THE ADMISSION AND ENROLMENT OF FOREIGN LEGAL PRACTITIONERS IN SACU COUNTRIES AS AN INTERNATIONAL TRADE IN SERVICES ISSUE

A Dissertation Submitted in Fulfilment of the Requirements for
the LLM Degree at the University of Venda

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DEDICATION

In loving memory of my late and beloved brother - Godfree Mambure - for advising me to take up Law as my life career. I say. “I love you, brother, and you will always be remembered”.

DECLARATION

I, YOLANDA NYASHA MAMBURE, hereby state that the LLM proposal titled

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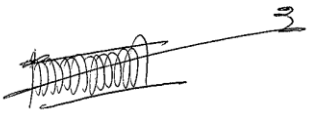
Signature of candidate's supervisor:…  ……

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ABSTRACT

When WTO members make GATS commitments, it is imperative to do follow-up studies to establish how each member adheres to her international obligations and the laws they profess to uphold. To this end, the dissertation calibrated each SACU country's GATS commitments in the background of the laws underpinning those commitments as a way to see if they uphold international ratifications. Data were collected from information available in the public domain and published online. The study established that legal services are the most restricted in all SACU countries except Lesotho. For example, foreign legal practitioners are not admitted or enrolled in the Republic of South Africa and Namibia unless they become ordinary residents or citizens. In BOLESWA countries, namely Botswana, Lesotho and Eswatini, law graduates from sister universities are given preferential treatment. Graduates with qualifications from outside BOLESWA, irrespective of nationality, must sit for local Bar examinations and satisfy some local laws. For these reasons, the measures put in place are viewed as a wanton infringement of each respective country's constitution and the key tenets of GATS. Using Lesotho, one of the SACU members who has completely liberalised legal services, as a model, the study, through recommendations, demonstrates how these countries could best comply with the GATS to enhance regional integration, cooperation, and development.

Key words: international trade; legal practitioner; legal services; services; trade in services

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ABBREVIATIONS

AfCFTA	African Continental Free Trade Area
AU	African Union
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EU	European Union
FTA	Free Trade Areas
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
GDP	Gross Domestic Product
MFN	Most Favoured Nation
NAFTA	North American Free Trade Area
REC	Regional Economic Community
SACU	Southern African Customs Union
SADC	Southern African Development Community
SAQA	South African Qualification Authority
TiS	Trade in Services
TRIPS	Trade Related Aspects of Intellectual Property Rights
WTO	World Trade Organisation

CHAPTER ONE

INTRODUCTION TO THE STUDY

1.0 Background to the study

The issues of International Trade in Services (hereafter TiS) cannot be taken lightly as services trade contributes about seven per cent of the world's Gross Domestic Product (GDP).[1] In a globalised world, the need for foreign practitioners for businesses and organisations providing TiS is escalating as liberalisation stimulates countries' economic growth.[2] This is one of the reasons why the World Trade Organisation (WTO) was founded in 1995.[3] The WTO is a 164 member international organisation that oversees global trade rules among and between nations.[4] The WTO Agreement consists of three Annexes: Annex 1A - GATT (General Agreement on Tariffs and Trade); Annex 1B - the General Agreement on Trade in Services (GATS) and Annex 1C – the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).[5] The North American Free Trade Area (NAFTA) was the first international agreement to provide for TiS and was superseded by the GATS (GATS) in 1995.[6]

GATS was part of the Marrakesh Agreement and has 160 signatories committed to global rules on TiS.[7] The GATS can make one appreciate the importance of positive

1. UNCTAD 'Handbook of statistics 2020-Total Trade in services' https://stats.unctad.org/handbook/Services/Total.html (accessed 9 April 2021).
2. C Hagenmeier *et al* 'The Admission and Enrolment of Foreign Legal Practitioners in South Africa under the Legal Practice Act: International Trade Law and Constitutional Perspectives' (2016)19 *Potchefstroom Electronic Law Journal* 2. See also M Surugiua 'International Trade, Globalization and Economic Interdependence between European Countries: Implications for Businesses and Marketing Framework' (2015) 32 *Procedia Economics and Finance* 131-138.
3. The Marakesh Agreement created the WTO and it entered into force on January 1st 1995. The Agreement defines the whole structure and objective of WTO. All WTO members are parties to the agreement. See alsohttps://www.trade.gov/trade-guide-marrakesh-agreement-establishing-wto (accessed 8 April 2021).
4. International Monetary Fund 'IMF and the World Trade Organization'13 March 2020 https://www.imf.org/en/About/Factsheets/The-IMF-and-the-World-Trade-Organization (accessed 17 April 2021).
5. P Van den Bossche & W Zdouc *The Law and Policy of the World Trade Organization* (2013) 41. GATT forms part of the WTO Agreement and was first signed in 1947. GATT deals with trade in goods.
6. ATF Lang *The Oxford Handbook of International Trade Law (*2009) 158. NAFTA was established on 1st of January 1994 among the United States of America, Canada and Mexico. The U.S. presidents: Ronald Reagan in 1979: 1992, President George H.W. Bush signed the NAFTA and Bill Clinton signed in 1993. The NAFTA was a treaty developed to eliminate most of the tariffs and trade barriers between these counties and it is through its creation that the signatories managed to accomplish increased trade and economic growth. See K Amadeo September 25, 2020https://www.thebalance.com/nafta-definition-north-american-free-trade-agreement-3306147 (accessed 3 June 2021).
7. Global Affairs Canada https://www.international.gc.ca/trade-agreements-accords-commerciaux/wto-omc/gats-agcs/index.aspx?lang=eng (accessed 8 April 2021).

integration, especially in legal services listed as professional services in countries' specific commitments.[8] This study focused on the admission and enrolment of foreign legal practitioners - attorneys and advocates - in the Southern African Customs Union (SACU) within the background of GATS. It focused on the Republic of Botswana (Botswana), the Kingdom of Eswatini (Eswatini), the Kingdom of Lesotho (Lesotho), the Republic of Namibia (Namibia) and the Republic of South Africa (South Africa) as an international TiS issue. The selected five (5) SACU member states are in the bigger Southern African Development Community (SADC) region created in 1992.[9] This body consists of 16 countries committed to regional integration, cooperation and development.[10] SADC was mooted after member states recognised the need for deeper regional integration in trade in goods and services.[11] Today, all SADC member states are WTO members, which means they are mandated to assume all attendant obligations of GATS.[12] In 1995, for example, when the WTO was formed, all SADC countries (except the Republic of Seychelles) became WTO members and took specific liberalisation commitments on trade in services.[13]

The SACU members discussed in this study fall within the bigger SADC region. The countries were chosen because SACU was the first to realise the need for integration by forming a union dealing with trade in goods as early as 1910.[14] The rules dealing with trade in goods fall under the auspices of GATT (1994) of the WTO.[15] Annex 1A - goods; 1B - services, and 1C - intellectual property, agreements are binding to all WTO members.[16] When a country accedes to the WTO, it automatically

8. P Delimatsis *International Trade in Services and Domestic Regulations* (2007)85.See also Hagenmeier *et al* (n 2 above) 5.
9. EU Mashingaidze *et al* 'Socio-Economic and Integration Benefits in SADC: a Cross National analysis in Zimbabwe' (2015) 9 *The Journal Contemporary Management Research* 2. See also SADC https://www.sadc.int/about-sadc/overview/history-and-treaty/(accessed 10 July 2021). Article 2 of the SADC Treaty of 1992 established SADC with its headquarters at Gaborone, Botswana .
10. Southern African Development Community https://www.sadc.int/about-sadc(accessed 8 April 2021).
11. Article 5 of the SADC Treaty of 1992. See also https://www.sadc.int/themes/economic-development/trade-services/ (accessed 8 April 2021).
12. WTO Trade in Service Division 2013 https://www.wto.org/english/tratop_e/serv_e/gsintr_e.pdf (accessed April 8 2021).
13. Southern African Development Community https://www.sadc.int/themes/economic-development/trade-services/(accessed 13 April 2021).
14. SACU was established in terms of Article 3 of the Southern African Customs Union Agreement, 2002 (As amended on 12 April 2013). See also SACU 12 August 2021 https://www.sacu.int/list.php?type=Agreements(accessed 12 August 2021).
15. P Van den Bossche & W Zdouc (n 5 above) 41.
16. MR Islam *The International Trade Law of the WTO* (2006) 28.

becomes a party to all multilateral trade agreements of the WTO.[17] Article XXIV of GATT 1994 allows WTO members to establish customs unions and free trade areas such as the SACU and the European Union (EU).[18] What can be noted is that all members of the SACU union are WTO members and bound by GATS principles.[19]

Although the SACU Agreement does not cover TiS as required by economic integration, Article V of GATS allows members to conclude liberalising service agreements amongst themselves.[20] As shown and discussed in the following chapters, the five (5) individual countries within the SACU undertook GATS commitments and signed the SADC Protocol on TiS dealing with services. These SACU countries, at least, placed issues on services as one of the priorities on their agenda, but this has not reached fruition.[21] Most of the service sectors within SACU are dominated by South Africa, usually referred to as the big brother of Africa in the sense that, from its inception, there has been a massive influx of foreigners from neighbouring countries and beyond looking for greener pastures in that country.[22] For that reason, South Africa is, from time to time, coming up with a raft of mechanisms to protect its industry and such measures are primarily not in tandem with the supreme law of the land.[23]

These SACU countries, despite being the first to realise the need to integrate by forming a union, share a long history as former British colonies.[24] The formation of the union was intended to promote greater regional integration as these countries sought to remove the legacy of colonialism that created artificial human-made borders to separate them.[25] The idea was to facilitate the cross-border movement of goods and people among SACU member states and promote integration through investment and

17. Islam (n 16 above) 28.
18. Islam (n 16 above) 53.
19. SACU 6 October 2021 https://www.sacu.int/show.php?id=415(accessed 6 October 2021); South Africa joined GATT in 1948; Botswana in 1987, Kingdom of Eswatini in 1993, Kingdom of Lesotho in 1988 and Namibia in 1992.
20. Art V of the GATS.
21. T Chidede 'SACU's trade and tariff profile' 14 December 2018 https://www.tralac.org/blog/article/13807-southern-african-customs-union-sacu-s-trade-and-tariff-profile.html (accessed 6 October 2021).
22. T Chidede (n 21 above).
23. Sec 2 Constitution of South Africa.
24. Encyclopedia https://www.encyclopedia.com/social-sciences/encyclopedias-almanacs-transcripts-and-maps/africa-british-colonies(accessed 10 August 2021). See also SACU 12 August 2021 https://www.sacu.int/list.php?type=Agreements(accessed 12 August 2021).
25. JP Ngandwe 'Challenges facing the harmonisation of the SADC legal profession: South Africa and Botswana under the spotlight' (2013) 46 *The Comparative and International Law Journal of Southern Africa* 366.

trade.[26] The countries were also selected because they developed their legal systems from Roman-Dutch law.[27] Except for Botswana with the Roman-Dutch Common law, in most SADC member states, the legal system was influenced mainly by the English Common and customary law.[28] For these foregoing reasons, the sample countries were suitable for the study on the legal services sector in the SACU region.

The study was motivated by the observation that GATS aims to ensure non-discriminatory treatment of all participants by promoting economic growth and development through the liberalisation of goods and services.[29] GATS also recognises regional agreements: for example, the Protocol on Trade in Services, which aims at harmonising the region to achieve deeper regional integration.[30] This partly explains why in the year 2012, SADC member states signed the Protocol on TiS intending to liberalise such services in fulfilment of the spirit of GATS.[31] TiS is defined in Article 1 of the GATS in four modes of services delivery: 'Mode 1 - cross border supply; Mode 2 - consumption abroad; Mode 3 - commercial presence and Mode 4 - the presence of natural persons'.[32] The WTO Service Sectoral Classification List (1991) approves the same by listing legal services as essential services.[33] This means that GATS is very relevant to the legal fraternity in general because it impinges on regulations addressing the enrolment of foreigners into the legal profession.

The two non-discrimination concepts under WTO are the most-favoured-nation treatment (MFN) (whether a country favours some countries over others) and national treatment obligation (whether a country favours itself over another country).[34] The

26. Art 2(f) of SACU Agreement, 2002.
27. RW Lee 'Introduction to Roman-Dutch Law' https://www.britannica.com/topic/Roman-Dutch-law(accessed 10 July 2021).
28. L Booi 'Botswana's Legal System and Legal Research' October 2006 https://www.nyulawglobal.org/globalex/Botswana.html (accessed 6 October 2021).
29. Art II.I of the GATS.
30. Preamble of the SADC Protocol on Trade in services 2012.
31. Art 22 of the SADC Treaty,1992 allows countries to conclude Protocols (SADC Protocol on TiS of 2012) , see also Southern African Development Community 'Get to know more about the SADC Protocol on Trade in Services' 6 January 2020 https://www.sadc.int/news-events/news/get-know-more-about-sadc-protocol-trade-services/ (accessed 8 April 2021).
32. Delimatsis (n 8 above) 25.
33. Thailand National Trade Repository WTO Services Sectoral Classification List http://www.thailandntr.com/index.php/en/trade-in-services/WTO-services-sectoral-classification-list(accessed 8 April 2021).
34. Van den Bossche & Zdouc (n 5 above) 315-316. See also Art ll:l GATS which states that each Member shall afford equal treatment to like services from another country. The MFN require countries not to discriminate between service providers through affording special treatment to service providers of another country; MFN is also envisaged under Art 4:1 of the SADC Protocol on TiS.

MFN obligation provided under Article II: I prohibits discriminating 'against like services and service suppliers from other countries'.[35] The national treatment obligation is provided for under Article XVll and requires eliminating any discrimination between domestic and foreign lawyers.[36] To this end, this study analysed the extent to which national legislation dealing with the admission of foreigners into the legal practice in SACU member states conforms to these international obligations as promulgated by GATS' principle of non-discrimination.

The study was motivated by an article published in the Times of Swaziland with the screaming headline: '*Zim lawyer must go back to Zimbabwe – Law Society*'.[37] The article was based on a resolution passed by the Law Society of Swaziland not to admit foreigners as legal practitioners. The article revealed that a Zimbabwean law graduate filed an admission application which was opposed by the Law Society of Swaziland and had taken the matter to the courts for determination.[38] The other observation is that some law graduates in South Africa are also challenging the Legal Practice Act of 2014[39] (hereafter the 2014 Act), arguing that it discriminates against migrants.[40] Such legislative enactments discriminate against SACU member states and foreigners within and outside SADC countries. My submission is based on the fact that in the article, it is reported that a Zimbabwean law graduate ended up working as a waiter after being refused admission in South Africa.[41] The Law Society of South Africa's opposition to foreign national's admission is another case that prompted me to consider this area of study.

Foreign legal practitioners find it difficult to be admitted to practise in the SACU countries under focus and the SADC region. This goes against the spirit of the Protocol on TiS, under which all SACU countries committed themselves as they advocate regional integration and harmonisation.[42] What is important to note is that the

35. Van den Bossche & Zdouc (n 5 above) 335.
36. JB Cronjé 'The admission of foreign legal practitioners in South Africa: a GATS perspective Tralac Working paper (2013) 6.
37. M Ndzimandze Times of Swaziland 'ZIM LAWYER MUST GO BACK TO ZIMBABWE –LAW SOCIETY' 29 November 2017 http://www.times.co.sz/news/116020-zim-lawyer-must-go-back-to-zimbabwe-%E2%80%93-law-society.html (accessed 9 April 2021).
38. Ndzimandze (n 37 above).
39. Legal Practice Act 28 of 2014.
40. T Broughton 'Law graduates challenge legal profession's discrimination against immigrants' 27 July 2021 https://www.groundup.org.za/article/law-graduates-challenge-legal-practice-councils-discrimination-against-immigrants/(accessed 12 August 2021).
41. Broughton (n 40 above).
42. Preamble of the SADC Protocol on TiS.

objectives of the 2002 SACU Agreement seek to advance regional integration and competitiveness in the global market through trade and investment.[43] In this regard, the restrictions on the admission of foreign practitioners are not in line with the move towards regional integration and harmonisation as espoused by the African Agenda of 2063.

The Supreme Court of Eswatini case of *Armand Matthew Perry and The Law Society of Swaziland (Perry Case),*[44] in which the Applicant challenged the Legal Practitioners Act of 1964[45] (hereafter the 1964 Act) on the grounds of discrimination, is another case that motivated the writer's interest to look at SACU countries. Although Perry won the case, the 1964 Act has not been amended and still requires only citizens or ordinarily residents in Eswatini to be admitted as legal practitioners.[46] In Botswana, for example, Batswana with qualifications outside the University of Botswana, Eswatini and Lesotho find it difficult to practice in that country. Botswana gives preferential treatment to candidates from the said universities.[47] Of major concern is that Botswana is very restrictive even to other members within the SACU family, for example, Namibians and South Africans.[48]

Although South Africa's 2014 Legal Practice Act made substantive legal reforms on the admission of legal practitioners, it is ironic that it has become more difficult for foreign practitioners to register and practice in that country. The 2014 Act reinstated the permanent residence requirement, a requirement also retained by Namibia.[49] However, Lesotho, which is used as a model in this study, adopts a different, if not conciliatory, approach to the issue. In Lesotho, aspiring citizen and non-citizen lawyers are treated equally since all must write practical examinations.[50] In the leading case of *Mosuoe v Law Society of Lesotho,*[51] it was held that equal treatment must be accorded to citizens and foreigners to protect the public and ensure that legal services are offered equally.[52]

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43. Art 2(f) of the 2002 SACU Agreement. See also SACU 12 August 2021 https://www.sacu.int/show.php?id=397(accessed 12 August 2021).
44. *Armand Matthew Perry and The Law Society of Swaziland* [2014] SZSC 35 (30 May 2014).
45. Sec 6 of the Legal Practitioners Act 15 of 1964.
46. Sec 5 and 6 of the Legal Practitioners Act 15 of 1964.
47. Ngandwe (n 25 above) 376.
48. Ngandwe (n 25 above) 376.
49. Sec 24 of the 2014 Act; Sec 4(1) (c) (ii) of the Legal Practitioners Act 15 of 1995.
50. Sec 8(c) (iv) of the 1983 Act.
51. *Mosuoe v Law Society of Lesotho* (C of A (CIV) N0.23/09.
52. *Mosuoe v Law Society of Lesotho* (C of A (CIV) N0.23/09 para 13.

The admission of foreign practitioners in the SACU countries discussed in this study is a topical issue given the number of past and present court cases. It has been argued that the restrictions imposed hinder the possibility of these services being supplied altogether. The study's premise is that SACU countries are obligated not to adopt discriminatory measures against the spirit of regional integration as they are signatories to GATS and the SADC Protocol on TiS.[53] Additionally, the African Continental Free Trade Area (AfCFTA) seeks to advance the free movement of persons and goods within the African region and member states. As of 7 July 2021, 37 countries had deposited their AfCFTA instruments of ratification.[54] However, the drive has slowed down the ongoing COVID-19 pandemic hindering further progress.[55]

In this regard, the laws regulating the admission of foreign legal practitioners are under review, considering the goals and aspirations of this broader continental treaty. To this end, the protectionism of the Legal Practice Act of Botswana, the Legal Practitioners Act of Eswatini, the Legal Practitioners Act of Namibia and the Legal Practice Act of South Africa are analysed and calibrated against the GATS obligations of each state.[56] The idea is to find a possible non-discriminatory solution using Lesotho, one of the SACU member states, as a model and point of reference. The study draws some lessons from Lesotho and the European Union (EU), which introduced the principle of mutual recognition of professional qualifications.[57] By drawing the lessons, the study contributes to scholarly research on the admission of foreign legal practitioners in the region.

1.1 Research problem

The admission and enrollment of foreign legal practitioners in SACU member states has become a cause for concern. The problem is attributable to the strict regulatory regime applicable to the admission of foreigners into the legal profession, which violates the states' constitutions and international obligations (GATS). A state's preferential treatment given to citizens compared to non-citizens discriminates against

53. Hagenmeier *et al* (n 2 above) 7.
54. Tralac 'Status of AfCFTA Ratification' https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html(accessed 10 August 2021).
55. F Kuwonu 'Africa's free trade area opens for business' 7January 2021 https://www.un.org/africarenewal/magazine/january-2021/afcfta-africa-now-open-business(accessed 13 April 2021).
56. Botswana Legal Practitioners Act 1979(Cap 61:01); Sec 6 Legal Practitioners Act 15 of 1964; Legal Practitioners Act 15 of 1995; Sec 24 of the Legal Practice Act 28 of 2014.
57. https://muhaz.org/the-admission-and-enrolment-of-foreign-legal-practitioners-in.html?page=3(accessed 4 July 2021).

foreign legal practitioners in their quest to practice in that state's territorial jurisdiction.[58] The requirement that one must be a citizen, ordinarily resident,[59] or permanent resident[60] is discriminatory against foreigners and favours citizens. On the other hand, it is ironic that these restrictions are not applied in other professions such as medicine,[61] engineering,[62] and social work,[63] raising serious questions warranting scholarly attention.

What is critical to note is that trade in services occurs under the following modes: cross-border transaction, consumption abroad, establishment in another jurisdiction and temporary movement of labour.[64] To this end, any policy that restricts service producers and consumers from interacting freely is regarded as an impediment to TiS.[65] The main barrier to cross-border legal practice in Africa emanates from stringent immigration requirements making it very difficult for legal practitioners to work in the region freely.[66] These requirements are no exception for the SACU member states discussed in this dissertation. The common bias among SACU member states is that, as indicated earlier, Batswana, with qualifications outside the University of Botswana, Eswatini and Lesotho, find it difficult to practise in that country. This is because, Botswana gives preferential treatment to candidates from the said universities.[67] In addition, Botswana is very restrictive to other members within the SACU family, for example, Namibians and South Africans.[68] This further violates the country's GATS commitments and the right to equality as provided in its Constitution.[69]

Questions are also raised about the countries' GATS (Article XVII) commitments within the context of the admission of foreign legal practitioners. The view is that all countries discussed in this study are signatories to GATS and may find themselves

58. Preamble of Protocol on trade in services. See also Ngandwe (n 25 above) 376.
59. Sec 6(c) of Legal Practitioners Act of 1979 (Cap 61:01); Sec 6(1) (a) Legal Practitioners Act 15 of 1964; Sec 24 Legal Practice Act 28 of 2014; Sec 6(c) (iii) of the Legal Practitioners Act 11 of 1983.
60. Sec 24 of the Legal Practice Act 28 of 2014; Sec 4(1) (c) Legal Practitioners Act 15 of 1995.
61. Sec 2 Medicines and Related Substances Control Act 9 of 2016 (Eswatini); See also Medicines and Related Substances Act 101 of 1965 (SA). The Health Professions Act 56 of 1974(SA).
62. Sec 19 Engineering Profession Act 46 of 2000.
63. Sec 17 Social Service Professions Act 110 of 1978.
64. Delimatsis (n 8 above) 25-26.
65. Delimatsis (n 8 above) 76.
66. GT Fnials 'Eliminating the Barriers to Cross Boarder Legal Practice in Africa' (2018) http://elf-fae.eu(accessed 4 July 2021).
67. Ngandwe (n 25 above) 376.
68. Ngandwe (n 25 above) 376.
69. Sec 3 Constitution of Botswana; Sec 20 Constitution of Eswatini; Sec 19 Constitution of Lesotho; Art 10 Constitution of Namibia; Sec 9 Constitution of South Africa.

repudiating the commitments they profess to uphold. This is confirmed by the many cases in which governments have been taken to court,[70] and in one case, the Appellant was admitted only after obtaining permanent residence.[71] Foreign law graduates recently lodged a case challenging South Africa's 2014 Act, allowing only citizens and permanent residents to be admitted and enrolled as legal practitioners.[72] From a close reading of the cases and the laws on foreign admission, it is evident that there are some ambiguities in the admission and enrolment of foreign legal practitioners in the SACU member states discussed in this study. The preferential treatment of citizens and permanent residents escalates the countries' non-compliance with their GATS obligations.

In light of the above, the study did suggest a possible solution by drawing some lessons from Lesotho, which has tried to harmonise the legal sector as decided in *Mosuoe v Law Society of Lesotho.*[73] This is because Lesotho allows aspiring lawyers, citizens and non-citizens to write practical examinations without giving preferential treatment to citizens.[74] In the case of Lesotho, the rationale is to protect the public and ensure that legal services are offered equally.[75] This explains why the country is a well-known importer of legal services.[76] It is also anticipated that lessons learned based from Lesotho and the EU, which introduced the principle of reciprocity for professional qualifications,[77] would help to map the best way forward in the admission and enrollment of foreign legal practitioners. The writer's view is that the study does contribute to scholarly research on the admission of foreign legal practitioners in the region.

70. *Tangkuampien v Law Society of South Africa* (CPD) (unreported case no 897/07), See also MH Hwacha 'Two lawyers named Mpofu: is the permanent residence requirement in the LPA unconstitutional?' 1 March 2020 http://www.derebus.org.za/two-lawyers-named-mpofu-is-the-permanent-residence-requirement-in-the-lpa-unconstitutional/(accessed 9 April 2021).
71. Hagenmeier*et al* (n 2 above) 14.
72. T Broughton 'Law graduates to challenge legal profession's discrimination against' 27 July 2021 immigrants. https://www.groundup.org.za/article/law-graduates-challenge-legal-practice-councils-discrimination-against-immigrants/(accessed 10 August 2021).
73. *Mosuoe v Law Society of Lesotho(C of A (CIV) N0.23/09).*
74. Sec 8(c) (iv) of the 1983 Act.
75. *Mosuoe v Law Society of Lesotho* (C of A (CIV) N0.23/09 para 13.
76. Africa Press 20 September 2021 'The globalization of Advocates legal services: Lesotho Perspective'https://www.africa-press.net/lesotho/all-news/the-globalization-of-advocates-legal-services-lesotho-perspective-2 (accessed 7 October 2021).
77. https://muhaz.org/the-admission-and-enrolment-of-foreign-legal-practitioners-in.html?page=3(accessed 4 July 2021).

1.2 Assumptions underlying the study

This study was and still is underpinned by the assumption that the laws regulating the admission of foreign legal practitioners in the selected SACU member states are inconsistent with GATS. For that reason, they need to be harmonised to promote the free movement and liberalisation of the legal profession in the region. The selected states are signatories to GATS; they must uphold their obligations emanating from GATS and adhere to their respective constitutions. For most SACU members, signing the GATS commitments can be viewed as a window-dressing exercise. The assumptions of this study were proved using both primary and secondary sources of the law.

1.3 Aim of the study

By looking at legislation regulating the admission and enrolment of foreign legal practitioners, the study aimed to demonstrate the extent to which SACU member states adhere to GATS..

1.4 Objectives

The objectives of the study were to:

1.4.1 outline GATS commitments of SACU member states;

1.4.2 identify and discuss legislations dealing with the admission of foreigners into the legal practice in SACU member states;

1.4.3 compare the rules applicable to the admission of foreign legal practitioners in the SACU member states using Lesotho as a model; and

1.4.4 recommend possible legislative interventions to facilitate trade liberalisation and harmonisation among SACU member states and the SADC region.

1.5 Research questions

The study addressed one main question to achieve the objectives, the question is:

To what extent do SACU member states' legal regimes for the admission of foreign legal practitioners comply with applicable GATS Commitments?

The study addressed the following sub-questions to answer the main research question:

1.5.1 What are the commitments made by SACU member states under GATS?

1.5.2 To what extent do SACU member states' legislations dealing with the admission and enrolment of foreign legal practitioners adhere to GATS?

1.5.3 What motivates states to develop stringent rules applicable to legal practitioners compared to Lesotho?

1.5.4 What are the possible legislative interventions needed to facilitate trade liberalisation and harmonisation among SACU member states?

1.6 Research methodology

The research was a desktop study in that data were collected mainly through intensive research.[78] For that reason, no interviews or questionnaires were used because data were collected from existing primary and secondary sources. The writer used primary data as in existing law: for example, the countries' constitutions, law societies' directives, legal practice Acts, court decisions, case law, mutual recognition Acts, GATS and commitments, etc.[79] Secondary sources were used to comment, explain and add to the primary sources to enhance the writer's understanding of the recognition of foreign legal qualifications for admission to legal practice in SACU member states as an international TiS issue. The secondary sources provide helpful answers to the writer's research question(s).[80] The writer chose a desktop study instead of other research methods because this well aligned with the stated objectives. Information relating to the enrolment and admission of foreign legal practitioners is accessible in publicly available government documents, the WTO Agreement, GATS commitments and legislation such as Legal Practice Acts. To process all the collected data, the writer employed the following approaches to achieve the study's desired objectives.

1.6.1 Discussion approach

The discussion approach was used to give a clear overview of GATS commitments taken by SACU member states and the legislation dealing with the admission of lawyers in the SACU member states.

78. Desk Research - Methodology and Techniques https://www.managementstudyguide.com/desk-research.htm(accessed 9 April 2021).
79. H Kiran 'Meaning of Legal Research' 02 May 2020 https://www.mylawman.co.in/2020/05/law-notes-legal-research-types-and.html (accessed 27 March 2021).
80. MNK Saunders et al *Research Methods for Business Students* (2000) 188.

1.6.2 Analytical approach

The analytical approach was used to examine the extent to which the legislations dealing with the admission of foreign legal practitioners in the SACU member states adhere to the international standards of GATS and the countries' respective constitutions.

1.6.3 Comparative approach

The comparative approach was used to compare the legal Acts of Botswana, Eswatini, Namibia and South Africa with Lesotho as a model to bolster proposed recommendations. The writer selected Lesotho as a comparative jurisdiction because the country has one of the most liberalised legal sectors required by GATS, enabling the easy importation of legal services.[81]

1.6.4 Prescriptive approach

The prescriptive approach was used to propose possible recommendations with the anticipation that the relevant regulatory bodies will adopt them or any future amendments to address the problems identified in the legislation dealing with the admission of legal practitioners in the SACU member states.

1.7 Justification of the study

The legislative frameworks for Botswana, Eswatini, Namibia and South Africa regulating the admission of legal practitioners are tainted with irregularities in respect of GATS. The reason is that aspiring foreign legal practitioners have lodged several cases before the courts challenging the constitutionality of the relevant laws and their consistency with international obligations. In light of this, the research was justified in that it interrogates the reasons behind the respective states' hesitancy to admit foreigners into their respective jurisdictions. The legal profession is the most restricted in nearly all SACU member states except for Lesotho. This, therefore, warranted scholarly investigation and scrutiny.

81. Africa Press 'The globalization of Advocates Legal Services: Lesotho Perspective' 20 September 2021 'https://www.africa-press.net/lesotho/all-news/the-globalization-of-advocates-legal-services-lesotho-perspective-2(accessed 30 September 2021).

