

- (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 commitments¹, 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 test²;
- (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

¹ 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.

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