with services negotiations. The schedules of South Africa and Lesotho are suspiciously similar in many respects and it almost seems as if both countries have been working off the same blueprint. This has left Lesotho with a schedule of commitments containing some errors which in certain instances do not accurately reflect government policy or domestic regulation.

sleeping-car services on trains, ferries and boats or meal servings on airplanes, boats and trains. However since 25 of the 27 EU countries made no commitments in Mode 1 under hotel and restaurant services¹⁸, services such as online bookings and online reservation for hotels may be part of their strategic reservations.

Botswana made a number of specific restrictions in the hotel and restaurant sub-sector. Under Mode 2 ('Consumption abroad'), the Bank of Botswana limits the amount of local and foreign currency entitled to permanent residents for each trip. Limits on foreign currency were, however, removed effective from 8 February 1999 by the Bank of Botswana, following the abolition of exchange controls. Permanent residents are now allowed to export an unlimited amount in cash or in any other form subject to the completion of a declaration if it is in excess of 10 000 pula. There is no limit regarding the selling of foreign currency for pula provided that the foreign exchange is legally earned and transferred, and that it is declared at the port of exit (Bank of Botswana 2002). Botswana also made specific market access and national treatment commitments under Mode 3 ('Commercial presence'). In the market access column, Botswana stipulates that the service must be supplied through commercial presence. This is in fact stating the obvious since the only way to supply services in Mode 3 would be through commercial presence. This type of restriction should rather be listed in Mode 1 in order to limit the cross-border supply of the services.¹⁹ On the national treatment side it is stipulated that the services supplier must meet all residency requirements. At the time²⁰, no specific residency restrictions relating to hotels and restaurants were found. It is more likely that the restriction refers to the immigration laws, regulations, guidelines and procedures of employment in Botswana²¹. This is, however, already stated in the horizontal section of Botswana's schedule: 'For a foreign natural person to work in Botswana a residence and work

¹⁸ The inscription recorded by the EU countries was 'Unbound except for Catering: None'. This indicates that only catering services have been fully liberalised while these countries are free to maintain or introduce restrictions the rest of the sub-sector.

¹⁹ Identical restrictions were recorded in a number of other sectors in Mode 3. 'The services should be supplied through commercial presence' can be valuable in sectors where cross-border supply is possible. A more accurate way would be to schedule this type of restriction under Mode 1.

²⁰ The Botswana Tourism Regulations 2006 reserved a number of tourism enterprises for Botswana citizens or companies wholly owned by Botswana citizens. However, at the time when the schedules were recorded there were no residency restrictions. See the full discussion on Botswana Tourism Regulations on page 152 below.

²¹ This nevertheless provides Botswana with the opportunity to clearly define these restrictions when negotiating their services schedules in future. The EU has already submitted a GATS request in 2002 to "clarify the requirements which a foreign services supplier must meet and to what extent they constitute a limitation to national treatment".

permit is required'; and 'entry and residence in Botswana of foreign natural persons is subject to immigration laws, regulations, guidelines and procedures'. Identical restrictions²² appear frequently in the rest of the schedule, but again seem unnecessary. The horizontal section will apply automatically, even if not explicitly so stated.

Mauritius recorded the most comprehensive restrictions of the countries in the selected group. It separated the hotel and restaurant sub-sector in order to make different commitments in both sectors. Disregarding the possible technical infeasibility of Mode 1, Mauritius made commitments under market access and national treatment on cross-border supply. In terms of the Hotel Management Act of 1982, hotel operators have to incorporate a company. This seems to support the notion that hotels should only be supplied through commercial presence. In addition, Mauritius provides for the free repatriation of profits which is governed by the Bank of Mauritius Act and the Income Tax Act. Although strictly speaking this is not a commitment that should be scheduled, it was presumably included as a guarantee to foreign investors. More importantly, Mauritius made influential commitments under Mode 3 to restrict foreign investment to a certain extent, but at the same time stimulating the development of the local hotel sector. Foreign investment in hotels with fewer than a hundred rooms is limited to 49 percent while foreign investment in hotels with more than a hundred rooms is unrestricted. A further requirement is added to secure employment for locals: it is stipulated in the national treatment column that foreign establishments must predominantly be staffed by Mauritians. This policy towards foreign investment ensures that big resorts and hotels are continuously being developed with foreign capital, while the participation of the locals is guaranteed through joint ventures and secure employment. The same policy is employed in the restaurant sector where foreign projects are only allowed if the investment is greater than 10 million rupees (US\$325 000)²³ with foreign establishments to be staffed predominantly by Mauritians. This ensures the sustainable involvement of locals in the development and growth of the hotel and restaurant business.

²² The restriction stipulates that 'the services supplier should meet all residency requirements'.

²³ Converted from Mauritius rupees to United States dollars, September 2009.

Tanzania made a similar kind of commitment in an effort to engage locals in the development of the hotel industry. Only four-star hotels and above²⁴ were partially liberalised. Acquisitions of domestic hotels and mergers by foreign firms are subject to approval when foreigners are considering investing in the hotel sector of four stars and above. In addition, the acquisition of land by foreign individuals or foreign companies is also subject to approval. Tanzania is the only country mentioning land property laws, an issue which is of crucial importance, particularly in the hotel and resort industry. Sections 19 – 20 of the Land Act 1999 (including the Amendment of 2004) limit the rights of non-citizens when occupying land in Tanzania. Non-citizens are only allowed occupancy rights, derivative rights, or joint venture rights if the investment project is approved under the Tanzania Investment Act of 1997. The Investment Act requires a minimum investment of 300 000 US dollars for foreign investors and the submission of a formal application in order to enjoy the benefits and protection afforded under the Act. Tanzania has made no commitments on national treatment in Mode 3, leaving it free to introduce discriminatory regulations in the hotel sector.