1.8 Literature review

Marshall and Rossman submit that a 'literature review is a process of relating a study or on-going dialogue in information and knowledge, filling in the loopholes and expanding previous studies'.[82] The study contributes to knowledge by filling gaps in the existing literature. The literature on the admission of foreigners into legal practice in SADC has traditionally focused on South Africa and Botswana, to almost a total exclusion of other SADC member states such as Eswatini, Lesotho, Mauritius, Namibia and Zimbabwe, to mention a few. The question that is hardly answered and prompted this research is the extent to which the applicable laws of the selected SACU member states adhere to the rules of the GATS.[83]

At the heart of GATS is the non-discrimination principle discussed by Van den Bossche and Zdouc are the most-favoured-nation treatment (MFN) (whether a country favours some countries over others) and national treatment obligation (whether a country favours itself over other countries). As enshrined in Article ll: l of GATS,[84] the MFN obligation prohibits discrimination in all its forms among countries in services and service suppliers.[85] Delimatsis puts it as 'favour one, favour all principle'.[86] The MFN is also incorporated in the GATT 1948 Article II. The national treatment obligation is provided for in Article XVII of GATS and prohibits players from discrimination against other countries.[87] According to Cronje, national treatment dictates that foreign legal practitioners are given equal opportunities to compete with local practitioners.[88] In a violation of any commitment and provision of the GATS, any WTO member may take legal action against that state under its enforcement regime.[89]

Delimatsis posits that the GATS in Article I: 2 defines services to include any service in any sector, and for him, there is no straightforward definition of services.[90] During the Uruguay negotiations, the members could not decide on a generally

82. C Marshall & G Rossman *Designing Qualitative Research: Thousand Oaks, CA: Sage Publications* (2006) 23.
83. Legal Practitioners Act of 1979 (Cap 61:01) of Botswana, Legal Practitioners Act 15 of 1964 (Eswatini), Legal Practitioners Act 11 of 1983 (Lesotho), Legal Practitioners Act 15 of 1995(Namibia), Legal Practice Act 28 of 2014 (South Africa)
84. Art ll:l of GATS; see also Van den Bossche & Zdouc (n 5 above) 315-316.
85. Van den Bossche & Zdouc (n 5 above) 335.
86. Delimatsis (n 8 above) 27.
87. P Van den Bossche *The Law and Policy of the World Trade Organisation Text, Cases and Materials* (2005) 308.
88. Cronjé (n 36 above) 6.
89. Cronjé (n 36 above) 3.
90. Delimatsis (n 8 above) 25

acceptable definition of services.[91] For the writer, this highlights that services are complex due to their intangible nature, and, for that reason, it is hard to provide a concrete definition, and the view of Delimatsis makes more sense. The definition of services is broad and incorporates legal services, measures affecting services and service suppliers.[92] Van den Bossche and Zdouc agree with Delimatsis that GATS does not define services but divides them into four modes.[93] Hagenmeier *et al.* then give examples of the four modes through which services are provided: Mode 1- cross-border supply when clients receive legal services from foreign territories by, for example, post or telecommunications devices;[94] Mode 2 - consumption abroad, for example, when citizens travel to another country to visit a legal practitioner for legal services;[95] and Mode 3 - commercial presence when, for example, a lawyer establishing a firm in another SACU member to supply a professional legal service.[96] Kempe gives an example under Mode 4 of a foreign lawyer visiting a country to offer legal services temporarily.[97] The implication is that natural persons' presence in the context of the admission of foreigners into legal practice will require their presence in a country to deliver legal services.[98] Goldsmith simplifies the four modes as follows:

> When services cross the border (Mode 1); when the client crosses the border (Mode 2); when the lawyer's office crosses the border and a branch is opened (Mode 3); and when the lawyer personally crosses the border (Mode 4).[99]

This study is aligned with Goldsmith's definitions as outlined above.

Hagenmeier *et al.* have written on the admission of foreigners into legal practice in South Africa, focusing on constitutional considerations in light of South Africa's 2014 Act.[100] They posit that preserving the permanent residence condition under the 2014 Act is problematic given South Africa's GATS obligations.[101] They make a case

91. Delimatsis (n 8 above) 25.
92. Delimatsis (n 8 above) 26.
93. Delimatsis (n 8 above) 25-26.
94. Hagenmeier *et al* (n 2 above) 12.
95. Hagenmeier *et al* (n 2 above) 7.
96. Hagenmeier *et al* (n 2 above) 8.
97. D Kempe *GATS General Agreement on Trade in Services A Handbook for International Bar Association Member Bars* (2002) 24.
98. National Treatment commitment Article XVll of the GATS entails that each Member shall afford services and service suppliers of any other member, in respect of all measures affecting the supply of services treatment no less favourable than that it accords to its own like services and service suppliers.
99. J Goldsmith 'Global Legal Practice and GATS: A Bar Viewpoint' (2004) *Penn State International Law Review* 627.
100. Hagenmeier *et al* (n 2 above) 13.
101. Hagenmeier *et al* (n 2 above) 13.

pointing out that this provision goes against the constitutional framework of South Africa. They further observe that the Constitutional Court of South Africa has been seized with cases dealing with discrimination against foreigners.[102] I agree withthe submission by Hagenmeier *et al.* that the permanent residence requirement is unconstitutional since the constitution advocates equality before the law is valid.[103] I agree because the right that everyone should be treated equally is a constitutional right enshrined under section 3 of Botswana's Constitution of 1966; section 20 of the Constitution of the Kingdom of Eswatini of 2005; section 4(1) of the Constitution of Lesotho of 1993; article 10(1) of the Constitution of Namibia of 1990 and section 9(1) of the Constitution of South Africa. This constitutional principle of equality before the law applies to the citizens of that state and all persons found within the territorial area of that state. Cronjé describes this permanent resident requirement as a bottle-neck system put in place to keep foreign legal practitioners out of the legal practice in South Africa.[104] The position articulated by Cronjé in saying that these restrictive measures imposed by these states amount to a national treatment limitation under GATS by giving different treatment between citizens and non-citizens is sound. These measures have not only applied in South Africa since Eswatini also has similar provisions.[105] The permanent residence requirement features under section 4(1)(c)(ii) of the Legal Practitioners Act, 15 of 1995 (Namibia), section 6 of the Legal Practitioners Act 1964 (Eswatini) and section 24 of the Legal Practitioners Act 28 of 2014 (South Africa). The national treatment obligation envisaged under Article XVII of the GATS stipulates that members should accord each member equal treatment. My argument is that the requirement is not only keeping foreigners away but does not support harmonisation and liberalisation sought by the region. This is because Article 5 of the SADC Treaty 1992 main objective is to promote regional growth through harmonisation and cooperation by Member states.

One other observation is that, although Eswatini and South Africa are trying to protect their nationals, the case is different for Botswana, as articulated by Ngandwe.[106] Ngandwe submits that Botswana favours graduates from Botswana, Eswatini and Lesotho, and these can enrol as attorneys immediately after graduating

102. Hagenmeier *et al* (n 2 above) 18.
103. Sec 9 Constitution of South Africa.
104. Cronjé (n 36 above) 19.
105. Sec 5 and 6 of the Legal Practitioners Act 15 of 1964.
106. Ngandwe (n 25 above) 376.

from these states' universities. The implication is that non-citizens graduating from these Universities are preferred over citizens who studied in other non-BOLESWA Universities.[107] Ngandwe further argues against the preferential treatment afforded to graduates from Eswatini and Lesotho, yet Batswana who have studied in other non-BOLESWA universities have to pass practical examinations.[108] He, therefore, advocates for a 'graveyard approach' in which persons are granted equal opportunities by 'levelling the playing field (the graveyard) or upgrading the playing field (the vineyard) in a manner consistent with the Constitution'.[109] In my view, it is indisputable, as pointed out, that the preferential treatment given to BOLESWA graduates is because of the long relationship between the universities, which is unfair looking at other SACU members who are subjected to unfavourable treatment because they did not study under BOLESWA universities.

Hagenmeier *et al.* pointed out that, due to these constraints similar to those highlighted earlier, no foreigners can fully profit from removing barriers to TiS as sought by GATS.[110] Ngandwe touches on the challenges facing harmonisation in SADC legal profession in South Africa and Botswana.[111] He observes that non-South Africans find it difficult to access the South African legal profession. Ironically, South Africa is regarded as a big brother/sister, leader and role model in Africa for advancing regional integration, cooperation, and development.[112] Ngandwe further points out the irony that although South Africa is highly specialised with rich jurisprudence, it is very reluctant to harmonise.[113] Cronjé also shares the same view with Ngandwe that South Africa's neighbours allow professional access to South African citizens enabling South Africans to enrich their legal profession in other states without reciprocating.[114] The views articulated by Cronje' and Ngandwe are sound because looking at South Africa being one of the developed countries in Africa, it makes no sense why the country is closing its doors to foreigners, yet its neighbours are allow South African legal practitioners.

107. Ngandwe (n 25 above) 376.
108. Ngandwe (n 25 above) 376.
109. Ngandwe (n 25 above) 377-378.
110. Hagenmeier *et al* (n 2 above) 21.
111. Ngandwe (n 25 above).
112. Ngandwe (n 25 above) 368-373.
113. Ngandwe (n 25 above) 368-373
114. Cronjé (n 36 above).

Cronjé thinks that the main barriers to cross-border legal practice in the SADC region are the stringent immigration requirements, making entry requirements burdensome with jurisdictional requirements.[115] Cronjé is supported by Hagenmeier *et al.* with specific reference to South Africa, which reserves legal practice to citizens and permanent residents as the only eligible parties to be admitted to the Bar.[116] Ngandwe further observed that the permanent residence and nationality requirement for admission into legal practice is problematic. The argument is that it impedes the free movement of legal practitioners from fellow member states into South Africa. According to Ngandwe, restrictions limiting the exercise of the legal profession to nationals are common in most SADC states and a threat to regional cooperation and integration.[117] These views of the cited writers are also shared by Chanda, who observes that the limitations to the professional sector in which the legal service fall are 'quantitative barriers to entry, licencing restrictions, nationality and residency conditions, and establishment restrictions.'[118]

Npom classifies the barriers to cross-border legal practice into two: border/immigration requirement and jurisdictional requirement.[119] Some countries also enact laws that make it difficult for foreign legal practitioners to practice fully in their countries.[120] He makes an example of Kenya, Uganda, and Tanzania in the East African region, which apply nationality requirements as conditions precedent to practice in their respective Bars.[121] According to Delimatsis, the main features of services are that they are intangible and invisible, and this is the reason TiS is more complicated than trade in goods under GATT.[122] He argues that the value bestowed on service transactions cannot be known until they are produced and known to customs and immigration authorities. To this end, the barriers on TiS are more complex than for goods under GATT.[123] Thomas and Trachtman share the same view

115. Cronjé (n 36 above).
116. Sec 24 of the 2014.
117. Ngandwe (n 26 above) 371.
118. Chanda R (November 2002) DESA Discussion Paper No.25 p9.
119. GEFNpom 'Eliminating the Barriers to cross Boarder Legal Practice in Africa'4 April 2018 http://elf-fae.eu/wp-content/uploads/2018/04/Trends-in-law-firm-management.pdf (accessed 11 July 2021).
120. Npom (n 119 above).
121. Npom (n 119 above).
122. Delimatsis (n 8 above) 38. See also GATT 1994
123. Delitmatsis (n 8 above) 37, He writes on the barriers to trade in services and says that because there are intangible they require the supplier and the receiver of the service to be in proximity to each other. He also points out that barriers to trade in services are in the form of within the border legislation, legislation and administrative practices that that control the entry.

with Delimatsis that the barriers to trade in services are more complex than for goods. Barriers to service usually have discriminatory tendencies against foreigners who provide a service and domestic regulations that may be *de facto* discriminatory.[124]

Ngubula points out the practices that most SADC states use to discriminate against services by denying other states' nationals access to their markets. He cites the requirements such as licenses, qualifications, and other regulations. In Ngubula's view, to remove obstacles to TiS, he proposes two practices: harmonisation or mutual recognition.[125] His position is that African states affiliate with multiple Regional Economic Communities (RECs), which stifles progress towards regional integration by belonging to more than one regional economic community (REC), each with its commitments.[126] This compromises the concerned player's competence to uphold and bargain effectively since they have competing interests while also stretching the limited resources.[127] I agree with Ngubula's observation that when a country affiliates with more than one REC, it slows down the region's quest to achieve deeper integration and harmonization due to conflicting interests.

When critically looking at the setup between the universities falling under the BOLESWA umbrella, favouring or giving preferential treatment to BOLESWA students over foreign legal practitioners from South Africa and the rest of the SADC region, the writer agrees with Ngom's views. Ngom further suggests that the only way to harmonise and liberalise the legal sector is to relax rules and regulations governing the admission of foreigners into the legal fraternity to practice in jurisdictions of their choice.[128] For the above reason, the writer contributed to the literature by proposing how best states like South Africa and Eswatini, for example, would handle the issue of citizenship, ordinarily residence, and permanent residence requirements on the admission of foreign lawyers in line with the global rules of international trade and investment law.

According to Grossman, Horn and Mavroidis, national treatment is meant 'to outlaw protectionist use of domestic instruments.'[129] Delimatsis looks at discretionary

124. C Thomas & JP Trachtman *Developing Countries in the WTO Legal System* (2009) 444.
125. M Ngubula 'The SADC Protocol on Trade in services: A review of the Protocol in light of the GATS and other SADC Protocols and what it means for trade in services in the region' unpublished LLM dissertation, University of Cape Town, 2013 36.
126. Ngubula (n 125 above) 40.
127. GDI https://www.files.ethz.ch/isn/27639/2000-06e.pdf(accessed 9 August 2021).
128. Ngom (n 119 above).
129. GM Grossman *et al* PC'LIFN Working Paper No. 917, 2012 The Legal and Economic Principles of World Trade Law: National Treatment' April 28, 2012 3.

qualifications as impediments to TiS. Delimatsis points out that all trade restrictions negate the benefits from trade liberalisation commitments undertaken by members during negotiations. It, therefore, becomes hypocritical for states to sign and commit themselves to GATS while reneging on their commitments.[130] He noted that TiS is more prone to burdensome domestic regulations than trade in goods.[131] The writer agrees with Delimatsis because there are more barriers in TiS than in goods due to the intangible nature of services.

According to Terry, the globalisation of legal services allows lawyers to travel to foreign countries to provide legal services.[132] His writings confirm that GATS applies to legal services. Zwart also supports Terry's view that GATS encompasses legal services as well. These commitments have already been undertaken for legal services.[133] Ikimi defines cross-border legal practice, also known as multi-jurisdictional legal practice, 'as the rendering of legal service by legal professionals beyond the boundaries of the legal professional's home country'. Nshimbi and Fioramonti have written on regional labour migration. From a regional integration viewpoint, the writers observed that freedom of movement manifests itself in four freedoms: free movement of persons, capital, goods, and services.[134]

Ikimi recommended that to foster full integration of the legal profession, there is a need for the 'different RECs in Africa to open up their legal services sector to each other fully. Thus, an entire region becomes a market for legal services'.[135] The writer concurs with Ikimi that it is only when the SADC member states eliminate the impediments toadmission and open legal services that the complete harmonisation that Article 5 of the SADC Treaty seeks to achieve can be realised. The writer contends that the starting point is a collaboration of all the Law Societies in the five (5) SACU member states and the SADC region to join and amend the Acts dealing with foreign admission and enrolment.

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130. Delimatis (n 8 above) 69.
131. Delimatis (n 8 above) 71.
132. Terry LS GATS to APEC: The Impact of Trade Agreements on Legal Services, 43 AKRON L. Rev. 875,983(2010).
133. T Zwart 'The reflection of cross-border law practice in the organisation and regulation of the legal profession' https://www.sciencespo.fr/chaire-madp/sites/sciencespo.fr.chaire-madp/files/tom_zwart.pdf(accessed 11 July 2021).
134. ILI Ikimi 'The Nigerian Legal Practitioner and Economic Development of Africa: Prospects and Challenges' (2019)1 *International Journal of Comparative Law and Legal Philosophy* 13. https://www.nigerianjournalsonline.com/index.php/IJOCLLEP/article/view/1170/1153(accessed 12 August 2021).
135. Ikimi (n 135 above) 13.

It is worth noting that South Africa committed itself under modes 3 and 4,[136] and Botswana, like Eswatini, has not listed legal services in its commitments under the professional service sector. However, these countries have made commitments in other professions like medical and engineering services. Ifubwa observed that, despite South Africa having made commitments under market access (Mode 3) and national treatment (Mode VI), foreign academic qualifications constitute a significant barrier to labour mobility.[137] He recommends that South Africa should adopt mutual recognition of foreign qualifications.[138] For Lesotho, the country has opened up its legal service trade to SACU countries and other African states by making itself an importer of legal services. Legal practitioners from other countries are allowed into Lesotho to practice.[139] Lesotho has opened its legal sector by allowing judges from African countries to adjudicate in local courts. The stringent requirements adopted by other SACU countries, namely permanent residence or ordinary residence requirements, are not applicable. All prospective candidates seeking admission have to write practical examinations as provided by the Legal Practitioners Act of Lesotho.[140]

The requirements imposed by other SACU countries are, as pointed out by Hagenmeier *et al,* impeding the free movement of lawyers to access the legal profession. According to the Africa Press, it is clear that Lesotho has opened up its legal sector to the SACU members and Africa at large.[141] Most judges adjudicating in the courts of Lesotho are from African countries. This is because Lesotho entered into mutual recognition agreement allowing advocates from South Africa to access the profession easily.[142]

136. Cronjé (n 36 above) 6.
137. Alfubwa 'The Implementation of Trade in Services 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 3.
138. Afubwa (n 138 above) 3.
139. Africa Press 20 September 2021 'The globalization of Advocates legal services: Lesotho Perspective'https://www.africa-press.net/lesotho/all-news/the-globalization-of-advocates-legal-services-lesotho-perspective-2 (accessed 7 October 2021).
140. Sec 8(c) (iii) of Legal Practitioners Act 1983.
141. Africa Press (n 139 above).
142. Africa Press (n 139 above).

1.9 Definition of key concepts

1.9.1 International trade

International trade is the 'exchange of goods and services among countries'. [143]

1.9.2 Legal practitioner

A legal practitioner is a person admitted into practice as an attorney, advocate, notary or conveyance.[144]

1.9.3 Legal services

Legal services involve advisory and representation services in legal or jurisdictional procedures and the drafting of legal instruments.[145] Legal practitioners usually provide these services.

1.9.4 Service

This is defined under GATS as any services involving production, distribution, sale and delivery service in any sector[146] except for those services provided in the exercise of governmental authority.[147]

1.9.5 Trade in services

This involves 'the exchange or sale of a service within the eleven broad categories subsequently indicated between residents of one country and residents of another country, according to one of the four modes of supply'[148] that is cross border, consumption abroad, commercial presence and presence of natural persons

1.10 Ethical considerations

The writer was aware of research ethics which entails the code of behaviour appropriate for academics and conducting academic research.[149] The study

143. K Amadeo February 17, 2021 https://www.thebalance.com/international-trade-pros-cons-effect-on-economy-3305579(accessed 27 March 2021).
144. Sec 2 of 1964 Act.
145. Hagenmeier *et al* (n 2 above).
146. Delimatsis (n 8 above) 25.
147. Van de Bossche (n 87 above) 50.
148. Dictionary of trade terms http://www.sice.oas.org/dictionary/sv_e.asp(accessed 13 April 2021).
149. Dr MNK Saunders, Dr P Lewis, Dr A Thornhill, 2000, Research Methods for Business Students Page 130.

meticulously avoided plagiarism, such as taking or stealing the ideas or words of another person and use as your own without crediting the source.[150] For this reason, all work was referenced, and ideas taken from other sources were acknowledged and not presented as my own. The study gave no false data. The data were based on primary and secondary sources that answered the study's objectives. In addition, a high level of transparency, honesty, integrity, and objectivity was observed not only in data collection but also in the writing of the dissertation. The writer was aware of the University of Venda's anti-plagiarism policy, which adopts the national best practices to combat plagiarism.

1.11 Limitations of the study

The study focused on the admission and enrollment of foreign legal practitioners in the SACU member states as an international TiS issue. The focus was on Botswana, Eswatini, Lesotho, Namibia and South Africa. The limitation of the study was that it was mainly desktop, and the writer did not conduct any oral interviews and/or empirical studies in SACU member states. The other limitation was that this research work relied on primary and secondary sources and existing data making the research findings to be limited to information that is already available. Visiting the Law Societies of the states under investigation could have helped the writer answer the research questions from a practical perspective rather than a theoretical perspective. The writer could have travelled or visited the SACU library archives, perused documents relating to the problematic issue under discussion, and gathered more literature but was restricted due to the Covid-19 pandemic restrictions. Another limitation was that some of the recent cases related to the study have not yet been finalised, and some judgements have been reserved *sine die*. However, the writer bridged the gap by using publicly available decisions in the selected jurisdictions.

1.12 Proposed research structure

This study is divided into five chapters structured as follows:

1.12.1 Chapter One

150. What is Plagiarism? Published May 18, 2017 https://www.plagiarism.org/article/what-is-plagiarism (accessed 27 March 2021).

The chapter consists of the background of the study, research problem, assumptions underlying the study, aim of the study, objectives, research questions, research methodology, justification of the study, literature review, definition of key concepts, ethical considerations, limitations of the study and proposed research structure.

1.12.2 Chapter Two

Chapter two deals with the principles of TiS under GATS in brief and discusses the level of GATS commitments made by Botswana, Eswatini, Namibia and South Africa.

1.12.3 Chapter Three

This chapter examines the laws regulating the admission and enrolment of foreign legal practitioners in the SACU member states above. The idea was to shed light on what currently obtains in the region against the background of calls by regional leaders and the SACU business community to escalate regional integration, harmonisation and cooperation.

1.12.4 Chapter Four

This chapter takes a comparative approach by looking at the admission and enrolment of foreign legal practitioners in SACU member states using Lesotho as a model. This would help shed light on what makes it difficult for foreign law graduates to be admitted in SACU countries. The chapter also articulates the impediments to the liberalisation of legal services.

1.12.5 Chapter Five

This chapter concludes the study by summarizing critical issues from the study and making recommendations for further research.

CHAPTER TWO

THE CONCEPTUAL UNDERSTANDING OF GATS AND SELECTED SACU MEMBERS' COMMITMENTS

2.0 Introduction

The first chapter provided a background to issues pertaining to the admission and enrolment of foreign lawyers into legal practice in SACU countries from a GATS perspective. The point was made that restrictions have been placed on cross-border legal practice in the selected SACU countries and the rest of SADC. This is due to the strict requirements of immigration laws that make it very strenuous for legal practitioners to work freely in foreign countries.[1] As a result of these impediments, SACU countries: Botswana, Eswatini, Namibia and South Africa have been of great interest in this dissertation. Lesotho, one of the SACU countries, is discussed in the next chapter for comparative purposes, which explains why it is not included in this chapter.

The chapter also reviews relevant GATS provisions applicable to legal services that promote regional integration, cooperation and development that SACU countries must comply with under international law. This is because GATS permits the countries to conclude RTAs as provided under Article V on economic integration agreements.[2] This is also in line with the SADC Treaty of 1992, with Article 22(1), allowing the conclusion of protocols such as the SADC Protocol on Trade in Services of 2012. The chapter also discusses the GATS commitments undertaken by Botswana, Eswatini, Namibia, and South Africa. It is important to calibrate the commitment level made by SACU countries, given what these countries, as a body, are doing to promote regional integration and harmonisation in their pursuit of the African Agenda of 2063.

2.1 The Southern African Customs Union (SACU) and WTO Law

The SACU is one of the oldest unions and came into force in 1910.[3] It was signed by South Africa (the Republic of South Africa) and other British colonies: Bechuanaland

1. GT Fnials 'Eliminating the Barriers to Cross Boarder Legal Practice in Africa' (2018) http://elf-fae.eu(accessed 4 July 2021).
2. Art V of GATS.
3. R Gibb 'The New Southern African Customs Union Agreement: Dependence with Democracy' (2006) 32 (3) *Journal of Southern African Studies* 583.

(Botswana); Basutoland (Kingdom of Lesotho); Swaziland (Kingdom of Swaziland), and South West Africa (Namibia).[4] The present SACU Agreement consists of the 1910, 1969 and 2002 agreements binding these five (5) countries.[5] SACU aims to facilitate the cross-border movement of goods among its constituent territories.[6] The legal structure of SACU is the SACU Treaty[7] governing trade in goods as covered in the GATT of 1994.[8] GATT falls under the auspices of the WTO Agreement (Annex 1A).[9] These SACU countries joined GATT in different years: South Africa (1948), Botswana (1987), Lesotho (1988), Namibia (1992) and Eswatini (1993)[10] as a way to promote regional integration and development.

From the beginning, the GATT and WTO parties were allowed to conclude Free Trade Areas (FTAs) and customs unions as an exception to the non-discrimination obligation under the WTO policy of MFN. In the framework for goods , the establishment of customs unions and FTAs is envisaged in Article XXIV of GATT 1994.[11] In this article, countries are allowed to offer preferential treatment to each other by forming custom unions: for example, the SACU and the EU. In the area of services, GATS provides for the conclusion of RTAs under Article V - economic integration agreements.[12] The rationale for concluding such agreements for GATS is to achieve liberalisation of TiS.[13] However, such agreements should be absent of any form of discrimination.[14] Unlike GATT, Article V (GATS) does not differentiate between a Custom Union and an FTA because TiS is different from trade in goods in that impediments to services come in the form of domestic regulations.[15] To this end,

4. About SACU https://www.sacu.int/about/history-old.html(accessed 15 October 2021).
5. L Ndlovu (2013) 'South Africa and the World Trade Organization Anti-Dumping Agreement nineteen years into democracy' *Southern African Public Law* Vol. 28, No. 2 page 291.
6. C. Ruppel & K Ruppel-Schlichting (2011) Legal and Judicial Pluralism in Namibia and Beyond: A Modern Approach to African Legal Architecture? *The Journal of Legal Pluralism and Unofficial Law*, 43:64, 33-63, DOI: 10.1080/07329113.2011.10756669 page 53.
7. C. Ruppel& K Ruppel-Schlichting (n 6 above) 53.
8. P Van den Bossche & W Zdouc *The Law and Policy of the World Trade Organization* (2013) 41.
9. MR Islam *The International Trade Law of the WTO* (2006) 43.
10. WTO https://www.wto.org/english/thewto_e/gattmem_e.htm(accessed 15 October 2021).
11. Art XXIV of GATT 1994.
12. Art V of GATS permits countries to enter into liberalizing TiS agreements provided the agreement is absent of any discrimination.
13. M Ngubula 'The SADC Protocol on Trade in services: A review of the Protocol in light of the GATS and other SADC Protocols and what it means for trade in services in the region' unpublished LLM dissertation, University of Cape Town, 2013 14.
14. Art V: 1(b) of GATS.
15. Ngubula (n 13 above)14.

Articles V of GATS and XXIV of GATT are equivalent as they provide rules applicable to RTAs and allow members to enter into regional services agreements.

According to Article II of the WTO Agreement, the GATT, GATS and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) are binding on every WTO member. Once a member becomes a party to one agreement, the member is automatically bound by all.[16] What this means is that when a country breaches any of the agreements, an affected party has the right to request for consultations or request the WTO Dispute Settlement Body (DSB) to establish a Panel to determine the dispute. At the time of writing, about 31 cases had been launched by WTO members wherein they cited the GATS agreement as Applicants requesting consultations after violations of GATS obligations.[17]

The dispute between the Republic of Korea and Japan,[18] which first requested consultations with Japan but failed to resolve the dispute and later requested the establishment of a panel by the DSB, is a good example of how this system works. The dispute emanated from imposition by Japan of an unjustifiable requirement of export licensing and procedures on the technologies and subject products whenever exported to Korea.[19] On the other hand, Korea viewed this as a restriction on TiS inconsistent with rules on domestic regulations (Article VI) of GATS. The dispute was that Japan failed to administer its lawsreasonably and impartially as required by GATS.[20] At the same time, Korea sought to nullify Japan's GATS commitments: by imposing such measures, the country failed to guarantee the compliance of its laws with its GATS obligations.[21]

16. Van den Bossche & Zdouc (n 8 above) 41.
17. https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm(accessed 15 October 2021).
18. *Japan – Measures Related to the Exportation of Products and technology to Korea Request for The Establishment of a Panel by the Republic of Korea*, WT/DS590/4 19 June 2020 (20-4341).
19. WT/DS590/4 19 June 2020 (20-4341).
20. Art VI of GATS.
21. WT/DS590/4 19 June 2020 (20-4341).

2.2 A conceptual understanding of GATS

In the preceding chapter, I reiterated that the GATS forms part of the WTO Agreement.[22] Placed under the auspices of WTO, the GATS deals with services[23] and aims at liberalising TiS so that it is parallel to the GATT of 1994.[24] The issue of services was a brainchild of the Uruguay Round negotiations after WTO policymakers realised the importance of services across the globe.[25] GATS agreement is divided into six (6) parts with twenty-nine (29) articles and eight (8) annexes relevant to legal services.[26] The standing order is that once a member state becomes a signatory of the GATS, it automatically becomes subject to the first fifteen (15) GATS articles.[27]

GATS is similar to GATT as it aims at ensuring equal competition between enterprises in domestic markets despite 'their place of origin and the origin of their services'.[28] Therefore, the GATS seeks to facilitate the progressive liberalisation of services while allowing WTO members to regulate them.[29] The agreement also seeks to protect its members' interests while respecting their national policy at the same time.[30] Subsequently, all signatories of the WTO are members of the GATS committed to individual service sectors, as this chapter shows.[31] GATS also regulates laws governing foreigners' admission to the legal fraternity in the SADC region.[32] In addition, it covers measures affecting TiS, which include 'legislations of a Member or by-laws of municipal authority.'[33] Such measures also appear in directives, decisions, legislations, by-laws, regulations, or administrative action.[34] For this reason, the rules

22. P Van den Bossche The *Law and Policy of the World Trade Organization Text, Cases and Materials* (2005) 44-45.
23. P Delimatsis *International Trade in Services and Domestic Regulations* (2007)4.
24. Van den Bossche & Zdouc (n 8 above) 42.
25. L Terry 'GAT's Applicability to Transnational Lawyering and its Potential Impact on U.S. State Regulation of Lawyers' (2001) 34 *Vanderbilt Journal of Transnational Law* 998.
26. Terry (n 25 above) 999.
27. Terry (n 25 above) 1000.
28. D Luff 'International Trade Law and Broadband Regulation: Towards Convergence?'(2002)3 *Journal of Network Industries* 3: 240.
29. Luff (n 28 above) 240.
30. Preamble of GATS para 3.
31. WTO https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm(accessed 31 July 2021).
32. C Hagenmeier Plenary Session: Globalization and Its Impact on the Law of International Business International Trade in Legal Services: Admission Rules for Foreign Attorneys in South Africa in the Light of GATS https://www.iaslsnet.org/meetings/business/HagenmeierCornelius-South Africa.pdf (accessed 16 July 2021).
33. Delimatsis (n 23 above) 19.
34. Islam (n 9 above) 347.

adopted by professional bodies, for example, the Law Societies relative to professional qualifications and licensing, are regarded as measures regulated by the GATS.[35]

The GATS aims to eliminate all impediments to TiS by dictating where and when to take liberalisation commitments for different services and supply modes.[36] To this end, GATS has the same objectives as GATT in seeking to ensure impartiality and equal treatment of all parties under the non-discrimination concept and help stimulate economic activities through assured policy bindings and encourage trade liberalisation.[37] For that reason, Article V of GATS does not prohibit any member from concluding an agreement liberalising TiS.[38] However, the agreement must be absent any discriminatory tendencies between parties as enshrined in Article XVII.[39] This has facilitated, for example, the SADC Protocol on TiS concluded in 2012 as a result of the SADC Treaty allowing the conclusion of Protocols[40] and GATS to regulate regional liberalising agreements dealing with TiS.[41] This explains why Article V allows the conclusion of RTAs and customs unions, as highlighted above. Although the SACU Agreement does not incorporate services, all its parties signed the SADC Protocol on TiS, and the individual countries took commitments under GATS, as shown in this chapter.

