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Special Issue on SADC Community Law Guest Editor: Professor Retselisitsoe Phooko

Editorial

Africa's Regional Integration Agenda: An introduction
by Retselisitsoe Phooko 277–280

Articles

The Development of a Uniform Cross-Border Insolvency Law in SADC: Drawing from the OHADA Experience Regional Legal Practice under the GATS: A SADC Perspective
by Andre Boraine and Ngaundje Doris Leno 281–301

The Missing Piece of the Puzzle: The Indispensable Role of Freer Movement of Persons in Implementing the AfCFTA
by Adetutu Oluwaseyi and Victor T Amadi 302–324

Re-calibrating Private Parties' Access to Trade Dispute Resolution under the SADC and AfCFTA Regimes
by David Kanyenda 325–341

Regional Legal Practice under the GATS: a SADC Perspective
by Yolanda N Mambure, Lonias Ndlovu and Tharien van der Walt 342–361

Aligning SADC and Continental Strategies: to what Extent Does Violence against Women in South Africa Constitute an eEent seriously Disturbing Public Order?
by Shunelle de Beer and Kim-Leigh Loedolf 362–378

Critical Analysis of the Capacity of SADC in Addressing Vulnerability to Climate Change: Prospects and Challenges on Climate Risk Management Strategies under Africa Agenda 2063
by Patrick Pikisayi Maweto and Ademola Oluborode Jegede 379–398

Another Missed Opportunity of Using International Law as an Interpretative Aid of Domestic Law in Botswana
by Moses Retselisitsoe Phooko and Nokuzola Pangwa 390–402

Examining the Domestication and Implementation of the African Union Convention on Prevention and Combating Corruption: Comparative Synopsis on the DRC and Botswana
by Anzanilufuno Munyai 403–416

The Role of the Principle of Free, Prior and Informed Consent in Fostering Development through Participatory Democracy
by Naledzani Mukwevho 417–436

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Regional Legal Practice Under the GATS: a SADC Perspective

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Abstract

This article examines the legal framework governing the admission and enrolment of foreign legal practitioners in selected Southern African Development Community (SADC) member states, focusing on Botswana, Namibia, the Kingdom of Eswatini, and South Africa. The authors contextualise these national admission laws within the General Agreement on Trade in Services (GATS) framework, which aims to facilitate market access and non discriminatory treatment in trade in services, including legal practice. Despite commitments made under GATS, restrictive domestic laws in these countries impose nationality and residency requirements that limit the admission of foreign legal practitioners. Recent litigation in selected SADC countries highlights the tensions between national regulatory frameworks and international trade obligations. This article argues that full compliance with GATS commitments could promote regional integration and harmonisation of legal services,

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fostering fairer access to legal markets across SADC. The article employs a doctrinal and comparative legal methodology, critically analysing legislative texts, case law, and international trade commitments. Inspired by Lesotho's approach as a model for balancing regulatory autonomy and trade liberalisation, the authors advocate for a uniform and transparent legal framework that aligns with both national interests and regional integration objectives.

Keywords: GATS; legal practice; foreign legal practitioners; SADC; market access; trade in services; national treatment

1 INTRODUCTION

This contribution provides a Southern African Development Community (SADC) overview of the requirements for the admission and enrolment of foreign legal practitioners in selected countries as a General Agreement on Trade in Services (GATS) issue. SADC has recently experienced a wave of litigation related to the admission of foreign legal practitioners as attorneys, advocates, and legal advisers in member states. Most foreign legal practitioners seeking such admissions target South Africa, attracting opposition from a constitutional perspective.¹ In Botswana, South Africa, the Kingdom of Eswatini, and Namibia, only citizens and permanent residents are eligible to be admitted, enrolled, and registered as legal practitioners by relevant law societies. This practice is uncritically viewed as discriminatory against foreign legal practitioners aspiring to practise in specific countries.²

The SADC is a regional economic community formed under the SADC Treaty³ and is composed of sixteen member states.⁴ The founders of the organisation aimed, among other purposes, to achieve regional economic integration, alleviate poverty, and attain economic development. All SADC members are members of the WTO and are expected to comply with their obligations under the GATS and to respect their commitments. Legal practice is a service, and denying admission based on citizenship or permanent residency is a market access and trade in services issue. Using the GATS four “modes of supply” as the springboard, we posit that if the admission and enrolment of foreign legal practitioners are viewed as a trade in services issues, the SADC region may move towards some uniformity and fairness in dealing with access to legal services.

The article consists of six parts, with the one immediately following this introduction focusing on the research methodology and approach. Part three is the literature review, while part four addresses the GATS commitments, admission requirements in the selected jurisdictions, and the attendant challenges. The fifth part is dedicated to the relevant litigation, focusing on a critical reflection on relevant case law from the Kingdom of Lesotho and South Africa. The sixth part, aided by comparative law, outlines and justifies why recourse to the GATS would be a panacea. The article concludes with a reiteration of the proposed GATS-based solutions and

1 Hagenmeier, Shumba and Mireku “The Admission and Enrolment of Foreign Legal Practitioners in South Africa Under the Legal Practice Act: International Trade Law and Constitutional Perspectives” 2016 *PER/PELJ* 1–27 1.

2 Ngandwe “Challenges Facing the Harmonisation of the SADC Legal Profession: South Africa and Botswana under the Spotlight” 2013 *Comp Int L JS Afri*; <https://www.jstor.org/stable/23644809> (accessed 27-02-2025) 365.

3 Treaty Establishing the Southern African Development Community (1992), <https://www.sadc.int/document/declaration-treaty-sadc-1992> (accessed 27-02-2025).

4 Current member states are the Republics of Angola, Botswana, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Zambia and Zimbabwe, the Democratic Republic of Congo, the Kingdoms of Eswatini, Lesotho, the Union of Comoros and the United Republic of Tanzania.

recommendations.

The authors also conclude that the GATS provides a framework for law societies and bars in the region to harmonise the requirements for the admission and enrolment of foreign legal practitioners. While national constitutions and considerations of migrant rights matter, the GATS is the best instrument for full regional integration.⁵

2 METHODOLOGY AND APPROACH

This contribution takes the form of a case study that compares the applicable laws of selected SADC members, all of which are also members of the WTO. The research methodology, commonly used in academic and practical legal scholarship, is doctrinal.⁶ The doctrinal method complements the comparative legal method⁷ and focuses mainly on the critical study of legal texts to draw conclusions that enable legal reform. This is usually complemented by a legal approach that compares laws across jurisdictions to extract practical legal lessons. The data was collected from existing primary and secondary sources. Sources include the constitutions of the selected countries, law societies' directives, legal practice Acts, court decisions, case law, mutual recognition Acts, the GATS, and individual countries' commitments, etc. Examples of relevant legislation consulted include the Legal Practitioners Act of Botswana, the Legal Practitioners Act of Eswatini, the Legal Practitioners Act of Lesotho, the Legal Practitioners Act of Namibia, and the Legal Practice Act (2014 Act)⁸ of South Africa. A desktop study aligns well with the objectives of this article because information on the enrolment and admission of foreign legal practitioners is available in publicly accessible government documents, including legal practice legislation and directives. Additionally, the WTO Agreement and individual countries' GATS commitments and legislation are also publicly available. A comparative analysis of the laws of the selected countries was also done. The selected countries were chosen for their attractiveness to foreign legal practitioners from the SADC and the rest of Africa, their historical ties, and their dependence on South Africa within the Southern African Customs Union (SACU).

Each country's relevant legislation and GATS commitments are analysed to assess permissiveness and identify potential areas for reform, and Lesotho is introduced as a good example of how to legislate the admission of foreign legal practitioners without violating GATS obligations. Therefore, Lesotho is regarded as a significant part of the solution.

3 LITERATURE REVIEW: ENROLMENT AND ADMISSION REQUIREMENTS IN SELECTED SADC COUNTRIES

3.1 Introduction

This section reviews the related literature on the admission and enrolment of legal practitioners in selected SADC countries. What is important to note is that most writers submit that legal services have transformed over the years, and the need for legal practitioners with specialised

5 Dodson, Region "Migration Governance and Migrant Rights in the Southern African Development Community (SADC)" 2015 <https://socialprotection-humanrights.org/wp-content/uploads/2015/11/Dodson-and-Crush.pdf> (accessed 27-02-2025).

6 Hutchinson and Duncan "Defining and Describing What We Do: Doctrinal Legal Research" 2012 *Deakin L Rev* <https://doi.org/10.21153/dlr2012vol17no1art70> (accessed 27-02-2025) 1.