The only restriction Uganda maintains in the hotel and restaurant sector is similar to the investment directives contained in the Tanzanian schedules. Government approval is required in accordance with the Investment Code of Uganda and the regulations contained within. Section 10(1) of the Uganda Investment Code 2000 obliges foreign investors to obtain a licence before commencing operation in Uganda. The application procedure and requirements for a licence is set out in Section 11 and must include the proposed capital structure, amount of investment and the projected growth over at least the next five years. Investment is not limited to a certain sector – according to Section 13(1) an investor may engage in any type of business. These kinds of scheduled limitations provide a country with some extent of control to screen potential foreign investors. In addition, the procedural and other requirements contained in the relevant acts for potential investors can be changed without withdrawing or modifying the scheduled commitments.

It is evident that the hotel and restaurant sector in the SADC and EAC countries are already fairly liberalised. It is only Madagascar and Mozambique that have not bound

²⁴ The commitments would only exclusively apply to four-star hotels and above as defined by Tanzanian legislation.

the hotel and restaurant sector, so these countries remain free to introduce more restrictive or discriminatory measures on foreign suppliers. Mozambique has, however, signed the interim SADC EPA in which it committed in Art. 67 'to a standstill as specified in Article V.1.b(ii) GATS, for all services sectors'. GATS Art. V.1(b)(ii) prohibits new or more discriminatory measures, either at the entry into force of the agreement, or on the basis of a reasonable time frame. Barriers to services are created and maintained by domestic legislation and regulations; therefore the reference to the prohibition of new or more discriminatory measures is included to control the loading of additional discriminatory legislation. But the disparity between the GATS provision and the provision in the interim EPA is its scope and timing. The GATS provision only encompasses the specific sectors that have been committed, while, in contrast, the commitment in the SADC interim EPA spans all services sectors, even before they have been committed. On a literal reading of this provision, parties to the interim SADC EPA will not be able to introduce any additional or new domestic legislation or regulations that deny market access for foreign suppliers or discriminate against them in any way.²⁵ This provision in the EPA can prevent Mozambique to load the tourism sector with any restrictive or discriminatory measures which are not currently contained in domestic legislation.²⁶ Madagascar has not yet signed the interim Eastern and Southern African (ESA) EPA, although it initialled the document at the end of 2007. Yet, the second phase of the negotiations (or Rendezvous clause) as described in the ESA and EAC EPA is not as detailed as the provision contained in the SADC EPA. No mention is made in the ESA or EAC EPA of a standstill clause prohibiting new or more restrictive or discriminatory measures. The remainder of the SADC and EAC countries partly or completely liberalised the hotel and restaurant sector. Besides Madagascar and Mozambique, it is in fact only Mauritius, Tanzania and Uganda that maintain significant restrictions denying market access for foreign suppliers. According to the schedules, it should be permissible in all the other countries to commercially establish any type of hotel,

²⁵ At best, a contextual interpretation may be construed to imply that specific reference to Art. V.1.b(ii) requires compliance with the GATS. In line with the GATS, the standstill will only apply to the committed sectors and not to all sectors. The fundamental idea here is clear – when a commitment is made, countries are prohibited from introducing discriminatory or restricting measures affecting the access or operation of foreign services suppliers.

²⁶ This has been duly noted by the SADC EPA Member States and the issue will be addressed during the second phase of the EPA negotiations.

motel, guesthouse, rooming houses, boarding houses, cabins, apartments, bungalows, caravan site, camp site or restaurant.²⁷

Foreign investors are nevertheless obliged to observe the relevant domestic legislation and regulations in the tourism sector. These include measures relating to the need to obtain a licence, register a company, transfer property, the recognition of qualifications, technical specifications, safety permits and standards. Domestic regulations provide the framework for participation – every company operating in that country must comply with these obligations, regardless whether they are foreign or local. Typically, the only obligation government has, is to ensure that these domestic measures are administered in a reasonable, objective and impartial manner (GATS Art. VI). The intention with this obligation is to prevent countries from denying, nullifying or impairing the rights of foreign suppliers through the use of onerous domestic administrative measures. The identification of the domestic regulations associated with the establishment and operations of hotels and restaurants is not within the scope of this study. It is, however, possible that poor and onerous domestic legislation can make it more difficult to invest in certain countries.²⁸ This stifles not only foreign investment but also activity in the local business sectors. In this context the efficiency of domestic regulation can be an important link to the amount and quality of foreign investment.

Travel agencies and tour operator services (CPC 7471)

These services are defined in the CPC product classification list as ‘services rendered for passenger travel by travel agencies tour operators, and similar services; travel information, advice and planning services; services related to the arrangement of tours, accommodation, passenger and baggage transportation; and ticket issuance services’. Travel agencies and tour operators are known as key intermediaries because they play a crucial role in connecting the consumer with destination services in the host country. The tourist receipts in comparison to the hotel and restaurant sector are insignificant, but efficient linkages between the two are necessary to exploit the tourism markets. The creation of services (or travel packages as they are

²⁷ Or any other type of accommodation or restaurant specified under CPC classification 641 – 643.