2.3 Services as pronounced by GATS

To begin with, it is important to give a working definition of services under GATS as this is a key concept used in this dissertation. In terms of GATS, services include any services almost in all sectors, excluding services provided in the execution of government authority.[42] There are twelve (12) services sectors in total listed by GATS.[43] These include the following: business services (for example, professional); communication; construction; distribution; environmental; educational; financial;

35. Delimatsis (n 23 above) 19-20.
36. Delimatsis (n 23 above) 28.
37. WTO https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm(accessed 31July 2021).
38. Art V (1) of GATS.
39. Art V (1) (b) of GATS.
40. Art 22 of the SADC Treaty.
41. Art V of GATS.
42. Art 3(b) of GATS.
43. Thailand National Trade Repository WTO Services Sectoral Classification List http://www.thailandntr.com/index.php/en/trade-in-services/WTO-services-sectoral-classification-list(accessed 8 April 2021).

health; recreational; tourism; transport; and other services.[44] Subsequently, the sectors are subdivided into 160 sub-sectors,[45] and legal services are included as professional services within the business.[46] To date, 76 countries have made commitments in legal services[47] , which consist of providing legal advice, legal representation and any activity relating to justice administration by clerks, state advocates, prosecutors and judges.[48]

2.3.1 Modes of services supply

For the reader's benefit, a detailed discussion of the four (4) modes of supply as outlined in Article 1(2) GATS is given.

2.3.1.1 Mode 1 - Cross-border supply

This occurs when a legal service from a territory of one member state is supplied into the territory of another member state:[49] for example when clients receive legal services from a foreign country through the mail or telecommunications devices.[50] In the case of SACU, mode 1 is where a client from Botswana receives legal services through, for example, telecommunication devices or mail from South Africa or any other SACU member state.

2.3.1.2 Mode 2 - Consumption abroad supply

This is whereby a consumer acquires services abroad, sometimes by physically visiting the supplier, for example, tourism services.[51] For this dissertation, in the legal sector, this is understood as a situation where a service consumer: for example, a law

44. WTO 31 January 2013 4 https://www.wto.org/english/tratop_e/serv_e/gsintr_e.pdf(accessed13 August 2021).
45. WTO (n 43 above) 4.
46. WTO (n 43 above) 4.
47. WTO S/C/W/318 14June 2010(10-3212)https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=93951,65273,16540,41871,2539,28812,5291&Curre\ntCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True(accessed 24 August 2021).
48. Services Export Promotion Council 10 January, 2019 https://www.servicesepc.org/services/legal-services/ (accessed 13 August 2021).
49. Delimatsis (n 23 above) 26.
50. JB Cronjé 'The admission of foreign legal practitioners in South Africa: a GATS perspective Tralac Working paper (2013) 6.
51. Art 1(2) (b) of the GATS.

student from Botswana, physically moves into another country's territory (South Africa) to consume or obtain respective services such as an LLB degree or vice versa.[52] This means that the graduate can, upon completion, work in that country or anywhere in the world. This explains why South African graduates are, as an example, immediately accepted in Australia, one of the countries outside the SADC.[53]

2.3.1.3 Mode 3 - Commercial presence

This mode has to do with 'the supply by a service supplier of one Member, through commercial presence in the territory of any other Member'.[54] This is when services are provided from one country to another by establishing a commercial presence in the territory of any other country.[55] One may think of foreign lawyers establishing a permanent presence in a country, for example, a branch office.[56] This also involves establishing an office in a foreign territory and for that reason, its employees may be deployed in foreign countries.

2.3.1.4 Mode 4 –'Temporary movement of natural persons'[57]

This is when a natural person supplies services in the jurisdiction of another state,[58] for example, persons from one member entering the territory of another member to supply services such as legal practitioners. Mode (4) addresses a situation whereby a foreign lawyer enters a country to give any legal services or 'the foreign lawyer flies in temporarily to provide services'.[59] Mode (4) is usually governed by immigration laws and regulations by institutionally independent administrators.[60] This explains why legal experts may be hired and allowed to preside over cases in foreign countries. The mode also relates to independent suppliers and employees of companies supplying services.[61]

52. Cronjé (n 50 above) 6.
53. A Fourie 'Brain Drain and Brain Circulation: A Study of South Africans in the United Arab Emirates' unpublished LLM thesis, University of Stellenbosch Town, 2006 9.
54. Mode 3 is Commercial presence.
55. Art 1(2) (c) of GATS.
56. Cronjé (n 50 above) 6.
57. Art 2(d) of GATS.
58. Art 1(2) (d) of GATS.
59. D Kembe 'A Handbook for International Bar Association Member Bars' May 2002 24 https://www.ibanet.org/MediaHandler?id=4F39B8D5-2110-4A8A-BDAF- 7CB1D7083236 (accessed 24 August 2021).
60. Page 6 WTO 23 March 2005 WTO working paper ERSD 2005.
61. Delimatsis (n 23 above) 26.

2.4 GATS provisions relevant for present purposes

First, Part ll of GATS sets out general rules that apply to all members regardless of entering specific commitments that apply to all service sectors. The key concepts applicable to this study are the general obligations stipulated by GATS. These apply to all members and services sectors and obligations that apply to specific sectors.[62] To this end, for GATS, SACU Members are obliged to adhere to the following obligations relevant to the legal sector.

2.4.1 MFN treatment obligation[63]

The fundamental principle of trade liberalisation is that of non-discrimination at all levels. The two non-discrimination obligations under WTO law are MFN (most-favoured-nation treatment) and National Treatment obligation, and these GATS obligations also find applicability.[64] The MFN obligation is the pillar of WTO law stipulating that:

> With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.[65]

MFN is an obligation that generally applies to all measures by Members affecting TiS. It requires countries not to discriminate between services providers by affording special treatment to service providers of another country.[66] This means that a GATS country is not permitted to discriminate among its trading partners.[67] In short, members must accord equal treatment to like services irrespective of the country of origin. This is called the 'favour one, favour all' principle.[68] MFN also finds general applicability under the SADC Protocol on TiS as non-discrimination applies that all service and

62. WTO Services: Schedule https://www.wto.org/english/tratop_e/serv_e/guide1_e.htm (accessed 12 August 2021).
63. Art II of GATS.
64. Van den Bossche (n 22 above) 40.
65. Art ll:l of GATS.
66. C Hagenmeier *et al* 'The Admission and Enrolment of Foreign Legal Practitioners in South Africa under the Legal Practice Act: International Trade Law and Constitutional Perspectives' (2016)19 *Potchefstroom Electronic Law Journal* 7.
67. Van den Bossche (n 22 above) 40.
68. Delimatsis (n 23 above) 27.

services providers must be afforded equal treatment.[69] This, in short, is the spirit behind equal opportunity policies.

Notably, suppose a member fails to comply with the obligation. In that case, an affected party may institute proceedings under Dispute Settlement Understanding (DSU) or request for consultation to avoid WTO disputes, as highlighted by the request for consultation in terms of Article 4 of DSU as in the case of Saudi Arabia and Qatar.[70] This was after Saudi Arabia prohibited the nationals from Qatari from travelling to and from Saudi Arabia to provide services and supply of digital and other services from Qatar to consumers of Saudi Arabia'.[71] Qatar regarded these measures as a violation of Saudi Arabia's GATS commitments under Article ll: 1 (MFN) as the country did not make MFN exceptions.[72]

2.4.1.1 MFN exception[73]

As a general obligation, the MFN applies to all WTO members, although members were permitted to place legal services on the MFN exception list at the time of signing the WTO Agreement.[74] If a country makes exceptions, it is not bound to comply with the MFN requirement. However, as of 1998, only thirteen (13) countries out of the then hundred and twenty (120) WTO members placed legal services on an MFN exceptions list.[75] This means that most countries are subject to MFN obligation in the legal sector.[76] This also applies to SACU countries discussed in this study, as they did not make any MFN exceptions within the ambit of GATS. The exceptions from MFN are only possible where a country has exempted itself from it or when a country has entered into mutual recognition agreement (Article VII GATS) or where preferential treatment results from regional integration and proper notice has been given.[77] It can be said that whatever commitment any country takes with respect to its commitments

69. Art (4) (1) of the SADC Protocol on TiS.
70. Saudi Arabia - Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights - Request for consultations by Qatar G/L/1182 IP/D/37 S/L/417 WT/DS528/1 | 4 August 2017.
71. As above.
72. As above.
73. Annex on Article II Exemptions.
74. Terry (n 25 above) 1003.
75. Terry (n 25 above) 1003.
76. Terry (n 25 above) 1003.
77. https://www.ialsnet.org/meetings/business/HagenmeierCornelius-SouthAfrica.pdf(accessed16 July 2021).

schedule, it is obliged to adhere to it. In the SADC Protocol on TiS, countries are not prohibited from entering into any new preferential agreements with third countries as stipulated by GATS Article V, provided that the agreement does not impede any objective of the Protocol.[78]

2.4.2 National treatment obligation[79]

The national treatment obligation of Article XVII: I of GATS 'prohibits a country to discriminate against any other country'.[80] The principle is that a country should not have measures which are beneficial to its own domestic services or suppliers.[81] This means that GATS countries are obliged to afford foreign services equal treatment and opportunity like domestic services. The obligation requires members not to discriminate between foreign and domestic service providers.[82] In a situation where national treatment obligation is applicable, foreign products, for example, those that cross the border to another country and enter the domestic market of another country should not be subjected to unfavourable regulations than like domestic services.[83] However, the obligation does not have a general application for measures affecting TiS but only applies to measures affecting TiS when a country explicitly commits itself to apply the obligation.[84] The commitments are provided in the Member's specific commitments. To this end, the imposition of the citizenship, permanent residence and ordinary residence requirement in the Acts dealing with the admission of the foreign legal practitioners acts as a limitation to national treatment envisaged by GATS.[85] The move is that national treatment guarantees that members are granted equal opportunity to compete in all spheres.[86]

2.4.3 Market access[87]

78. Art (4) (3) of the SADC Protocol on TiS.
79. Art XVII of GATS.
80. Van den Bossche & Zdouc (n 22 above) 414.
81. WTO https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm(accessed 23 July 2021).
82. Hagenmeier *et al* (n 66 above) 7.
83. Van den Bossche (n 22 above) 40.
84. Van den Bossche & Zdouc (n 8 above) 403.
85. Van den Bossche & Zdouc (n 8 above) 404.
86. WTO TiS Division 31 January 2013 'The General Agreement on TiS in introduction'https://www.wto.org/english/tratop_e/serv_e/gsintr_e.pdf(accessed 13 August 2021).
87. Art XVI of GATS.

As provided under GATS, market access is subject to negotiation by a member on a sector by sector basis.[88] This explains why WTO members, in their schedules of specific commitments, are required to stipulate the extent to which they grant market access. Once a country has stipulated its commitment, it must extend that treatment to other WTO members.[89] In this respect, only six (6) market access limitations are prohibited, namely, limitation on the total service suppliers allowed; transaction value; quantity of service output; the total of national persons employed and the kind of legal body allowed for any foreign service supplier and the contribution of foreign capital in absolute values.[90]

2.4.4 Domestic regulation[91]

Where a country takes specific commitments in any services sector entered, the member is mandated to guarantee that domestic regulations are governed in an objective, practical and impartial way.[92] Domestic regulations are vital in the legal sector because of the requirement that regulatory measures, such as admission, qualifications or licensing, be regulated objectively and reasonably.[93] There is a need to guarantee that qualification requirement are not burdensome than necessary[94] and are transparent to ensure equality of services.[95] This means that the admission and enrollment of foreigners into the legal framework have to be governed in an equal, impartial and objective way.[96] That is the reasoning behind domestic regulation in the legal sector.

2.4.5 Transparency[97]

88. Islam (n 9 above) 316.
89. Ngubula (n 13 above)13.
90. PH Egger & R Lanz 'The Determinants of GATS Commitment Coverage' (2008) 31 *World Economy* 1666.
91. Art VI of GATS.
92. Art VI(1) of GATS.
93. Terry (n 25 above) 1002.
94. Terry (n 25 above) 1002.
95. Hagenmeier *et al* (n 66 above) 7.
96. Art VI (1) of GATS.
97. Art III of GATS.

To enhance transparency, GATS requires all its members to publish all relevant measures pertaining to it.[98] The rationale is to ensure transparency at all levels.[99] This is one of the reasons why Article III of the GATS requires transparency in all services sectors through publication and exchange of information.[100] This means that all measures: for example, international agreements affecting the operation of GATS need to be published and made readily available to the public.[101]

2.4.6 Recognition[102]

Recognition is one of the key concepts of GATS that apply to legal services. The legal services regulators are required to decide whether to recognise lawyers who are licensed in other jurisdictions. GATS envision that all recognition issues need to be dealt with through the 'mutual recognition agreements' (MRA)negotiated among GATS member states.[103]

2.5 GATS commitments

For GATS, the drive is to liberalise TiS[104] and the services schedule are either horizontal or specific commitments applicable to all or only at particular sectors.[105] When a schedule applies horizontally, it means that it applies to all sectors.[106] In this respect, horizontal limitations are likely to show, for example, restrictive work permits required for foreign professionals.[107] Specific commitments include national treatment (Article XVII), market access (Article XVI) and additional commitments (Article XVIII).[108] In all unlisted sectors, the countries are not bound by any specificlimits implemented.[109] This is because Part lll of the GATS includes the stated specific commitments. When making commitments, countries may select among three commitments: none, bound and unbound.[110] The term none, as used in the schedules,

98. Art III of GATS.
99. Islam (n 9 above) 351.
100. Islam (n 9 above) 351.
101. Islam (n 9 above) 351.
102. Art Vll of GATS.
103. Terry (n 25 above) 1002.
104. Preamble of the GATS. See also Preamble of the SADC Protocol on TiS.
105. WTO https://www.wto.org/english/tratop_e/serv_e/guide1_e.htm(accessed 31 August 2021).
106. Kembe (n 59 above) 5.
107. Page 30 WTO 23 March 2015 staff working paper ERSD 2015-01.
108. Part III of GATS.
109. Egger & Lanz (n 90 above) 1667.
110. Egger & Lanz (n 90 above) 1673.

m implies that there are no limitations placed on the services schedule.[111] On the other hand, bound means that, in some instances, there are partial limitations on a particular mode and unbound means no commitments are made in that particular services sector.[112]

In addition, unbound means the member has refused to provide access to that mode.[113] For that reason, members have to specify all the commitments they negotiated in its schedule, which is a crucial annexure under GATS.[114] As of December 1993, by the closure of negotiations, all countries' commitments schedules were completed by respective GATS members.[115] To date, 76 countries have undertaken commitments in legal services,[116] and each country's schedule is unique. If a member specifies the commitment under GATS, it has to adhere to such, and a violation of the commitment means any member state may institute dispute settlement proceedings given that the DSU applies to all agreements, including GATS.[117]

The schedule consists of four columns: identifies sectors concerned; specifies any restrictions available on national treatment. The other column is on market access, and lastly, it allows for the writing of additional commitments.[118] Each member must expressly state the four (4) supply modes alongside the conditions and limitations on market access[119] and national treatment.[120] A member is expected to propose, in some instances, the duration for implementation of such commitment and grant market access which is the liberalising GATS tool together with national treatment.[121] This means that these commitments must be undertaken for each of the four (4) modes, as stated earlier.[122] The thinking is that once a country commits itself to any sector, it is not expected to introduce any discriminatory measures except when such a measure

111. Ngubula (n 13 above) 30.
112. Ngubula (n 13 above) 30.
113. Kempe (n 59 above) 24-25.
114. Cronjé (n 50 above) 3.
115. D Kembe (n 59 above) 5.
116. WTO S/C/W/318 14June2010 (10-3212)https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=93951,65273,16540,41871,2539,28812,5291&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True(accessed 24 August 2021).
117. Delimatsis (n 23 above) 19.
118. WTO https://www.wto.org/english/tratop_e/serv_e/guide1_e.htm(accessed 24 August 2021).
119. Art XVI of the GATS.
120. Art XVII of the GATS.
121. Delimatsis (n 23 above) 28.
122. Art I of the GATS.

is listed explicitly in the member schedules.[123] This seems to be the reasoning behind these ratifications under GATS, the regulating agreement.

2.6. The SADC treaty and Protocol pertinent to harmonisation

To meet GATS obligations, the countries also signed the SADC Protocol on TiS with a raft of measures to promote regional integration. To a greater extent, the Protocol resonates with the GATS agreement. The SADC Treaty allows the conclusion of Protocols to promote harmonisation in the region. This is stipulated in the aims of the SADC Treaty that the countries seek to achieve growth through regional integration, harmonisation and cooperation.[124] All countries are encouraged to participate in projects and policies of the region.[125] For the countries to fulfil the aims of SADC, they are not to discriminate against any country based on nationality, political affiliation, gender, or religion.[126] In light of the SADC objectives, it could be said the treaty seeks to harmonise the region. This means that the region acknowledges a need for cooperation between law societies in SADC countries. As all the countries have committed to at least one sector under GATS, the SADC region, given its objectives, has some ratifications it has to do to open up space to international players as well.

2.7 GATS commitments made by individual SACU Member states

2.7.1 Preliminary remarks

The study's primary focus is on SACU countries, and for that reason, the chapter gives an overview of GATS commitments taken by Botswana, Eswatini, Namibia and South Africa. This chapter does not include Lesotho, one of the SACU countries, as the country is used as a model in chapter four (4). The chapter also discusses the countries' commitments in other professions such as architecture, engineering, medicine, etc., and legal services. This chapter is related to the discussion in Chapter Four (4), focusing on why the legal sector is the least liberalised and why the legislature imposes such strict requirements. All the countries discussed in this chapter are GATS members and seek to fulfil the aspirations of SADC as a body driving towards harmonisation, integration and cooperation. The chapter also provides the

123. Cronjé (n 46 above) 4.
124. Art 5 of the SADC Treaty.
125. Art 5(2) (b) of the SADC Treaty.
126. Art 6 of the SADC Treaty.

basis for looking at what is going on in SACU countries, discussed in alphabetical order starting with Botswana and closing with South Africa.

2.7.2 Botswana

Botswana was a former British Protectorate and gained independence in 1966.[127] As a result of colonialism, she adopted a mixture of Roman Dutch law, informed mainly by English and customary Law.[128] This sets the country apart from other SACU countries discussed in this dissertation. The legal system is dual, which means that the country needs to ratify all treaties and international agreements before being domesticated and integrated into national legislation.[129] Therefore treaties to which Botswana is a party become binding only after they have been made into law by an Act of Parliament.[130] The country also signed the SADC Protocol on TiS, committing itself to reaffirm the commitments and rights of countries under the WTO/GATS.[131] In 1969, the country also signed the SACU Agreement.[132] Botswana has been a WTO/GATS member since May 1995.[133] The country did not take any commitments on legal services.[134] The country took binding commitments under GATS on August 30, 1995.[135] The next section highlights Botswana's GATS obligations.

2.7.2.1 Botswana's GATS commitments

Botswana has made three commitments in services sectors: business, communication, and tourism.[136] In professional services, which fall under business,

127. L Booi 'Botswana's Legal System and Legal Research' October 2006 https://www.nyulawglobal.org/globalex/Botswana.html(accessed 15 October 2021).
128. Booi (n 128 above).
129. https://issafrica.org/chapter-4-country-study-i-botswana-lee-stone(accessed 15 October 2021).
130. https://www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/Bostwana.pdf (accessed 15 October 2021).
131. Preamble of the Protocol on TiS.
132. SACU https://www.sacu.int/show.php?id=394(accessed 15 October 2021).
133. Botswana and the WTOhttps://www.botswanamission.ch/wto/(accessed 7 September 2021).
134. GATS/SC/109https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=20035&CurrentCatalogueIdIndex=0&FullTextHash=(accessed 7 August 2021).
135. As above.
136. As above.

the country made sectoral commitments in engineering, medical and dental, veterinary, etc., excluding legal services.[137] What is important to note is that the country does not provide any explanation for excluding this sector under its commitments schedule.

2.7.2.2 Horizontal commitments

The country made horizontal commitments in all sectors with no restrictions on market access for modes 1 and 2. However, limitation on national treatment is placed on these modes.[138] In all modes, judicial persons should have a license and must be registered by the Registrar of Companies.[139] On the other hand, mode 4 is the most restricted in all Botswana sectors, and entry and residenc are subject to immigration laws and procedures.[140] The requirement is that any foreigner seeking employment in that country is subjected to the labour laws and policies. For a foreigner to work in the country, they require a residence and permit.[141] This is no exception to the legal fraternity as all professionals are mandated to register with the appropriate regulatory body: for example, the Law Society of Botswana. It is only on admission that foreign lawyers can practise in the country. Foreign firms can establish themselves. However, the requirement is that the firm should have a local member on board as affirmative action.[142] In the DLA Piper and the African network AB & David, a foreign firm working with a local firm, a local member was appointed to meet this condition.[143]

The country, however, puts no explicit measures on fly-in or the fly-out of advisory practice in Botswana.[144] On the other hand, foreign lawyers from most Commonwealth countries do not require visas to visit Botswana to consult with their clients. However, work permits are required for any commercial activity conducted by foreign lawyers, as highlighted in the country's horizontal commitment that a foreigner requires residence and permit.[145] The requirement that legal practitioners from other jurisdictions must have permanent residence constitutes a national treatment and

137. As above.
138. As above.
139. As above.
140. As above.
141. As above.
142. https://www.ibanet.org/PPID/Constituent/Bar_Issues_Commission/ITILS-Botswana (accessed1 November 2021).
143. As above.
144. As above.
145. As above.

market access limitation. This means that, by requiring residence and work permits, Botswana is not very restrictive despite not having committed to legal services by GATS.

2.7.2.3 Business as professional services

The professional services in mode 3 are the most restricted in national treatment. Mode 3 has market access limitations as well: for example, architectural services in mode 3 and 4 are restricted.[146] In mode 3, architects are allowed national treatment as long as the qualification of a foreign professional employed in the company is recognised by the relevant legislative council, the Architects Association of Botswana.[147] For all professional services, there is no limitation in mode 2 but all unbound in Mode 1.[148] Engineering, integrated engineers, medical and dental services are allowed national treatment under mode 3,[149] but the qualification of the foreign national should be recognised by the relevant legislation.[150] In medical services, the condition is that foreigners employed in hospitals or clinics are required to have the necessary qualification approved by the Medical Council of Botswana under the Ministry of Health.[151]

In mode 4, the country does not provide market access to foreigners but allows national treatment for medical and dental practitioners, provided they have been registered with the Medical Council of Botswana.[152] Despite not committing itself to the legal services and the obligations on market access, Botswana, as argued in the next chapter, has to comply with the general GATS obligations. These are discussed in Chapter One, the MFN, national treatment, recognition standards (Article VII) and domestic regulation envisaged in Article VI of GATS. All WTO members are bound by GATS whether scheduled commitments are entered or not entered by each respective country.[153] In specific commitments in the legal service sector, Botswana and Eswatini have made no GATS commitments in legal services. However, the movement of

146. As above.
147. As above.
148. As above.
149. As above.
150. As above.
151. As above.
152. As above.
153. Cronjé (n 50 above) 8.

natural persons in the country 'is subject to immigration laws, policies and procedures'.[154]

The country has about twenty-three subsectors, and most sectors are restricted in their market access.[155] Health professionals such as nurses, midwives, physio-therapists and para-medical personnel are allowed to have commercial presence provided that the qualification is recognised by the regulatory body of the Botswana Medical or Nursing Council.[156] The same concession, of course, is not extended to legal professionals.

2.7.2.4 Communication services

All courier services have no limitations for the first and second mode on national treatment in communication services. The country does not impose any restriction market access on courier services. These modes have no limitation on national treatment for commercial courier services.[157] However, all courier services supplied through commercial presence (mode 3) have to meet all residence requirements.[158] This means that communication services are restricted in the last mode 4.[159]

2.7.2.5 Tourism and travel-related services

The conclusion is that tourism is the most liberalised sector especially travel agencies and tour operators. This is because one would think, the country is well known for its scenic environment, having one of the finest tourist and wildlife attractions in the world. For all hotel services, mode 1 is not restricted on market access.[160] There is no restriction for tourism for mode 1 for national treatment. On the other hand, the supply of services under mode 3 is limited for national treatment.[161] In mode 4, all persons entering the country must comply with horizontal commitments. This means that tour

154. N Khumalo 2007Trade Policy Report No. 16TiS: From Controlling to Managing the Movement of Persons in SADC 16 https://saiia.org.za/wp-content/uploads/2013/06/16-trade_report_no16.pdf (accessed 24 August 2021).
155. GATS/SC/109https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=20035&CurrentCatalogueIdIndex=0&FullTextHash=(accessed 7 August 2021).
156. As above.
157. As above.
158. As above.
159. As above.
160. As above.
161. As above.

operators and travel agencies are allowed market access in modes 1, 2 and 3 except for mode 4.[162] There are no national treatment limitations in modes 2 and 3 for tour services.

The above discussion may explain why the influx of foreign lawyers to Botswana in the previous years has slowed down and nearly halted., The government is not renewing or giving permits to foreigners except in very exceptional cases. The position is that they have to employ locals, train them and leave Botswana except for directors and shareholders who may remain in the interim.

2.7.3 Eswatini

Eswatini, formerly known as Swaziland, is the only remaining absolute monarchy in sub-Saharan Africa.[163] The country, just like other SACU countries discussed in this dissertation, is a former British Protectorate that gained independence in September 1968.[164] Eswatini signed the SACU Agreement in 1969,[165] SADC (1980), COMESA (1981) and WTO (1995).[166] The legal system is dual, with the Roman Dutch Common Law and Swazi customary law in force.[167] These laws are applied side by side with uncodified 'Swazi law and custom' applied and interpreted wholly by Swazi courts established under Swazi Courts Act.[168] However, in a situation where Swazi law applies and is inconsistent with any provision envisaged in the Constitution[169] (herein Constitution of Eswatini) or repugnant to natural justice,[170] 'the customary law shall, to the extent of that repugnancy, be void'.[171]

As a dual system, international and domestic law are the legal systems applicable upon ratification by an Act of Parliament.[172] The legal effect of ratification is

162. As above.
163. Amnesty International https://www.amnestyusa.org/countries/swaziland/(accessed 10 September 2021).
164. Swaziland Legal tradition https://www.icj.org/cijlcountryprofiles/swaziland/swaziland-introduction/swaziland-legal-tradition/(accessed 15 October 2021).
165. SACU https://www.sacu.int/show.php?id=394(accessed 15 October 2021).
166. https://www.intracen.org/country/swaziland/(accessed 23 July 2021).
167. Sec 252 (1)(2) Constitution of Eswatini.
168. Swazi Courts Act No. 80 of 1950.
169. The Constitution of the Kingdom of Eswatini Act 2005.
170. Sec 252(3) Constitution of Eswatini.
171. B Dube et al 'The Law and Legal Research in Swaziland' August 2016 https://www.nyulawglobal.org/globalex/Swaziland1.html(accessed 1 November 2021).
172. Sec 238(2) (a) Constitution of Eswatini.

that the international agreement becomes binding upon the country.[173] The country automatically assumes rights and obligations, and the international agreement becomes part of the country's law.[174] Like in Botswana, Lesotho and South Africa, Eswatini has a supreme Constitution with an entrenched Bill of Rights Charter.[175] Section 238 of the Constitution of Eswatini empowers the Government to execute international agreements in the name of the Crown.[176] According to the constitution, international agreements include a treaty, protocol or convention.[177] The Attorney General peruses and drafts all treaties and agreements in which the government is a signatory.[178] To this end, the WTO/GATS Agreements became binding for Eswatini beginning in 1995 when the country joined WTO,[179] and on April 15, 1994, when the country made GATS commitments, respectively.[180] When dealing with any international relation, the country is obliged to protect its interest and settle all international disputes peacefully.[181] The country is also urged to uphold the rules and principles of all international organisations of which it is a member,for example, WTO and GATS.[182]

2.7.3.1 Eswatini GATS commitments

Eswatini made commitments in business, health and tourism services.[183] The business sector comprises professional services including but not limited to these services: engineering; computer; research and development; medical and dental;

173. Sec 238(2) (a) Constitution of Eswatini.
174. Sec 238(4) Constitution of Eswatini.
175. Sec 2 Constitution of Eswatini.
176. Sec 238(1) Constitution of Eswatini.
177. Sec 238(6) Constitution of Eswatini.
178. Sec 77(5) (b) Constitution of Eswatini.
179. https://www.intracen.org/country/swaziland/(accessed 23 July 2021).
180. GATS/SC/81 15 April 1994 https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=26607&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True(accessed 23 July 2021).
181. Sec 236(1) (c) Constitution of Eswatini.
182. Sec 236(1) (d) Constitution of Eswatini.
183. GATS/SC/81 15 April 1994 https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=26607&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True (accessed 23 July 2021).

other business; management; and consulting and technical testing services.[184] There are no restrictions on national treatment in all sectors; however, some are restricted on market access.[185]

2.7.3.2 Business services

Eswatini does not allow market access in mode 1(cross border supply) for engineering services.[186] However, there are no market access limitations for modes 2 and 3. As in mode 1, the presence of natural persons (mode 4), market access is restricted except for senior qualified chartered engineers.[187] There is no national treatment limitation for engineering services in all 4 modes.[188] This means that engineering services are freely accessed with no unnecessary national treatment limitation as imposed in other sectors in all the modes. Integrated engineering services are restrictions in mode 1, and no market access restrictions are placed for modes 2 and 3.[189] There is no restriction for market access in integrated engineering in mode 4, and the country does not allow persons from another country to enter Eswatini to supply integrated engineering services except if the person holds a higher degree that is not locally available.[190] The country does not have any national treatment limitations in all the four modes for integrated engineering.

Eswatini allows market access to medical and dental services in modes 1 and 4 but only for specialist doctors.[191] This means that market access is the most limited for professional services except for specialist medical services.[192] All hospital services in modes 2 and 3 have no market access and national treatment limitations except in modes 1 and 4, which are open only to specialist medical personnel.[193]

In all consultancy services involving computer hardware installation, no market access limitation for modes 1, 2 and 3.[194] However, mode 4, as in other professional services, is the most restricted except market access is afforded to senior computer

184. As above.
185. As above
186. As above.
187. As above.
188. As above.
189. As above.
190. As above.
191. As above.
192. As above.
193. As above.
194. As above.

engineers with specialised skills not available in the country.[195] There is no national treatment limitation for consultancy services in all the four modes in Eswatini.[196]

2.7.3.3 Other business services

In management and consulting services, market access in modes 1 and 4 is limited and only persons with senior university degrees, or professional training are given preferential treatment.[197] The country has no national treatment limitation for all the fourmodes in this services sector. On the other hand, technical testing and analysis services in mode 1 are unbound for market access.[198] In addition, there are no restrictions on market access for modes 2, 3 and 4. Notably, there are no national treatment limitations for all the four modes in management and consultancy. To this end, it shows that this sector has managed to open up in all four modes to afford national treatment.

2.7.3.4 Health-related and social services

All hospital services in modes 1 and 4 are restricted on market access except that natural persons are only allowed in Eswatini for specialist doctors under mode 4.[199] There is no national treatment limitation for all the four modes under this sector as the country has taken a stance to train its doctors to fill in the vacancies currently occupied by foreigners.