7 Adams and Bomhoff "Comparing Law: Practice and Theory" in *Practice and Theory in Comparative Law* 2012 <https://research.tilburguniversity.edu/en/publications/comparing-law-practice-and-theory> (accessed 27-02-2025) 1. See also Musson and Stebbings *Making Legal History: Approaches and Methodologies* 2012 <https://www.cambridge.org/core/books/making-legal-history/makinglegalhistory/DCDB3203769B2E155213A2C7CAB1EB26> (accessed 27-02-2025).

8 Act 28 of 2014.

expertise is escalating across borders.⁹ This is true for most SADC countries, which are also involved in international trade in legal services. This aligns with the GATS, especially the non-discrimination principle, most favoured nation treatment (MFN),¹⁰ and the national treatment obligation.¹¹ The MFN obligation prohibits discrimination in all its forms among countries in services and service suppliers.¹² It is colloquially characterised as the “favour one, favour all principle.”¹³ This national treatment obligation prohibits members from discriminating against other countries.¹⁴

3 2 Services: Concepts and Distinctions

The definition of services is broad and encompasses legal services, as well as measures affecting services and suppliers. The GATS does not define services; instead, it divides them into four modes. Mode 1 is cross-border supply when clients receive legal services from foreign territories, by, for example, post or telecommunications devices. Mode 2 is consumption abroad, for example, when citizens travel to another country to visit a legal practitioner for legal services. Mode 3, known as commercial presence, relates to situations such as lawyers establishing themselves in another SADC member country to supply professional legal services.¹⁵ Mode 4, the movement of natural persons, refers to services traded by individuals of one WTO member through their presence in another territory. It covers employees of service firms and self-employed service suppliers.¹⁶ A good example of Mode 4 is a situation in which a foreign lawyer temporarily visits a country to provide legal services.¹⁷

3 3 The GATS and Its Application to Legal Services in SADC: An Outline

Given South Africa’s GATS obligations, admitting foreigners to legal practice in South Africa on the basis of the permanent residence condition under the 2014 Act is problematic.¹⁸ This is because this provision violates South Africa’s constitutional framework by discriminating against foreigners, and it is criticised as unconstitutional because the Constitution advocates equality before the law, as envisaged under section 9 of the Constitution of South Africa.¹⁹ This requirement is described as a bottleneck system designed to keep foreign legal practitioners out

9 Cronjé “The Admission of Foreign Legal Practitioners in South Africa: A GATS Perspective” 2013 *Monit Reg Integr S Afr* <https://www.tralac.org/publications/article/4593-the-admission-of-foreign-legal-practitioners-in-south-africa-a-gats-perspective.html> (accessed 27-02-2025) 78.

10 Article II: Most Favoured Nation Treatment, General Agreement on Trade in Services (GATS) 1994 <https://www.worldtradelaw.net/document.php?id=uragreements/gats.pdf&mode=download> (accessed 27-02-2025).

11 Article XVII: National Treatment, General Agreement on Trade in Services (GATS) 1994 <https://www.worldtradelaw.net/document.php?id=uragreements/gats.pdf&mode=download> (accessed 27-02-2025).

12 Van den Bossche and Zdouc *The Law and Policy of the World Trade Organization: Text, Cases, and Materials* 2013 https://archive.org/details/lawpolicyofworld0000boss_a1b7 (accessed 27-02-2025).

13 Delimatsis *International Trade in Services and Domestic Regulations: Necessity, Transparency, and Regulatory Diversity* 2007 <https://academic.oup.com/book/9432> (accessed 27-02-2025).

14 Jaipuria “Comparative Analysis of Most Favoured Nation and National Treatment under GATT and GATS” (2021) 4 *International Journal of Law Management & Humanities* 510–523.

15 Hagenmeier, Shumba and Mireku “The Admission and Enrolment of Foreign Legal Practitioners in South Africa under the Legal Practice Act: International Trade Law and Constitutional Perspectives” 2016 *PER/PELJ* <https://repository.nwu.ac.za/handle/10394/18096> (accessed 27-02-2025) 2.

16 WTO “Movement of Natural Persons (Mode 4)” https://www.wto.org/english/tratop_e/serv_e/movement_persons_e/movement_persons_e.htm (accessed 0-03-2025).

17 Kempe *GATS General Agreement on Trade in Services: A Handbook for International Bar Association Member Bars* 2002 <https://www.ibanet.org/MediaHandler?id=4F39B8D5-2110-4A8A-BDAF-7CB1D7083236> (accessed 27-02-2025) 24.

18 Hagenmeier, Shumba and Mireku 2016 *PER/PELJ* 2.

19 *Ibid* 13.

of legal practice in South Africa.²⁰ Although this requirement amounts to a national treatment limitation under the GATS, providing different treatment to citizens and non-citizens, such discrimination is not unconstitutional. The discrimination has not been limited to South Africa; the Kingdom of Eswatini has similar provisions.²¹

Another observation is that although the Kingdom of Eswatini and South Africa are trying to protect their nationals, the situation is different in Botswana. This is because Botswana favours graduates from universities in Botswana, the Kingdom of Eswatini, and Lesotho (BOLESWA), who can enrol as attorneys immediately after graduating from these states' universities. The implication is that non-citizens who graduated from these universities are preferred over citizens who studied at other non-BOLESWA universities.²² The preferential treatment afforded to graduates from the Kingdom of Eswatini and Lesotho stands in sharp contrast to the position applicable to Botswana who study at other non-BOLESWA universities, who are expected to pass practical examinations.²³ The presence of these constraints implies that foreigners do not derive any benefits from the liberalisation of trade in services (TiS) as sought by GATS.²⁴ The challenges facing harmonisation in the SADC legal profession in South Africa and Botswana are that foreigners who are neither citizens nor permanent residents find it very difficult to access the South African legal profession. Ironically, South Africa is seen in Africa as a “big brother/sister,” leader, and role model for advancing human rights, regional integration, cooperation, and development.²⁵ Although South Africa's legal system is highly specialised and has a rich jurisprudence, the country is reluctant to liberalise its legal services, as highlighted in the introduction to this article.²⁶

The main barriers to cross-border legal practices in the SADC region are stringent immigration and jurisdictional requirements, which make entry burdensome.²⁷ Permanent residence and nationality requirements for admission into legal practice are problematic because they are inward looking. The requirements seem to go against the overall objective of the SADC Protocol on the Facilitation of Movement of Persons, which “is to develop policies aimed at the progressive elimination of obstacles to the movement of persons of the Region generally into and within the territories of State Parties.”²⁸ Restrictions limiting the exercise of the legal profession to nationals and permanent residents are common across most SADC states and threaten regional cooperation and integration.²⁹ The limitations to the professional sector in which the legal service falls are “quantitative barriers to entry, licensing restrictions, nationality

20 Cronjé “The Admission of Foreign Legal Practitioners in South Africa: A GATS Perspective” 2013 *Monit Reg Integr S Afr* <https://www.tralac.org/publications/article/4593-the-admission-of-foreign-legal-practitioners-in-south-africa-a-gats-perspective.html> (accessed 27-02-2025) 78.

21 Legal Practitioners Act 15 of 1964 ss 5 and 6.

22 Ngandwe 2013 *CILSA* 370.

23 *Ibid.*

24 Hagenmeier, Shumba and Mireku 2016 *PER/PELJ* 5.

25 Ngandwe 2013 *CILSA* 370.

26 *Ibid.*

27 Cronjé 2013 *Monit Reg Integr S Afr* 80.

28 SADC Protocol on the Facilitation of Movement of Persons (2005 Art 2 https://www.sadc.int/sites/default/files/2021-11/Protocol_on_Facilitation_of_Movement_of_Persons2005.pdf (22-06-2024).

29 Ngandwe 2013 *CILSA* 370.

and residency conditions, and establishment restrictions.”³⁰

In most cases, barriers to cross-border legal practice are divided into two categories: border/immigration requirements and jurisdictional requirements.³¹ Border/immigration requirements are conditions a person must meet to lawfully enter, stay, or reside in a country. They are part of a state’s immigration law and border control system, and in South Africa, they are regulated by the Immigration Act.³² Jurisdictional requirements are legal qualifications or status needed to perform a particular function, claim a right, or be subject to a court or authority’s power. In the context of this article, the fact that one must be a citizen or permanent resident before being admitted and enrolled as a legal practitioner is a jurisdictional requirement.³³ Some countries also enact laws that make it difficult for foreign legal practitioners to fully practise.³⁴ Because services are intangible and invisible, the TiS is more complicated than its goods counterpart under the GATT.³⁵ Therefore, barriers to the TiS are more complex than those to goods, because service barriers often discriminate against foreigners who provide services, and domestic regulations may be *de facto* discriminatory.³⁶ Most SADC states’ practices discriminate against services by denying other states’ nationals market access.³⁷ To remove obstacles to the TiS, harmonisation or mutual recognition is required.³⁸ However, a further impediment to harmonisation is that African states maintain membership in multiple Regional Economic Communities (RECs), each with its own distinct set of commitments and obligations.³⁹ This compromises the player’s competence to uphold and bargain effectively, as they face competing interests while stretching limited resources.