²⁸ Other countries, again, make it more attractive for foreign investors to invest in certain sectors. In many countries investors are eligible for some type of preferential treatment if they comply with the specified requirements.

known in the industry) is central to the development of tourism; without intermediaries to promote, market and sell services in the destination markets, the travel and tourism industry will not be able to show sustainable growth. However, the travel and tourism industry in many of the leading tourism markets is dominated by a number of large agencies that organise tours and trips to various destinations. The characteristics of such a value chain will undoubtedly impact on the liberalisation process in many African countries. Foreign tourists, especially from the large tourism markets of Asia, Europe and the United States, will primarily use their own domestic agencies for international travel.²⁹ Generally speaking, local providers in developing countries still pick up overflow business from tourists looking for a more personalised and unique travel package while servicing the needs of outbound travellers. Some business is also generated from ad hoc or impulse decisions, once the tourist is already in the host country. This sector is considerably smaller than the hotel and restaurant sector, providing a rationale for the relative low penetration of foreign investment. In developing countries, travel agency and tour operator services are predominantly provided by local small and medium enterprises. Travel agencies have also gradually declined in importance, mainly due to technological changes. Most bookings today can be done online, reducing the need for travel intermediaries. Regrettably, Africa has been slow to take advantage of this phenomenon.³⁰

Of the eighteen examined countries, five countries made 'extensive' commitments while only Namibia made a 'full' commitment.³¹ Botswana made a specific commitment under Mode 1 in the national treatment column relating to exchange control regulations. It is stipulated that 'permanent residents should not purchase tickets to enable foreigners to visit Botswana and accept payment outside of Botswana'. As mentioned above, exchange controls were abolished in 1999 and permanent residents can export unlimited amounts subject to the submission of a declaration. In the case of Botswana, its domestic legislation is more liberal than indicated in the published GATS schedule. This can be distinguished from the situation in Zimbabwe where the domestic legislation is *more restrictive* than

²⁹ One way of circumventing the traditional value chain is to employ e-tourism to facilitate the access of local operators in foreign markets.

³⁰ According to E-Tourism Africa (<http://www.e-tourismafrica.com>), travel is the number one selling commodity online and is generating more than \$110 billion annually in sales; however, very little African tourism is sold online.

³¹ See page 139 above for a discussion on the distinction between 'extensive' and 'full' commitments.

recorded in its schedule.³² Botswana unilaterally decided to relax its exchange control regulations by removing the restrictions on foreign exchange. The result is that the GATS schedules are not always a reflection of the current domestic situation. There is no mechanism in the GATS to automatically update unilateral improvements made in services industries. The GATS makes provision for modifying or revoking commitments, but it can be interpreted only to refer to more restrictive or discriminatory commitments.³³ The existence of no current discriminatory domestic legislation can primarily be explained by a shift in policy thinking. The GATS schedules were negotiated during the Uruguay Round in the early nineties, more than 15 years ago. Today, Botswana pursues a different investment and foreign policy than at that time. The country gradually liberalised its invest regime, ending in the complete abolishment of all exchange control regulations in 1999. The result is that there are currently no exchange control restrictions, even though it is stated so in the schedule. This kind of discrepancy provides Botswana with two main benefits: 1) if Botswana decides to introduce similar discriminatory regulations restricting exchange controls, the country will not violate its GATS obligations; and 2) the recorded restrictions in the schedule will provide Botswana with more bargaining power in the next round of services negotiations. Similar discrepancies also exist in the schedules of other WTO members – such a result is inevitable considering the length of time that has elapsed since the initial negotiations and the progress that has been made in successive negotiations. It can be argued that from a negotiating point of view the schedules are useful, but from a practical point of view the schedules are insufficient to determine the real conditions in the domestic sphere.

Mauritius made sensible commitments illustrating their sophisticated understanding of the tourism sector. Its schedule requires travel agencies established outside of Mauritius to work through a local established agency. In a perfect world such a restriction would be ideal to ensure the participation of local travel agents in the global value chain, but in reality it would be arduous, if not impossible, to enforce. Mode 1 covers cross-border supply where the service supplier is not present within the territory of the country where the service is delivered. Or in other words, the service supplier is not present within the territory of the country making the

³² For a comprehensive discussion on the inconsistency between the Zimbabwean schedules and its domestic legislation, see page 149 below.

³³ See GATS Art. XXI (Modification of schedules) and the discussion on p 150.

commitment. In essence, a country may only impose restrictive measures affecting its own suppliers and consumers, or on the activities taking place within its jurisdiction. Foreign suppliers can therefore be regulated when they establish a commercial presence under Mode 3 because they are operating within the sovereign jurisdiction of the host country. A host country will find it more difficult to regulate foreign suppliers if only the service, and not the actual supplier itself, crosses the border.³⁴ The service itself (for example mobile cellular services) can be restricted, but it is not possible to restrict every service in this way. The host country can restrict its own citizens receiving services under Mode 1, but in the case of Mauritius it is the foreign supplier established outside of Mauritius that is being regulated. This argument is further confirmed by the fact that no such restriction was found in Mauritian domestic legislation.

Foreign travel agencies establishing themselves in Mauritius require a bank guarantee and a licence. Clearance also has to be obtained from the Ministry of Tourism and the Ministry of Internal and External Communication. In 2006 Mauritius promulgated the Tourism Authority Act with the object of establishing a more efficient framework for regulating activities within the tourism sector. The current act repealed and replaced all the previous laws governing tourist enterprises. The Act makes no distinction between foreign and local tourist suppliers – no person may run or carry on a tourism enterprise without a licence.³⁵ The Minister of Tourism can, however, restrict the number of tourist enterprise licences for any particular activity if it is for public security or in the public interest to do so. In practice, the Ministry of Tourism must first grant clearance to an investor³⁶ before the licence application can be submitted to the Tourism Authority.