2.7.3.5 Tourism services

For the tourism sector, all hotel and restaurant services are liberalised. The country allows market access from modes 2 and 3. No national treatment restrictions for mode 2 and mode 3.[200] However, market access is restricted for mode 4 except for senior managers and executives. For all the four modes of supply, national treatment is not limited.[201]

195. As above.
196. As above.
197. As above.
198. As above.
199. As above.
200. As above.
201. As above.

Eswatini does not take specific commitments under the legal services sector and, just like Botswana, has to comply with the general obligations under GATS. The observation is that Eswatini has made no limitation to national treatment in all service sectors under the GATS.[202] However, as a member of the SADC and as a signatory to the SADC Protocol on TiS, the country is obliged to adhere to the treaty. The country did not take any horizontal commitments in Mode 4.[203] To this end, no national treatment limitation is placed on any of these sub-sectors except for market access.[204]

2.7.4 Namibia

Most countries in SACU gained their independence around the 1960s, but this was not the case for Namibia, officially called the Republic of Namibia. The country, formerly called the 'German South West Africa, was a German colony from 1884-1890'.[205] However, the German rule lapsed around 1915 after a defeat by South Africa, which administered the country until it gained independence in 1990.[206] Namibia has been a member of the WTO since January 1995.[207] The country took GATS commitments on April 15th, 1994.[208] After gaining independence in 1990, the country then joined SACU.[209] As a result of colonial rule, the country's legal system is characterised by legal pluralism. The legal system consists of Roman law, Roman Dutch law, English law and indigenous customary law.[210]

The country's Constitution, referred to as the '*Mother of All Laws',*[211] is regarded as a democratic document, and Namibia adopts the monist legal tradition. The President of Namibia is empowered to conclude trade agreements binding the country

202. As above.
203. N Khumalo 2007 Trade Policy Report No. 16TiS: From Controlling to Managing the Movement of Persons in SADC 19 https://saiia.org.za/wp-content/uploads/2013/06/16-trade_report_no16.pdf (accessed 24 August 2021).
204. Ngubula (n 13 above) 31.
205. RH Green 'Namibia' Sep 24, 2021 https://www.britannica.com/place/Namibia (accessed 1 November 2021).
206. https://www.rhinoafrica.com/en/destinations/namibia/facts-and-information/history/77538(accessed 1 November 2021).
207. WTO https://www.wto.org/english/thewto_e/countries_e/namibia_e.htm (accessed 15 October 2021).
208. GATS/SC/60 15 April 1994 (94-1057) http://www.esf.be/pdfs/GATS%20UR%20Commitments/Namibia%20UR%20SoC%20.pdf (accessed 24 August 2021).
209. C McCarthy 'The Southern African Customs Union in Transition' (2003) 102(409) *African Affairs* 611.
210. C. Ruppel & K Ruppel-Schlichting (n 6 above) 36.
211. C. Ruppel & K Ruppel-Schlichting (n 6 above) 37.

after ratification by the Parliament.[212] The binding agreements include all trade agreements ratified by the country.[213] Upon ratification, these agreements also form part of the laws governing the country.[214] The courts and national authorities directly apply international law at the national level before taking the case before regional or international judicial bodies.[215] However, all international laws have to be in line with the constitutional provisions to apply domestically, and where an international law rule is inconsistent with the Constitution, the latter prevails.[216] The Executive must manage international engagements, including entering into international agreements.[217] With the assistance of the Cabinet, the President signs and negotiates international agreements binding the country or by the powers vested in him or her delegate such to act on his or her behalf.[218] Article 32(3), 40(1), and 63(2) (e) of the Constitution incorporates provisions for concluding international agreements.[219] International law needs no legislative act to become a law of the country.[220] The main sources of international law binding in the country are 'public international law and international agreements'.[221]

2.7.4.1 Namibia's GATS commitments.

On the other hand, the country has made commitments in business and tourism.[222] The country made horizontal commitments in all sectors.[223]

2.7.4.2 Horizontal commitments

212. WTO WT/TPR/G/114 (03-1631) 24 March 2003 13.
213. Art 143 Constitution of Namibia.
214. Art 144 Constitution of Namibia.
215. C. Ruppel & K Ruppel-Schlichting (n 6 above) 37.
216. C. Ruppel & K Ruppel-Schlichting (n 6 above) 37-38.
217. C. Ruppel & K Ruppel-Schlichting (n 6 above) 38.
218. C. Ruppel& K Ruppel-Schlichting (n 6 above) 38.
219. C. Ruppel& K Ruppel-Schlichting (n 6 above) 38.
220. Art 144 Constitution of Namibia.
221. Art 144 Constitution of Namibia.
222. GATS/SC/60 15 April 1994(94-1057)http://www.esf.be/pdfs/GATS%20UR%20Commitments/Namibia%20UR%20SoC%20.pdf (accessed 24 August 2021).
223. As above.

For market access, in all services sectors, commercial presence (Mode 3) requires the foreign service provider to establish a business locally in compliance with the Companies Act 61 of 1973.[224] The same rights are afforded to both companies with foreign investment and domestic enterprises in the country. For mode 4, the entry and residence of foreigners, especially services providers, are subject to the country's labour laws and the Immigration Control Act of 1993.[225] In mode 3, foreigners can render a service by establishing a business locally in line with the Companies Act 61 of 1973.[226] The employment of foreigners for implementation of foreign investment is decided by contracting parties, subject to approval by the government[227] and foreigners are employed in expert and management positions only.[228]

2.7.4.3 Business services

No limitations are placed on national treatment on all these sectors for business.[229] The country has also not restricted market access to business services. However, Namibia did not make commitments in the legal services sector like in other SACU member states such as Botswana and Eswatini. Namibia is the third SACU country not to commit itself fully to this sector.

2.7.4.4 Tourism services

The tourism sector is fully liberalised in Namibia in all four supply modes. There is no limitation on national treatment in all the four modes[230], , which makes the country liberalised, unlike the other countries. fourThere is no limitation in all the four modes in national treatment and market access for hotel and restaurant services.[231] Travel agencies and tour services are fully liberalised with no restrictions on all the modes. From this presentation, it is evident that, compared to legal services, these sectors are somehow relaxed in this country.

2.7.5 South Africa

224. As above.
225. As above.
226. As above.
227. As above.
228. As above.
229. As above.
230. As above.
231. As above.

South Africa joined WTO in 1995, and the Agreements bind the country at international law.[232] The country undertook specific GATS commitments on April 15, 1994.[233] In the decided case of *Progress Office Machines v SARS,*[234] it was highlighted that the country is a signatory to GATT and WTO Agreement which became binding after approval by Parliament in April 1995.[235] The enactment of the International Trade Administration Act (ITAA)[236] and Anti-Dumping Regulations promulgated under section 59 of ITAA aim to give effect to the provisions of treaties binding on the country in international law.[237] The Constitution provides that international agreements should be used to interpret domestic law.[238] South Africa is a GATS membercommitted to liberalising TiS under WTO and the GATS.[239] The country also joined SADC (1994)[240] and SACU (1969)[241] , and all international agreements are binding and enforceable by the Constitution.

The Constitution stipulates that customary international law becomes law unless it is inconsistent with either the Constitution or an Act of Parliament.[242] This approach is monist.. The country adopts a dualist approach when dealing with the domestic effect of international treaties. Notably, it is only upon ratification that international obligations are created.[243] The dualist system requires that only after a treaty has been incorporated into domestic law will any obligation therein become applicable domestically.[244] The effect of international law on South African municipal law is provided for in sections 231, 232 and 233 of the Constitution. Section 231(4) states

232. SA and the WTO https://www.wto.org/english/thewto_e/countries_e/south_africa_e.htm (accessed 9 August 2021).
233. General Agreement on Trade in Services GATS/SC/78 15 April 1994 (94-1075) https://www.wto.org/ENGLISH/TRATOP_E/serv_e/telecom_e/sc78.pdf(accessed 2 September 2021).
234. *Progress Office Machines v SARS* [2007] SCA 118 (RSA).
235. *Progress Office Machines v SARS [2007] SCA 118 (RSA)*para 6
236. International Trade Administration Act 71 of 2002.
237. Progress Office Machines v SARS [2007] SCA 118 (RSA)para 6.
238. Ndlovu (n 5 above) 289.
239. Cronjé (n 50 above).
240. http://www.dirco.gov.za/foreign/Multilateral/africa/sadc.htm(accessed 1 November 2021).
241. C McCarthy 'The Southern African Customs Union in Transition'(2003) 102(409) *African Affairs* 611.
242. Sec 232 Constitution of South Africa.
243. South Africa Law https://unimelb.libguides.com/c.php?g=929734&p=6718239(accessed 15 October 2021).
244. South Africa Law https://unimelb.libguides.com/c.php?g=929734&p=6718239(accessed 15 October 2021).

that; 'any international agreements become binding law in the country when enacted into law by national legislation'.[245]

When courts interpret the Constitution and the Bill of Rights, there is a need to promote democratic values of the society premised on human dignity and equality[246] as well as considering international and foreign law.[247] The courts must uphold the spirit and object and purport of the Bill of Rights Chapter when interpreting legislation.[248] In *S v Makwanyane,*[249] the Constitutional Court held 'that reference to international law in this provision includes both binding and non-binding international law'.[250] On the other hand, the *Progress Office Machines* case[251]contributed to jurisprudence by clarifying whether or not the WTO Anti-Dumping Agreement is applicable in the country in the absence of an express legislative provision domesticating it.[252] In *International Trade Administration Commission v SCAW South Africa (Pty) Ltd,*[253] it was held that the Anti-dumping Agreement binds the country in international law despite not having been enactedinto municipal law.[254]

According to *Progress Office Machines,'*[255] the country, as WTO member, is bound by the obligations provided in the Agreement on the implementation of the Anti-Dumping Agreement under Article VI of the GATT.[256] This means that the country complies with its international trade obligations by enacting domestic legislation, including the International Trade Administration Act[257] and its Anti-Dumping Regulations regulating the requirements for imposition of anti-dumping duties.[258]

2.7.5.1 South Africa's GATS commitments

245. Sec 231(4) Constitution of South Africa.
246. Sec 39(1) (a) Constitution of South Africa.
247. Sec 39(1) (b) Constitution of South Africa.
248. Sec 39(2) Constitution of South Africa.
249. *S v Makwanyane* [1995] (3) SA 391 (CC).
250. *S v Makwanyane* [1995] (3) SA 391 (CC) para 35.
251. *Progress Office Machines v SARS* [2007] SCA 118 (RSA).
252. Ndlovu (n 5 above) 297.
253. *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* (CCT 59/09) [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) (9 March 2010).
254. *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* (CCT 59/09) [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) (9 March 2010) para 25.
255. *Progress Office Machines v SARS* [2007] SCA 118 (RSA).
256. *Progress Office Machines v SARS* [2007] SCA 118 (RSA) para 5.
257. International Trade Administration Act 71 of 2002.
258. *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* (CCT 59/09) [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) (9 March 2010) para 2.

As the biggest 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.[259] South Africa made horizontal commitments, but modes 3 and 4 are restricted in sectors.[260] South Africa imposes a time limit on the presence of natural persons providing a service in the country. Therefore, like Lesotho and the Republic of Seychelles, South Africa has made commitments under legal services, as shown below.

2.7.5.2 Business services: Legal as Professional services

The country made commitments in the legal sector under professional services. The commitments made in the legal fraternity allow national treatment and market access only for intra-corporate transferees, executives, specialists, professionals and managers engaged in legal services.[261] For legal services, the country has made commitments to supply services in modes 3 and 4 only.[262] The country allows advisory services only in domestic, foreign and international law.[263] In Mode 3, the country does not have any market access or national treatment limitation for advisory services in international and foreign law.[264] On the other hand, the country only limits mode 4 except to the extent highlighted in the horizontal sector.[265] The country prohibits advocates from forming partnerships.[266] 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,providing equal opportunities.[267] Similarly,the supply of foreign legal market access is also restricted for the supply of domestic law under mode 4 in both market access and national treatment.

259. General Agreement on Trade in Services GATS/SC/78 15 April 1994 (94-1075) https://www.wto.org/ENGLISH/TRATOP_E/serv_e/telecom_e/sc78.pdf (accessed 2 September 2021).
260. As above.
261. Cronjé (n 50 above) 7.
262. General Agreement on Trade in Services GATS/SC/78 15 April 1994 (94-1075) https://www.wto.org/ENGLISH/TRATOP_E/serv_e/telecom_e/sc78.pdf(accessed 2 September 2021).
263. As above.
264. As above.
265. As above.
266. As above.
267. As above.
268. As above.

This means that South Africa restricts legal services in modes 1 and 2. To this end, the country is not restricted from limiting legal services supply in modes 1 and 2.[268] In said modes, the country did not make commitments in the legal sector and is not prohibited from restricting the supply of legal services in modes 1 and 2.[269] There is no national treatment or market access taken by the country on mode 1 or 2.[270] This is not the case for engineering, urban planning, medical and dental services. This is because modes 1 and 2 do not have limitations for market access or national treatment in the country.[271] This shows that the legal profession is restricted in one way or the other. Making commitments under mode 3 and 4 means that the country allows foreign legal practitioners from other SACU countries to have a commercial presence (mode 3) and transfer practitioners to the country.[272]

The country also committed itself to allowing foreign law firms' commercial presence (mode 3). This means that the country has managed to liberalise and this commitment restrict South Africa from introducing measures on market access and national treatment.[273] A foreign law firm can establish a practice in the country to provide legal representation to clients for any service concerning 'domestic law and legal advisory services on domestic, foreign and international law'.[274] These foreign law firms are also allowed to transfer any professional staff under mode 4. However, this is for a limited timeframe for about three (3) years.[275] The condition is that the employee must hold the necessary professional and academic qualifications recognised by the South African professional body.[276]

South Africa has also made GATS commitments to apply the national treatment and market access without any limitation under mode 3, for example, establishing a permanent business presence in that country. This may include the opening of of a branch office in the country. The country committed itself to applying the market access under mode 4 sanctioned on the condition that such natural persons are

269. Cronjé (n 50 above) 6.
270. Cronjé (n 50 above) 6.
271. Cronjé (n 50 above) 6.
272. General Agreement on Trade in Services GATS/SC/78 15 April 1994 (94-1075) https://www.wto.org/ENGLISH/TRATOP_E/serv_e/telecom_e/sc78.pdf (accessed 2 September 2021).
273. https://www.tralac.org/files/2013/10/S13WP112013-Cronje-Admission-of-foreign-legal-practitioners-in-SA-20131002-fin.pdf (accessed 16 July 2021).
274. Cronjé (n 50 above) 6.
275. Cronjé (n 50 above) 6.
276. Cronjé (n 50 above) 6.
277. Cronjé (n 50 above) 8.

intra-company transferees.[277] The reason is that South Africa did not make any commitments under Modes 1 and 2 in the legal services sector.[278] For this reason, the country is not prohibited fromrestricting the supply of legal services for mode 1 and 2.[279] However, South Africa can introduce limitations on mode 1 in legal services and consumption abroad only to the extent that there is absence of discrimination against all countries.[280] Sincecountries took specific commitments in legal services, the obligations on market access (Article XVI) and national treatment (Article XVII) Botswana, Eswatini, Lesotho, Namibia and South Africaare mandated to adhere to the non-discrimination obligation in the context ofthe MFN treatment,[281] recognition of qualifications[282] and domestic regulation.[283] These general obligations apply to all members and bind them whether commitments have been taken or not in each sector.[284]

For auditing services classified as professional services, no restrictions are imposed in modes 1 and 2 for market access. South Africa does not impose national treatment restrictions for professional services. However, market access is granted for auditing services under mode 3 and the issue of citizenship is essential in order for natural persons to get national treatment under mode 3.[285] On the other hand, mode 4 is restricted to market access and national treatment for auditing services but not in the horizontal sector.[286]

In addition, taxation services including all legal services, are liberalised as market access and national treatment is granted to all cross border supply, consumption abroad and commercial presence except for the restricted presence of natural persons (mode 4).[287] The engineering, integrated, landscape architectural and urban planning services have no market access ornational treatment limitations like what obtains , in

278. General Agreement on Trade in Services GATS/SC/78 15 April 1994 (94-1075) https://www.wto.org/ENGLISH/TRATOP_E/serv_e/telecom_e/sc78.pdf (accessed 2 September 2021).
279. As above.
280. As above.
281. As above.
282. Art II of the GATS.
283. Art VII of the GATS.
284. Art VI of the GATS.
285. Cronjé (n 50 above) 8.
286. General Agreement on Trade in Services GATS/SC/78 15 April 1994 (94-1075) https://www.wto.org/ENGLISH/TRATOP_E/serv_e/telecom_e/sc78.pdf (accessed 2 September 2021).
287. As above.
288. As above.

legal services.[288] This is because, cross-border supply, consumption abroad and commercial presence are permitted in all these modes except mode 4.[289] This mode is limited except to extent that is provided in horizontal commitments.[290]

For veterinary, medical and dental services, there are no limitations for national treatment and market access for mode 1, 2 and 3 except for mode 4.[291] However, services provided in the health sector by midwives and nurses, cross border supply (mode 1) is restricted for both national treatment and market access.[292] However, for midwives and nurses, no limitation is placed on commercial presence or consumption abroad in supply of their services.[293] There are, however, limitations on national treatment and market access in mode 4.[294] For physiotherapist and paramedics, there are no limitations on mode 3, but modes 1, 2 and 4 are restricted.[295]

The computer services, categorised under consultancy (relating to installation of computer hardware), data processing, data base, software implementation, maintenance and repair of office equipment's (e.g. computers) all have no market access or national treatment mode 1, 2 and 3 except for mode 4, the most restricted not only in the supply of computer related services but also health as highlighted above.[296] In the real estate business South Africa committed to provide market access and national treatment for mode 1, 2 and 3.[297] The presence of natural persons (mode 4) is restricted to some extent as indicated in horizontal sector.[298] When real estate services are provided on a contractual or fee basis, no market access or national treatment restrictions are placed on cross border supply, consumption abroad or commercial presence except the presence of natural persons (mode 4), to an extent, as indicated in horizontal section.[299]

On the supply of services relating to ships, no market access or national treatment limitation is placed on modes 1, 2 and 3 except for mode 4.[300] All services

289. As above.
290. As above.
291. As above.
292. As above.
293. As above.
294. As above.
295. As above.
296. As above.
297. As above.
298. As above.
299. As above.
300. As above.
301. As above.

relating to aircraft, transport and equipment andmachinery have no limitation on mode 1, 2 and 3 except for mode 4 to the extent as indicated in horizontal section. All other business services are liberalised except in mode 4 which is the most restricted.[301]

2.7.5.3 Communication services

South Africa also made commitments in communication services to allow all couriers to freely supply services under modes 1, 2 and 3 without any market access or national treatment limitation.[302] Restrictions are only on mode 4 except, as indicated, in horizontal commitments.[303] All telecommunication services including electronic mail, code and protocol conversation, electronic data interchange, voice mail, online information, data base retrieval, enhanced facsimile services, and data processing have no national treatment limitation for mode 1, 2 and 3 except for mode 4.[304] However, there are general market access limitations for modes 1, 2 and 3 in the supply of these telecommunication services.[305] Limitations are placed on the bypass of the county's facilities for routing of international and domestic traffic.[306] In South Africa, Telkom is acting as a *de facto* regulator because of the agreements entered with VANS providers in that country.[307] It is only with the consent of Telkom SA Ltd that VANS can provide international services.[308] At the time of writing this dissertation, plans were underway to introduce a regulator to take the licensing function. In all the telecommunication services which the country has committed under GATS, mode 4 is restricted in market access and national treatment except as provided in the horizontal section.[309]

2.7.5.4 Construction and Related Engineering services

All construction services are not allowed cross border supply (mode 1) for both market access and NT.[310] These services include general construction such as building, civil

302. As above.
303. As above.
304. As above.
305. As above.
306. As above.
307. As above.
308. As above.
309. As above.
310. As above.
311. As above.

engineering, installation, assembling and building completion work.[311] For all these services, in mode 2 and 3 there is no limitation on NT and market access except restrictions placed on mode 4.[312]

2.7.5.5 Distribution services

The distribution sector is liberalised with no limitations on market access and NT for cross boarder supply, commercial presence and consumption abroad. What this means is that, wholesale trade, franchising and retailing services are not limited.[313] The restriction is on 4 (presence of natural persons) as indicated in the horizontal sector.[314]

2.7.5.6 Environmental services

In environmental services such as refuse disposal, sewage, sanitation and other (cleaning) services, there are no limitations on market access and NT for mode 1, 2 and 3 except for mode 4.[315] For sewage services no market access limitations are imposed in mode 1 to 3, except 4. National treatment limitation is only imposed in mode 4, and, the other modes are not restricted. Refusal services have no market access limitation in mode 1, 2 and 3 except 4. The country does not impose national treatment limitation on the modes except 4.[316] In all sanitation and other environment services, South Africa has not imposed any market access limitation in mode 1 to 3 except in mode 4.[317]

2.7.5.7 Financial services

In financial services market access, mode 3 is restricted, as, for one to transact any businesses in the country, insurers - domestic and foreign – are controlled, need to be incorporated in accordance with the Companies Act No. 71 of 2008 as a public company.[318] To protect its local markets, the country ensures that any share acquisition by either a resident or not resident is a registered insurer holding at least

312. As above.
313. As above.
314. As above.
315. As above.
316. As above.
317. As above.
318. As above.
319. As above.

25% shares or more in the business with written approval from the Registrar of Insurance.[319] The financial services are restricted for market access in mode 3 as the Finance Minister, in certain instances, may give permission to a bank to give more than 49% shares to such person only when 'competition is not impaired'.[320] It is only after establishing a domestic public company that a foreign bank obtains controlling interest in a local company under mode 3.[321] There is no national treatment limitation for mode 2 and 3 but these services are limited in mode 4.[322] For all banking and other financial services excluding insurance, mode 1 and 2 are restricted in market access and national treatment.[323]

2.7.5.8 Tourism and travel related services

As in all SADC countries, the tourism sector is the most liberalised given that each country took commitments in this sector. All hotel and restaurants services have no market access or national treatment limitation in mode 1, 2 and 3.[324] The only limitation is on cross-border supply in catering services.[325] All travel agencies and tour operators have no market access and national treatment limitation on mode 1, 2 and 3 except for mode 4.[326] All tourist guide services are unbound for cross-border supply. However, modes 2 and 3 have no limitation for national treatment and market access.[327]

2.7.5.9 Transport services

From the schedule, transport services are the most restricted. This is because, passengers and freight transportation in mode 1 and 2 is limited on market access and national treatment.[328] However, for mode 3, there are no limitations on national treatment and market access.[329] Mode 4 is restricted except as provided in the horizontal section.[330] Maintenance and repair of road transport equipment mode 1 and

320. As above.
321. As above.
322. As above.
323. As above.
324. As above.
325. As above.
326. As above.
327. As above.
328. As above.
329. As above.
330. As above.
331. As above.

4 is unbound and there is no limitation on market access and national treatment in mode 1 and 2.[331] This is the situation obtaining in most of the services in this country.

2.7.5.10 Other services

Before winding up on this discussion, the chapter considers a few more services not listed elsewhere. In washing, dyeing and cleaning services, there are no limitations in modes 2 and 3 on market access and national treatment. However, market access limitation is placed on cross border supply of these services.[332] All hairdressing and other services are restricted under modes 1 and 4 although only market access and national treatment is allowed for mode 2 and 3 only.[333] To this end, the countries under the spotlight have to adhere to their regional obligations under GATS and the SADC Treaty, all are signatories and the SADC Protocol on TiS.[334]

2.8. Summary of countries' GATS commitments

The chapter reviewed GATS commitments taken by Botswana, Eswatini, Namibia and South Africa. It suffices to say that the legal sector is the least liberalised because, in all the four (4) countries discussed in this chapter, South Africa is the only country that has made commitments under the legal sector. Despite this, as shown in the preceding discussion, South Africa is tightening the screws against the admission and enrolment of legal practitioners. Although the other three SACU countries, namely Botswana, Eswatini and Namibia, did not specifically commit themselves, they are bound by the general obligations of GATS. Eswatini has opened its doors to all four modes, and no restrictions are placed on national treatment for all professional services. On the other hand, Botswana, Namibia and South Africa undertook horizontal commitments. All the countries made commitments under tourism, which is not restricted in any way, making it the most liberalised sector.

2.9. Conclusion

The chapter provided an overview of GATS commitments taken by Botswana, Eswatini, Namibia and South Africa. The tourism sector is the most liberalised in the

332. As above.
333. As above.
334. As above.
335. Preamble of the SADC Protocol on TiS.

SACU countries as all of them made commitments under GATS. Of all the services, Mode 4 is the most restricted by these SACU member states as countries refuse market access or national treatment in this mode. By restricting this mode, one presumes that they are out to protect their domestic market for the benefit of citizens. In the SACU region, only Lesotho and South Africa have made commitments under legal services. The writer concludes that the legal sector is the least liberalised as countries are reluctant to make commitments. The next chapter focuses on the admission and enrolment of foreign practitioners in SACU countries. As discussed in this and the preceding chapter, the idea is to consider whether the countries adhere to international obligations envisaged under GATS. The chapter reviews laws governing the legal profession to make a contextual evaluation.

CHAPTER THREE

THE ADMISSION AND ENROLMENT OF LEGAL PRACTITIONERS IN SELECTED SACU MEMBER STATES

3.0 Introduction

The previous chapter looked at the principles of TiS and further discussed GATS commitments undertaken by Botswana, Eswatini, Namibia and South Africa. The chapter indicated that the legal sector is the least liberalised, unlike tourism, with no market access and national treatment limitations in most modes. This chapter expands on this topical issue by examining whether the selected countries adhere to the commitments highlighted in Chapter Two. The chapter also provides a conceptual understanding of relevant laws dealing with the admission and enrolment of legal practitioners in the SACU region. The reviews are done to demonstrate the extent to which the laws uphold international standards of GATS and national constitutions. The idea is to shed light on what is going on in the region currently against the background of calls by regional leaders and the SACU business community to escalate regional integration, harmonisation and cooperation. Previously, I pointed out that the countries discussed in this study fall under the bigger SADC region and are signatories to the SADC Treaty, which encourages countries to harmonise and integrate for development.[1] The chapter treats the countries alphabetically, beginning with Botswana, then Eswatini, followed by Namibia and South Africa.

3.1 The admission of legal practitioners in selected countries

3.1.1 The admission framework of Botswana

The admission of attorneys and advocates in Botswana is regulated by the Legal Practitioners Act (herein referred as the Act) as amended.[2] The Act governs the process and requirements of admitting legal practitioners.[3] Section 55 of the Act established the Law Society of Botswana, a body with the requisite personality to sue or be sued.[4] The Law Society of Botswana aims to maintain the profession's integrity

1. JP Ngandwe 'Challenges facing the harmonisation of the SADC legal profession: South Africa and Botswana under the spotlight' (2013) 46 *The Comparative and International Law Journal of Southern Africa* 368. See also art 5 of the SADC Treaty.
2. The Botswana Legal Practitioners Act 1979(Cap 61:01) as amended.
3. Sec 6 of the Act.
4. Sec 55 of the Act.

by safeguarding the 'rule of law'[5] and espouses standards of the legal profession.[6] Its duty also includes helping the government and courts decide on cases that impinge on legal issues.[7] The term legal practitioner refers to an attorney, advocate, notary or conveyancer.[8] The Constitution of Botswana sets out all fundamental rights and freedoms of the people as it upholds principles of democracy.[9]

The first part (Part I) of the Act deals with preliminary provisions and provides a comprehensive interpretation of all the key concepts of the Act. Part II deals with the admission of legal practitioners into the legal profession and is stipulated that, for someone to be registered, the candidate should be admitted and the name placed on the roll of practitioners.[10] The admission of legal practitioners is regulated by the sections dealing with: citizens (4); Commonwealth citizens (5); foreigners (6); foreign advocates (7); qualifications for notary or conveyance (8); notary and conveyancer (9) as well as application for admission and enrolment (10).

3.1.2 Admission of legal practitioners in Botswana

Section 4 of the Act stipulates how Botswana citizens are admitted into the legal practice. The High Court of Botswana has the power to admit persons in light of this section ifthat a citizen is fit and proper to practise.[11] Under this section, both citizens and foreign nationals may be admitted. Given that the legal profession is regarded as a 'noble profession' and requires fitness and a high level of professionalism, the person must be of sound health.[12] The Act does not define 'fit and proper' , but it is a common requirement in all SACU countries and candidates are required to be honest and be persons with respect for the legal practice.[13]

The aspirants must have obtained, by examination, a Law degree in Botswana, Lesotho or Eswatini.[14] Alternatively, the person must hold a Bachelor's degree in law

5. The Law Society of Botswana https://pdf4pro.com/view/the-law-society-of-botswana-69c91.html(accessed 31 August 2021).
6. Sec 59(b) of the Act.
7. Sec 59 (c) of the Act.
8. Sec 2 of the Act.
9. Constitution 0f Botswana, 1966 Chapter II sets out the fundamental rights and freedom of all persons.
10. Sec 3(1) (a) (b) of the Act.
11. Sec 4(1) (a) of the Act.
12. Ngandwe (n 1 above) 378.
13. Sec 5(1) (a) and 6(1) (a) of 1964 Act; Namibia sec 4(1) (a) of the 1995 Act and South Africa sec 24(2) (c) of the 2014 Act.
14. Sec 4(1) (b) (i) of the Act.

from 'American University, New York, South Africa, Syracuse University, Universities of Northern Ireland; United Kingdom of Great Britain; USA; Universities in Australia; University of Ghana or Zambia'.[15] The graduate citizen is duly qualified to be admitted after passing practical examinations.[16] A person may be exempted from the requirements specified in section 4(1) if they satisfy the High Court of Botswana that they are competent to practice in any given country with a similar legal system. The qualification they hold makes them suitable for admission.[17]

The Act also makes provision for the admission of Commonwealth citizens in Botswana.[18] The requirement is that the person must be fit and proper, have been admitted and completed pupillage.[19] The person must have been permitted to 'practise as a barrister in England, Northern Ireland, the Republic of Ireland or an advocate in Scotland or practise as an advocate in the Supreme Court of South Africa or High Court of Zimbabwe'.[20] The aspiring candidate must be an ordinary resident or intend to reside in the country permanently.[21] A person may be admitted if there is a mutual provision of that particular Commonwealth state that allows Batswana to practise in that country's legal system.[22] Notably, the exact requirements also apply to the admission of foreign legal practitioners in the country. For example, the requirement of ordinarily resident or intention of becoming a permanent resident in that country.[23] If there is a mutual provision in the foreigner's country that allows qualified Batswana to get admission, the candidate is admitted.[24] However, foreigners are exempted from the requirements provided by the Act if the person is authorised to practise in a jurisdiction with a similar legal system.[25]

Section 7 of the Act on: "Admission of foreign advocates"[26] clearly states that:

> An advocate who is not a citizen of Botswana and is not permanently or ordinarily resident in Botswana but is qualified to practise as an advocate in a superior court in a Commonwealth country or a country prescribed by Parliament in accordance with the provisions of section 96(3) or 100(3) of the Constitution (in this section referred to as "a foreign advocate") may, on an

15. Sec 4 (1) (b) (ii) of the Act.
16. Sec 4(1) (c) of the Act.
17. Sec 4 (2) of the Act.
18. Sec 5 of the Act.
19. Sec 5(a) of the Act.
20. Sec 5) (b(c) of the Act.
21. Sec 5(f) of the Act.
22. Sec 5(g) of the Act.
23. Sec 6(c) of the Act.
24. Sec 6(d) of the Act.
25. Sec 6(c) of the Act.
26. Sec 7 of the Act.