Botswana used to grant automatic admission to legal practice to graduates of the universities of Botswana, Lesotho, and the Kingdom of Eswatini, while foreign legal practitioners from South Africa and the rest of the SADC region were expected to apply for an exemption.⁴⁰ This dates back to the era of the close association between the (BOLESWA) universities before Swaziland became Eswatini.⁴¹ Despite amending the law in 2020 to remove this preference, only 10 universities from different countries are now listed as “specified universities.”⁴² From a SADC perspective, the list is derisory because only five universities are listed, all from Lesotho, the Kingdom of Eswatini, South Africa, and Zambia.⁴³ While Botswana should be commended for allowing foreign advocates to be admitted temporarily and practise their trade on ad hoc

30 Chanda “Coming Together” 2002 <https://archive-yaleglobal.yale.edu/coming-together> (accessed 27-02-2025).

31 Npom “Eliminating the Barriers to Cross Border Legal Practice in Africa” 2018 <http://elf-fae.eu/wp-content/uploads/2018/04/Trends-in-law-firm-management.pdf> (accessed 27-02-2025).

32 Immigration Act 13 of 2002 as amended.

33 See, for example, Botswana’s Legal Practitioners Act 39 2022 Art 2 s 4 (qualifications for admission as legal practitioner) and 5 (admission of foreign advocate).

34 Chanda “Transnational Legal Practice” 2008 https://www.academia.edu/58443746/Transnational_Legal_Practice_2008 (accessed 27-02-2025).

35 Delimatsis *Int Trade Serv Dom Reg* 2007 150.

36 Thomas and Trachtman *Developing Countries in the WTO Legal System* (2009) 446.

37 Ngubula *The SADC Protocol on Tis: A Review of the Protocol in Light of the GATS and Other SADC Protocols and What it Means for Tis in the Region* (LLM-dissertation, University of Cape Town, 2013) 36.

38 Ngubula 2013 “SADC Protocol on Tis” 45.

39 *Ibid.*

40 See section 4 generally of the Legal Practitioners Act 39 of 2022.

41 On the issue of BOLESWA universities and the development of legal skills, see generally Iya “Skills Development for Competent Practice of Law: An Analysis of the Skills Development Programmes for Lawyers in the Boleswa Countries of South Africa (Dissertation, University of Warwick, 1996).

42 *Ibid* Schedule 1.

43 *Ibid.* Namibia has a longer list of thirty-two countries comprising five 5 SADC members in Schedule 3, passed pursuant to s 5(1)(d) of the.

cases,⁴⁴ this is subject to acquiring a work permit.⁴⁵ Other legal practitioners do not have this privilege and must have obtained their qualifications from the listed universities and also be “ordinarily resident in Botswana” or intend “to reside permanently in Botswana”.⁴⁶ Although the GATS allows preferential treatment in circumscribed circumstances, national treatment is meant to outlaw the protectionist use of domestic instruments.⁴⁷ Trade restrictions usually negate the benefits arising from trade liberalisation commitments undertaken by members during negotiations. Therefore, it becomes hypocritical for states to sign and commit to the GATS while renegeing on their commitments.⁴⁸

To foster full integration of the legal profession, there is a need for the various RECs in Africa to fully open their legal services sectors. Thus, the entire region will become a market for legal services.⁴⁹ It is only when SADC member states eliminate the impediments to admission and open legal services that the complete harmonisation SADC seeks can be realised. We contend that the starting point is a collaboration among all law societies in the selected SADC member states to join and amend the acts dealing with foreign admission and enrolment. There is a paucity of literature that discusses this suggested approach to address the plight of lawyers in SACU and SADC countries. It is worth noting that South Africa committed itself under Mode 3, and Botswana, like the Kingdom of Eswatini, has not listed legal services in its commitments under the professional service sector.⁵⁰ However, these countries have committed to other professions, such as medical and engineering services.

Despite South Africa’s commitments toward market access (Mode 3) and national treatment (Mode 4), recognising foreign academic qualifications is a significant barrier to labour mobility.⁵¹ Lesotho has opened its legal service trade to SADC countries and even other African states by not imposing the citizenship and residency requirements.⁵² The country opened its legal sector by allowing judges from African countries to adjudicate in local courts. The stringent requirements adopted by other SADC countries, such as the permanent or ordinary residence requirements, are not applicable, as all prospective candidates seeking admission have to write practical examinations, as provided by the Legal Practitioners Act of Lesotho.⁵³ Despite South Africa’s decision to repeal the previous applicable legislation, it has not reciprocated accordingly and has retained discriminatory requirements in the 2014 Legal Practice Act.

To sum up, this section problematised the issues addressed in the article, showing how discriminatory practices related to the admission of legal practitioners such as residence and ordinary residence, the requirement to have a work permit for ad hoc legal representations,

44 Legal Practitioners Act 15 1995 s 5(1).

45 *Ibid* s 5(2).

46 *Ibid* Section 4(1)(e).

47 Grossman, Horn and Mavroidis “The Legal and Economic Principles of World Trade Law: National Treatment” 2012 *IFN Working Paper* https://scholarship.law.columbia.edu/faculty_scholarship/2381/ (accessed 27-02-2025).

48 Delimatsis *International Trade in Services and Domestic Regulations: Necessity, Transparency and Regulatory Diversity* 2007 69.

49 Ikimi “The Nigerian Legal Practitioner and Economic Development of Africa: Prospects and Challenges” 2019 *Int J Comp L Leg Philos* 13.

50 Cronjé “The Admission of Foreign Legal Practitioners in South Africa: A GATS Perspective” 2013 *Monit Reg Integr S Afr* <https://www.tralac.org/publications/article/4593-the-admission-of-foreign-legal-practitioners-in-south-africa-a-gats-perspective.html> (accessed 27-02-2025) 78.

51 AIfubwa “The Implementation of Tis Liberalisation: Challenges to Enhancing the Movement of Natural Persons across Borders (Mode IV) and the Recognition of foreign qualifications in South Africa” (Unpublished Mini-thesis, University of the Western Cape, 2015).

52 Legal Practitioners Act of 1967 ss 6 and 7.

53 Lesotho Legal Practitioners Act 11 1967 s 8(c)(iii).

the designation and preference of universities in specified countries over others and how the inequitable extension of preferences to fellow SADC Members may violate the GATS..

4 THE GATS FRAMEWORK AND SELECTED SADC COUNTRIES' COMMITMENTS

4.1 The GATS Framework

The GATS was adopted in 1994 as part of the WTO Agreement.⁵⁴ GATS deals with services and aims to liberalise the TiS in contradistinction to the GATT of 1994,⁵⁵ aimed at liberalising international trade in goods. GATS was a product of the Uruguay Round negotiations after WTO negotiators realised the importance of services across the globe.⁵⁶ GATS is similar to GATT as it aims to ensure equal competition between enterprises in domestic markets, despite “their place of origin and the origin of their services.”⁵⁷ The GATS also applies to laws governing foreigners' admission into the legal profession in the SADC region.⁵⁸

In addition, the GATS covers measures affecting the TiS, which include legislations of a member or by-laws of a municipal authority.⁵⁹ Such measures also appear as directives, decisions, legislation, by-laws, regulations, and administrative actions.⁶⁰ For this reason, the rules adopted by professional bodies, such as law societies prescribing professional qualifications and licensing, are regarded as measures regulated by the GATS,⁶¹ which aims to eliminate all impediments to the TiS by dictating where and when to take liberalisation commitments for different services and supply modes.⁶² For this reason, Article V of the GATS does not prohibit any member from concluding an agreement liberalising the TiS as long as the agreement does not contemplate any discriminatory tendencies between parties.⁶³ This has facilitated, for example, the SADC Protocol on Trade in Services concluded in 2012, due to the SADC Treaty, allowing the conclusion of Protocols,⁶⁴ and GATS regulating regional liberalising agreements dealing with the TiS.⁶⁵ Services under the GATS include services in almost all sectors, excluding

54 Van den Bossche *The Law and Policy of the World Trade Organisation: Text, Cases and Materials* 2005.

55 Delimatsis *Int Trade Serv Dom Reg* 2007 100.

56 Terry “GAT’s Applicability to Transnational Lawyering and its Potential Impact on U.S. State Regulation of Lawyers” 2001 *Vand J Transnatl L* <https://ideas.dickinsonlaw.psu.edu/fac-works/150/> (accessed 27-02-2025) 998.