³⁴ The service itself can be restricted in Mode 1 (for example mobile cellular services under telecommunications services), but it is not possible to restrict every service in this way. Monitoring and tracking the delivery of certain services in Mode 1 can be challenging and time consuming. With modern technology, it will be impossible to prevent the supply and consumption of a number of services without serious disruptions.

³⁵ The First Schedule of the Tourism Authority Act 2006 describes tourism enterprises as tourist accommodation; places where food, beverage and entertainment services are provided; and tourism activities which include eco-tourism, golf, hawking, helmet diving, carting, operating a boat house, operation of cable car, scuba diving, tour operator, tourist guides, travel agents, and rental agencies for bicycles, buses, minibuses, cars, motorcycles and quads,

³⁶ An investor is defined as a person who is not a citizen of Mauritius or an association or body of persons, whether corporate or incorporate, the control or management of which is vested in persons who are not citizens of Mauritius.

Uganda's schedule contains a similar restriction as in the hotel and restaurant sector. Government approval is required from the Uganda Investment Authority. Although this is slightly different than the restriction in the hotel and restaurant sector which requires 'government approval in accordance with the Investment Code of Uganda', the approval process seems to be the same. In terms of the Invest Code, prospective tourism suppliers need to apply for a licence in terms of Section 11. The Uganda Investment Authority is the institution responsible for the appraisal of all licence applications. The Investment Code lists a number of objectives that this authority must consider when making the appraisal decision. These objectives are far-reaching and include the following: a) the generation of new earnings or savings of foreign exchange through exports, resource-based import substitution or services activities; b) the utilisation of local materials, supplies and services; c) the creation of employment opportunities in Uganda; d) the introduction of advanced technology or upgrading of indigenous technology; e) the contribution to locally or regionally balanced socioeconomic development; and f) any other objectives that the Authority may consider relevant for achieving the objectives of the Investment Code.³⁷ The tourism industry is identified in the Investment Code as a priority area in the Second Schedule of the Code. This means that an applicant for a licence who wished to engage in any activity in the tourism industry will be accorded additional benefits. The Code does not elaborate on the sort of benefits but one can assume that applicants in priority areas will be treated more favourably in the appraisal process.³⁸

Zimbabwe made some commitments in Mode 3 of which the practical value can be questioned. Tour operators operating a vehicle of over three tonnes or using more than 20 vehicles must pay an annual levy for each park. This restriction is recorded in the market access column but does not in any way deny market access for foreign suppliers. This must rather be seen as a domestic regulation which can be omitted from the schedule. A similar type of regulation requiring foreign tour operators to pay park entry in foreign currency was recorded in the national treatment column. GATS Art. XVI ('Market access') contains an exhaustive list consisting of five quantitative

³⁷ See Section 12 of the Uganda Investment Code 2000. Also see the full discussion on investment related regulations on page 158 below.

³⁸ The Tourism Profile issued by the Uganda Investment Authority also identified tour operators as a priority area for investment. The profile is available on the website of the Uganda Investment Authority.

restrictions and one restriction pertaining to the legal composition of the entity.³⁹ Other measures outside of this classification would not fall within the scope of market access. If such a measure is discriminatory in the sense of GATS Art. XVII ('National treatment') in that it discriminates against foreign services or foreign services suppliers, to the extent that it modifies the conditions of competition in favour of domestic services or domestic suppliers, then the measure must be listed in the National Treatment column. All other measures would fall under the realm of GATS Art. VI ('Domestic regulation'). All market access limitations, discriminatory or not, covered by one of the specific limitations defined by Article XVI; and all measures that discriminate against foreign services or services suppliers in the sense of Article XVII, are trade restrictive measures which must be listed in the schedules. All other measures pertain to domestic regulation and the only obligation of members is to ensure that these measures are administered in a reasonable, objective and impartial manner.

If Zimbabwe feels the need to include administrative regulations of this kind in the schedule, it is best to record them in the 'Additional commitments column'. GATS Art. XVIII ('Additional commitments') can only cover measures affecting trade in services not subject to scheduling under Articles XVI and XVII. Commitments scheduled under 'Additional commitments' can include, but are not limited to, undertakings with respect to qualifications, technical standards, licensing requirements or procedures, and other domestic regulations that are consistent with GATS Art. VI (WTO Secretariat 2001).

A more accurate inscription in the Zimbabwean schedule relates to hunting licences. Only locally registered safari operators may obtain concessions through leasing or auctions by which hunting areas are leased out. This restriction is rather vague and it can be argued that even foreign tour operators who are locally incorporated can receive hunting concessions. Of far more significance is the sweeping restrictions Zimbabwe maintain in certain reserved sectors. Section 25 (2) of the Zimbabwe

³⁹Restrictions on the number of service suppliers; restrictions on the total value of service transactions or assets; restrictions on the total number of service operations or the total quantity of service output; restrictions on the number of natural persons that may be employed in a particular section; measures that restrict or require supply of the service through specific types of legal entity or joint venture; and percentage restrictions on the participation of foreign capital, or restrictions on the total value of foreign investment.