> application to the Chief Justice with notice of the application to the Society, be admitted to practise as an advocate for the purpose of any specific cause or matter of importance and complexity in or regard to which he has been instructed either by the Attorney.[27]

This section highlights the requirements for foreign advocates to practise in Botswana temporarily. After completing the case or hearing the final appeal, the foreign advocate ceases to practise in the country.[28] According to the Act, upon payment of a prescribed fee to the Registrar, the foreign advocate is allowed to practice in the country.[29]

It is also a requirement to get admitted as an attorney before one becomes a notary or conveyancer in Botswana.[30] A notary or conveyancer needs to be fit and proper and have no order to remove him or her from the roll or pending proceedings removing his name on the roll. The person must pass the examination required to be admitted as a notary or conveyancer in Botswana.[31] It is only after a person has satisfied all the requirements stipulated in the Act that he or she may be admitted. The person may lodge a petition to court accompanied by any supporting documentary proof and all qualifications prescribed in section 4, 5, 6 and 9.[32] The petition is served to the Attorney General and Law Society of Botswana.[33] After the court is satisfied that the applicant possesses all the qualifications necessary, it proceeds to admit and enrol him or her as an advocate, attorney, conveyancer or notary.[34] The person is also required to take an oath or affirmation on admission.[35]

3.2 A critical appraisal of the Act

The admission of citizens in Botswana is provided in section 4 of the Act. What is important to note is that the drafters of this legislation intended to favour locals and foreigners from sister universities in Botswana, Lesotho and Eswatini. This is because

27. Sec 7(1) of the Act.
28. Sec 7(2) of the Act.
29. Sec 7(3) of the Act.
30. Sec 8 of the Act.
31. Sec 9 of the Act.
32. Sec 10(2) of the Act. A petition filed before court is different from a normal application lodged in Court. A petition is a formal written request to a court for an order of court. The party who lodges a petition to court is a Petitioner and Respondent and for Application proceedings- Applicant and Respondent. See https://www.proz.com/kudoz/english/law-patents/372900-petition-vs-application-jur.html (accessed 9 January 2022).
33. Sec 10(3) of the Act.
34. Sec 11 of the Act.
35. Sec 12 of the Act.

graduates from these universities are exempted from any practical examination.[36] This is a case of unwarranted preferential treatment afforded to candidates from these three universities, and their legal qualification receives special treatment in Botswana legal profession.[37] The preferential treatment violates the MFN treatment obligation enshrined in Article II: I of the GATS. According to the MFN, countries are urged to afford equal opportunities to all service suppliers.[38] The MFN obligation is usually understood as 'favour one, favour all principle'.[39]

The reason for affording such unwarranted preference is that these universities have a historical relationship dating to the years between 1964 and 1975.[40] The University of Botswana, Lesotho and Eswatini, formerly known as the University of Basutoland, Bechuanaland and Swaziland (UBBS), were one university with the main campus in Lesotho. These countries were British protectorates against apartheid South Africa.[41] To date, they have strong ties as the universities maintain their past heritage by having yearly and, on a rotational basis, intervarsity games and moot courts to promote their historical ties under the acronym BOLESWA. To this end, students from the University of Eswatini and Lesotho enjoy 'undue preferential status in the Botswana legal profession'.[42] On the other hand, Botswana remains restrictive to other members within the SACU family: for example, South Africa and Namibia.[43] This is shown by the fact that "LLB graduates from the BOLESWA University can enrol as attorneys immediately after graduation in any of the three cooperating countries".[44]

The writer suggests that the reason for such special treatment is also embedded in their geopolitical relationship during the colonial era. This incoherent provision adopted by the country that nationals from the respective universities are given special treatment compared to candidates from other GATS countries is problematic in the light of the countries' obligation to accord all other GATS countries MFN status. Although the country did not make specific commitments in the legal sector, Botswana

36. Ngandwe (n 1 above) 376.
37. Ngandwe (n 1 above) 376.
38. P Van den Bossche & W Zdouc *The Law and Policy of the World Trade Organization* (2013) 335.
39. P Delimatsis *International Trade in Services and Domestic Regulations* (2007)27.
40. History of University of Botswana https://www.ub.bw/discover/history (accessed 8 September 2021).
41. https://amp.ww.en.freejournal.org/38520626/1/university-of-botswana-lesotho-and-swaziland.html (accessed 23 July 2021).
42. Ngandwe (n 1 above) 376.
43. Ngandwe (n 1 above) 376.
44. Ngandwe (n 1 above) 376.

is mandated to comply with the general obligations under GATS.[45] These obligations include the MFN, national treatment, recognition qualifications and domestic regulation applicable to all WTO members under the legal sector.[46]

However, worth noting is that, at the time of signing the WTO Agreement, members were permitted to place legal services on the MFN exception list, and, in 1998, only thirteen (13) WTO countries did so.[47] Like all the SACU countries discussed in this study, Botswana did not make any exceptions. This means the country is enjoined to afford MFN treatment to all members. On the other hand, the country unilaterally recognises BOLESWA qualifications as highlighted above. Nonetheless, the recognition is considered an MFN exception.[48] On this point, the unilateral recognition of BOLESWA qualifications places an obligation on these countries to afford equal treatment and opportunity to other WTO members. It is important that they demonstrate their academic experiences, qualifications, and certificates obtained or required in that other jurisdiction.[49] According to GATS, it is clear that a country, as in the case of Botswana, discussed herein, can enter into a recognition agreement. However, the GATS is clear that:

> A Member shall not accord recognition in a manner which would constitute a means of discrimination between countries in the application of its standards or criteria for the authorization, licensing or certification of services suppliers, or a disguised restriction on trade in services.[50]

Accordingly, GATS places an obligation on Botswana to conform to the non-discrimination principles in its application of recognition agreements. T A country is obliged to inform the Council for Trade in Services of existing recognition measures.[51]

To this end, this special treatment does not promote international obligations of GATS as MFN applies 'to *de jure* and *de facto* discrimination'.[52] The *de jure* discrimination under Article ll: l of GATS is a 'measure which discriminates based on

45. JB Cronjé 'The admission of foreign legal practitioners in South Africa: a GATS perspective Tralac Working paper (2013)8. See also Chapter Two which discuss GATS obligations relevant for present purposes that's: MFN (Article VII: I), National treatment (XVII), recognition qualification (Article VII) and domestic regulation (VI).
46. Cronjé (n 45 above) 8.
47. L Terry 'GAT's Applicability to Transnational Lawyering and its Potential Impact on U.S. State Regulation of Lawyers' (2001) 34 Vanderbilt Journal of Transnational Law 1003.
48. Cronjé (n 45 above) 19.
49. Art VII of GATS on recognition.
50. Art VIII (3) of GATS.
51. Art VII (4) of GATS.
52. Van den Bossche & Zdouc (n 38 above) 336.

origin of the services'.[53] In the case of Botswana, if a qualification is not from BOLESWA universities, the candidate seeking admission is required to write an examination. It does not matter whether the person is a citizen or a non-citizen. The treatment is *de jure* discriminatory in view of GATS as law graduates from BOLESWA are enrolled immediately upon graduation in any of the three countries.[54] The irony is that Botswana favours Lesotho and Eswatini to the exclusion of Namibia and South Africa, which are also in the SACU family. According to the writer, this decision hardly makes any sense in light of the family's integration aspirations. To remove this inconsistent measure imposed by Botswana, any country can request consultations under the WTO Dispute Settlement Mechanism to address this issue.

A matter of concern is that practical examinations are administered to citizens who have not obtained their LLB degree from BOLESWA institutions for admission.[55] This, on its own, infringes the countries' international obligations envisaged under GATS.[56] However, this sharply contrasts with countries like South Africa and Eswatini, which favour their citizens over foreigners. According to the writer, favouring citizens is against the spirit of regional integration and cooperation as espoused by the SADC treaty, which the countries are party to and their respective constitutions advocating equality of all persons.[57]

In addition, the administration of practical examinations only to citizens from outside BOLESWA and the granting of special treatment to foreigners from BOLESWA does not promote the international principles of GATS: the MFN and national treatment obligation (Article XVll: l). This is because the demand that practical examinations be written by candidates outside BOLESWA gives the impression that qualifications from other universities need to be evaluated through examination. On the other hand, Botswana citizens who studied in Botswana, Eswatini and Lesotho have freedom and access to the legal profession compared to those who studied outside the BOLESWA family.[58]

53. Van den Bossche & Zdouc (n 38 above) 336.
54. Ngandwe (n 1 above) 376.
55. Sec 4(1) (c) A person who is a citizen of Botswana shall be qualified to be admitted as a legal practitioner if he satisfies the court that he has passed such practical examinations as may be prescribed.
56. Art II: I of GATS and national treatment obligation.
57. Sec 20(1) Constitution of Eswatini; Sec 9(1) Constitution South Africa; Art 10(2) Constitution of Namibia.
58. Ngandwe (n 1 above) 377.

In the GATS context, the recognition of qualifications in terms of Article VII and domestic regulations Article VI, Botswana is required to commit itself irrespective of commitments undertaken.[59] To this end, the country has to ensure that measures affecting TiS are administered reasonably, objectively and impartially as required by GATS.[60] The qualification criteria used must be objective and transparent.[61] This means that the selective application of the examination requirement to only citizens outside BOLESWA 'belittle' the qualifications from other universities and does not uphold the principles of GATS. According to the decided case of *Dow v Law Society of Botswana,*[62] for example, the High Court of Botswana refused to admit a graduate from the United States of America[63] is a clear case which shows that the Act has to be revised to conform to the international obligations as espoused by GATS.

In a related article titled 'Foreign-trained lawyers claim sabotage,' – Batswana who graduated from foreign universities decried the delay by the Law Society to release their results as a ploy to deny them practice.[64] The Batswana law graduates who attained qualifications in foreign institutions outside BOLESWA allege that they face discrimination in their motherland although they wish to contribute meaningfully to their own country.[65] This is, in contrast with South Africa and Eswatini, in which citizens are given special treatment. The allegations were that the Law Society was protecting the domestic market for local graduates against some Botswana citizens outside the BOLESWA family.[66] The accusations against the Law Society were that, from 1996, the practical examinations comprising three papers taken in three hours each were escalated to five papers taken in three hours.[67] For them, this was a ploy to frustrate aspiring attorneys with qualifications from outside the BOLESWA family and deny them an opportunity to practise in Botswana.[68]

59. Cronje (n 45 above) 8.
60. Art VI of GATS.
61. C Hagenmeier *et al* 'The Admission and Enrolment of Foreign Legal Practitioners in South Africa under the Legal Practice Act: International Trade Law and Constitutional Perspectives' (2016)19 Potchefstroom Electronic Law Journal 7.
62. *Dow v Law Society of Botswana, MAHLB 000537/07.*
63. Ngandwe (n 1 above) 376.
64. https://www.mmegi.bw/index.php?sid=1&aid=3&dir=2008/October/Friday10/ (accessed 16 July 2021).
65. https://www.mmegi.bw/index.php?sid=1&aid=3&dir=2008/October/Friday10/ (accessed 16 July 2021).
66. As above.
67. As above.
68. As above.

One could conclude that, to some extent, the Act is discriminatory in that the Constitution defines discrimination as:

> Affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.[69]

From the definition envisaged in the Constitution of Botswana, it is justified for the writer to conclude that citizens with LLB degrees from outside the BOLESWA family are discriminated against. The requirement that those with qualifications from outside BOLESWA must write examinations is discriminatory as it only applies to specific prospective applicants. This applies to law graduates holding law qualifications from any other jurisdictions within SADC, such as South Africa, Namibia and Zimbabwe.[70] This decision repudiates the spirit of regional integration, cooperation and development.

For Eswatini, citizens and non-citizens who attained an LLB degree from the country have to undergo articles of clerkship, and all write practical examinations (Bar examinations) to be admitted. The approach taken by Eswatini, one of the BOLESWA family members, is the most ideal one. It makes more sense that they all write or they all do not take the examinations. On the other hand, a citizen of Botswana may be exempted from practical examinations if he or she qualifies to practise in any jurisdiction with a similar legal system, provided that the individual holds all the necessary qualifications to make him or her suitable for admission.[71] The only condition is that such an applicant should have been admitted to practice in their countries and fulfilled all their requirements for admission.[72] To this end, the administration of practical examinations to candidates outside BOLESWA is not in line with the non-discrimination principles of GATS and the constitution.

The Constitution guarantees the fundamental rights of every Botswana citizen ‘without any differential treatment as to their colour, race, and place of origin, political

69. Sec 15(3) Constitution of Botswana; See also Sec 20(3) Constitution of Eswatini.
70. Ngandwe (n 1 above) 376.
71. Sec 4(2)(1) of the Act
72. Ngandwe (n 1 above) 378.

opinions, creed or sex'.[73] In the decided case of *The Attorney General of the Republic of Botswana v Unity Dow,*[74] the issue of discrimination was addressed at length. The Court of Appeal of Botswana upheld the High Court's decision in its finding that "the Citizenship Act discriminated based on gender under both the Botswana Constitution and the Declaration on the Elimination of Discrimination Against Women because it punishes a female citizen for marrying a non-citizen male".[75] It is this same Constitution that the Act infringes upon by retaining discriminating provisions to keep out foreign legal practitioners. To successfully analyse whether an Act is discriminatory, the South African case of *Harksen v Lane NO and Others*[76] is instructive:

> If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"?[77] Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.[78]

To this end, the Act is discriminatory against citizens and foreigners from outside the BOLESWA family. This certainly is a violation of the principles of GATS and the supreme law of the country, which guarantees equality before the law.

The national treatment limitation is that legal practitioners, whether domestic or foreign, can freely access the legal framework from the preferred institutions: the University of Botswana, Lesotho and Eswatini. This is a *de facto* discrimination, and the fact that the degrees from these countries are recognised only for candidates who have studied in the respective countries constitutes national treatment limitation. Notably, national treatment as provided under Article XVII of the GATS resonates with Article III of the GATT. This is because, national treatment 'prohibit *de jure* as well as

73. *The Attorney General of the Republic of Botswana v Unity Dow* https://uniteforreprorights.org/wp-content/uploads/2017/10/botswana.pdf (accessed 8 August 2021).
74. *The Attorney General of the Republic of Botswana v Unity Dow* https://uniteforreprorights.org/wp-content/uploads/2017/10/botswana.pdf (accessed 8 August 2021).
75. https://www.law.cornell.edu/women-and-justice/resource/attorney_general_v_unity_dow (accessed 8 August 2021).
76. *Harksen v Lane NO and Others (CCT9/97) [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 (7 October 1997).*
77. *Harksen v Lane NO and Others* (CCT9/97) [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 (7 October 1997) 37-38 para 53.
78. *Harksen v Lane* 1998 1 SA 300 (CC) para 53.

de facto discriminations between domestic and foreign services and service suppliers'.[79]

The national treatment limitation is also on local qualifications, given the requirement that legal practitioners should hold Bachelor of Laws from BOLESWA, and this seems to be origin neutral.[80] However, it discriminates *de facto* against the foreigners lawyers.[81] The local qualification requirement restricts foreign lawyers seeking admission irrespective of the type of legal services they wish to provide. This is because, of its competitive disadvantage against local candidates outside BOLESWA institutions.[82] The objective of the national treatment dictates that all members are granted equal opportunity to compete in all spheres.[83] To this end, the local qualification is a limitation in GATS.

In addition, the requirement is that Batswana aspirants must have obtained, by examination, the Law Degree in Botswana, Lesotho or Eswatini.[84] Or alternatively, hold a Law Bachelor's Degree either from: 'Universities of Northern Ireland and United Kingdom of Great Britain and; South Africa; American University; Washington DC; United States of America; Syracuse University; New York; USA; Zambia; University of Ghana and University in Australia'.[85] The above mentioned countries are the only WTO countries selected for cross-border legal practice in Botswana. This provision violates the MFN obligation under GATS because it is not applied in a non-discrimination way to the rest of all other WTO countries. The country has not listed it as an MFN exception provided Annex of Article II Exemption.

The condition that a foreigner needs to be ordinarily resident or intend to reside in Botswana permanently is problematic in light of the country's international obligations.[86] This is because the requirement to be ordinarily resident acts as an impediment for foreign legal practitioners to freely practise in the region and across

79. D Luff 'International Trade Law and Broadband Regulation: towards convergence?' (2002) 3 *Journal of Network Industries* 246.
80. Sec 5(1) of 1964 Act.
81. Cronje (n 45 above) 15.
82. Cronje (n 45 above) 15.
83. WTO TiS Division 31 January 2013 'The General Agreement on TiS in introduction'https://www.wto.org/english/tratop_e/serv_e/gsintr_e.pdf (accessed 13 August 2021).
84. Sec 4(1) (b) (i) of the Act.
85. Sec 4 (1) (b) (ii) of the Act.
86. Sec 6(c) of the Act.

the borders.[87] The requirement falls short of the national treatment obligation envisaged in Article XVII:I which provides that members must not adopt measures which discriminate against domestic and foreign services providers.[88] This requirement makes it difficult for foreigners to access the domestic legal profession since the process of acquiringcitizenship or permanent residence is tedious and strenuous.[89] With the imposition of such measures, cross-border supply of legal services is restricted to a greater extent. Although this measure does not intentionally discriminate, its consequence is discriminatory because protecting domestic the market by applying these domestic regulations keeps foreigners out.[90]

The MFN treatment obligation stipulates that if a state allows legal advisers or legal practitioners from a specific foreign jurisdiction to practise in its country, it is obliged to also permit admitted attorneys from all other GATS countries to do likewise.[91] What this means is that, the relevant laws of Botswana do not conform to the said GATS obligation. As a WTO member the stringent entry requirements based onordinarily residence or permanent residence do not only apply in Botswana but in South Africa and Eswatini as well and are barriers to cross-border legal practise.[92] Ironically, the SADC Treatycalls for harmonisation between member states and the removal of all stringent requirements that inhibit the free movement of people and goods in the region.[93] The move is to harmonise all political and socio-economic rules of countries and inspire people and their respective societies to take necessary initiatives to grow the economic, cultural, social relations of the region, and take part in implementing SADC projects.[94]

The Treaty states that SADC members should not discriminate against any country,[95] which resonates with GATS, but this is divorced from the practical reality. Foreigners are only admitted to practise when they convince the High Court of

87. Eliminating the Barriers to Cross Boarder Legal Practice in Africa, 4th April 2018, Livingstone, Zambia http://elf-fae.eu/wp-content/uploads/2018/04/Trends-in-law-firm-management.pdf(accessed 23 July 2021).
88. Hagenmeier *et al* (n 61 above).
89. Ngandwe (n 1 above) 378.
90. Delimatsis (n 39 above) 38.
91. Ngandwe (n 1 above) 381.
92. Eliminating the Barriers to Cross Boarder Legal Practice in Africa 4th April 2018, Livingstone, Zambia http://elf-fae.eu/wp-content/uploads/2018/04/Trends-in-law-firm-management.pdf(accessed 23 July 2021).
93. Art 5(2) (a) of the SADC treaty of 1992.
94. Sec 5(2) (a) of the SADC Treaty.
95. Art 6(7) of the SADC Treaty.

Botswana that they intend to permanently reside in Botswana and yet Batswana are allowed to practise in that country. Foreign advocates are allowed to appear in the High Court only when the Chief Justice is convinced that their presence is needed on account of expertise in the case.[96] From the assessment of the Act, there is a need for the removal of discriminatory provisions dealing with the admission of foreign legal practitioners in the country.

3.3 The admission of legal practitioners in Eswatini

In Eswatini, the admission of legal practitioners is governed by the Legal Practitioner's Act[97] (herein 'the 1964 Act') which commenced on 14th January 1966. The 1964 Act regulates the admission of attorneys and advocates. The pre-requisites for admission of advocates are set out in section 5 and those for attorneys are provided for in section 6 of the 1964 Act. The governing professional body forattorneys and advocates is the Law Society of Eswatini, a professional body that was established by the Act.[98] The Law Society of Eswatini controls the legal profession by safeguarding the rule of law and the conduct of legal practitioners in the country.[99] It is the High Court of Eswatini that has the power to admit advocates and attorneys into the legal profession.[100]

3.3.1 Admission as an Advocate

The pre-requisites for the admission of advocates are regulated by section 5 of the 1964 Act.[101] The term 'legal practitioner' incorporates an admitted advocate, attorney, notary or conveyancer.[102] This section stipulates that, the High Court of Eswatini has the right to admit and enroll a person into the legal profession on grounds that the person provides proof that he or she is fit and proper, is a Swazi citizen or ordinarily

96. Minchin & Kelly 13 February 1997 Botswana: New Legislation-The Legal Practitioners Amendment Act https://www.mondaq.com/year-2000/2081/ (accessed 16 July 2021).
97. Legal Practitioner's Act No.15 of 1964.
98. Sec 2 of the 1964 Act.
99. B Dube & A Magagula the Law and Legal Research in Swaziland https://www.nyulawglobal.org/globalex/Swaziland.html#_Swazi_National_Courts (accessed 16 July 2021).
100. Sec 6 of the 1964 Act.
101. Sec 5 of the 1964 Act.
102. Sec 2 of the 1964 Act.

resident of Eswatini.[103] The person must be above 21 years, holding a Bachelor of Laws degree from the university of Botswana, Lesotho and Eswatini.[104] Additionally, he individual canhold a Bachelor of Laws from Botswana, Lesotho, Zimbabwe, South Africa, Namibiaor England and Ireland or Scotland, as long as the qualification is not an honorary degree.[105] For SADC aspirants, the requirement is that the person must have been admitted as an advocate in Botswana, Lesotho, Namibia, South Africa, or 'legal practitioner in Zimbabwe and practised for at least two years', or still enrolled with no pending legal proceedings to remove or suspend him or her from practice.[106] It is upon satisfaction that all the requirements have been adhered to that the High Court admits the person as an advocate.[107] An exception to these requirements provided under the 1964 Act:

> Notwithstanding subsection (1), the Chief Justice may for the purpose of any particular case or matter grant a right of audience in the Courts of Swaziland or before any quasi-judicial tribunal in Swaziland to any person who, being otherwise eligible for admission, is not a citizen of Swaziland or ordinarily resident or practicing as an advocate therein, in order to enable such person to appear as Counsel in any such case or matter.[108]

3.3.2 Admission as an Attorney

The same requirement of sound health is put on advocates as a condition before admission for attorneys. Applicants have to provide proof that they are fit and proper.[109] As indicated earlier, this is the first entry point in most countries across the globe and South African cases are instructive in the country.[110] In the decided case of *Jasat v Natal Law Society,*[111] it was argued that the legal profession is held in high esteem demanding a person to be honest, reliable and of high level of integrity.[112] The prospective attorney has to be trustworthy, have dignity, have the capacity and

103. Sec 5(1) of the 1964 Act.
104. Sec 5(1) (c) (i) of the 1964 Act.
105. Sec 5(1) (c) (iii) of the 1964 Act.
106. Sec 5(1) (d) of the 1964 Act.
107. Sec 5(1) (f) of the 1964 Act.
108. Sec 5(2) of the 1964 Act.
109. Sec 6(1) (a) of the 1964 Act.
110. *Armand Matthew Perry and The Law Society of Swaziland* [2014] SZSC 35 (30 May 20140 para 14.
111. *Jasat v Natal Law Society* (78/98) [2000] ZASCA 14; 2000 (3) SA 44 (SCA); [2000] 2 All SA 310 (A) (28 March 2000).
112. *Vassen v Law Society of the Cape of Good Hope (468/96) [1998] ZASCA 47; 1998 (4) SA 532 (SCA); [1998] 3 All SA 358 (A) (28 May 1998) para* 15; See also *Kaplan v Incorporated Law Society Transvaal [1981] 2 SALR 762.*

willingness to help and of great service to the public.[113] The qualities of being a 'fit and proper person' are only applicable when the person is seeking admission. There are no mechanisms employed to follow up when the candidate is practising. This is because only a recommendation is required before admission. In addition, any person applying for admission as an attorney must provide proof that he or she is Swazi citizen or ordinarily resident of the country.[114] The person must be above twenty one years.[115]

The person must prove that he or she is a holder of:

> A Bachelor of Laws degree of the former University of Botswana, Lesotho and Swaziland; or the former University of Botswana and Swaziland; or any university in Botswana, Lesotho, Swaziland, Zimbabwe, South Africa or Namibia[116] or hold a Bachelor's degree in law from a University in a country Botswana; Lesotho; Swaziland; Zimbabwe, South Africa or Namibia.[117]

The person applying for admission and enrolment must be a holder of a Bachelor's degree from any institution in England, Ireland or Scotland and has duly served articles of clerkship and passed all examinations required.[118] The individual has also to produce proof to the High Court of Eswatini that he has a Bachelor's Degree and is an enrolled attorney in Botswana, Lesotho, Namibia, South Africa or Zimbabwe having practiced for about two years and has no pending legal proceedings to suspend or remove him or her from the roll of attorneys.[119]

The person must have sufficient proof that he or she has been admitted as a 'barrister in England, Scotland or Ireland and no proceedings to remove him as barrister from the roll are pending'.[120] The aspiring candidate seeking admission should produce proof that he or she was an advocate in Eswatini and has practised for at least three (3) months period preceding the application. The person also has not, at any time, been removed from the roll and has effectively served articles and passed the Bar examinations.[121] After satisfying the requirements of the 1964 Act, the High Court may

113. M Slabbert & DJ Boome Reformation from criminal to lawyer: is such redemption possible?Potchefstroom Electronic Law Journal (PELJ) On-line version ISSN1727-3781 PER vol.17 n.4 Potchefstroom 2014.
114. Sec 6(1) (a) of the 1964 Act.
115. Sec 6(1) (b) of the 1964 Act.
116. Sec 6(1) (c) (i) of the 1964 Act.
117. Sec 6(1) (c) (ii) of the 1964 act.
118. Sec 6(1) (c) (iii) of the 1964 Act.
119. Sec 6(1) (d) of the 1964 Act.
120. Sec 6(1) (e) of the 1964 Act.
121. Sec 6(1) (f) of the 1964 Act.

admit and enroll such a person as an attorney.[122] The only exception to the requirement is that, one has to be a citizen or ordinary resident as provided under section 6(2) and the Chief Justice has the discretion to allow a right of audience to any person in the courts, not a Swazi citizen or ordinary resident Eswatini, to appear and proceed with a case.[123]

3.3.3 Critical appraisal of the 1964 Act

The requirement that a person must be a Swazi citizen or is ordinarily resident in the Kingdom of Eswatini acts as an impediment to foreign legal practice in the SACU union.[124] This stringent requirement of ordinarily residence or citizenship for admission is not a new phenomenon in the legislations dealing with the admission of foreigners as highlighted in other jurisdictions as South Africa and Namibia applies the same as discussed hereunder.[125] Notably, the 1964 Act does not define what ordinarily resident is and this is open to the court's interpretation. All in all, the requirement that one must be ordinarily resident acts against the country's international obligations envisaged under GATS (MFN and national treatment). This requirement is usually imposed by many countries as a way of protecting the domestic market from foreign legal practitioners. Upon application, if a candidate does not satisfy this requirement, the application can easily be dismissed on grounds that one does not meet this condition.

In the decided case of *Armand Matthew Perry and The Law Society of Swaziland,*[126] (Perry case), the petitioner claimed that he was an ordinarily resident of Eswatini because he was 'permitted to enter and remain in the country under provisions of Class A Entry Permit'.[127] The learned judge, in Perry case, adopted the definition in *R v Barnet London Borough Council, Ex p Nilish Shah*,[128] wherein Lord Scarman held that an ordinarily residence refers to:

> A man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration.[129]

122. Sec 6(1) (f) of the 1964 Act.
123. Sec 6(2) of the 1964 Act.
124. Sec 6 (1) (a) of the 1964 Act.
125. Sec 24 (2) (b) of the 2014 Act; Sec 4(1) (c) of the 1995 Act.
126. *Armand Matthew Perry and The Law Society of Swaziland* [2014] SZSC 35 (30 May 2014).
127. Perry case para 26 page 22.
128. *R v Barnet London Borough Council, Ex p Nilish Shah*, [1983]2AC309.
129. *Armand Matthew Perry and The Law Society of Swaziland* [2014] SZSC 35 (30 May 2014) para 27.

From the definition adopted in the Perry case, the Supreme Court of Eswatini concluded that the applicant was an ordinary resident and as such was admitted. Despite Perry being admitted in the courts of Eswatini, the legislation dealing with the admission of attorneys and advocates has serious flaws and discrepancies infringing international obligations under GATS.

For that reason, there is no consensus on what an ordinarily resident is and this requirement is used to discriminate against foreigner legal practitioners. The conclusion that can be drawn from the 1964 Act is that the law is used 'to prevent the invasion of the national market by foreign legal practitioners'.[130] This is an impediment to the free movement of foreigners seeking to access the legal profession and it works against the spirit of harmonisation and integration as enshrined in the SADC Treaty to which Eswatini is a signatory.

An interesting point to note is that Eswatini courts mainly rely on South African jurisprudence and case law.[131] South African law is persuasive in most judgments which are available online. For that reason, the imposition of citizenship and ordinary residence requirements in the relevant laws violates the national treatment obligation (Article XVll: l) of GATS. The national treatment obligation requires countries not to have any discriminatory tendencies that benefit domestic service or services suppliers.[132] The national treatment obligation stipulates that:

> Where the national treatment obligation applies, foreign products, for example, should once they have crossed the border and entered the domestic market, not be subject to less favourable taxation or regulation than like domestic products.[133]

It is on this understanding that Eswatini has made no limitation to national treatment in all service sectors under GATS.[134] However, the said requirements of ordinarily residency/ citizenship[135] are in violation of the national treatment obligation. This requirement, which is only applicable to foreigners seeking admission into the

130. Ngandwe (n 1 above) 374.
131. *Armand Matthew Perry and The Law Society of Swaziland* [2014] SZSC 35 (30 May 2014) para 14.
132. WTO https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm(accessed 23 July 2021).
133. Van den Bossche P *The Law and Policy of the World Trade Organisation Text, Cases and Materials* (2005) 40.
134. https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/SCHD/GATS-SC/SC81.pdf&Open=True (accessed 23 July 2021).
135. Sec 5 of the 1964 Act.

legal profession, acts as an impediment to free access tothe legal profession. To this end, the ordinarily residence requirement violates the national treatment obligation envisaged under GATS. It is not only the national treatment obligation violated by the protectionist tendencies in the country by imposing the citizen and/or ordinarily residence requirement. This is because this requirement also violates the market access principles under GATS. For this reason, the legislation which governs the attorneys practice in the country is protectionist and also violates the market access principles under GATS.

Not only is the 1964 Act violating GATS obligations, but the adoption of restrictive measures in the legal profession does not promote regional integration and harmonisation as highlighted above. Article 6 of the SADC Treaty stipulates that countries are not expected to discriminate against persons on the basis of religious affiliation, political opinion, gender, race, national origin or culture.[136] It can be said that the laws governing attorneys' profession does not promote harmonisation and integration as aspired by the SADC Treaty.

In one relevant article titled **'**Zim lawyer must go back to Zimbabwe – Law Society', the reporter brought to the attention of the public the discriminatory nature of the law as applied by the Law society of Eswatini**.**[137] This was after the applicant was refused admission by the law society because he wasa foreigner. In the relevant case of *Pretty Mupfurudza v Law Society of Eswatini,* [138] which the newspaper reported on, the Applicant, a Zimbabwean citizen, sought admission as attorney, notary and conveyancer in the High Court of Eswatini. The Law Society of Eswatini opposed the application on grounds that Pretty Mupfurudza was supposed to be admitted in Zimbabwe since theEswatini's market is saturated. The argument was also that, the Applicant did not satisfy the requirements since she is a foreigner.[139] The Applicant took the matter to court, won the case and was admitted by the High Court of Eswatini. Despite the judgment, the discriminatory law is still in force and has not been amended.

136. Art 6(2) of the SADC Treaty.
137. M Ndzimandze 'ZIM LAWYER MUST GO BACK TO ZIMBABWE – LAW SOCIETY 29 November 2017 http://www.times.co.sz/news/116020-zim-lawyer-must-go-back-to- zimbabwe-%E2%80%93-law-society.html (accessed 9 August 2021).
138. *Pretty Mupfurutsa v The Law Society of Swaziland* Case No.821/16.
139. M Ndzimandze 'ZIM LAWYER MUST GO BACK TO ZIMBABWE – LAW SOCIETY 29 November 2017 http://www.times.co.sz/news/116020-zim-lawyer-must-go-back-to- zimbabwe-%E2%80%93-law-society.html (accessed 9 August 2021).

As an exception to the ordinarily residence requirement, the Chief Justice by the authority vested in his/her office, may permit legal representation in the Courts of Eswatini to any person who, was not eligible for admission.[140] The person may not necessarily be a Swazi citizen or ordinarily resident and may appear as attorney in any matter.[141] From what has been presented in this section, it means that there are instances in which foreigners are granted the right of audience in Eswatini courts only at the discretion of the Chief Justice. In essence, the question of the admission of foreigners in Eswatini remains at the hands of the Chief Justice after other considerations, as highlighted in section 5 of the 1964 Act, are fulfilled.[142] On this point, this complies with the principles envisaged under GATS by allowing temporary movement of natural persons to provide legal services.