57 Luff “International Trade Law and Broadband Regulation: Towards Convergence?” 2002 *J Netw Ind* <https://www.econbiz.de/Record/international-trade-law-and-broadband-regulation-toward-convergence-luff/10010704496> (accessed 27-02-2025) 246.

58 Hagenmeier, Shumba and Mireku 2016 *PER/PELJ* 2.

59 Delimatsis *Int Trade Serv Dom Reg* 2007 150.

60 Islam “The Role of Law in Governance: Directives, Decisions, Legislations, By-laws, Regulations, and Administrative Actions” 2006 <https://www.islamweb.net/en/fatwa/19490/governmental-administrative-regulations-are-permissible> (accessed 27-02-2025).

61 Delimatsis *Int Trade Serv Dom Reg* 2007 150.

62 *Ibid.*

63 National Treatment, General Agreement on Trade in Services (GATS) Art XVII https://www.wto.org/english/res_e/publications_e/ai17_e/gats_art17_oth.pdf (accessed 27-02-2025)

64 SADC Treaty Art 22 <https://www.sadc.int/document/agreement-amending-article-22-treaty-2007-english> (accessed 27-02-2025).

65 General Agreement on Trade in Services (GATS) Art V https://www.wto.org/english/res_e/publications_e/ai17_e/gats_art5_jur.pdf (accessed 27-02-2025).

services provided in the execution of government authority.⁶⁶

There are twelve service sectors: business services (for example, professional), communication, construction, distribution, environmental, educational, financial, health, recreational, tourism, transport, and other services.⁶⁷ The sectors are further sub-divided into 160 sub-sectors, and legal services are included as professional services within the business services basket.⁶⁸ To date, seventy-six countries have made commitments for legal services, which consist of providing legal advice, legal representation, and any activity relating to justice administration by clerks, state advocates, prosecutors, and judges.⁶⁹ The four modes of service supply provided in Article 1(2) of the GATS and the MFN and national treatment principles were discussed earlier. Suffice it to add that the MFN also finds general applicability under the SADC Protocol on Trade in Services⁷⁰ as a non-discrimination provision requiring that all services and service providers must be afforded equal treatment.⁷¹

The national treatment obligation of Article XVII: 1 of the GATS prohibits a country from discriminating against any other country.⁷² The imposition of citizenship, permanent residence, and ordinary residence requirements in the acts dealing with the admission of foreign legal practitioners is a limitation on national treatment envisaged by the GATS.⁷³ Although the imposition of these conditions is not illegal *per se*, it is important to record that there are differences between the GATT and GATS approaches to national treatment. The differences lie in scope, application, and conditionality. In terms of scope, the GATT applies to goods while the GATS applies to services categorised into the four modes.⁷⁴ Under the GATT, national treatment is a general obligation that applies automatically to all imported products, whereas in the GATS, national treatment is a specific commitment that applies only where a member has scheduled it for a particular service sector.⁷⁵ Domestic regulations are vital in the legal sector because regulatory measures, such as admission, qualifications, and licensing requirements, are objectively and reasonably applied.⁷⁶ This is because there is a need to ensure that qualification requirements are neither overly burdensome nor unnecessarily opaque, and to ensure equal access to services.⁷⁷ The implication is that the admission and enrolment of foreigners into the legal practice must be governed in an equitable, impartial, and objective way.⁷⁸ This is the reasoning behind domestic regulations in the legal sector. To enhance transparency, the GATS

66 General Agreement on Trade in Services (GATS) Art 3(b) https://www.wto.org/english/docs_e/legal_e/26-gats.pdf (accessed 27-02-2025).

67 World Trade Organization (WTO) “Services Sectoral Classification List (document MTN.GNS/W/120)” 2013 https://www.americanbar.org/groups/professional_responsibility/policy/gats_international_agreements/track_one_class/ (accessed 27-02-2025).

68 *Ibid.*

69 Services Export Promotion Council (SEPC) *Annual Report 2019* 2019 <https://www.servicesepec.org/> (accessed 27-02-2025).

70 In the Protocol, MFN is provided for in Article 4 and national treatment in Article 15.

71 Article 4(1), Southern African Development Community (SADC) *Protocol on Trade in Services* 2012 https://tis.sadc.int/files/2416/2988/2480/EN_32_CMT_-_SADC_TiS_Negotiating_and_Scheduling_Guidelines_for_the_2nd_Round.pdf (accessed 27-02-2025).

72 Van den Bossche and Zdouc *The Law and Policy of the World Trade Organization: Text, Cases, and Materials* 2013 https://archive.org/details/lawpolicyofworld0000boss_a1b7 (accessed 27-02-2025).

73 Van den Bossche and Zdouc *Law Policy WTO* 2013 250.

74 See the preamble to the GATT 1994 and Art 1:2 of GATS.

75 GATS Art XVII.

76 Terry *GATs Transnatl Lawyering* 2001.

77 Hagenmeier, Shumba and Mireku 2016 *PER/PELJ* 2.

78 Article VI: Domestic Regulation, General Agreement on Trade in Services (GATS) 1995 https://www.wto.org/english/res_e/publications_e/ai17_e/gats_art6_oth.pdf (accessed 27-02-2025).

requires all its members to publish all relevant measures.⁷⁹

4.2 Selected SADC Countries' GATS Commitments

All SADC countries are members of the WTO and are bound by the GATS and seek to fulfil the aspirations of the SADC as a body, driving towards harmonisation, integration and cooperation, as provided for in the SADC Treaty and the Protocol on Trade in Services (Services Protocol). While WTO law and its relevant agreements, such as the GATS, are not automatically binding on SADC members, they contain a series of principles that members are legally obliged to follow, such as the most favoured nation and national treatment principles. However, the GATT,⁸⁰ the GATS⁸¹ and the Enabling clause allow members to deviate from those obligations, enabling them to provide preferential treatment to their trading partners, amongst which include a Free Trade Area (FTA), a Customs Union (CU) or an interim agreement likely to lead to the formation of a free trade area or customs union. It is also crucial to state that the Services Protocol is based on the GATS and some of its provisions mimic their GATS counterparts verbatim.⁸² The Agreement Establishing the African Continental Free Trade Area (AfCFTA)⁸³ and its accompanying 2018 AfCFTA Protocol on Trade in Services⁸⁴ were passed later than the Services Protocol but are also relevant to the SADC context. The relevant agreements and protocols recognise the sovereignty of state parties to regulate services within their territories, and legal services are covered in the basket of services eligible for regulation.

In the section below, we discuss the selected SADC countries in alphabetical order, starting with Botswana.

Botswana was a former British Protectorate and gained independence in 1966.⁸⁵ As a result of colonialism, the country adopted a mixture of Roman-Dutch law, which is primarily informed by English and customary law, setting the country slightly apart from other SADC countries discussed herein.⁸⁶ The country also signed the SADC Protocol on Trade in Services, reaffirming the commitments and rights of SADC member states under the WTO/GATS.⁸⁷ The country did not make commitments to legal services, but took binding commitments under the GATS on 30 August 1995.⁸⁸ Botswana is a dualist jurisdiction, and the dualist doctrine dictates that international treaties and customary international law do not automatically form part of domestic law.⁸⁹ The treaties must be incorporated into domestic law by legislation enacted by parliament

79 Article III: Transparency, General Agreement on Trade in Services (GATS) 1995 https://www.wto.org/english/res_e/publications_e/ai17_e/gats_art3_oth.pdf (accessed 27-02-2025).

80 GATT Art XXIV.

81 GATS Art.

82 For example, Art 2 of the Services Protocol is a replica of Article 2 of GATS.

83 The Agreement Establishing the African Continental Free Trade Area (2018) https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf (accessed 22-06-2025) defines explicitly refers to trade in services severally, and defines the scope of services in Article 1: P.

84 See Arts 1 and 2 of the AfCFTA Protocol on Trade in Services <https://www.sadc.int/latest-news/sadc-protocol-trade-services-enters-force> (accessed 14-06-2025).

85 Booi *Botswana's Legal System and Legal Research* 2006 (Globalex) <https://www.nyulawglobal.org/globalex/Botswana.html> (accessed 27-02-2025).