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. One can argue that the establishment of hotels and restaurants can be classified as tourism infrastructure development, although the same cannot be said for other travel and tourism providers. Investment in the services sector is restricted to a maximum of 70 percent, while specific reservations⁴⁰ are made for certain sensitive sectors.⁴¹ 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. These are serious market access impediments which Zimbabwe is obliged to include in its schedule. Zimbabwe has fully liberalised the travel and tourism sector except for the restrictions indicated above. The scheduled commitments constitute legally binding obligations on member states which are enforceable through the WTO's binding dispute settlement process. Here the domestic legislation is in conflict with the GATS schedules of Zimbabwe – the current situation leaves the country vulnerable to dispute settlement under GATS Art. XXIII.⁴²

The only legal means for Zimbabwe to revise its commitments is to abide by the procedure set out in GATS Art. XXI ('Modification of schedules'). According to the provision, a country wishing to modify or withdraw any commitment in its schedules can do so three years after the commitment entered into force. The country must notify its intention to change the commitment at least three months before implementing the change. This will give WTO Members affected by the change an opportunity to identify themselves as affected Members, and to notify their claim of interest for compensation. Countries will then enter into a consultation process to

⁴⁰ Statutory Instrument 108 of 1994.

⁴¹ Road haulage services, rail operations passenger transportation, tourist transportation, wholesale and retail services, hairdressers, employment agencies, estate agencies and valet services are the specific services sectors reserved for local investors.

⁴² Although there have been a few GATS dispute settlement cases, none involved discrepancies in the GATS schedules.

determine the necessary compensatory adjustments due to the affected country. Reaching an agreement on compensation is a critical aspect of the process but no explanation is provided on the nature of compensation or the manner in which it should be determined. The compensatory calculation is further complicated by a lack of historical precedents on the use of GATS Art. XXI.⁴³

The situation in Zimbabwe can be contrasted with a recent inconsistency in the schedules. After a review of its tourism policy,⁴⁴ Botswana promulgated a new set of tourism regulations in 2006 in which reservation was made for a number of tourist enterprises. The Botswana Tourism Regulations of 2006 stated in its Third Schedule that the following tourist enterprises are reserved for citizens of Botswana or companies wholly owned by citizens of Botswana: a) camping sites including caravan sites, b) guest houses, c) mekoro operations,⁴⁵ d) mobile safaris, e) motorboat safaris, and f) transportation. Certain reservations were, however, in conflict with the commitments made by Botswana in its GATS schedules. The only significant restrictions made by Botswana relate to exchange control regulations and movement of natural persons under Mode 4; the remainder of the hotel and restaurant sector and the travel agencies and tour operators sector have been fully liberalised. The hotel and restaurant sector includes camping and caravan services (CPC 64195) and guesthouses (CPC 64193) while travel agencies and tour operators include passenger travel by tour operators and passenger transportation. As with Zimbabwe, some of these newly promulgated domestic reservations were clearly in conflict with the undertakings in the GATS schedules. This inconsistency was pointed out by commentators, and credit must be given to Botswana for revoking the contradictory regulations in 2007. The whole section reserving tourist enterprises was revoked without stipulating additional reservations⁴⁶. Actions such as this truly demonstrate the

⁴³ To date only two countries – the EU and United States – have invoked the procedures of GATS Art. XXI.

⁴⁴ The review revealed that of the 567 licensed enterprises only 250 are citizen owned.

⁴⁵ Also known as canoe safaris.

⁴⁶ Although all the whole section (camping sites including caravanning sites, guesthouses, mekoro operations, mobile safaris, motorboat safaris and transportation) was revoked, only the reservations relating to camping sites, caravanning sites and guesthouses were in conflict with Botswana's GATS schedules. The remaining services (mekoro operations, mobile safaris, motorboat safaris and transportation) are rather classified as tourist guide services (CPC 7472) and can legally be maintained. In fact, mekoro operations, mobile safaris and motorboat safaris are activities reserved for professional and specialist guides as stated in Part VI of the Wildlife conservation and National Parks (Hunting and Licensing) Regulations 2001.

dedication of countries such as Botswana to the spirit and responsibilities of the GATS.

The eight remaining SADC and EAC countries excluded the travel agency and tour operator sub-sector from their schedules. If a service sector is omitted from a schedule, that country has no obligations on market access and national treatment in that specific sector. In other words, these countries are free to maintain or introduce new measures to deny market access or the operation of services in those omitted sectors.⁴⁷ The only way to determine the exact extent of liberalisation in these countries is to examine each piece of legislation and regulation in the travel agencies and tour operators sector in order to determine whether it limits market access for foreign suppliers or if it discriminates against them in any way once they operate in the market. Even then, the current state of affairs cannot be used as a prevailing standard since countries are permitted to introduce new discriminatory measures.⁴⁸ It is, however, expected that there would be relatively few restrictions on travel agencies and tour operators. These activities are vital in attracting tourists and facilitating various elements of their stay once in the host country. Regulations restricting the accessibility or selection of such operators can have a negative ripple effect on the rest of the tourism industry.

Tourist guide services (CPC 7472)

Tourist guide services by tourist guide agencies and own-account tourist guides are included in this definition, while own-account hunting guides and personal escort services are excluded. The definition of tourist guides differs between countries but South African legislation provide a good general description: A tourist guide can be defined as someone who for reward, whether monetary or otherwise, accompanies any person who travels within the country and who furnishes such a person with information or comment with regard to any matter.⁴⁹ Due to the unique position that they occupy in the tourism value chain, tourist guides, through their commentary and interpretation, are in a position to enhance a tourist's experience and perception of the richness and diversity of a country's cultural and natural heritage. As a result, the

⁴⁷ One has to bear in mind the EPA standstill clause as discussed on page 143 above.