The influx of cases in the High Court of Eswatini of foreign attorneys seeking admission is evidence that the legal profession is heavily protected and reserved for Swazi nationals. Although Eswatini is a signatory to GATS and the SADC Treaty, it has taken measures which act as impediments to foreign legal practitioners. In the decided case of *Armand Matthew Perry and The Law Society of Swaziland*[143] (Perry Case), the Supreme Court of Eswatini dealt in depth with section 6(1)(e) which requires proof that a person 'has been admitted as a barrister or solicitor in England, Scotland or Ireland and has no proceedings to remove or suspend him or her from the roll are pending.'[144] The applicant was an admitted solicitor who was practising in the Courts of England and Wales with his name on the roll of solicitors of that court.[145] The Law Society opposed the petition on the basis that 'section 6(1) (e) affords an unfair advantage upon a petitioner relying upon that alternative for his or her admission'.[146] The court held that Perry had satisfied all the requirements in the 1964 Act and, as such, had to be admitted. The 1964 Act is clear that persons admitted as barristers in England, Ireland or Scotland and with no legal proceedings pending to suspend them can be admitted in the High Court of Eswatini. This measure is a

140. Sec 6(2) of the 1964 Act.
141. Sec 6(2) of the 1964 Act.
142. Sec 6(2) of the 1964 Act.
143. *Armand Matthew Perry and The Law Society of Swaziland* 2014 SZSC 35 (30 May 2014).
144. Sec 6(e) of the 1964 Act.
145. Perry case para 9.
146. Perry case para 18 page 13.

national treatment limitation as it discriminates *de facto* against foreign legal practitioners from other WTO members as well.[147]

The fact remains that Eswatini signed different agreements butnationals from different jurisdictions are not treated equally. This is because,

> Swazi nationals or residents who have qualified as lawyers from South Africa, Lesotho, Zimbabwe, Namibia, Botswana, England, Ireland, Scotland receive special treatment by virtue of recognition in the Legal Practitioners' Act.[148]

What can be said so far is that the 1964 Act affords favourable treatment to some WTO members mentioned above. This violates the MFN obligation, which requires a WTO member that affords certain favourable treatment to another member to reciprocate to all other WTO members. This means that a WTO member state is not allowed to discriminate between its trading partners.[149] In simple terms, the members should give equal treatment to like services regardless of country of origin ('favour one, favour all').[150] The reason that some countries are favoured in Eswatini is arguably a violation of this obligation.

A candidate who holds a Bachelor of Laws degree from a former BOLESWA institution or any university in Botswana, Lesotho, Namibia, South Africa and Zimbabwe is given preferential treatment in Eswatini. As indicated earlier on, the Universities of Botswana, Lesotho and Eswatini have a historical relationship which dates back to 1964 and 1975.[151] To date, these countries nurture the historical ties by giving preferential treatment to graduates from BOLESWA universities. What this means is that, there is a need to reform these laws governing the admission of foreigners in Eswatini to be in line with international obligations under GATS which are binding in the country.

An important point to note is that any person intending to practice in Eswatini has to serve articles of pupilage and sit for an examination. This is a progressive tool in Eswatini, which, unlike in its counterpart such as Botswana, where only citizen graduates from outside BOLESWA universities are required to write the

147. Cronje (n 45 above) 15.
148. https://www.ibanet.org/PPID/Constituent/Bar_Issues_Commission/ITILS-eSwatini(accessed16 July 2021).
149. P Van den Bossche *The Law and Policy of the World Trade Organisation Text, Cases and Materials* (2005) 40.
150. Delimatsis (n 39 above) 27.
151. https://amp.ww.en.freejournal.org/38520626/1/university-of-botswana-lesotho-and-swaziland.html(accessed 23 July 2021).

examination.[152] What separates Botswana and Eswatini is that citizens and non-citizens with an LLB Degree undergo articles of clerkship and sit for practical or Bar examinations to be admitted as attorneys. This aligns with Article VI (1) of GATS which requires that qualifications should be governed objectively, transparently and impartially.[153] Notably, the administration of bar examinations to citizens and foreigners aligns well with the international MFN obligation in that equal treatment is given to all participants.

The admission of advocates in Eswatini is regulated by section 5 of the 1964 Act. The power to enroll a person as an advocate is exclusively vested in the High Court of Eswatini.[154] For one to be admitted as an advocate, he or she must be Swazi citizen or ordinarily resident of Eswatini.[155] However, it is settled law that the Chief Justice has the discretion to grant audience in the courts for a non-Swazi or person with no permanent resident status as requirement in section 5(1) (a) of the 1964 Act to appear as an advocate in respect of a particular matter.[156] This exception only applies when the person is eligible to be enrolled and be admitted as an advocate in Eswatini courts as envisaged in section 5(1) of the 1964 Act.

In the case of *Eric Ndwamato Nwedo v The Law Society of Swaziland and Another*[157] (Eric Ndwamato Nwedo case) it was ruled that the Chief Justice has the power to waive the requirements of the 1994 Act and grant audience if satisfied that the applicant has successfully established his or her case that he or she is granted the right of audience and the instructing attorney depose to such effect of a non-resident advocate.[158] The said section gives the discretion to the Chief Justice to evoke section 5(2) of the 1964 Act but this was not successful in the mentioned case. Eric Ndwamato Nwedo, a South African citizen, was seeking the right of audience to appear before the Industrial Court of Eswatini as an advocate in line with section 5 (2) of the 1964 Act.[159] The petition was opposed by the Law Society and the Attorney General's

152. Sec 4(1) (c) of the Legal Practitioners Act of 1979 (Cap 61:01).
153. Art VI (1) of GATS.
154. Sec 5 of the 1964 Act.
155. Sec 5(a) (b) of the 1964 Act.
156. Sec 5(2) of the 1964 Act.
157. *Eric Ndwamato Nwedo v The Law Society of Swaziland and Another Civil Case No.368/2016* at para 10 and 11.
158. Nwedo case para 10 and 11.
159. *Eric Ndwamato Nwedo case* Para 1.

Chambers[160] and the court did not invoke section 5(2) of the 1964 Act and it was held that:

> The Petitioner has failed to establish that good cause exists for the Court to grant him the right of audience. The instructing attorney has not deposed to an affidavit justifying the need for a non-resident advocate and why local advocates cannot properly handle the matter pending before the Industrial Court. The petitioner is not a Senior Counsel; he has been in practice as an advocate since 1st May 2015. Other than his academic qualifications which are not disputed, the petitioner has not shown that he has the necessary expertise to handle the matter. Similarly, the importance and complexity of the matter has not been disclosed which could justify engaging Senior Counsel let alone the petitioner. What is even more puzzling is that the instructing attorney is considered as one of the best legal minds in labour issues in this country, and, however, he has been in private practice for a period exceeding twenty years; however, he has briefed a Junior Advocate with less than ten months experience in the practice of the law.[161]

The argument raised here is that, when courts refuse foreigners to practise, it is the discretion of the Court to weigh all the issues and make a determination as in the mentioned case. In light of the case, it does not deal with discrimination *per se* as it is the courts with the final say as in this case and made its discretion in light of the facts presented. Discrimination is regulated in section 20(2) that promulgates that:

> For the avoidance of any doubt, a person shall not be discriminated against on the grounds of gender, race, colour, ethnic origin, tribe, birth, creed or religion, or social or economic standing, political opinion, age or disability.[162]

In the case of *Stephen Craig Vivian*[163] (Stephen Craig Vivian case), the petitioner moved a petition in terms of section 5(2) of the 1964 Act. The petitioner, a South African Senior Counsel duly admitted and practising as an advocate in South Africa, made an application for admission as an advocate in Eswatini.[164] The Law Society opposed the application on grounds that petitioner was not fit and proper and that the petitioner did not disclose his expertise and competence compared to local practitioners. The court granted the petitioner the right of audience on grounds that the petitioner was previously granted the right of audience in the High Court of Eswatini in

160. *Eric Ndwamato Nwedo* case Para 2.
161. *Eric Ndwamato Nwedo* case Para 13.
162. Sec 20(2) Constitution of Eswatini.
163. *Stephen Craig Vivian* (542/2018) [2018] SZHC 274(2018).
164. Sec 5(1) of the 1964 Act.

arbitration and litigation proceedings in respect of the same matter and was conversant with all filed records pertaining to this matter.[165] In this regard, the matter before court was 'the enforcement and registration of the arbitration award which was obtained in South Africa'.[166] To this end, it suffices to say that Swazi courts in certain instances, allow foreign advocates to practise. This permits cross-border supply of services envisaged under GATS.

In addition, during the writing of this dissertation, in a related case, *King v Mduduzi Bacede Mabuza and Mthandeni Dube,*[167] Jacobus Lodewicus Coetzee Jansen van Vuuren, a South African citizen, approached the High Court seeking the right of audience and appearance to represent the Members of Parliament charged under the Terrorism Act. The petition was brought under section 5(2) of the 1964 Act and the Law Society did not oppose the application. In his petition, the petitioner applied for admission on grounds that, 'the matter is of a complex nature, your petitioner submits that he is an experienced practitioner in criminal matters, hence his application to grant him audience in this Honorable Court'.[168] The petitioner was admitted by the High Court of Eswatini. My observationthat the admission of foreign advocates in Eswatini also borders on the complexity of the case which determines whether a foreigner is admitted or not. The country also tries to afford temporary presence for foreign legal practitioners in order to appear in the courts of the country. The main requirement for admitting an advocate in Eswatini is that, the person must hold a Bachelor of Laws degree from any of following countries: Botswana; Lesotho; Namibia and South Africa, Zimbabwe and has been admitted into practice in the mentioned countries for at least two years, or still enrolled with no legal proceedings pending to remove or suspend him or her.[169]

In terms of the 1964 Act, Botswana, Lesotho, Namibia, South Africa and Zimbabwe[170] are the only WTO countries listed on cross-border legal practice in the country. This provision violates the MFN obligation under GATS because it is not applied in a non-discriminatory manner to all other WTO countries yet the country did

165. *Stephen Craig Vivian* (542/2018)[2018]SZHC 274(2018) page 1 & 2.
166. *Stephen Craig Vivian* (542/2018)[2018]SZHC 274(2018) para 23.
167. *King v Mduduzi Bacede Mabuza and Mthandeni Dube High Court of Eswatini Case No. 1508/21.*
168. *King v Mduduzi Bacede Mabuza and Mthandeni Dube High Court of Eswatini Case No.* 1508/21.
169. Sec 5(1) (d) of the 1964 Act.
170. Sec 5(1) (d) of 1964 Act.

not list any MFN exemption (Annex of Article II Exemption). The MFN obligation prohibits any discrimination among countries.[171] This means that a WTO member state (Eswatini) must afford equal treatment to all WTO members as envisaged under Article II:I of GATS. To this end, the law governing foreign admission should be reformed to harmonise the region as advocated by SADC.

The requirement for local qualification certainly constitutes a national treatment limitation. The requirement that legal practitioners should hold relevant degrees from the University of Eswatini and other selected countries seem to be neutral at face value, but, in essence, discriminates against foreign legal practitioners.[172] The local qualification requirement restricts foreign lawyers who wish to practise in Eswatini. The requirement places foreign practitioners at a competitive disadvantage against local candidates.[173] The objective of the national treatment obliges members to grant equal opportunity to compete in all spheres.[174] To this end, the local qualification is a limitation under GATS.

3.4. The admission of legal practitioners in Namibia

The admission of legal practitioners in Namibia is governed by the Legal Practitioners Act 15 of 1995 (herein referred as '1995 Act'). The 1995 Act commenced on 7th September 1995 through the GN 150/1995(991148).[175] The Law Society of Namibia is a body corporate capable of being sued or sue established by section 40 of the 1995 Act.[176] The functions of the Law society of Namibia are to: uphold all standards and behaviour of members of the profession,[177] present all views of the legal profession[178] and uphold the rule of law and protect human rights for everyone.[179] The term profession means the profession of legal practitioner.[180] The 1995 Act stipulates that, once a person is enrolled as a practitioner, the person automatically becomes a

171. Van de Bossche & Zdouc (n 38 above) 335.
172. Cronje (n 45 above) 15.
173. Cronje (n 45 above) 15.
174. WTO TiS Division 31 January 2013 'The General Agreement on TiS in introduction'https://www.wto.org/english/tratop_e/serv_e/gsintr_e.pdf (accessed 13 August 2021).
175. Legal Practitioners Act, 15 of 1995 ('the 1995 Act').
176. Sec 1 of 1995 Act.
177. Sec 41(a) of 1995 Act.
178. Sec 41(b) of 1995 Act.
179. Sec 41(m) of 1995 Act.
180. Sec 1 of 1995 Act.

member of the Law Society of Namibia.[181] The Constitution of the country affectionately called the '*Mother of All Laws*'[182] is regarded as a democratic document and guarantees the protection of the rights of all persons.[183]

3.4.1 The admission of legal practitioners under the 1995 Act

The 1995 Act deals with the admission of legal practitioners in the country. It is stated that, it is only when a person has satisfied all the requirements of the 1995 Act that he or she is admitted into the legal profession.[184] Section 4 stipulates that the Court has the power to admit a person into the legal practice if satisfied that a person is fit to practice.[185] The candidate has to be qualified as provided for under section 5 of the 1995 Act.[186] All aspiring persons seeking admission have to be Namibian citizens or permanent residents and ordinarily resident in that country.[187] Alternatively, hold a permit which is granted by the Immigration Control Act[188] in order to access employment in that country.[189] The petitioner has to lodge an application before the court for admission.[190] The professional and academic qualifications for admission are regulated by section 5 of the Act.

A person seeking admission must hold a degree from the University of Namibia or an equivalent academic qualification in law from a university or comparable to foreign institution prescribed by Minister under section 4(a) of the 1995 Act. The person must have been provided with a certificate by the Board (Board for Legal Education established by section 8) which stipulates that the person has passed practical legal training and Legal Practitioners' Qualifying Examination.[191] A person shall be duly qualified for the purposes of section 4(1) if the person is a holder of degree, diploma or certificate in law which is immediately prior to the commencement of the 1995 Act was approved by the Attorneys Act 53 of 1979 as a degree, diploma

181. Sec 43 (1) of 1995 Act.
182. C. Ruppel & K Ruppel-Schlichting 'Legal and Judicial Pluralism in Namibia and Beyond: A Modern Approach to African Legal Architecture?' (2011) *The Journal of Legal Pluralism and Unofficial Law* 37.
183. Preamble Constitution of Namibia.
184. Sec 3 of 1995 Act.
185. Sec 4(1) (a) of 1995 Act.
186. Sec 4(1) (b) of 1995 Act.
187. Sec 4(1) (c) (ii) of 1995 Act.
188. Immigration Control Act, 1993 (Act 7 of 1993).
189. Sec 4(1) (c) (iii) of 1995 Act.
190. Sec 4(2) of 1995 Act.
191. Sec 5(1) (a) of 1995 Act.

or certificate which enabled a holder to be admitted as an attorney under that 1995 Act.[192] The person also has, after having obtained the above qualifications, to have duly complied with the provisions of the Attorneys Act of 1979 in respect to service under articles and passed the practical examinations.[193] It is the duty of the Registrar to enrol any person who was an attorney or advocate before the commencement of the 1995 Act on the roll.[194]

3.4.2 Critical appraisal of the 1995 Act

As in other sister SACU countries, Namibia has put measures in place to restrict foreign legal practitioners from accessing the legal profession in that country. The requirement is that, an aspiring candidate seeking admission has to be a Namibian citizen; or a permanent resident or ordinarily resident in that country.[195] Inasmuch as the country has made horizontal commitments under GATS and for mode 4, the presence of natural person permission of entry and residence of foreigners especially services providers in the country is subject to the countries' labour laws and Immigration Control Act of 1993. What this means is that, a valid work permit is required in order to seek employment in the country issued in terms of section 27 of the Immigration Control Act.[196] This provides an alternative route for foreign legal practitioners to access the legal profession. However, due to the strenuous process and the way the country frustrate the process of acquiring a permit shows the ploy to restrict foreign legal practitioners in the country. This requirement of citizenship and permanent residence in the Act dealing with admission of foreign legal practitioners is an impediment to market access and national treatment (Article XVII) under GATS. This is because, the requirement is not liberalising the TiS which GATS seeks to achieve as stated in its objectives. Namibia is obliged to comply with general obligations discussed in the previous chapter. These admission requirements are placed to protect the domestic market but violate international obligations.

The requirement of permanent residence discriminates against non-nationals/non-residents wishing to supply legal services in the country. As required by

192. Sec 5(1) (b) of the 1995 Act.
193. Sec 5(1) (b) (i) of the 1995 Act.
194. Sec 6 of the 1995 Act.
195. Sec 4(1) (c) of 1995 Act.
196. https://www.ibanet.org/PPID/Constituent/Bar_Issues_Commission/ITILS-Namibia (accessed 12 August 2021).

GATS, when country intends to keep such measures in place, there is a need for Namibia to include such measures in its schedule by modifying its commitments. This is because national treatment of Article XVII:I of GATS 'prohibits a country to discriminate against any other country'.[197] A country should not put measures that are beneficial to its own domestic services or suppliers.[198] What this means is that, GATS members are obliged to afford foreign services equal treatment and opportunity in a way it treats its own domestic services. To this end, the requirement of permanent residence in the 1995 Act acts as an impediment to the supply of legal services.

The supply of services for GATS occurs in terms of any of the four modes: cross-border transaction; consumption abroad; establishment in another jurisdiction and temporary movement of labour are fulfilled.[199] In this respect, the imposition of permanent resident status is a measure that infringes service producers (legal practitioners) to freely interact and supply their services constitutes an impediment to TiS.[200] The 1995 Act clearly highlights that the court admits any person who has satisfied the court that they are Namibian citizens[201] or ordinarily citizens/permanent residence.[202] Foreigners should hold a permit granted by the Immigration Control Act[203] to be given employment access in the country.[204] These measures imposed by the legislation are, to a greater extent, inconsistent with international obligation as it constitutes national treatment limitation under GATS.[205] To this end, the requirement imposed by Namibia is a *de facto* discrimination as defined on national treatment obligation which seeks to avoid protectionism.[206] The obligation states that:

> Each member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.[207] Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member.[208]

197. Van den Bossche & Zdouc (n 38 above) 414.
198. WTO https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm (accessed 23 July 2021).
199. Delimatsis (n 39 above) 25-26.
200. Delimatsis (n 39 above) 76.
201. Sec 4(1) (c) of the 1995 Act.
202. Sec 4(1) (c) (ii) of the 1995 Act.
203. Immigration Control Act, 1993 (Act 7 of 1993).
204. Sec 4(1) (c) (iii) of 1995 Act.
205. Van den Bossche & Zdouc (n 38 above) 404.
206. Van den Bossche & Zdouc (n 38 above) 414.
207. Art XVII:I GATS.
208. Art XVII(3) of GATS.

From the article picked above, it is clear that the country is, in a way, restricting foreign practitioners in that country by offering less favourable treatment to some foreign lawyers. The requirements of citizenship or permanent residence are not only a national treatment limitation but also violate the Namibian Constitution of the country which is the supreme law.[209] According to Article 10 of the Constitution, expands on issues of equality and freedom from any discrimination, it is provided that:

> All persons shall be equal before the law'[210] and 'no persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.[211]

It is said in the 1995 Act that one has to be a Namibian citizen to be admitted.[212] The alternative provided by the Act is that person must be a permanent resident and ordinarily resident in the country in order to provide legal services.[213] The Constitution of Namibia, as highlighted under article 10, does not discriminate on the basis of ethnic origin or race as it allows equality before the law.[214] For that reason, the stringent requirement violates the constitutional right as envisaged in the Constitution. This freedom is curtailed by the imposition of these strict requirements as aspiring lawyers wishing to practise in Namibia are restricted as in other SACU countries discussed so far given the imposition of the requirements stated above.

The country also adopts the principle of recognition as provided under GATS Article VII. According to the 1995 Act, persons allowed to practices must seek admission as holders of a degree from the University of Namibia or have an academic qualification in law equivalent from a university or comparable foreign institution which is prescribed by Minister under Section 4(a) of the 1995 Act. The applicant must have a certificate by the Board stipulating that he or she passed practical legal training[215] and the Legal Practitioners' Qualifying Examination.[216] This is to some extent in line with the international obligation for countries to enter into recognition agreements:

> A member may recognize the education or experience obtained, requirements met, or licenses or certifications granted in a particular country. Such recognition, which may be achieved

209. Art 1(6) Constitution of Namibia.
210. Art 10(1) Constitution of Namibia.
211. Art 10 (2) Constitution of Namibia.
212. Sec 4(1)(c)(i) of 1995 Act.
213. Sec 4(1)(c)(ii) of 1995 Act.
214. Art 10(1) Constitution of Namibia.
215. Sec 5(1)(a)(i) of 1995 Act.
216. Sec 5(1)(a)(ii) of 1995 Act.

> through harmonisation or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously.[217]A member shall not accord recognition in a manner which would constitute a means of discrimination between countries in the application of its standards or criteria for the authorization, licensing or certification of services suppliers, or a disguised restriction on trade in services.[218]

In Article 85 of the 1995 Act, it is stipulated that:

> Where the Minister is satisfied that the law of a foreign country permits the admission or authorization otherwise of legal practitioners resident in Namibia to practise law in that country, whether generally or in particular cases, the Minister may, after consultation with the Chief Justice and by notice in the Gazette, declare such country to be a reciprocating country for the purposes of this Act.[219]

However, the power can be delegated by the Chief Justice to the Judge-President. After considering the nature of the case, and that it is reasonable to obtain the services of a practitioner not resident in the country or a reciprocating country, the Chief Justice or Judge-President may, upon application by the lawyer, grant a certificate authorising the lawyer right to appear in relation to that particular matter.[220] The certificate is only applicable in relation to that specific matter which the certificate is issued.[221] The lawyer permitted to practise under this certificate is not allowed to handle any finances in trust of clients.[222] This serves to shows that the country has adopted GATS obligation by accepting reciprocity and other countries' qualifications. As highlighted under GATS, the recognition must not be conducted in a discriminatory way between countries.[223] The observation is that this reciprocity, is, in other words, discriminatory in that Namibia returns favours only to countries that also allow its lawyers in their jurisdiction. Those that do not, this does not apply. Notably, Article VII (4) of the GATS states that a country has an obligation to notify the Council for TiS for its recognition measure.

The permanent residence requirement restricts market access under GATS and for this reason it can be concluded that the retention of this measure by Namibia violates national treatment and market access obligation. To this end, all the countries

217. Art VII(1) of GATS.
218. Art VII(3) of GATS.
219. Sec 85 (1) of 1995 Act.
220. Sec 85(2) of the 1995 Act.
221. Sec 85(3) of the 1995 Act.
222. Sec 85(5) of the 1995 Act.
223. Art VII(3) of GATS.

discussed in this chapter are repudiating the international obligations under GATS by putting in place the said requirements. A case of reference, in light of Namibia, is the decided case of *Ex parte: Mukondomi*[224] (Ex parte: Mukondomi case), in which the Applicant moved an application for admission as required by section 4(1) (c) (ii) of the 1995 Act.[225] The Applicant, a Zimbabwean attained his qualifications at the University of Namibia. He then married a Namibian wife which he alleges that, by virtue of the union, he acquired domicile through marriage and, as such alleged he qualified for admission.[226]

The legal question before the court was whether, during his marriage, he was a lawful resident of Namibia or was a prohibited immigrant at the time of marriage then his status cannot be legalised.[227] The court decided that, the Applicant did not make sufficient case to prove he is permanent residence as required by the 1995 Act for admission.[228] From Ex parte: Mukondomi case, the writer can conclude that, the 1995 Act is discriminatory to a certain extent and violates the international standards envisaged by GATS. The conclusion is based on the reason that, the candidate, as in the mentioned case, holds the qualification on Namibia acquired after four (4) or 5 (years) of study and thereafter is refused admission in that jurisdiction. This is not only financially draining for the candidates but also a waste of resources. When this occurs, it is most likely possible that such a graduate would engage in illicit acts in order to acquire the necessary documents. This, the writer posits, in a way, prompts corrupt activities as such persons seek to penetrate the market. To this end, the legislation dealing with foreign admission by maintaining the stringent permanent status rule it to a greater extent not adhering to GATS obligations.

3.5. The admission of legal practitioners in South Africa

3.5.1 The legal framework of South Africa

The Legal Practice Act 28 of 2014 (herein '2014 Act') was enacted in 2014 and greatly transformed legal framework of that country. The 2014 Act came into operation on 1st

224. *Ex parte: Mukondomi* (HC-NLD-CIV-MOT-ALP-2020/00004) [2020] NAHCNLD 89 (20 July 2020).
225. *Ex parte: Mukondomi case* para 2.
226. *Ex parte: Mukondomi* case para 5.
227. *Ex parte: Mukondomi case p*ara 28.
228. *Ex parte: Mukondomi case p*ara 29.

November 2018 creating the Legal Practice Council (the Council),[229] a body that oversees the legal profession in South Africa. The Council is established by Section 4 of the 2014 Act and regulates the conduct of all lawyers in the country.[230] The Council aims at upholding the rule of law and administration of legal justice.[231] It is the duty of the Council to also set rules and principles for admission into the profession for attorneys by regulating the professional conduct of lawyers to ensure transparency and accountability.[232] Prior to the enactment of the 2014 Act, attorneys and advocates conduct was governed by Attorneys Act[233] and Advocates Act[234] respectively and have since been repealed. More recently, there have been changes in the admission of attorneys and advocates in South Africa as the 2014 Act governs both professions.[235] The 2014 Act aims at creating a single legislation that oversees the affairs of legal practitioners.[236] In the legal framework, legal practitioner refers to an attorney and advocate duly admitted to practice according to Section 24 and 30 of the 2014 Act.[237] To this end, the 2014 Act now governs both professions. The preamble to the 2014 Act stipulates that, the Act aims at ensuring that the legal service is accessible, uphold constitutional values and the rule of law.[238]

3.5.2 The admission of legal practitioners under the 2014 Act

The admission of legal practitioner is regulated by Sections 24 and 30 of the 2014 Act.[239] It is pronounced that, the High Court has the requisite power to admit and enrol attorneys, advocates, conveyancers and notaries into practice.[240] For that reason, any person seeking admission, upon application, has to satisfy the Honourable court that

229. Law Society of South Africa 'History' https://www.lssa.org.za/history/ (accessed 18 August 2021).
230. Sec 4 of the 2014 Act.
231. Sec 5(k) of the 2014 Act.
232. Legal Practice Council https://lpc.org.za/ (accessed 16 August 2021).
233. Attorneys Act 53 of 1979.
234. Advocates Act 74 of 1964.
235. Law Society of South Africa https://www.lssa.org.za/about-us/about-the-attorneys-profession/becoming-a-legal-practitioner/ (accessed 16 July 2021).
236. Sec 3(c) of the 2014 Act.
237. Sec 1 of the 2014 Act.
238. Preamble of the 2014 Act.
239. Sec1 of the 2014 Act.
240. Sec 24(2) of the 2014 Act.

he or she satisfied the requirements of section 26[241] and is a citizen or permanent residence of South Africa.[242] The minimum qualification, to be admitted, is that the person must hold a Bachelor of Laws degree acquired at a South African University for a period of not less than four (4) years or has taken a course which is not less than five (5) years.[243] This applies when 'the LLB degree is preceded by a bachelor's degree other than LLB'.[244] In addition, the person also has to fulfil the law degree requirements if obtained in another jurisdiction comparable to South Africa LLB degree and the degree must be recognised by South African Qualification Authority (SAQA),[245] the body that evaluates all academic certificates taken outside the country.

The law requires prospective candidates seeking admission to take practical vocational training set by the Minister.[246] This training involves community service, a practise management course.[247] The person must have passed a competency-based examination prepared for candidates.[248] Community services include service in the country as, 'approved by the Minister in consultation with Council.'[249] One can also serve at the South African Human Rights Commission[250] service without remuneration as a judicial officer in the case attorneys and advocates or act as commissioner in 'small claim courts'.[251] However, the Council, upon application, has the discretion to exempt any candidate wishing to enter into legal practice from performing community service.[252] Another requirement for an attorney who intends to become a conveyancer is that, he or she has to pass a competency-based examination as provided by Council directive.[253]

An attorney can only be enrolled as a notary after passing a competency-based examination regulated by the Council.[254] Any person seeking admission has to be fit and proper.[255] This means that, the person has to be of good health, honest, reliable,

241. Sec 24(2) (a) of the 2014 Act.
242. Sec 24(2) (b) (i) (ii) of the 2014 Act.
243. Sec 26(1) (a) of the 2014 Act.
244. Sec 26(1) (a) of the 2014 Act.
245. SAQA was established by the National Qualifications Framework Act, 2008(Act No.67 of 2008).
246. Sec 26(1) (c) of the 2014 Act.
247. Sec 26(1) (c) of the 2014 Act.
248. Sec 26(1) (d) of the 2014 Act.
249. Sec 29(2) (a) of the 2014 Act.
250. Sec 29(2) (b) of the 2014 Act.
251. Sec 29(2) (c) of the 2014 Act.
252. Sec 29(3) of the 2014 Act.
253. Sec 26(2) of the 2014 Act.
254. Sec 26(30 of the 2014 Act.
255. Sec 24(c) of the 2014 Act.

and trustworthy and willing to serve the public.[256] On submitting the application, another copy of the applicants' petition for admission is served to the Council[257] and the Minister may, after consulting with the Council and in consultation with the Minister of Trade and Industry, make all the necessary guidelines for admission to make it possible for a foreigner to practise in South Africa.[258] After the candidate complies with all the requirements envisaged by the 2014 Act, he or she will be permitted to practise in the country.[259]

3.5.3 A critical appraisal of the 2014 Act

The 2014 Act was received with open arms as it significantly transformed the legal fraternity in South Africa. This is because the 2014 Act repealed various legislations governing this legal domain. One of the changes was that, attorneys and advocates are regulated by a single statute. South Africa then undertook GATS commitments in legal service in mode 3 and 4 only.[260] In mode 3, a lawyer is admitted in a GATS country when he or she establishes himself or herself in another GATS country for purposes of supplying a professional legal service.[261] The country then committed to apply market access and national treatment without any limitation in mode 3 and made commitments to allow market access in mode 4 as well.[262] As South Africa did not make any commitments in mode 1 and 2, it is not prohibited to restrict such by law.[263] On that ground that, South Africa did not make commitments in mode 1, the preferential treatment afforded to foreign practitioners, to some extent, violates the MFN obligation by imposing the permanent residence requirement. [264]

For any preferential treatment not to violate MFN, South Africa has to waive such obligation. As the country has not taken this position, any GATS country may institute proceedings in respect of the DSB, in respect of WTO Dispute Settlement Understanding.[265] In spite of taking specific commitments in the legal sector and the

256. Slabbert & Boome (n 151 above) 1502.
257. Sec 24(2) (d) of the 2014 Act.
258. Sec 24(3) of the 2014 Act.
259. Sec 25(1) of the 2014 Act.
260. General Agreement on Trade in Services GATS/SC/78 15 April 1994 (94-1075) https://www.wto.org/ENGLISH/TRATOP_E/serv_e/telecom_e/sc78.pdf(accessed 2 September 2021).
261. Hagenmeier *et al* (n 61 above) 8.
262. Hagenmeier *et al* (n 61 above)11.
263. Hagenmeier *et al* (n 61 above)12.
264. Hagenmeier *et al* (n 61 above)13.
265. Cronje(n 45 above) 3

obligations on market access and national treatment respectively, the country has to comply with the general GATS obligations. These are: MFN treatment obligation;[266] national treatment; recognition of qualifications envisaged in Article VII and domestic regulation binding to all GATS members irrespective of whether scheduled commitments are taken or not by the signatories.[267]

According to the 2014 Act, for a candidate to be admitted into the legal practise, he or she must possess the minimum qualifications as set out in section 26 of the 2014 Act. The academic qualification requirements in the 2014 Act were amended to conform to the countries' GATS commitments.[268] The statute recognises other foreign qualifications, but not as a unilateral process. This is because the individual is required, by law, to have the qualifications evaluated by the South African Qualification Authority (SAQA).[269] The country did this to recognise all foreign academic qualifications and services as stipulated in Articles I and VII of GATS.[270] What is important to note is that the evaluation of foreign qualifications by SAQA, to a greater extent, is a transparent and fair practice as it departs from the national treatment obligation and MFN provisions of the previous regime.[271] The function of SAQA is to compare foreign and local qualifications and make recommendations regarding the general procedures.[272]

This process is in accordance with the country's commitments as in GATS Article VI(1) ensuring that all regulatory measures, for example, the admission of foreigners are carried out in an objective, practical, and impartial way.[273] The argument advanced is that, all qualification and licensing requirements have to comply with Article VI (5) of the GATS that requires objectivity, transparency and equality.[274] To this end, the evaluation administered by SAQA seeks to conform to the above by enforcing this

266. Art II:I of the GATS.
267. Cronje (n 45 above)8.
268. Hagenmeier *et al* (n 61 above) 13 & 14; See also GATS VII(5) which state that recognition should be based on a multilaterally agreed criteria. In most cases member states shall work in cooperation with relevant organizations towards the establishment and adoption of common international standards for recognition and common international standards for practice of relevant services trades and professions.
269. SAQA is a body established by the National Qualifications Framework Act, 2008 (Act No. 67 of 2008).
270. Africa Press 'The globalization of Advocates legal services: Lesotho Perspective' 20 September 2021https://www.africa-press.net/lesotho/all-news/the-globalization-of-advocates-legal-services-lesotho-perspective-2 (accessed 9 October 2021).
271. Hagenmeier *et al*(n 61 above)14.
272. Cronje (n 45 above) 10.
273. Hagenmeier *et al* (n 61 above) 8.
274. Hagenmeier *et al* (n 61 above) 8.

requirement South Africa fully satisfies its GATS commitments by recognising foreign qualification and certificates acquired from another country.[275]The reason being that member is not allowed to give recognition in a manner that constitutes any form of discrimination among countries in applying of the procedure for evaluation.[276] What this means is that, the evaluation process by SAQA is conformity with the countries' international GATS obligation as decreed in Article VII.