86 Booi *Botswana Legal System* 2006 50.

87 Preamble, Southern African Development Community (SADC) *Protocol on Trade in Services* 2012 https://tis.sadc.int/files/6713/2635/0127/20060629_protocol_tourism.pdf (accessed 22-06-2025).

88 World Trade Organisation (WTO) "Schedule of Specific Commitments: Botswana (Document GATS/SC/109)" 1995 <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/SCHD/GATS-SC/SC109.pdf> (accessed 27-02-2025).

89 Fombad. "Reconciling Legal Pluralism and Constitutionalism: New Trajectories for Legal Theory in the Age of Globalisation in Botswana" in *Debating Legal Pluralism and Constitutionalism: New Trajectories for Legal Theory in the Global Age* 103–113 2020.

before they can be invoked in domestic courts.⁹⁰ Botswana has some legislative instruments and regulatory frameworks that, although not exclusively directed at trade in services, indirectly address it. These include, *inter alia*, the Trade Act,⁹¹ Botswana Trade Commission Act,⁹² and the National Trade Policy.⁹³ The Trade Act provides a framework for licensing and regulating various trades and businesses in Botswana, including those involved in the service sector.⁹⁴ The National Trade Policy seeks to promote market access for both goods and services, thereby enhancing consumer access to a broader spectrum of internationally available products and services.⁹⁵ Vision 2036 acknowledges the contribution of the services sector to the GDP, employment and exports and includes strategies for developing individual service sectors.⁹⁶

Botswana has made three commitments in the services sector, namely business, communication, and tourism. In professional services, which fall under business, the country made sectoral commitments in engineering, medical, dental, and veterinary services, excluding legal services. The country made horizontal commitments in all sectors, with no restrictions on market access for modes 1 and 2. However, the limitations on national treatment apply to these modes.⁹⁷ Mode 4 is the most restricted of all sectors in Botswana, and entry into and residency in the country are subject to immigration laws and procedures.⁹⁸ The requirement is that any foreigner seeking employment in that country must comply with its labour laws and procedures. A foreigner must have a residence permit to work in the country.⁹⁹ There is no exception for the legal fraternity, as all professionals must register with the appropriate regulatory body, in this case, the Law Society of Botswana. In the specific commitments in the legal services sector, Botswana has made none. However, the movement of natural persons in the country “is subject to immigration laws, policies, and procedures.”¹⁰⁰ The country has about 23 sub-sectors, and most are restricted in terms of market access.¹⁰¹

The Kingdom of Eswatini, formerly known as Swaziland, is the only remaining absolute monarchy in sub-Saharan Africa.¹⁰² Like other SADC countries, the country was a former British Protectorate that gained independence in September 1968.¹⁰³ The Kingdom of Eswatini

90 *Ibid.*

91 Trade Act no. 25 of 2019 https://assets-global.website-files.com/601b3fe900f2a66ff84d23e2/61605ca1def51624c34fa6d5_botswana-investment-law-vd7jq0aa.pdf (accessed 14-03-2024).

92 Botswana Trade Commission Act No. 20 of 2013, https://www.botc.org/bw/application/files/6916/2194/0536/BOTC_Act_2013_gazetted_18_Oct_2013.pdf (accessed 22-06-2025).

93 UNCTAD (2016) Trade Policy Framework: Botswana 39-58 https://unctad.org/system/files/official-document/ditctncd2016d1_en.pdf?utm_source=chatgpt.com (accessed 22-06-2025).

94 See the preamble to the Trade Act, and the definitions of “Subject in Question” and “Trade or Business” in s 2 of the Act.

95 Republic of Botswana, “Industry, Trade and Investment” <https://www.gov.bw/trade-industry?txterm=144> (accessed 22-06-2025).

96 See generally Statistics Botswana (2016) “Vision 2036: Achieving Prosperity for All” https://www.statsbots.org/bw/sites/default/files/special_documents/Vision%202036_0.pdf (accessed 22-06-2025).

97 World Trade Organization (WTO) “Botswana Commitments” 1995.

98 *Ibid.*

99 *Ibid.*

100 Khumalo *Trade Policy Report No. 16: TiS: From Controlling to Managing the Movement of Persons in SADC* 2007 (South African Institute of International Affairs (SAIIA)) https://saiia.org.za/wp-content/uploads/2013/06/16-trade_report_no16.pdf (accessed 27-02-2025).

101 World Trade Organization (WTO) “Botswana Commitments” 1995.

102 Makhubu *Trade in Services and the Movement of Persons in SADC: Challenges and Opportunities* 2021 (South African Institute of International Affairs (SAIIA)) <https://saiia.org.za/research/trade-in-services-and-the-movement-of-persons-in-sadc-challenges-and-opportunities/> (accessed 27-02-2025).

103 International Commission of Jurists (ICJ) *Botswana: Independence and Legal System* 2014 <https://www.icj.org/sadc-countries-independence/> (accessed 27-02-2025).

signed the SACU Agreement in 1969, as well as the SADC Agreement (1980), the COMESA Agreement (1981), and the WTO Agreement (1995). The legal system is dual, with Roman-Dutch common law and Swazi customary law in force.¹⁰⁴ As a dual system, international laws become applicable alongside domestic laws upon ratification by an Act of Parliament.¹⁰⁵ Like Botswana, Lesotho, and South Africa, the Kingdom of Eswatini has a supreme constitution with an entrenched Bill of Rights Charter.¹⁰⁶ To this end, the WTO/GATS Agreements became binding for the Kingdom of Eswatini in 1995, when the country joined the WTO, and on April 15, 1994, when it made GATS commitments (GATS/SC/81).¹⁰⁷

Although this article is focused on professional legal services, references to other professions are included for context and to demonstrate the glaringly limited attention paid to legal services. Therefore, discussions of other professions are an important and relevant background. Eswatini made commitments in business, health, and tourism services.¹⁰⁸ No restrictions exist on national treatment in any sector; however, some are restricted to market access. The Kingdom of Eswatini does not allow market access for engineering services under Mode 1 (cross-border supply).¹⁰⁹ However, there are no market access limitations for Modes 2 and 3. Like in mode 1, in the presence of natural persons (mode 4), market access is restricted, except for senior-qualified chartered engineers. No national treatment limitations exist for engineering services in any of the four modes.¹¹⁰ This means engineering services are freely accessible with no national treatment limitations imposed, as in other sectors, in all modes. The Kingdom of Eswatini allows market access to medical and dental services in Modes 1 and 4, but only for specialist doctors.¹¹¹ This means that market access is the least available for professional services, except for specialist medical services (GATS/SC/81).¹¹² All hospital services in Modes 2 and 3 have no limitations on market access and national treatment, except in Modes 1 and 4, which are open only to specialist medical personnel.

In all consultancy services involving computer hardware installation, Modes 1, 2, and 3 have no market access limitations. However, mode 4, as in other professional services, is the most restricted, except that market access is afforded to senior computer engineers with specialised skills not available in the country.¹¹³ All hospital services in modes 1 and 4 are restricted to market access, except that natural persons are only allowed in Eswatini for specialist doctors under mode 4.¹¹⁴ There is no national treatment limitation across all four modes in this sector, as the country has taken the stance of training its doctors to fill vacancies previously occupied by foreigners. For the tourism sector, all hotel and restaurant services are liberalised. The country allows market access from Modes 2 and 3. There are no national treatment restrictions for

104 Constitution of the Kingdom of Eswatini 2005 s 252(1) and (2).

105 *Ibid* s 238(2)(a).

106 *Ibid* s 2.

107 General Agreement on Trade in Services (GATS) “Schedule of Specific Commitments: Eswatini” 1994 <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=R:/SCHD/GATS-SC/SC81.pdf> (accessed 27-02-2025).

108 General Agreement on Trade in Services (GATS) “Schedule of Specific Commitments: Eswatini” 1994 <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=R:/SCHD/GATS-SC/SC81.pdf> (accessed 27-02-2025).

109 General Agreement on Trade in Services (GATS) “Schedule of Specific Commitments: Eswatini” 1994 <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=R:/SCHD/GATS-SC/SC81.pdf> (accessed 27-02-2025).

110 General Agreement on Trade in Services (GATS) “Eswatini Commitments” 1994.

111 General Agreement on Trade in Services (GATS) “Eswatini Commitments” 1994.

112 *Ibid*.

113 *Ibid*.

114 *Ibid*.