⁴⁸ If Botswana had not substantially liberalised the tourism sector, it would have been allowed to introduce the new discriminatory tourism regulations in 2006.

⁴⁹ See Section 1 (x) of the South African Tourism Act 72 of 1993

professionalism, services quality and excellence of tourist guides can elevate a country's competitiveness as a popular tourist destination.⁵⁰ This has prompted some countries to introduce detailed provisions regulating tourist guides' activities.

In South Africa, the Second Tourism Amended Act of 2000 prohibits any person to carry on business for reward unless he/she has been registered as a tourist guide in terms of Section 21A ('Procedures relating to the registration of tourist guides'). The amended Act further requires all tourist guides to comply with the requisite competence as determined by the South African Qualifications Authority. The tourist guide must therefore first complete training or recognition of prior learning with an accredited institution before being allowed to register with the Provincial Registrar of Tourist Guides. Such qualification requirements are typical domestic regulations which only need to be administered in a reasonable, objective and impartial manner (GATS Art. VI). The GATS explicitly recognises the right of member states to regulate, and introduce new regulations, on the supply of services within the territories in order to meet national policy objectives. This was further confirmed in the CARIFORUM EPA where it was stated that the 'attached Schedule of commitments may not include measures relating to qualification requirements and procedures, technical standards and licensing requirements and procedures when they do not constitute a market access or a national treatment limitation within the meaning of Articles 6 and 7 and 15 and 16 of Title II of the Agreement. Those measures (e.g. need to obtain a license, need to register with the Registrar of Companies, universal service obligations, need to obtain recognition of qualifications in regulated sectors, need to pass specific examinations, including language examinations, non-discriminatory requirement that certain activities may not be carried out in environmental protected zones or areas of particular historic and artistic interest), even if not listed, apply in any case to service suppliers of the other Party'.⁵¹

The Second Tourism Amendment Act also contains an important restriction reserving tourist guide activities for South African locals. Section 21A (3)(b) prohibits anyone to register as a tourist guide if the person "loses his or her South African citizenship or right of permanent residence or work permit in the Republic". By implication, foreign

⁵⁰ See the Gauteng Guides Association (<http://www.guidessa.org>).

⁵¹ See the explanatory note on the Schedule of Commitments on services of Cariforum States, December 2007.

tourist guides without South African citizenship, permanent residence or a work permit are excluded from registering as a tourist guide and thereby preventing them to legally provide tourist guide services in South Africa. In practice, a foreign tourist guide must be accompanied by a local tourist guide when operating in South Africa. Most of the activities of foreign tour guides will take in place in Mode 1 and Mode 4, both of which has been left 'unbound' by South Africa, in which case these restrictions are allowed.

Similar regulations concerning the competencies of tourist guides are contained in Tanzanian legislation. Section 42 of the Tanzanian Tourism Act of 2008 regulates the licensing conditions and requires every tour guide to be registered in accordance with the Act. No person can register for a tourist guide unless he/she has adequate knowledge of the area and has knowledge in the field applied. The minister can also specify other qualifications as a prerequisite for registration. Furthermore, the tourist guide must at least complete an ordinary level of education (secondary school) and hold a first aid certificate. These requirements are included in legislation to ensure that tourist guides have the appropriate skills and ability to inform and educate tourists. Similar to the situation in South Africa, the Tourism Act also reserve tourist guide activities for Tanzanian citizens. Tanzania made no commitments in the tourist guide sub-sector and is therefore allowed to introduce or maintain discriminatory restrictions. The intention of the legislator was only to restrict tourist guide activities, but not the activities of *tour operators*. A tourist operator is defined in the Tanzanian legislation as a 'tourist agent or photographic safaris operator or any person who for reward conduct an activity or operate a facility, or undertakes to provide services for tourists and other members of the public in relation to tours and travel within or outside the country' (Tourism Act of Tanzania 2008 Section 1). Many tour operators operate across borders especially in Africa. Imagine a scenario where an overland company takes its tourists from the north to the south of Africa, zigzagging through various African states. If a country restricts the activities of these operators, they would simply avoid travelling through that country by plotting a different route to the south. Countries can strive to preserve some tourism supply activities for citizens, but not at the expense of tourist arrivals.

The six countries that fully liberalised this sector are only allowed to maintain regulations aimed at regulating and protecting the tourist guide industry. The ten countries, on the other hand, that made no commitments in this sub-sector (as is the case with Tanzania) can maintain or introduce market access restrictions or discriminatory measures without violating their GATS obligations. The remaining two countries, Mauritius and Zimbabwe, recorded specific commitments in the tourist guide services sector. Zimbabwe has tried to schedule tourist guide services, but strangely enough, only recorded tour operator restrictions in the appropriate columns. Once a sub-sector has been scheduled, all applicable restrictions on foreign suppliers must be included as these scheduled commitments will be regarded as the only limitations. It is accepted that the scheduled sector contains a complete reflection of the related domestic situation. The outcome in this instance is that Zimbabwe fully liberalised tourist guide services, whether it intended to do so or not.