The 2014 Act empowers the Minister to allow foreign lawyers market access by appearing in courts and practising in the country after consulting the Minister of Trade and Industry and the Council.[277] In the same vein, any regulation made by the country has to comply with GATS for the country to meet its international obligation on legal services. The system of unilateral recognition of the countries academic qualifications under the former system has been amended by the 2014 Act by allowing the conclusion of mutual recognition agreements according to section 24(3) (b) which says:

> The Minister may, in consultation with the Minister of Trade and Industry and after consultation with the Council, and having regard to any relevant international commitments of the government of the Republic, make regulations in respect of admission and enrolment to (a) determine the right to foreign legal practitioners to appear in courts in the republic and to practise as legal practitioners in the republic; or (b) give effect to any mutual recognition agreement to which the Republic is a party regulating –(i) the provision of legal services by foreign legal practitioners; or (ii) the admission and enrolment of foreign legal practitioners.[278]

By recognising foreign qualification, the country fulfils its GATS commitments through mutual recognition agreements.[279] This is in accordance with GATS which allows preferential trade and mutual recognition agreements to be concluded in a spirit that promotes economic integration, harmonisation and recognition.[280] For that reason, agreements must be absent of any discrimination between or among participants.[281]

The requirement imposed by the country that applicant must be a South African citizen or or permanent resident[282] are a travesty of the country's international

275. Art VII(1) of GATS.
276. Art VII (3) of GATS.
277. Sec 24(3) of the 2014 Act.
278. Sec 24(3) (b) of the 2014 Act.
279. Hagenmeier *et al* (n 61 above) 12.
280. Hagenmeier *et al*(n 61 above)
281. Art V: 1(b) of GATS.
282. Sec 24(2) (b) of the 2014 Act.

obligations, an impediment to the free movement of legal practitioners in SACU member states.[283] This requirement is as shown in the preceding discussion, applies in all the four countries. This is also the case in other countries, for example, Namibia.[284] The countries are out to protect their own nationals and favour own citizens against non-citizens, and this violates the MFN treatment obligation enacting that:

> With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.[285]

The MFN obligation as enshrined in GATS dictates that every member state has to be treated equally and prohibits discrimination between or among countries.[286] Although there are exceptions to this general rule, the MFN exceptions are permitted when a country has exempted itself from the obligation, entered into 'Mutual Recognition Agreement' or where special treatment results from regional integration but, the country has not made any MFN exemption in legal services.[287] For this reason, South Africa is bound to adhere to the MFN obligation if it is to fully satisfy its GATS commitments.

The country, instead, makes it very difficult for foreigners to access the legal profession by putting in place the said requirements. What makes it even more difficult is that, the process is so frustrating for foreigners to obtain permanent resident status.[288] The permanent residence permit takes about five (5) years provided that the foreigner was residing in the country with a valid work permit.[289] Mostly, permanent resident in South Africa is given to foreigners who have been granted a permanent post to work, has necessary skill or qualification or have intention to open a business in the country.[290] The Department of Home Affairs gives the impression that it takes up to twenty four (24) months to process the application but, on the ground this is not

283. Ngandwe (n 1 above) 371.
284. Sec 4(1) (c) (ii) of 1995 Act.
285. Art II:1 of GATS.
286. Van den Bossche & Zdouc (n 38 above) 346.
287. https://www.ialsnet.org/meetings/business/HagenmeierCornelius-SouthAfrica.pdf(accessed16 July 2021).
288. Hagenmeier *et al* (n 61 above) 13.
289. Immigration Act 13 of 2002.
290. Cronje (n 45 above) 16.

the case.[291] To dodge its international obligations the country has come up with a more tedious application process. This way one cannot say the country is refusing to employ foreigners. The market is open to foreigners but for them to be employed, they have to fulfil immigration requirements. This way the country is frustrating foreigners and tightening screws so that foreigners do not have access to the market. This on its own acts as an impediment to market access as provided by GATS.

The permanent residence and citizenship requirement constitutes a national treatment violation given that the condition is that:

> Each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.[292]

As stated earlier on, the national treatment obligation 'prohibits both *de jure* and *de facto* forms of discrimination.'[293] The spirit of the national treatment obligation is that foreigners are granted equal and competitive opportunities with local attorneys and advocates as well.[294] This is, however, not the case, not only in South Africa but other SACU member states as shown in the preceding discussion. This is because, the 2014 Act is, to a greater extent, protecting its domestic market by making it very difficult for foreigners to freely access the legal fraternity, and infringes Article VI (5) of GATS pronouncing that:

> In sectors in which a Member has undertaken specific commitments, pending the entry into force of disciplines developed in these sectors pursuant to paragraph 4, the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which: (i) does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c); and (ii) could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.[295]

In spite of, repealing the previous legislations governing the legal framework in the country the 2014 Act, maintained the requirement for permanent residence which is challenged for their national treatment and market access limitation.[296] For this reason,

291. Integrate Immigration https://www.intergate-immigration.com/blog/5-big-south-african-permanent-residency-benefits/(accessed 9 October 2021)
292. Article XVII:I of GATS.
293. Van den Bossche & Zdouc (n 38 above) 404.
294. Cronje (n 45 above)6.
295. Art VI (5) of GATS.
296. Hagenmeier *et al* (n 61 above) 21.

South Africa is not allowed to maintain any market access limitations unless this is on its commitments schedule.[297] The impression that the country gives to its members is that we are open and, it is only when one enters the country, that one would realise that the doors are being closed to foreigners. This situation is certainly deceptive, in my view, and something must be done to address this issue. This is the main argument raised in this study.

The only market access measure which South Africa entered into was to prohibit advocates, local and foreign, to form partnerships or companies.[298] This, however, is not a discriminatory measure because it applies to foreigners and domestic lawyers.[299] The national treatment obligation states that, if a country, for example, South Africa in this case, gives equal treatment to foreign and domestic services or service suppliers, it is upholding its national treatment obligations.[300] What this means is that, the treatment afforded to advocates is MFN and national treatment compliant. In light of this, it could be said that the will to fulfil its GATS commitments is evident but there are certainly underlying factors pushing the country back in its drive to satisfy its international obligation under the GATS. Possibly, the massive influx of foreigners accused of taking jobs on the local market. This point shall be discussed at length in the next chapter.

The preferential treatment accorded to citizens does not only augur well given SADC's aspiration towards harmonisation and integration. The country signed the economic integration agreement, the SADC Protocol on TiS aiming at liberalising the services sector.[301] The national treatment restrictions are mostly residency requirements, connected to nationality requirement. Market access and national treatment are two restricted under mode 4.[302] On the other hand, the SADC Treaty advocates equal growth and development to escalate quality of life and development as a region.[303] To achieve the objectives, SADC countries are enjoined to harmonise, participate in all programmes and activities of the region and integrate as one united

297. Art XVI of GATS.
298. Cronje (n 45 above) 6.
299. Cronje (n 51 above) 6.
300. Van den Bossche & Zdouc (n 38 above) 412.
301. Cronje (n 51 above) 8.
302. A Ifubwa November 2015 mini thesis title: the implementation of trade in services liberalisation: challenges to enhancing the movement of natural persons across borders (mode IV) and the recognition of foreign qualifications in South Africa University of the Western Cape Page 82.
303. Art 5(1) of the SADC Treaty.

body.[304] By insisting on permanent residence for foreigners this does not, in any way, spur regional development and also violates international obligation.[305]

The submission is that, the 2014 Act violates the GATS obligations and breach the supreme law of the country[306] as argued by affected parties in the court of law. In light of the constitutional framework, when interpreting legislations, the courts are enjoined to adopt a 'reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'.[307] The provisions of 2014 Act are challenged in light of the Bill of Rights,[308] of the country, which acknowledges that, any law that is inconsistent with the Constitution is invalid.[309] To this end, when interpreting persons' rights, the court must take into consideration international law.[310] The requirement of permanent residence goes against the constitutional framework of South Africa and is being in most countries, at present, challenging its constitutionality.

The requirement is not only discriminatory but, infringes on equality rights as enshrined in the Constitution.[311] It is in this context that one submits that these requirements are discriminatory against foreigners in favour of citizens.[312] On the other hand, the 2014 Act professes to uphold the constitutional values and rule of law[313] and, when it comes to the treatment of foreigners the same law violates their constitutional rights of equality before the law[314] as well as freedom to choose trade or profession.[315] This puts Section 24(2) (b) under serious scrutiny as it discriminates against foreigners seeking admission into the legal profession in South Africa. This is because, Section 9(3) of the country's Constitution affirms that:

> The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.[316]

304. Art 5(2) of the SADC Treaty of 1992.
305. Hagenmeier *et al* (n 61 above) 13 -14.
306. Sec 2 Constitution of South Africa.
307. Sec 233 Constitution of South Africa.
308. Hagenmeier *et al* (n 61 above) 14.
309. Sec 2 Constitution of South Africa.
310. Sec 39(1) (b) Constitution of South Africa.
311. Sec 9 Constitution of South Africa.
312. Hagenmeier *et al* (n 61 above) 13.
313. Preamble of the legal Practice Act.
314. Sec 9(1) Constitution of South Africa.
315. Sec 22 Constitution of South Africa.
316. Sec 9(3) Constitution of South Africa.

The allegation that the legislation dealing with foreign legal admission infringes on the equality clause[317] entrenched in the Bill of Rights was made in the application for admission in the unreported case of *Pattaya Tangkuampien v The Law Society of South Africa.*[318] *The* applicant is Thai and at the time of his application before court, he was not a permanent resident of South Africa. Pattaya Tangkuampien was subsequently only admitted after he obtained his permanent residence.[319] The legal issue before court was whether permanent residence infringes unjustifiably on the equality clause entrenched in the Constitution. The test in *Harksen v Lane*[320] was used by the Constitutional court to make a determination whether a right has been infringed or not. The test was:

> Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.[321]

It must be pointed out that the differential treatment afforded to citizens and foreigners does not promote equality which the Constitution seeks to uphold. In the affidavits filed before court in Pattaya Tangkuampien case above, referred to the Minister argued that the differentiating citizens from foreigners was to protect the public and promote the administration of justice in South Africa. The decision was reached after the court accessed whether differentiation bears a rational connection to a legitimate government purpose. It was submitted that, the permanent residence permit requirement, does indeed bear a rational connection to a legitimate government purpose.[322]

The decision was also reaffirmed when the courts also had to answer whether the provision differentiates between people as highlighted in the decided case of *Union of Refugee Women and Others v Director: Private Security Industry Regulatory*

317. Sec 9 Constitution of South Africa.
318. *Pattaya Tangkuampien v The Law Society of South Africa* (CPD) (unreported) case number 897/07.
319. Hagenmeier *et al* (n 61 above) 14.
320. *Harksen v Lane* 1998 1 SA 300 (CC).
321. *Harksen v Lane* 1998 1 SA 300 (CC) Para 53.
322. M.H Hwacha 'Two lawyers named Mpofu: Is the permanent residence requirement in the LPA unconstitutional?' March 1st, 2020https://www.derebus.org.za/two-lawyers-named-mpofu-is-the-permanent-residence-requirement-in-the-lpa-unconstitutional/ (accessed 12 August 2021).

Authority and Others.[323] The court decided on the question, in relation to the requirement of a permanent residence permit as required in terms of Section 23(1) (a) of the Private Security Industry Regulation Act 56 of 2001. It was held that this requirement differentiated between people.[324] Also in the recent case of *Rafoneke and Another v Minister of Justice and Correctional Services and Others (FB*)[325] the court declared that section 24(2) of the Legal Practice Act 28 of 2014 was 'unconstitutional and invalid to the extent that it does not allow foreigners to be admitted and authorised to be enrolled as non-practising legal practitioners'.[326] The writer, therefore, submits that it is justifiable to say that, the requirement of permanent residence as envisaged under Section 24 of the 2014 Act, similarly, differentiates between categories of people seeking legal admission in the country. For this reason the legal question raised before is answered in the affirmative. The constitutionality of the 2014 Act is currently put to test in the High Court of South Africa in Pretoria in which the Applicants submits that permanent residence does not stand constitutional scrutiny. The applicant seeks to declare section 24(2) (b) of the 2014 Act unconstitutional and invalid as it excludes foreigners with the right to admission who are not permanent residence.[327] What this means is that cases are piling up challenging this legislation.

A newspaper article with the headline 'Zimbabwean lawyers challenge SA law preventing them from practicing'[328] is another case in point. The three applicants are Zimbabwean law graduates who studied in South Africa challenging the 2014 Act arguing that this piece of the legislation is discriminatory. This is because, for years now, they are refusing them from admission in South Africa legal system as they do not have permanent residence. The applicants: Bruce Chakanyuka, Nyasha Nyamugure and Dennis Chadya hold Bachelor of Laws from South African Universities. In spite of the fact that the applicants have relevant degrees, have passed

323. *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others 2007 (4) SA 395 (CC).*
324. Hwacha (n 326 above).
325. *Rafoneke and Another v Minister of Justice and Correctional Services and Others (FB)(unreported case no 3609/2020 and 4065/2020, 19-9-2021)(Musi JP (Molitsoane J and Wright AJ).*
326. https://www.derebus.org.za/wp-content/uploads/2021/11/DR_Journal_November_2021.pdf(accessed 25 January 2022).
327. Para 124 of the notice of Motion of the High Court of South Africa, Gauteng Division, Pretoria.
328. B Wicks'Zimbabwean lawyers challenge SA law preventing them from practicing' 27 Jul 2021 https://www.citizen.co.za/premium/2581855/zimbabwean-lawyers-challenge-sa-law-preventing-them-from-practicing/ (accessed 16 August 2021).

the required examination, they are deemed to be foreigners without the required papers. With his law degree Chakanyuka, is employed as a waiter because of this discriminatory legislation for specifically legal practitioners.

In light of these observations, it is justifiable for the writer to conclude that the admission of foreigners into the legal profession remains a serious and contentious international issue in that country. After being refused, they end up taking jobs which are not in line with their career choice. This infringes on their constitutional right provided in Section 22 pronouncing that persons have the right to choose own trade, occupation or profession freely.[329] On the other hand, for some of the graduates, the South African government would have invested financially in them and, to deny them the right to work in that country is a waste of resources. It is also a cause of concern that, the same country refusing admission of lawyers, is absorbing foreigners with what has been categorized as scarce skills. This again, is not only discriminatory but a decision that one finds difficult to provide satisfactory answers. All in all, this is a violation of the country's international obligations.

The requirement of a permanent residence has been retained after several amendments for over the years including the 2014 Act. The irony is that, the legal profession is the only profession that has such stringent requirements as auditors, accountants, nurses, surveyors and social workers do not require this permanent residence to be employed[330] as shown in the next chapter. In light of this, the jurisprudence dealing with the legal admission in South Africa has upheld legislations which offer differentiation treatment as seen in Section 24 of the 2014. On the other hand, South Africa's neighbours, Zimbabwe, for example, permitted advocate George Bizos from South Africa to represent Tsvangirai in the decided treason case of *S v Tsvangirai*.[331] However, the munificence and generosity afforded by these countries to South Africa is hardly reciprocated. To this end, it calls for the country to open doors to cross-border legal practice as other countries are not refusing cross-pollination of jurisprudence.[332] In this regard, the legislation governing the admission of foreign

329. Sec 22 Constitution of South Africa.
330. T Broughton 'Law graduates to challenge legal profession's discrimination against immigrants' 27 July 2021 https://www.groundup.org.za/article/law-graduates-challenge-legal-practice-councils-discrimination-against-immigrants/ (accessed 16 August 2021).
331. *S v Tsvangirai* 2004 ZWHHC 169 (15 October 2004).
332. https://muhaz.org/the-admission-and-enrolment-of-foreign-legal-practitioners-in.html?page=3 (accessed 24 August 2021).

lawyers in South Africa should be reformed to conform to the country's international obligations and Constitution.

3.6. Conclusion

When one looks at all points raised in this chapter, it is evident that there is a conflict of domestic regulations in these countries with their GATS obligations. Given the reviewed Acts, the admission and enrollment of legal practitioners reveal that the legal requirements put in place deny foreign legal practitioners access to the market. To achieve this, these countries impose requirements of ordinarily[333] and/or permanent resident,[334] as pointed out in this chapter. This negates the liberalisation of TiS in legal services: for example, exchanging jurisprudence and employment creation. The point is that the legislation is protectionist as they unfairly favour citizens over foreign legal practitioners. This the chapter concludes, violates the MFN and national treatment obligation as espoused by GATS. The reasoning is that these countries did not take any MFN exceptions in the legal services sector for one reason or the other. The legislations reviewed do not only violate the GATS general obligations but their constitutions as well. For this reason, the signing of GATS commitments is seen as a mere window-dressing than a serious commitment to the spirit of the letter. Based on these observations, the next chapter provides some possible solutions to escalate the free movement of legal practitioners in the SACU region. In the next chapter, I explain why Lesotho, which was not discussed here, and the EU, are used as examples of what it means to liberalise trade in services.

333. Sec 6(c) of Legal Practitioners Act of 1979 (Cap 61:01) of Botswana; Sec 6(1) (a) Legal Practitioners Act 15 of 1964(Eswatini); Sec 24 Legal Practice Act 28 of 2014 (SA); Sec 6(c) (iii) of the Legal Practitioners Act 11 of 1983 (Lesotho).
334. Sec 24 of the 2014 Act.

CHAPTER FOUR

LESOTHO AS A MODEL

4.0 Introduction

The previous chapter located laws regulating the admission and enrolment of legal practitioners in SACU countries within a GATS perspective. The conclusion reached was that membership of GATS by these countries is more of a window dressing activity. In addition, it was pointed out that the countries considered pay lip service to their international obligations envisaged under GATS and violate their respective constitutions. This chapter then uses Lesotho as a model and gives a brief overview of the country's commitments. The idea is to explore plausible solutions to this contentious issue. This approach would help clarify what makes it difficult for foreign law graduates to be admitted in SACU countries and recommend possible solutions on how best to promote regional integration and harmonisation in the last chapter.

4.1 Impediment to the liberalisation of legal services in SACU countries

4.1.1 International obligations of member states from a SACU perspective

The preceding chapter discussed the legislations dealing with the admission of legal practitioners, and the writer identified impediments inherent in all jurisdictions in the SACU region. The point was made that these measures are detrimental to the move towards harmonisation and integration as espoused by GATS and SADC.[1] The observation was that the legal sector is the least liberalised, given that only three (3) SADC countries: Lesotho, South Africa and Seychelles, made commitments under this sector and that tourism services are, of all services, the most liberalised. My argument has consistently been that the laws enacted to regulate the legal profession violate the selected countries' international obligations and their national constitutions.[2]

The pieces of legislation put in place measures that frustrate the principles of integration, harmonisation and cooperation as advocated by the SACU Agreement, SADC Protocol on TiS and GATS. That these countries come up with new stringent

1. Art 5(2) (d) of SADC Treaty.
2. Sec 2 Constitution of South Africa; Sec 2 Constitution of Eswatini; Art 1(6) Constitution of Namibia.

entry requirements of permanent residence[3] or ordinarily residence[4] and refuse cross-border supply of legal services becomes a serious international TiS issue. Another observation was that the geopolitical issues explain why these countries take this position and promote discrimination tendencies as authorities and governments try to 'guard against unwittingly fuelling xenophobia'.[5] It is also likely that this is because of these countries' different levels of development. This is explained by the massive exodus of foreign practitioners to specific countries searching for greener pastures. This is seen as one of the factors influencing the enactment of more stringent laws in some countries. The argument made is that all this is meant to make it very difficult for foreigners to access the market and exhibits official xenophobic tendencies.

The writer asserts that the preferential treatment of citizens over non-citizens by these countries is a new phenomenon given their colonial history. The laws are meant to protect the domestic market from foreigners, and the countries impose these inequalities to guard their national market jealously.[6] This, on the other hand, does not augur well with harmonisation, regional integration and cooperation in the SACU region and GATS. This is because GATS aims to create a reliable system of international trade rules, to guarantee fair treatment of all participants, to encourage trade and development through progressive liberalisation'.[7] This means that the protectionist tendency does not promote regional integration as advocated by the SADC treaty, to which members are signatories. The argument is that these countries are not only signatories in practice, but they do not uphold their international obligations. This is a strong case because these SACU countries and nearly all African countries have nationalistic mentalities and are reluctant to embrace a global mentality[8] by not opening up space for international players.

It was mentioned earlier that GATS, which facilitates global rules of TiS in which these countries are signatory, has two non-discrimination policies, namely, the MFN

3. Sec 4(1) (c) (ii) of the 1995 Act; Sec 24(2) (b) (ii) of the 2014 Act.
4. Sec 5(1) (a) and 6(1) (a) of 1964 Act.
5. *Somali Association of South Africa v Limpopo Department of Economic Development, Environment and Tourism (48/2014) ZASCA 143 (26 September 2014*) para 44.
6. JP Ngandwe 'Challenges facing the harmonisation of the SADC legal profession: South Africa and Botswana under the spotlight' (2013) 46 *The Comparative and International Law Journal of Southern Africa* 380.
7. C Hagenmeier *et al* 'The Admission and Enrolment of Foreign Legal Practitioners in South Africa under the Legal Practice Act: International Trade Law and Constitutional Perspectives' (2016)19 *Potchefstroom Electronic Law Journal* 4.
8. Ngandwe (n 6 above) 380.

and national treatment discussed earlier. The MFN obligation provides that if a country allows, for example, legal practitioners from a specific foreign state to practice within its jurisdiction, it is also obliged to allow the legal practitioners of all the other GATS members to do likewise.[9] The rationale of the obligation is to ensure equal opportunities for all competitors among its members.[10] However, the laws regulating the admission of attorneys and foreign legal practitioners do not uphold this obligation, yet the countries made no exceptions under MFN. The laws governing the admission and enrollment of attorneys in the countries discussed earlier violate the MFN obligation by discriminating against foreigners. By adopting protectionist tendencies in refusing to open up the market access to foreign practitioners, these countries violate their international obligations.

The primary obligation under GATS is not to discriminate even if certain exceptions are provided for this general rule (Article V). When countries enter into agreements liberalising TiS, such agreements must be absent of any form of discrimination.[11] Any measure dealing with TiS affecting legal services (lawyers) must be objective, reasonable, and impartial.[12] To this end, any measure under GATS must be absent of discrimination to fulfil GATS obligations. This means that international obligations undertaken by these countries bind them to give all GATS signatories equal treatment (MFN). The observation is that they commit themselves on paper to the rules, but they violate the same obligations they profess to uphold in practice. The preferential treatment of, for example, practitioners from BOLESWA Universities violates the MFN treatment obligation. This is because MFN treatment enjoins Botswana to give the same favourable treatment to all GATS Member states such as Namibia and South Africa.

This means that, even if Botswana has opened space to some foreign nationals, it breaches a legal obligation under GATS. This is also true for South Africa for not giving one another the similar favourable treatment afforded by other states.[13] The issue is exacerbated by the fact that these countries prefer their legal curriculum, as in the case, for example, Botswana, Eswatini, Namibia and South Africa, by giving

9. Ngandwe (n 6 above) 381.
10. P Van den Bossche & W Zdouc *The Law and Policy of the World Trade Organization* (2013)335.
11. Art V (1) (b) (i) GATS.
12. Art VI (1) GATS.
13. Ngandwe (n 6 above) 381.

preference to graduates from their universities. It becomes challenging to anticipate which national legislative regime is vital in the career of any law student. This problem emanates from the fact that there is no collaboration between the regulatory bodies of Law Societies in the respective countries.[14] Despite gaining knowledge of the legal system of any country discussed in this chapter, upon completion, a foreigner finds it even more difficult to get admitted in that jurisdiction after staying for four (4) or five (5) years. This is because of the stringent requirements needed, such as permanent residence[15] or ordinarily resident,[16] to access the legal profession. This is not only financially draining for the aspiring legal practitioners but, in one's view, an expression of institutionalised xenophobia, to put it in other words.

The argument is that the challenges to integration and harmonisation of the legal fraternity are self-made as these countries resist embracing globalisation. This is not the case with other professions, such as accounting, which has reoriented with 'the emergency of global accounting standards.'[17] The accounting profession requires one to write international examinations such as ACCA and can work anywhere on the globe. The key observation is that by favouring citizens over non-citizens to benefit from their legal system, Botswana examinations are administered to candidates outside BOLESWA, even to citizens. This is discriminatory, as shown in this dissertation.

On the other hand, this is not the case in light of Lesotho, one of the SACU countries used as a model in this dissertation. This is because all aspiring citizens and non-citizens write practical examinations. This affords equal treatment to all parties and, by so doing, embraces the global rules of TiS. However, it should be noted that, for a country not to be held liable under the MFN treatment obligation, it has to make exceptions. These countries have not taken any exceptions under the MFN treatment obligation.

Arguably, the answer to regional integration and harmonisation lies in the reciprocity principle as it is a good solution to the problem of harmonisation, as identified in Chapter Three. Being one of the least developed countries in SACU, Lesotho most likely finds no reason to close its doors to all members. Geographically,

14. Ngandwe (n 6 above) 382.
15. Sec 4(1) (c) (ii) of the 1995 Act (Namibia); Sec 24(2) (b) (ii) of the 2014 Act (South Africa).
16. Sec 5(1) (a) and 6(1) (a) of the 1964 Act.
17. Ngandwe (n 6 above) 382.

it is surrounded by South Africa, and, to access the region, it has opened up. On the other hand, South Africa sees no need to reciprocate and closes its markets to other SACU member states and SADC countries. The closure may also be motivated by the fact that South Africa has one of the best legal minds in the region. This view is based on the observation that, in high profile cases, as shown in Chapter Three, the tendency in neighbouring countries is to hire experts from South Africa. This is true not only for the legal fraternity but also for other professions. When people want certain specialities not readily available in their countries, they look for expertise from South Africans, for example, doctors or consultancy professionals, etc. In belief, the country has the best universities in Africa and the whole world. For that reason, the government sees, in my view, no reason to reciprocate.

The high demand for South African advocates in the region, one would think, makes the country see no reason to reciprocate. To this end, the writer notes that countries import legal expertise from South Africa for high profile matters, revealing some doubts about the competence of local counsel. A good example is the case of *King v Mduduzi Bacede Mabuza and Mthandeni Dube in Eswatini* referred to in Chapter Three above. In this case, a South African senior advocate was hired to represent the members of parliament charged under the Terrorism Act. At the time of writing, the case was still pending in the courts. The same is true, for example, in the case of Zimbabwe, in which Advocate George Bizos from South Africa represented a prominent Zimbabwean opposition politician, Morgan Tsvangirai.

Notably, the concern with jobs in South Africa is also a factor to consider in explaining the strict measures. The country has a high unemployment rate among graduates. It is not only lawyers who are on the streets but also other professionals. This may be because the job market has reached the saturation point. For some of these reasons, these countries are coming up with laws to serve the interests of their nationals and curb xenophobia erupting from time to time.

Notably, the imposition of requirements such as permanent residence[18] or ordinary residence[19] to foreign legal practitioners constitutes a national treatment limitation. The national treatment limitation is when foreign legal practitioners are

18. Sec 4(1) (c) (ii) of the 1995 Act; Sec 24(2) (b) (ii) of the 2014 Act.
19. Sec 5(1) (a) and 6(1) (a) of the 1964 Act.

treated less favourably than their domestic counterparts.[20] This restriction is discriminatory because 'they alter the condition of competition in favour of service suppliers of national origin'.[21] National treatment discrimination can be *de jure* ('in law') and *de facto* ('in fact') when it is prima facie clear from an interpretation of the text of the law that it treats services from one WTO country less favourably than the like product from another WTO country is, in law or *de jure*, discrimination.[22] If the countries selected intend to keep such measures, they have to enter such requirements as national treatment condition in countries' commitments.[23] However, the failure of these countries may subject them to WTO dispute procedure. The supply of services under GATS occurs in four (4) modes, as explained in Chapter Two. Any limitation to the supply of services is regarded as an affront to 45rtthe liberalisation of TiS.

4.2 Lesotho as a model for SACU member states

When discussing GATS commitments of SACU countries in Chapter Two, it was mentioned that Lesotho will be discussed in this Chapter for one good reason: to use it as a model. Of all the 16 countries in the SADC region, alongside Seychelles and South Africa, Lesotho took commitments under GATS in legal services. The country does not have strict requirements like South Africa, which restricts the free movement of legal practitioners.

4.2.1 A brief background of Lesotho

Unlike Eswatini, an absolute monarchy, Lesotho is a 'sovereign democratic country'[24] with a multi-party system promoting individual freedoms.[25] Lesotho is a former British colony like Botswana, Eswatini, Malawi, Zambia, and Zimbabwe.[26] Having joined the

20. P Delimatsis *International Trade in Services and Domestic Regulations* (2007)76.
21. Delimatsis (n 24 above) 76.
22. Van de Bossche & Zdouc (n 10 above) 319.
23. Cronjé JB 'The admission of foreign legal practitioners in South Africa: a GATS perspective Tralac Working paper (2013)15.
24. Sec 1 Constitution of Lesotho.
25. I Shale 'Historical perspective on the place of international human rights treaties in the legal system of Lesotho: Moving beyond the monist-dualist dichotomy' (2019) 19 African Human Rights Law Journal 193-218 https://www.ahrlj.up.ac.za/shale-i (accessed 30 October 2021).
26. http://library.fes.de/fulltext/iez/01125001.htm#E9E1 (accessed 9 August 2021).