Modes 2 and 3.¹¹⁵ The Kingdom of Eswatini does not take specific commitments under the legal services sector and, like Botswana, must comply with the general obligations under the GATS. The observation is that the Kingdom of Eswatini does not limit national treatment in all service sectors under the GATS.¹¹⁶ However, as a member of the SADC and a signatory to the SADC Protocol on the TiS, the country is obliged to adhere to the treaty. Eswatini did not make any horizontal commitments in Mode 4.¹¹⁷

Namibia, officially called the Republic of Namibia, was formerly called the “German South West Africa, as a German colony from 1884 to 1890.”¹¹⁸ Namibia became a member of the WTO on 1 January 1995 and took GATS commitments on 15 April 1994.¹¹⁹ After gaining independence in 1990, the country joined the SACU.¹²⁰ As a result of colonial rule, the country’s legal system is characterised by legal pluralism. The legal system consists of Roman-Dutch Law (established during Dutch colonisation), English law alongside Roman-Dutch law, and Indigenous customary law.¹²¹ The country’s Constitution, referred to as the “Mother of All Laws,” is regarded as a democratic document, and Namibia adopts the monist legal tradition.¹²² Public international law and international agreements are the country’s primary sources of international law.¹²³ Our purposive interpretation of this provision is that, unless the Constitution or an Act of Parliament states otherwise, customary international law and international agreements ratified by the Republic of Namibia become automatically binding on the Republic as part of national law without any further action.¹²⁴

Namibia has made commitments in two sectors, namely, business and tourism.¹²⁵ The country made horizontal commitments in all sectors.¹²⁶ For market access across all service sectors, commercial presence (Mode 3) requires foreign service providers to establish a local business in line with the provisions of the Companies Act.¹²⁷ For business, there is no limitation on national treatment in any of these sectors, and the country has also not restricted market access to business services. However, Namibia did not make any commitments in the legal services sector, and this position is similar to other SADC member states, such as Botswana and the Kingdom of Eswatini. The country is reticent and hesitates to fully commit to the TiS. However, the tourism sector is fully liberalised in Namibia in all four supply modes. There is no limitation

115 *Ibid.*

116 *Ibid.*

117 Khumalo *Trade Policy Report* 16 2007.

118 Green “Namibia” 2021 <https://www.britannica.com/place/Namibia> (accessed 27-02-2025).

119 General Agreement on Trade in Services (GATS) “Schedule of Specific Commitments: Namibia” 1994 <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/SCHD/GATS-SC/SC60.pdf&Open=True> (accessed 27-02-2025).

120 McCarthy “The Southern African Customs Union in Transition” 2003 *Afr Aff* <https://doi.org/10.1093/afraf/adg082> (accessed 27-02-2025) 605–630.

121 Article 144, Constitution of the Republic of Namibia 1990.

122 Ruppel and Ruppel-Schlichting “Legal and Judicial Pluralism in Namibia and Beyond: A Modern Approach to African Legal Architecture?” 2011 *J Leg Pluralism* 53.

123 Article 144, Constitution of the Republic of Namibia.

124 This is based on our contextual reading of Article 44 of the Constitution.

125 General Agreement on Trade in Services (GATS) “Schedule of Specific Commitments: Namibia” 1994 <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/SCHD/GATS-SC/SC60.pdf&Open=True> (accessed 27-02-2025).

126 General Agreement on Trade in Services (GATS) “Namibia Commitments” 1994.

127 General Agreement on Trade in Services (GATS) “Namibia Commitments” 1994. The Namibia law is the Companies Act 28 of 2004.

on national treatment in any of the four modes.

South Africa joined the WTO in 1995 but undertook specific GATS commitments on April 15, 1994.¹²⁸ In the case of *Progress Office Machines v SARS*,¹²⁹ the court held that because South Africa is a signatory to the GATT and WTO Agreement, which became binding after approval by the parliament in April 1995, WTO law is thus binding on the Republic in international law.¹³⁰ The Constitution provides that international agreements should be used as references in interpreting domestic law.¹³¹ South Africa committed to liberalising the TiS under the WTO.¹³² The country also joined the SADC (1994) and SACU (1969); all international agreements are binding and enforceable by the Constitution.¹³³

Sections 231, 232, and 233 of the Constitution describe the effect of international law on South African municipal law. South Africa uses the monist approach to applying international law in terms of section 232 of the Constitution, and a dualist approach may be adopted when dealing with the domestic effect of international treaties. An international agreement can only become a binding law in the country when it is enacted into law by national legislation.¹³⁴ In the case of *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*,¹³⁵ it was held that the Anti-dumping Agreement binds South Africa in international law, despite not being specifically enacted in municipal law. In the context of this article, although this case and *Progress Office Machines* dealt with dumping, the GATS is part of the WTO law package, and the WTO Agreement is binding on South Africa; the implication is that the GATS is similarly binding since it is an integral part of the Marrakesh Agreement Establishing the World Trade Organisation.¹³⁶ In this regard, some authors, such as Stubbs, Brink, Sucker, and Khanderia, cited by Vinti, have addressed the relationship between the WTO Agreement and its covered Agreements in the context of South African municipal law. Vinti's submission, which we agree with, is that when a WTO Agreement, such as the Agreement on Safeguards, has not been domesticated, "no rights can arise out of it."¹³⁷ Similarly, our view is that, since the GATS has not been domesticated in any legislation, South Africa's obligations under it arise in the context of its membership in the WTO, SADC, the African Union, and the AfCFTA. As the largest economy in the SADC region, the country has made commitments in the following services: business; construction and related engineering; communication; distribution; environmental; financial; telecommunication; tourism; transport; and other services.¹³⁸ South Africa made

128 General Agreement on Trade in Services (GATS) "Namibia Commitments" 1994.

129 *Progress Office Machines v SARS* [2007] SCA 118 (RSA).

130 *Ibid* para 6.

131 Ndlovu "South Africa and the World Trade Organization Anti-Dumping Agreement nineteen years into democracy" 2013 *S Afr Pub Law* https://www.researchgate.net/profile/Lonias-Ndlovu-2/publication/256021895_South_Africa_and_the_World_Trade_Organisation_Anti-Dumping_Agreement/links/615ad687a6fae644fbd1f9eb/South-Africa-and-the-World-Trade-Organisation-Anti-Dumping-Agreement.pdf (accessed 27-02-2025) 291–314.

132 Cronjé 2013 *Monit Reg Integr S Afr* 80.

133 McCarthy *Southern African Customs Union* 2003 610.

134 South African Constitution s 231(4).

135 (CCT 59/09) [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) (Mar 9, 2010).

136 The GATS is an Annex thereto, as Annex IB.

137 Vinti 2025 *PELJ* 3.

138 General Agreement on Trade in Services (GATS) "Schedule of Specific Commitments: South Africa" 1994 <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/SCHD/GATS-SC/SC78.pdf> (accessed 27-02-2025).

horizontal commitments, but Modes 3 and 4 are restricted in sectors.¹³⁹

The country imposes a time limit on the presence of natural persons providing services. Just like Lesotho and the Republic of Seychelles, South Africa has made commitments in the legal sector as professional services. These commitments allow national treatment and market access only to intra-corporate transferees, executives, specialists, professionals and managers engaged in legal services.¹⁴⁰

In legal services, South Africa has made commitments to supply services only in modes 3 and 4.¹⁴¹ The country allows advisory services only under domestic, foreign, and international laws.¹⁴² In Mode 3, the country has no market access or national treatment limitations for advisory services under international and foreign law.¹⁴³ On the other hand, the country only limits mode 4, except to the extent highlighted in the horizontal sector, and prohibits advocates from forming partnerships.¹⁴⁴ This market access restriction also applies to foreign advocates practising in the country. The measure is not discriminatory as it applies to foreigners and locals, thereby providing equal opportunities.¹⁴⁵ As with the supply of foreign legal services, market access for domestic law under Mode 4 is also restricted, both in market access and in national treatment.