The only other country which recorded specific restrictions in the tourist guide sub-sector is Mauritius. Tourist guide services in Mode 1 are limited to Mauritian nationals, but an exception is made for languages not spoken by Mauritians. In addition, the tourist guide services in Mode 1 are governed by local immigration laws. Mode 1 specifically refers to the supply of services from the territory of one country into the territory of another country, so in the case of tourist guides this will most likely refer to foreign tourist guides accompanying tour groups travelling to Mauritius. This activity is reserved for Mauritian citizens, except if they cannot speak the language of the foreign tour group. In this instance the foreign tourist guide accompanying the group must be issued with a work permit as per the immigration laws of Mauritius. In Mode 3, Mauritius allows the establishment of tourist guides only in 'linguistic scarce' areas. This commitment is rather vague and only makes sense if read together with the restriction recorded in Mode 1. The schedule further stipulates that Mode 3 be governed by Income Tax laws. The same restriction is also maintained in the horizontal section, so it will nevertheless apply automatically notwithstanding the inscription in this sub-sector. See the relevant extract from the Mauritius schedule below:

11.TOURIST GUIDE SERVICES - MAURITIUS	Limitations on Market Access	Limitations on National Treatment
<u>C. Travel guide services</u>	1) Limited to Mauritian nationals. Exception made for languages not spoken by Mauritians. 2) None 3) Only allowed in linguistic scarce areas 4) Unbound except as indicated in the horizontal section	1) Governed by Immigration laws 2) None 3) Governed by Income Tax laws 4) Unbound except as indicated in the horizontal section

Relatively little attention was given to the tourist guide sector when the examined countries scheduled their specific commitments in the Uruguay Round. All six of the countries that liberalised the tourist guide sub-sector also liberalised the rest of the travel and tourism sector. It can therefore be argued that the tourism sector has been considered as a whole, while little awareness exists of its separate components. This sub-sector can also be considered small in comparison with the other tourism sub-sectors while in many instances tourist guides are employed by tour operators. It is unlikely that a foreign tourist guide will only supply tourist guide services without the tour operator component which makes for an uneasy overlap between the two categories. Another reason might be that tourist guides are purely domestic in focus, and export opportunities in this sub-sector are of little interest. In many countries tourist guides are referred to as *local guides*, confirming their domestic scope. This can, however, also be the driver to develop the sub-sector further for the benefit of the locals, even without any restrictions or discrimination. The perception of tourists is that locals have insider information and specialist knowledge of a specific country or region. For that reason tourists would prefer the company of an indigenous tourist guide over a foreign tourist guide. Ensuring the competency and adequate knowledge and training of tour guides are therefore more important than simply reserving this industry for local guides.

Related legislation to be considered

The GATS schedules and domestic services legislation do not exist in a vacuum, so it is necessary to consider related legislation that also has an influence on foreign investment in order to determine the exact requirements of entry into each of the sectors. Particularly important is the investment regulations that will be taken into consideration once the foreign supplier has decided to establish a commercial presence in the host country.⁵² Most countries have some kind of investment code or legislation aimed at promoting and facilitating local and foreign investment. This legislation needs to be read together with the specific domestic services legislation in order to arrive at a better understanding of the investment conditions for foreign tourism suppliers.

Investment legislation typically includes the establishment and powers of the respective investment institutions, procedural obligations for prospective investors and clarification on investment incentives. In general, any foreigner wishing to invest must follow the set procedures in order to obtain the prerequisite permission to make an investment in the host country. This eligibility will enable a foreign investor, amongst other things, to acquire the necessary licences for the establishment of local operations, receive legal protection for the investment, access dispute settlement procedures, obtain compensation in the event of expropriation and be eligible for the various investment incentives. The contrast between a foreign and a local investor is best explained in the Kenyan Investment Promotion Act of 2004: while a local investor *may apply* to the Authority for an investment certificate, a foreign investor *shall apply* to the Authority (Kenya Investment Promotion Act 2004 Section 3). This is further confirmed by Section 6(3) which states that no foreign investor shall invest in Kenya unless the foreign investor has been issued with an investment certificate.

Mechanisms to control the entry of foreign investors are contained in the domestic legislation of all countries; if not in the relevant investment legislation, such procedures will be incorporated elsewhere. For instance, a foreigner wishing to establish, or invest in a business in South Africa, must apply for a business permit issued by the Department of Home Affairs. In most cases, the amount of money

⁵² According to some estimates more trade is conducted through Mode 3 ('Commercial presence') than all the other modes combined.

invested by a foreigner must also be substantially more than that invested by a local investor. For example, the minimum investment capital required by a foreigner to enjoy protection and benefits under the Tanzanian Investment Code is US\$300 000 in comparison to the US\$100 000 required by a local investor. In Mozambique, the minimum value of direct foreign investment is pegged at US\$50 000 compared to minimum value of direct national investment of US\$5 000. Similarly, the minimum amount to be invested by a foreigner in Kenya is US\$500 000 while a local investor is obliged to invest 5 million Kenyan shillings (roughly US\$65 000).⁵³ Not all countries specify a minimum threshold for investment, but it is evident from the procedural provisions that the capital amount will play a role in the appraisal process. In the case of Botswana, no minimum amount is stipulated, but financial institutions like the Botswana Development Corporation and the National Development Bank require a minimum of 25% of the total cost from the foreign investor.