In these specified modes, South Africa did not make commitments in the legal sector and was not outlawed from restricting the supply of legal services in Modes 1 and 2.¹⁴⁶ This contrasts with the case for engineering, urban planning, or medical and dental services. This is because modes 1 and 2 do not have limitations for market access or national treatment in the country.¹⁴⁷ This shows that the legal profession is restricted. By making commitments under modes 3 and 4, South Africa allows foreign legal practitioners from other SADC countries to establish a commercial presence (mode 3) and to transfer practitioners to the country.¹⁴⁸ The country also committed to allowing foreign law firms to have a commercial presence (mode 3). This means that the country has managed to liberalise, and this commitment restricts South Africa from introducing measures on market access and national treatment.¹⁴⁹ A foreign law firm can establish a practice in the country to provide legal representation to clients for any service involving domestic or foreign law. These foreign law firms can also transfer professional staff under Mode 4. However, this applies only for about three years.¹⁵⁰

From the GATS commitments made by Botswana, the Kingdom of Eswatini, Namibia, and South Africa, it is axiomatic that the legal sector is the least liberalised, as only South Africa has made commitments in this sector. Countries under review are tightening the screws against the admission and enrolment of legal practitioners. The tourism sector remains the most liberalised in the selected SADC countries. Of all the services, Mode 4 is the most restricted by SADC member states, as countries refuse market access or national treatment in this mode, and we

139 General Agreement on Trade in Services (GATS) “South Africa Commitments” 1994.

140 Cronjé 2013 *Monit Reg Integr S Afr* 80.

141 *Ibid.*

142 *Ibid.*

143 *Ibid.*

144 *Ibid.*

145 *Ibid.*

146 Cronjé 2013 *Monit Reg Integr S Afr* 80.

147 General Agreement on Trade in Services (GATS) “South Africa Commitments” 1994.

148 Cronjé 2013 *Monit Reg Integr S Afr* 80.

149 *Ibid.*

150 *Ibid.*

presume the rationale is the protection of the domestic market for the benefit of citizens.

In the SADC region, only Lesotho, Seychelles, and South Africa have made commitments in the legal services sector. We conclude that the legal sector is the least liberalised of all, and nationalist considerations drive the reluctance to make commitments.

5 RELEVANT LITIGATION RELATING TO SOME OF THE JURISDICTIONS DISCUSSED

There has been a wave of litigation related to the admission of foreign legal practitioners as attorneys, advocates, and legal advisers in SADC member states. Lawyers are in and out of court battling for admission and enrolment as legal practitioners in the selected SADC states. In 2017, *The Times of Swaziland* reported on a peculiar case that pitted a Zimbabwean national against the Law Society of Swaziland, which passed a resolution to not admit foreigners as legal practitioners.¹⁵¹ Pretty Mupfurutsa, a Zimbabwean national, challenged the resolution in the Supreme Court and won the case.¹⁵² The Law Society of Swaziland opposed the application on the grounds that Mupfurutsa was not a citizen or an ordinary resident of Eswatini, as required by the Legal Practitioners Act. In the related case of *Armand Matthew Perry and The Law Society of Swaziland*, the ordinary residence requirement for the admission of foreign legal practitioners was also successfully challenged.¹⁵³ The Law Society of Swaziland had opposed the application because the relevant section of the Act¹⁵⁴ operates unfairly in favour of applicants who rely on it, in violation of constitutional fairness.¹⁵⁵ The *Perry case* reflects a shift towards compliance with the GATS mandates by dismissing nationality/residency barriers that frustrate foreign qualified legal practitioners, a step fully consistent with liberalisation commitments in the SADC and under the GATS.¹⁵⁶ We further submit that the case may serve as persuasive authority regionally for aligning domestic law with international trade obligations.

What is outlined in the above two cases from the Kingdom of Eswatini also holds true for South Africa, where some foreign law graduates have also challenged the 2014 Act, arguing that it discriminates against migrants.¹⁵⁷

The most relevant case through which to fully view litigation on the subject from a South African perspective is *Rafoneke and Others v Minister of Justice and Correctional Services and Others (Makombe Intervening)*.¹⁵⁸ The case is quite important because the Constitutional Court, the highest court in the land, decided on it, and its precedential value is beyond doubt. In a unanimous decision delivered by Justice Tshiqi, the Constitutional Court held that the High Court's declaration that section 24(2) of the 2014 Act is unconstitutional and invalid insofar as it precludes foreigners from being admitted and enrolled as non-practising legal practitioners could not be confirmed and accordingly set it aside. In this case, involving foreign applicants

151 Ndzimandze "Zim Lawyer Must Go Back to Zimbabwe – Law Society" *Times of Swaziland* 2017 <http://www.times.co.sz/news/116020-zim-lawyer-must-go-back-to-zimbabwe-%E2%80%93-law-society.html> (accessed 27-02-2025)

152 *Pretty Mupfurutsa v The Law Society of Swaziland* unreported case No.821/16. The applicant's case was based on section 6 (1) (e) of the Legal Practitioners' Act 1964.

153 *Armand Matthew Perry and The Law Society of Swaziland* [2014] SZSC 35 (30 May 2014).

154 Legal Practitioner's Act 1964, s 6(1)(e).

155 *Armand Matthew Perry and The Law Society of Swaziland*, para 20.

156 GATS Article VI.

157 Broughton "Law Graduates to Challenge Legal Profession's Discrimination Against Immigrants" 2021 <https://www.groundup.org.za/article/law-graduates-challenge-legal-practice-councils-discrimination-against-immigrants/> (accessed 27-02-2025).

158 *Rafoneke and Others v Minister of Justice and Correctional Services and Others (Makombe Intervening)* [2022] ZACC 29.

from Lesotho and Zimbabwe, the Constitutional Court upheld the limitation on entry to the legal profession based on permanent residence and nationality.¹⁵⁹ It is also important to note that the court concluded that the restriction serves a legitimate governmental purpose of protecting opportunities for South Africans and does not amount to unfair discrimination.¹⁶⁰

Thus far, we have demonstrated that foreign legal practitioners find it difficult to be admitted to practice not only in the selected SADC member states but also across the SADC region. This goes against the spirit of the SADC Protocol on Trade in Services, under which all SADC countries committed themselves to regional integration and harmonisation.¹⁶¹

The objectives of the SADC Protocol seek to escalate regional integration and competitiveness in the global market through trade and investment. Despite the outcomes of the two Kingdom of Eswatini cases discussed earlier, the Legal Practitioners Act of 1964 has not been amended and still requires only citizens or ordinary residents of Eswatini to be admitted as legal practitioners. Batswana with qualifications outside the University of Botswana, Eswatini, and Lesotho find it difficult to practice in the Kingdom of Eswatini. Although Botswana used to give preferential treatment to candidates from the former BOLESWA universities,¹⁶² its laws remain restrictive for other members of the SADC family, for example, Namibians and South Africans (despite South Africa being a listed jurisdiction with mutual recognition).¹⁶³

Relatedly, although South Africa's 2014 Act made substantive legal reforms on the admission of legal practitioners, it is now more difficult for foreign practitioners to register and practise in South Africa. The Act reinstated the permanent residence requirement,¹⁶⁴ a requirement also retained by the Legal Practitioners Act of Namibia.¹⁶⁵ However, this is not the case in Lesotho, where aspiring lawyers, citizens, and non-citizens are accorded equal treatment if they are fit to practise, possess recognised legal qualifications, complete articles, where applicable, and pass mandatory practical examinations.¹⁶⁶ In the case of *Mosuo v Law Society of Lesotho*,¹⁶⁷ the court held that equal treatment must be accorded to citizens and foreigners to protect the public and ensure equal access to legal services. Lesotho, like South Africa, has specifically committed to legal services. Botswana, the Kingdom of Eswatini, and Namibia remain stark exceptions. The admission of foreign legal practitioners in the selected SADC countries and across the region will remain a sore point until the matter is viewed largely through a GATS lens.

6 WHY THE GATS IS THE PANACEA

The SADC has committed to trade liberalisation in services under the GATS, yet regulatory restrictions in member states continue to impede cross-border legal practice. Despite these commitments, several SADC countries maintain restrictive regulatory frameworks that limit foreign legal practitioners' ability to offer services within their jurisdictions. Barriers such as nationality and residency requirements have fragmented the regional legal services market and hindered the integration of legal practice in SADC. Full compliance with the GATS commitments would facilitate greater regional integration and harmonisation of legal practice regulations,

159 *Ibid* 75–84.

160 *Ibid* para 90.

161 Southern African Development Community (SADC) Preamble *Protocol on Trade in Services* [URL] (accessed 27-02-2025).

162 Ngandwe 2013 *CILSA* 370.

163 Ngandwe 2013 *CILSA* 370.

164 Section 24 of the 2014 Act.

165 Legal Practitioners Act 15 of 1995, s 4(1)(c)(ii).

166 Section 8(c) (iv) of the Act.

167 *Mosuo v Law Society of Lesotho* (C of A (CIV) 23 of 9) [2009] LSCA 22 (23 October 2009).

ensuring fairer access to legal markets and advancing SADC's broader economic objectives.