To apply for permission to invest in a host country, approval must be obtained from the relevant investment institution. An application must be submitted in the prescribed form and will typically include the following information: details of the enterprise, the nature of the proposed business activity, proposed location of establishment, the proposed capital structure, the investment amount, projected growth, number of employees, qualifications and experience, the prospects of technology transfer, environmental impact assessment, annual turnover, and any other relevant information.⁵⁴ The application must also be accompanied by the prescribed fees and any such documents as required by the institutions. The institution will then carry out an appraisal to determine the viability of the proposed investment. All foreign investors have the right to apply to the investment institution for permission to establish their business, but there is no guarantee that the investment application will be granted.

In considering the application, the institutions must take into account a number of factors which in many cases are stated in the legislation. For example, the Investment Board of Zimbabwe must regard the following: the extent to which skills and technology will be transferred, the extent to which the proposed investment will

⁵³ Currency converted on 4 August 2009.

⁵⁴ These requirements are only listed by way of example. Investors must comply with the provisions set out in the applicable legislation in order to submit a correct and complete application. Additional information might also be required in some instances.

lead to the creation of employment opportunities and the development of human resources, the extent to which local raw materials will be utilised and benefited, the issue of whether the project complies with the prescribed requirements, the value of the convertible foreign currency transferred to Zimbabwe in connection with the project, the impact the proposed investment is likely to have on the environment, the measures proposed to deal with any adverse environmental consequences, the impact the investment is likely to have on existing industries in the economy, the possibility of transfer of technology; and any other considerations that the board considers appropriate (Zimbabwe Investment Authority Act 2006 Section 14). Similar factors are contained in the Ugandan Investment Code Act 2000 (Section 12), the Namibian Foreign Investment Act 1990 (Section 6), the Mozambique Investment Decree 3/93 (Section 7) and the Kenyan Promotion Act 2004 (Section 4).

In most cases the institution retains some kind of discretion to grant or refuse prospective applications. However, in some cases these powers are far-reaching and include a number of prerequisites to be taken into account. It can therefore be argued that prospective investors can be denied market access even in a sector where full liberalisation has taken place. The rights of sovereign states to introduce and maintain regulations to meet national policy objectives are recognised in international law. The only obligation a country has is to ensure that such regulations are administered in a 'reasonable, objective and impartial manner' (GATS Art. VI.1). This is to prevent members from denying, nullifying or impairing the liberalisation benefits to other WTO members through the use of onerous domestic administrative measures, as could be the case if the selection criteria were too harshly applied. The discussion nevertheless illustrates the contention that the GATS schedules or services liberalisation commitments never exist in a vacuum and must be considered together with other applicable legislation. This situation is accurately highlighted in the Madagascar Investment Law 2007-036 which states that '[a]ny natural person or legal entity, Malagasy or foreign, is free to invest and settle down on the national territory, in accordance with the laws and regulations in force, subject to provisions applicable to some activity sectors which are also subjected to specific regulations'.

Conclusion

The chapter finds that relatively few barriers in travel service exports exist, which may explain the relatively strong growth in this industry (increasing its comparative advantage) vis-à-vis other industries. The analysis shows that the travel and tourism sector in southern and eastern Africa is already fairly liberalised. In particular, hotels and restaurant services (CPC 641 – 643) – the sub-sector which is by far the most strategic to foreign investors – are completely liberalised in the majority of the southern and eastern African states. Even if it were not the intention of some countries to liberalise their markets to such an extent, these governments must deal with the consequences of inexperienced decisions as best they can. For most countries, it would therefore be difficult to attract more investment in the sector by simply lowering barriers to services trade. There is still some space to manoeuvre and restrict foreign suppliers in the remaining sub-sectors. Careful consideration, however, is necessary when protecting local travel agencies and tour operators (CPC 7471) from foreign competition since these services play a key intermediate role in connecting the consumer with destinations. Liberalisation of these services can lead to better developed global linkages with greater potential to facilitate interaction with prospective visitors. These sub-sectors make a minor contribution to the tourism receipts of a country and it can therefore be argued that liberalisation efforts alone will not be enough to sufficiently attract foreign investment and develop the tourism industry. Related policies, including regional strategies, will have to be articulated and implemented in order to further stimulate tourism development in sub-Saharan Africa.

Regional integration processes involving trade in services are still in the initial stages of development in most southern and eastern African states. An important first step to prepare for future negotiations and liberalisation is to identify all relevant restrictions in domestic law which affect the supply of tourism and travel services. All relevant legislation, amendments, regulations, rules and charters must be reviewed in order to arrive at a clear portrayal of the sector. Countries that have fully liberalised the sector must ensure that there are no conflicting measures restricting the access and operation of foreign suppliers. It is also important to monitor newly promulgated legislation and regulations to avoid a situation similar to what happened in

Botswana.⁵⁵ Improving and updating the GATS enquiry points in each member state will go a long way towards increasing transparency and administration of current and future measures. For countries still in the process of liberalisation, these preparations are equally crucial. The identified restrictions will form the base line for countries wishing to further liberalise their services sectors. It will give them a clear idea of the policy space available within which future commitments are to be made. At the moment, most of the countries in southern and eastern Africa are in process of completing, or have completed, services sector inventories to determine the state of play in their services industries. Officials and negotiators must study these regulatory audits to increase their understanding of the respective services sectors and be familiar with the non-conforming measures. Such a comprehensive overview of the regulatory regime can also highlight regulations in need of reform (as is the case in Zimbabwe)⁵⁶ and assist with the formulation of negotiating offers.

⁵⁵ See page 152 above for a discussion on the amendments to the tourism regulations in Botswana.

⁵⁶ For a discussion on the restrictions in the Zimbabwean services industries, see page 150 above.

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