The GATS enshrines principles such as market access, most-favoured-nation (MFN) treatment, and national treatment, all designed to prevent protectionist policies that disadvantage foreign service providers. The MFN principle obliges member states to treat all WTO members equally in the provision of services, ensuring that no single state benefits from preferential treatment unless an exception is explicitly agreed upon. National treatment mandates that once a service provider enters a market, they must be treated no less favourably than domestic service providers.

One of the primary reasons for the continued fragmentation of the SADC legal services market is the lack of mutual recognition agreements (MRAs) between member states. Unlike the European Union (EU), which has implemented a standardised recognition system that allows legal practitioners to work across member states, the SADC lacks a framework for mutual recognition of legal qualifications.¹⁶⁸ This absence has led to inconsistencies in the treatment of foreign legal practitioners, as each country imposes its own standards and criteria for admission.

It is heartening that in the South African *Rafoneke* case,¹⁶⁹ the Constitutional Court referred to the GATS. This was the first of the cases surveyed, and although the reference to the GATS was cursory, the court reiterated that the solution was apposite. In its rendition of South Africa's obligations in terms of the GATS, the court emphasised the importance of reciprocal duties between the state parties to the WTO and, by extension, the GATS.¹⁷⁰ The court reiterated that South Africa maintains reciprocal arrangements for legal services, permitting admitted legal practitioners from designated jurisdictions to practise law within its territory.¹⁷¹ The eligibility of such foreign legal practitioners is predicated upon their admission in their home jurisdiction and is grounded in the principle of reciprocity between states.¹⁷²

It seems the Constitutional Court proposed a solution within the GATS itself, and we argue that the admission of foreign legal practitioners in the SADC region should be a GATS matter rather than an employment or nationality matter. Therefore, while the admission requirements remain restrictive, foreign legal practitioners should make the most of the GATS and seek admission in their countries first. They can then apply for admission in SADC countries by invoking prior admission in their home countries as the basis for eligibility for admission in a SADC member state, provided their countries of origin are on the list of designated states. At least, this seems to be the guiding jurisprudence from the *Perry and Rafoneke* cases. We also hasten to add that if the GATS is part of the domestic law of the SADC member in which admission is sought, the applicant is within their rights to base the admission application on its provisions. Namibia will serve as an example of such a jurisdiction because it is monist and joined the WTO in 1995.¹⁷³

The other possible GATS-based solution can be found in the argument advanced by one of the applicants in the *Rafoneke* case.¹⁷⁴ The applicants argued that the requirements under the 2014 Act should be aligned with those of comparable jurisdictions within SADC, as neither permanent residence nor citizenship is a prerequisite for admission to the legal profession

168 Nordås 2016 "Does Mutual Recognition of Qualifications Stimulate Services Trade? The Case of the European Union" (2016) 48 *Applied Economics* 1852–1865.

169 *Rafoneke and Others v Minister of Justice and Correctional Services and Others (Makombe Intervening)* para 85.

170 *Ibid.*

171 *Ibid.*

172 *Ibid.*

173 Namibia became a member of the General Agreement on Tariffs and Trade (GATT) in 1992 and a member of the WTO in 1995. See WTO "Namibia and the WTO" https://www.wto.org/english/thewto_e/countries_e/namibia_e.htm#:~:text=Namibia%20has%20been%20a%20WTO,GATT%20since%2015%20September%201992 (accessed 27-02-2025).

174 At para 48.

in the region.¹⁷⁵ The applicants further argued, citing no provision of the SADC Protocol on Trade in Services, that the primary requirement is that an applicant be ordinarily resident, thus ensuring the uniform treatment of citizens and non-citizens.¹⁷⁶ Although we disagree with this submission as the norm in SADC, we agree that if introduced across the region, it will form a large part of the GATS solution. However, our proposed GATS solution is likely to hit snags when one factors in the Annex on the Movement of Natural Persons Supplying Services Under the General Agreement on Trade in Services (GATS Movement Annex).¹⁷⁷ The pertinent provision reads as follows:

The Agreement shall not apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis.¹⁷⁸

The implication of the cited provision, as critically discussed by scholars such as Adlung and Roy,¹⁷⁹ Van den Bossche and Zdouc¹⁸⁰ and Matoo,¹⁸¹ is that a country can apply its immigration rules, but it cannot use them as an excuse to block foreign service suppliers where it has already agreed to allow them in under a GATS commitment.¹⁸² Our opinion is that Mode 4 is under-utilised, partly due to the above cited clause, because members may apply opaque or discretionary immigration measures that, while formally legal, have a chilling effect on services trade.

7 CONCLUDING REMARKS

This article has demonstrated that the General Agreement on Trade in Services (GATS) provides a robust legal framework for SADC member states to harmonise their legal services sectors and enhance regional integration. Analysing the applicable admission requirements in Botswana, Namibia, the Kingdom of Eswatini, and South Africa has illustrated the inconsistencies between national legal frameworks and international trade commitments. Despite being WTO members bound by GATS, these countries continue to impose nationality and permanent residency requirements that create barriers to foreign legal practitioners, restricting the free movement of legal services and undermining regional cooperation. The persistence of these protectionist policies highlights the tension between domestic regulatory autonomy and the obligations undertaken under the multilateral trade regimes.

Recent litigation within SADC has further exposed the legal uncertainties surrounding the admission of foreign legal practitioners. Courts have increasingly been called to adjudicate cases challenging restrictive national laws, with mixed outcomes. While some judicial decisions have signalled a move towards liberalisation, legislative reforms remain slow and uneven across the region. The reluctance to remove these barriers reflects broader challenges in implementing the SADC's commitments under the Protocol on Trade in Services and its obligations under the GATS. This situation contradicts the regional economic integration objectives enshrined in the

¹⁷⁵ *Ibid* para 48.

¹⁷⁶ *Ibid*.

¹⁷⁷ See the June 2024 version of the Annex, a full text of which is available at https://www.wto.org/english/res_e/publications_e/ai17_e/gats_annnaturalpersons_oth.pdf (accessed 27-02-2025).

¹⁷⁸ Paragraph 2 of the Annex.

¹⁷⁹ Adlung and Roy "Turning Hills Into Mountains? Current Commitments Under the General Agreement on Trade in Services and Prospects for Change" 2005 *Journal of World Trade* 1–32.

¹⁸⁰ Van den Bossche and Zdouc *The Law and Policy of the World Trade Organisation* 5 edn (2021).

¹⁸¹ Mattoo and Sauv  "The Preferential Liberalization of Services Trade: Economic Insights" in *The Preferential Liberalization of Trade in Services* 2014 37–67.

¹⁸² These commitments are made pursuant to parts III and IV of the GATS and restated in para 3 of GATS Movement Annex.

SADC Treaty and limits the potential benefits of an open and competitive legal services market.

Lesotho provides an instructive example of how an SADC member state can regulate the admission of foreign legal practitioners without violating GATS obligations. Lesotho has established a fair and transparent system that balances regulatory oversight with market openness by allowing all foreign-trained lawyers to qualify through standardised examinations. Similar reforms across SADC would help mitigate discriminatory practices while maintaining professional competency standards. Moreover, developing a regional mutual recognition agreement (MRA) for legal qualifications, like those implemented in the European Union and ASEAN, could provide a structured pathway for cross-border legal practice within SADC.

Full compliance with GATS commitments offers a pathway toward legal harmonisation, professional mobility, and economic development in the SADC region. Eliminating protectionist admission requirements and ensuring that national treatment and market access commitments are honoured would create a more integrated and competitive legal services sector. Moreover, aligning SADC's legal regulatory frameworks with broader continental trade initiatives, such as the African Continental Free Trade Area (AfCFTA), would position the region as a leader in facilitating trade in professional services.

For this vision to materialise, SADC governments and law societies must take decisive steps to reform outdated admission laws, develop mutual recognition frameworks, and enhance regional cooperation. Institutional collaboration among SADC law societies could play a pivotal role in fostering uniform standards and ensuring that foreign legal practitioners are assessed based on their qualifications and expertise, rather than their nationality or ordinary residence. Furthermore, greater transparency in regulatory decision-making and engagement with WTO technical assistance programmes could facilitate the effective implementation of trade reforms in the legal sector.

Integrating the SADC's legal services market under GATS principles is a legal and economic imperative. By fostering regulatory alignment, reducing market barriers, and embracing legal liberalisation, the SADC can ensure that its legal profession remains locally relevant and globally competitive while advancing regional economic integration. If properly implemented, these reforms would benefit legal practitioners and businesses and enhance access to justice by expanding the pool of qualified legal professionals available within the region. The time has come for the SADC to fully embrace its GATS commitments, laying the foundation for a legal services market that is fair, open, and responsive to the needs of an increasingly interconnected world.