WTO on 31 May 1995,[27] Lesotho is also a SADC and SACU member. The legal system of Lesotho is dualistic in that it uses international and domestic laws emanating from the supremacy of the Constitution.[28] International laws apply only to the extent that they do not interfere with the country's constitutional provisions.[29] The foregoing was confirmed in *Joe Molefi v Government of Lesotho,*[30] in which the court adopted a dual approach and demanded that ratified international instruments be included in the domestic law before the provisions are enforceable.

In *Basotho National Party and Another v Government of Lesotho and Others,*[31] the applicants were before the court seeking an order to direct the Government to take steps, following its constitutional processes, to adopt any legislative measure necessary to give effect to the rights recognised in international conventions such as the African Charter on Human and Peoples' Rights. The Court ruled that 'these Conventions cannot form part of our law until and unless they are incorporated into municipal law by legislative enactment.'[32] This means that in theory, Lesotho is considered dualist, but, in practice, the courts are also allowed to invoke her international obligations on the protection of the fundamental human rights contained in the Bill of Rights.[33] This shows why international laws are, alongside domestic law, equally important. This is because they give domestic effect to international obligations assumed by Lesotho under international treaties and the opportunity for individuals to claim rights protected by the conventions to which Lesotho is a party.[34]

Lesotho has a diverse legal system owing to the infusion of 'Roman-Dutch Civilian law and English Common Law'.[35] Like most SADC countries, Lesotho has a supreme Constitution.[36] International law is applicable in the country after being domesticated by an Act of Parliament.[37] What is also important to note about Lesotho

27. WTO https://www.wto.org/english/thewto_e/countries_e/lesotho_e.htm (accessed 9 August 2021).
28. Shale (n 29 above) 195.
29. Shale (n 29 above) 203.
30. Joe Molefi v Legal Advisor & Others [1970] 3 ALL ER 724, 17 June 1970; see also https://www.ahrlj.up.ac.za/shale-i (accessed 30 October 2021).
31. Basotho National Party and Others v Government of Lesotho and Others (Constitutional Case No.4/2002) (NULL) [2003] LSHC 65 (10 June 2003).
32. Shale (n 29 above).
33. Shale (n 29 above) 193-218.
34. https://www.nyulawglobal.org/globalex/Lesotho1.html(accessed 15 October 2021).
35. BA Dube 'The Law and Legal Research in Lesotho' February 2008 https://www.nyulawglobal.org/globalex/Lesotho.html(accessed 16 July 2021).
36. Shale (n 29 above).
37. Dube (n 39 above).

is that it is an 'island' entirely surrounded by South Africa. The border separating the two countries is artificial given its geographical location. Once South Africa closes its borders, the Basotho cannot exit the country unless they go by air. This possibly is for its survival and possibly explains why Lesotho has opened its doors to the outside world by taking liberalisation seriously, including legal services, as shown in the next section.

4.2.2 Lesotho's GATS commitments and TiS

For the reader's benefit, discussing the GATS commitments entered by Lesotho helps the reader understand the good that the country has done in upholding its GATS commitments. To this end, Lesotho has made specific commitments under GATS in seven services: business; financial; communication; construction and related engineering; distribution; education; environmental; tourism and travel-related; transport and other services.[38] The country is also one of the SACU countries specifically committed to legal services.

The country has made commitments in the legal sector as well. Lesotho has managed to open its borders to foreign legal practitioners in SACU and Africa.[39] Lesotho is committed explicitly to allowing advisory services of foreign and international law.[40] The country is committed in the legal sector and only provides access to commercial presence for advisory services in foreign and international law.[41] However, for mode 4, legal advice in international and foreign law market access is also provided in situations where an automatic entry is permitted.

For Lesotho, all sectors included in its schedule have no limitations for modes 1 and 2 for market access. Also, all horizontal commitments have no national treatment limitation. However, mode 3 is open, but any foreigner-owned enterprise, including a joint venture business, must comply with the minimum capital required and all foreign equity requirements.[42] The requirement is that for an entirely foreign company, a minimum capital of US$2000,000 and a joint venture company of US$50,000 is

38. World Trade Organization Trade in Services GATS/SC/114 30 August 1995 (95-2634) https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=4755&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True.
39. As above.
40. As above.
41. As above.
42. As above.

required to be granted a permit to operate a business in the country.[43] In my view, by promulgating this requirement, Lesotho seeks to fulfil its GATS commitments by being open to foreigners.

However, this also raises critical questions primary of this write-up: the issue of discrimination and violation of fundamental human rights. I say so because we see an emergent and disguised challenge in that this, again, is discrimination based on socio-economic status. There are very few individuals, let alone just competing graduates and very few, if any, can meet this threshold to open a business in their own or foreign countries. I make the point here that we see a new world order that is even manipulating the laws promoting inequality by applying the bottleneck system. This explains why this is not only an issue for the admission and enrollment of foreign legal practitioners but also for other professions and businesses.

For Lesotho, all the sub-sectors under educational services have no limitation on national treatment for modes 1, 2 and 3 and mode 4 is restricted as well.[44] The country also opened its borders for these modes by not imposing any market access limitation on modes 1, 2 and 3. Lesotho has committed to the legal service in mode 3 for only 'advisory services in foreign and international law'.[45] The country has refused to give access to modes 1 and 2 and permits market access in modes 3 and mode 4 to the extent permitted by horizontal commitments.[46] The country has also made commitments in mode 3 and mode 4 in legal services.[47] For the benefit of the reader and writer, as this is used to argue my case, the chapter briefly highlights the legal framework of Lesotho.

4.2.3 The legal framework for the admission of legal practitioners in Lesotho

The legal framework of Lesotho is regulated by the Legal Practitioners Act No. 11 of 1983 (herein '1983 Act'), which governs attorneys and advocates admission into the legal profession.[48] The body which oversees the legal work is the Law Society of Lesotho, created under the 1983 Act.[49] The Law Society has the power to uphold the rule of law and control the legal profession in the country. What this means is that it is

43. As above.
44. As above.
45. As above.
46. As above
47. As above.
48. Legal Practitioners Act No. 11 of 1983.
49. The Law Society of Lesotho https://lawsociety.org.ls/ (accessed 9 August 2021).

an autonomous body. On the other hand, the admission of advocates is regulated in Part II under section 6 and attorneys section 8 of the 1983 Act. In addition, Part VI of the 1983 Act deals with the 'admission of persons practising in certain countries' in section 22.[50]

4.3 Admission of legal practitioners under the 1983 Act

The High Court of Lesotho has the power to admit a person as an advocate who is 'fit and proper' and is above 21 years.[51] The person also has to satisfy that he or she has been admitted as an advocate or barrister in another jurisdiction and continuously practised for 5 years or more. At the time, the person applying for admission and enrolment must still be enrolled in that jurisdiction and have passed his or her practical examinations as prescribed.[52] According to the 1983 Act, the candidate needs to prove that they have been admitted to practise as an advocate in the Supreme Court of the Republic of South Africa in any Division or of the mandated territory of South West Africa or the High Court of Zimbabwe.[53] They have to have been in continuous practice as advocates in those countries for five years or more. Upon application, the person is still enrolled and has successfully passed prescribed examinations.[54]

The person must also satisfy the necessary procedure for a Bachelor of Laws degree at the National University of Lesotho.[55] If the person is a Lesotho citizen, they have to prove that they have all the requirements of the Bachelor of Laws degree of any university outside Lesotho and have written and passed a 'Bar Practical Examination' of Lesotho.[56] After satisfying the above, the person is admitted to practise in the Courts of Lesotho as an advocate. On the other hand, an advocate is not allowed to appear in the Courts of Lesotho except on instructions given by an admitted attorney holding a practising certificate of the Courts of Lesotho.[57] The advocate cannot directly take instructions from clients or money except through the instructing admitted attorneys holding a practising certificate.[58]

50. Sec 22 of the 1983 Act.
51. Sec 6(1) (a) (b) of the 1983 Act.
52. Sec 6 (c) (ii) of the 1983 Act.
53. Sec 6 (c) (ii) of the 1983 Act.
54. Sec 6(c) (ii) of the 1983 Act.
55. Sec 6(c) iii) of the 1983 Act.
56. Sec 6(c) (iii) of the 1983 Act.
57. Sec 6(2) (a) 0f the 1983 Act.
58. Sec 6(2) (b) of the 1983 Act.

The fourth part (Part IV) of the 1983 Act deals with the admission of attorneys in Lesotho.[59] The section stipulates that a person needs to be 'fit and proper and above 21 years.[60] In addition, the person shall be admitted if s/he proves that s/he is either an admitted solicitor in another country or, at the time of application, s/he is still enrolled as a solicitor of such jurisdiction with no order of suspension and has passed examinations.[61] The person must produce proof to the High Court of Lesotho that they are also an admitted attorney in any Division of South Africa, "Mandated Territory of South-West Africa or in Zimbabwe, and that he remains enrolled as an attorney of that Court and is not under any order of suspension in such court and has passed practical examinations set by the Law Society.[62] In this regard, citizens and foreigners are admitted as attorneys after passing examinations set by the Law Society[63] and the practical examinations mentioned under section 43 (2) (b).[64] The other condition is that the person must also have served his or her articles under a registered legal practitioner.[65] Only after a person has satisfied all the requirements provided under the 1983 Act that the High Court of Lesotho admits him or her as an attorney.[66]

Part VI of the 1983 Act deals with the 'admission of persons practising in certain countries.[67] According to the 1983 Act, a person who is admitted already as an advocate or barrister of any prescribed courts of the specified jurisdictional country with approval from the Chief Justice, after consultation with the Law Society of Lesotho, may be enrolled and admitted as an advocate in the country after satisfying the High Court that he or she is a fit and proper person.[68] One may also be admitted if already admitted as an advocate or barrister continuously for five years or more in such prescribed country with no legal proceedings against his or her and has passed practical examinations set by the Law Society according to the 1983 Act.[69] Alternatively, the person may have been exempted from writing the examinations by the Chief Justice.[70]

59. Sec 8 of the 1983 Act.
60. Sec 8(a) (b) of the 1983 Act.
61. Sec 8 (c) of the 1983 Act.
62. Sec 8 (c) of the 1983 Act.
63. Sec 43 (2) (b) of the 1983 Act
64. Sec 8(c) (IV) of the 1983 Act.
65. Sec 9 of the 1983 Act.
66. Sec 8 (c) (iv) of the 1983 Act.
67. Sec 22 of the 1983 Act.
68. Sec 22(a) of the 1983 Act.
69. Sec 22(b) of the 1983 Act.
70. Sec 22(c) of the 1983 Act.

4.4 A critical appraisal of the 1983 Act

Lesotho has made progressive inroads in liberalising the legal sector. The country has successfully participated in the international market by being more of an importer of legal services than an exporter.[71] Legal services are mostly imported from South Africa. The Court of Appeal is mostly adjudicated by judges from other African states[72] allowing the country's cross-border supply of legal services. Advocates from South Africa are readily admitted in the country. Compared to fellow SACU and SADC member states, the 1983 Act notably does not have conditions based on permanent residence[73] or ordinary residence.[74] The only requirement, which is not onerous, is that citizens (and non-citizens) intending to be admitted in Lesotho have to write practical examinations.[75] This promotes international obligation regarding GATS by affording equal opportunities to everyone seeking admission to the legal profession.[76] This contrasts with Botswana, wherein only candidates outside BOLESWA, citizens or non-citizens, must write the examinations.[77] This means that a certain group must write the examinations, unlike in Lesotho, which affords equal opportunities to everyone without any distinction.

This was best discussed in *Mosuoe v Law Society of Lesotho* [78](Paul Mosa Mosuoe case). Paul, a Lesotho citizen, who obtained an LLB degree in South Africa, challenged the 1983 Act.[79] The Appellant contended that he holds all qualifications and should, without further examinations, be admitted as an attorney in the country, and the 1983 Act could not permit it.[80] The motive was to be given first preference as a citizen. However, the Law Society opposed the application because the appellant 'was at least required to pass practical examinations as prescribed in Lesotho, pursuant to the provisions of section 8(c)(iv) read with section 43(2)(b) of the 1983

71. https://www.africa-press.net/lesotho/all-news/the-globalization-of-advocates-legal- services-lesotho-perspective-2 (accessed 25 October 2021).
72. https://www.africa-press.net/lesotho/all-news/the-globalization-of-advocates-legal- services-lesotho-perspective-2 (accessed 25 October 2021).
73. Sec 4(1) (c) (ii) of 1995 Act; Sec 24(2) (b) (ii) of the 2014 Act.
74. Sec 5(1) (a) and 6(1) (a) of 1964 Act.
75. Sec 8(c) (i) of the 1983 Act.
76. Van den Bossche & Zdouc (n 10 above) 335.
77. Sec 4(1) (c) of the Act.
78. *Mosuoe v Law Society of Lesotho* (C of A (CIV) N0.23/09).
79. Paul Mosa Mosuoe case para 4.
80. Paul Mosa Mosuoe case para 5.

Act'.[81] The practical examinations were later set, and the appellant did not write the examinations. The legal question for consideration on appeal was whether, 'in the absence of sitting and passing the written examinations set by the Law Society, the appellant was nevertheless entitled to his admission as an attorney of Lesotho?'.[82] It was held that section 8 is mandatory and not discretionary. The primary purpose is to protect the public and ensure that legal services are offered equally.[83] The court held the requirements of the 1983 Act were mandatory, and no waiver was allowed.[84]

The Law Society's administration of practical examinations to both citizens and foreigners [85] and the practical examinations mentioned in section 43 (2) (b)[86] upholds international obligation rules of equal treatment as advocated by the two non-discrimination concepts GATS: MFN and national treatment obligation. All aspirants into the legal framework have to write examinations as the requirement is mandatory and seeks to protect the public and society by providing equal treatment.[87] The MFN states that countries must be afforded equal opportunities at all levels.[88] To this end, the 1986 Act upholds the international obligation by offering equal opportunities for all persons. Lesotho has liberalised its legal sector, unlike Botswana and the rest of the SACU countries, as it does not discriminate or 'favour itself over other countries'[89] and is applauded for its national treatment obligation.

The country is known as the best importer of legal services from SACU countries and SADC. As a result of the liberalisation of the legal sector, foreign judgments handed in South African courts are enforceable in Lesotho. This was decided in *Adam v Adam.*[90] The judge allowed the judgment granted in South Africa as a competent order to dissolve a marriage between the parties according to Lesotho laws. The judgment was also recognised in the Lesotho courts.[91]

The country has also entered into mutual recognition agreements (MRA) to liberalise its legal services sector as required by GATS. As a measure to recognise

81. Paul case para 6.
82. Paul case para 9.
83. Paul case para 13.
84. https://www.nyulawglobal.org/globalex/Lesotho1.html#_ednref10 (accessed 9 August 2021).
85. Sec 43 (2) (b) of the 1983 Act
86. Sec 8(c) (iv) of the 1983 Act.
87. Paul case para 13.
88. Art II:I of GATS.
89. Van den Bossche & Zdouc (n 10 above) 349.
90. Adam v Adam (CIV/APN/327/94) (CIV/APN/327/94) [1994] LSCA 183 (19 December 1994).
91. Adam v Adam (CIV/APN/327/94) (CIV/APN/327/94) [1994] LSCA 183 (19 December 1994) page 15.

foreign qualifications and services in Articles I and VII of GATS. A law degree from Lesotho is equivalent to its South African counterpart as provided under the Admission of Advocates Act[92] and section 26 (b) of the 2014 Act.[93] Notably, the admission of Lesotho and South Africa advocates is a legally cognisable right premised on international mutual recognition commitment.[94] Articles I and VII (Recognition) of GATS allow countries to put forth equal measures that recognise and facilitate advocates' inter-state admission. Section 6 (1) (2) of the 1983 Act entitles South African advocates to admission in the Courts of Lesotho and reciprocally.[95] On the other hand, the promulgation of the 2014 Act abolished the distinction between attorneys and advocates by creating a single Act (the 2014 Act) which governs both professions by repealing the previous Acts.[96] According to section 24 of the 2014 Act, which provides for foreign admission, the Minister may consult with the Minister of Trade and Industry and the Council, and observing any pertinent international commitments of the Government of the Republic, make regulations to:

> Determine the right of foreign legal practitioners to appear in courts in the Republic and to practise as legal practitioners in the Republic; or (b) give effect to any mutual recognition agreement to which the Republic is a party, regulating— (i) the provision of legal services by foreign legal practitioners; or (ii) the admission and enrolment of foreign legal practitioners[97]

Notably, as highlighted in the section, the regulations have already been made in terms of other sections, not section 24 of the 2014 Act. The question remains whether the minister will wait for another endless period before he or she promulgate regulations governing the admission of foreign Advocates as occurred under the repealed Act (section 5 of Admission of Advocates Act).[98] However, this would be unjust and call for negotiations to speed the regulations' promulgation. Otherwise, Lesotho may have to invoke the remedy of specific performance of the contract or suspend the admission of South African advocates under Article XXIII of GATS (Dispute settlement and enforcement)[99] , which states that:

92. Sec 3 (2) (ii) of Advocates Act, No. 5 of 1964.
93. Legal Practice Act, No. 28 of 2014.
94. Africa Press 'The globalization of Advocates Legal Services: Lesotho Perspective' 20 September2021https://www.africa-press.net/lesotho/all-news/the-globalization-of- advocates-legal-services-lesotho-perspective-2 (accessed 25 October 2021).
95. Advocates Act, No. 5 of 1964.
96. Africa Press (n 98 above).
97. Sec 24(3) of the Legal Practice Act 2014.
98. Africa Press (n 98 above).
99. Africa Press (n 98 above).

> If any Member should consider that any other Member fails to carry out its obligations or specific commitments under this Agreement, it may with a view to reaching a mutually satisfactory resolution of the matter have recourse to the DSU.[100]

To this end, Lesotho may have recourse under the DSU. However, it can be said that Lesotho has managed to embrace the global rules of integration. Unlike its counterparts, Lesotho has no strict permanent residence or ordinary residence rules imposed to restrict national treatment and limit market access. For Lesotho, foreigners and citizens are all afforded the same opportunity to access the legal profession in the country.

4.5 The case of other professions in comparison

The stringent entry requirements for admission as an attorney or advocate in selected SACU countries discussed in this study are not applied to other professions. Such strict entry requirements are only applicable to the legal fraternity and not to other professions like teachers, doctors, auditors, engineers, nurses, and accountants; quantity surveyors do not need to attain permanent residence status.[101] The writer argues that the countries are trying to 'protect' their industry by reserving it for citizens only.

The rhetorical questions are: Why is the legal fraternity the most protected or preserved profession? Why are legal services the least liberalised? The other professions are usually taken as scarce skills required by these developing countries. However, when these countries talk about democratic societies, they invite judges and lawyers from other countries to access their legal framework. To answer the question, it is important to note that liberalising the legal profession has many advantages, including enrichment of jurisprudence. If legal practitioners from other jurisdictions are practising in another jurisdiction, this strengthens the rule of law. This is because, as outsiders, their chances of being influenced by internal politics are undoubtedly limited.

The view is that an impartial judiciary is essential in building confidence in the judiciary system of a given country. My submission is that when those in power appoint locals only, the justice system is compromised to some degree. It could be said that

100. Art XXIII(1) GATS.
101. T Broughton 'Law graduates to challenge legal profession's discrimination against immigrants' 27 July 2021 https://www.groundup.org.za/article/law-graduates-challenge-legal-practice-councils-discrimination-against-immigrants/(accessed 16 August 2021).

the preference by SACU countries for applicants who studied in their universities is a clear testimony that the governing bodies of the legal fraternity (Law Societies) are not harmonised and cooperative as the case of the EU, which introduced the principle of mutual recognition with regards to professional qualifications.[102] This is not the case, however, and the question still remains: Why are these countries reluctant to do so and yet for other professions such as accounting, have undergone a reorientation due to emerging global accounting standards.[103] The writer's concern is that the legal profession is failing to embrace change by remaining nationalistic and refusing to fully integrate as required by the SADC treaty targeted at promoting regional development, cooperation, and development.

4.6 Conclusion

The chapter looked at the impediments facing the legal sector using Lesotho as a model in the union. The observation is that the country has liberalised to a certain extent, and its counterparts: Botswana, Eswatini, Namibia, and South Africa, could draw some lessons from this member state. The next chapter summarises the study's main findings and concludes by proposing how the countries under focus could heighten their commitment to regional integration.

102. Hagenmeier *et al* (n 7 above) 21.
103. Ngandwe (n 6 above) 382.

CHAPTER FIVE

SUMMARY OF FINDINGS, CONCLUSION AND RECOMMENDATIONS

5.0 Introduction

This dissertation reviewed the laws regulating the admission and enrolment of foreign legal practitioners in the SACU region from a GATS perspective. The study outlined the GATS commitments of SACU member states, identified and discussed legislation dealing with the admission of foreigners into the legal practice in SACU member states and compared the rules applicable to the admission of foreign legal practitioners into legal practice. Lesotho was used as a model for liberalisation in the previous chapter. This chapter summarises the main findings, draws conclusions and makes recommendations for possible legislative interventions to facilitate trade liberalisation and harmonisation among the selected SACU members.

5.1 The research problem, aims and objectives in brief

The point was made that the admission and enrolment of foreign legal practitioners into the legal profession in SACU countries has become a tropical issue. This is because of the legal impediments emanating from the requirements that one has to be a citizen, ordinarily resident[1] and/or permanent resident.[2] The argument made was that these discriminate against foreigners and favour citizens.[3] This raises serious attention regarding GATS' non-discrimination rules – the MFN and national treatment as discussed in Chapter Two. It is critical to reiterate that services trade occurs under the following modes: cross-border transaction, consumption abroad, establishment in another jurisdiction, and temporary movement of labour.[4] Based on the stated objectives, it was said that any policy that restricts service producers and consumers from interacting freely is regarded as an impediment to TiS.[5] In light of the above, the writer looked at each country's specific commitments in the background of GATS to see if these countries uphold their international obligations.

As was shown in Chapter One, the admission and enrolment of foreign legal practitioners in SACU countries remains a thorny issue. The issue emanates from the

1. Sec 6(c) of Legal Practitioners Act of 1979 (Cap 61:01) of Botswana; Sec 6(1) (a) Legal Practitioners Act 15 of 1964 (Eswatini); Sec 24 Legal Practice Act 28 of 2014 (SA); Sec 6(c) (iii) of the Legal Practitioners Act 11 of 1983 (Lesotho).
2. Sec 24 of the Legal Practice Act 28 of 2014(SA).
3. Sec 9 Constitution of South Africa.
4. P Delimatsis *International Trade in Services and Domestic Regulations* (2007)25-26.
5. Delimatsis (n 4 above) 76.

stringent immigration requirements that make it very difficult for legal practitioners to work in the region freely: for example, the permanent resident requirement.[6] The writer, *inter alia*, conducted an in-depth study from the GATS perspective to understand why the legal sector is the least liberalised. As shown in the research problem in Chapter One, it was pointed out that citizens are favoured over non-citizens, and the irony is that these restrictions are not applied in other professions. This prompted the study on the admission and enrolment of legal practitioners as a TiS issue. Due to the restrictions adopted by the respective countries discussed in the dissertation, the writer noted that these do not only violate the countries' international obligations but their respective constitutions as well.

To achieve the stated aims, the study addressed four main objectives. In outlining the GATS commitments of each SACU member state in Chapter Two, the study looked at GATS commitments made by Botswana, Eswatini, Namibia and South Africa. Before focusing on the requirements for admission. Lesotho was treated in Chapter Four, in which it was used as a model of liberalisation in the region. One of the major findings was that the legal sector is the least liberalised, with tourism as the most liberalised. From the information available online on the WTO website, South Africa and Lesotho are the only countries identified as members that took commitments in the legal sector. In this respect, their counterparts – Botswana, Eswatini and Namibia are reluctant to make commitments in the legal sector under professional services.[7]

The study then identified and discussed legislation dealing with the admission of foreigners into the legal practice in SACU member states in Chapter Three. In this chapter, it was observed that the legislation dealing with admission and enrolment of foreign legal practitioners, to a greater extent, favours citizens over non-citizens. The countries fall short of upholding the principles envisaged under GATS: the national treatment obligation of Article XVII. The article requires the total elimination of any discrimination between domestic and foreign lawyers.[8] In the same chapter, the writer observed that it is a violation of GATS principles and constitutional provisions. To this

6. GT Fnials 'Eliminating the Barriers to Cross Boarder Legal Practice in Africa' (2018) http://elf-fae.eu (accessed 4 July 2021); See also Sec 24 of the 2014 Act.
7. Thailand National Trade Repository WTO Services Sectoral Classification List http://www.thailandntr.com/index.php/en/trade-in-services/WTO-services-sectoral-classification-list (accessed 8 April 2021).
8. JB Cronjé 'The admission of foreign legal practitioners in South Africa: a GATS perspective Tralac Working paper (2013) 6.

end, the laws governing the admission of attorneys in SACU countries are regarded as problematic given the countries' international GATS obligations. This is specifically regarding the permanent residence or ordinarily resident requirements that are discriminatory.[9] The study asserts that any violation of the GATS agreement makes it possible for any country to seek remedy in the relevant DSB established under WTO in terms of the DSU.

The argument was that international agreements are binding on each country as they are part of the legal system. For that reason, parties can find remedy in their respective countries by challenging these legislations impinging on their rights as enshrined under the bill of rights chapter. To this end, the writer posits that the legislation dealing with the admission of legal practitioners does violate not only the GATS obligations but also the constitutional rights of persons as free agents in a globalised world. The right and freedom to 'practise any profession, or carry on any occupation, trade or business' or choose a profession of your choice[10] is one of the fundamental principles highlighted. This is because there is no blanket prohibition for a person to seek employment in any sector of his or her choice. By imposing these strict measures, it emerged that the countries are violating their constitutions as aspiring candidates in the legal fraternity end up seeking other job opportunities. Surprisingly, the respective Councils (Law Societies) that profess to uphold the rule of law are the main culprits. Their deafening silence on the rights of admission of foreign legal practitioners, on the one hand, and, on the other hand, their loud objecting voice to petitions for admission is quite surprising. They also play around with local politics and laws to refuse to admit foreign legal practitioners.

For example, during the writing of this dissertation, a case was lodged before a court in South Africa wherein the Applicant is seeking an order to declare the 2014 Act unconstitutional. The Applicants allege that they are forced to seek alternative employment like Chakanyuka, as indicated in Chapter Three, who is forced to work as a waiter as the Council refused to admit him because he is a foreigner national without permanent residence in South Africa.[11] The dissertation reiterates the constitutional

9. Sec 4(1) (c) (ii) of the 1995 Act; Sec 24(2) (b) (ii) of the 2014 Act.
10. Art 21(1) (j) Constitution of Namibia; Sec 22 Constitution of South Africa; Sec 32(1) Constitution of Eswatini.
11. The Admission and Enrolment of Foreign Legal Practitioners in South Africa under the Legal Practice Act https://muhaz.org/the-admission-and-enrolment-of-foreign-legal-practitioners-in.html?page=3 (accessed 24 August 2021)

framework that every person is equal before the law.[12] To this end, the differential treatment afforded to citizens over foreign legal practitioners is seen as a violation of the right to equal opportunities as envisaged under many Constitutions.[13]

In this light, some countries are regarded as architects of discriminatory laws. They do so by, on paper, claiming, as in constitutions, that everyone is equal before the law [14] and, in the case of legal services, coming up with a raft of measures to keep out foreign legal practitioners. It means that the countries do not adhere to this principle by discriminating based on nationality. They turn a blind eye to discrimination which is best defined, for example, in the constitution of Botswana as:

> Affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.[15]

The different treatment afforded to citizens against foreigners is, to a greater extent, discriminatory and violates the constitutional framework. The differential treatment given to citizens and foreigners does not promote the equality that the Constitution seeks to uphold. The requirement of permanent residence[16] or ordinarily resident[17] unfairly discriminates against foreigners by offering different treatment based on nationality.

The dissertation also outlined the rules applicable to the admission of foreign legal practitioners in the SACU member states using the model of Lesotho in Chapter Four. The reasoning in *Mosuoe v Law Society of Lesotho was embraced* .[18] It was held that section 8 of the 1983 Act is mandatory and not discretionary. The main purpose is seen as a move to protect the public and ensure that legal services are offered equally.[19] The point was that despite Paul being a Lesotho citizen with an LLB degree from South Africa, he was expected to write practical examinations like

12. Sec 20(1) Constitution of Eswatini; Sec 9(1) Constitution South Africa; Art 10(2) Constitution of Namibia.
13. Sec 20 Constitution of Eswatini.
14. Sec 20(1) Constitution of Eswatini.
15. Sec 15(3) 1966 Constitution of Botswana; see also Sec 20(3) Constitution of Eswatini.
16. Sec 4(1) (c) (ii) of the 1995 Act; Sec 24(2) (b) (ii) of the 2014 Act.
17. Sec 5(1) (a) and 6(1) (a) of the 1964 Act.
18. *Mosuoe v Law Society of Lesotho* (C of A (CIV) N0.23/09).
19. Paul case para 13.

everyone else.[20] This case illustrates how Lesotho has managed to afford equal opportunity to citizens and non-citizens. In contradistinction, Botswana requires that only persons outside the BOLESWA family should sit for examinations. This requirement is viewed as a deliberate antic to maintain historical memories.[21]

The study also addressed the extent to which SACU member states legal regimes for the admission of foreign legal practitioners comply with GATS Commitments. Chapter Two found that all the five countries in the SACU region except Lesotho are not GATS compliant. The chapter shed light on which services are opted for and gave the possible reason for doing so. Market saturation is cited as the reason when it comes to stringent rules applicable to legal practitioners.

The findings presented in the dissertation are based on desktop research, and no interviews or questionnaires were used.[22] Some of the data on which the findings are based were retrieved from the countries' constitutions, law societies' directives, legal practice Acts, court decisions, case law, mutual recognition Acts, the GATS and commitments, etc. The analytical approach was used to examine how the legislation dealing with the admission of foreign lawyers in the SACU member states adheres to the international standards of GATS and the countries' respective constitutions. The idea was to indicate the nature of the problem of the admissions of foreign legal practitioners in the SACU countries as a TiS issue. To this end, the prescriptive approach was adopted to propose possible recommendations that the relevant regulatory bodies may adopt to amend discriminatory legislation related to TiS. Through these approaches, the writer thinks the issue at hand was, to a greater extent, addressed.

5.2 Some Important thoughts on concluding remarks

The study discussed the admission of foreign legal practitioners from a GATS perspective. From the laws and regulations reviewed in this study, it is evident that the legal services sector is the least liberalised. SACU countries impose restrictions on the regulations governing foreign legal practitioners' admission to protect their markets. The writer submits that the countries under discussion fail to appreciate the

20. Paul case para 4.
21. JP Ngandwe 'Challenges facing the harmonisation of the SADC legal profession: South Africa and Botswana under the spotlight' (2013) 46 *The Comparative and International Law Journal of Southern Africa* 377.
22. https://www.managementstudyguide.com/desk-research.htm (accessed 9 April 2021).

benefits accrued due to the increased openness of TiS. The legal sector leads in the cross-pollination of jurisprudence, higher economic growth and development.[23] The reality is that developing countries, in general, and the African continent specifically, cannot circumvent the realities of globalisation.[24] As a result, the stringent rules imposed by the Acts dealing with the admission of legal practitioners put them in a situation in which, in thinking that they are moving forward, they are disadvantaged by not taking full advantage of the opportunities presented by globalisation.[25] The observation is that international trade in legal services has grown worldwide, yet, it remains poorly liberalised in SACU and SADC in general, with many restrictions in place, as shown in this dissertation.[26]

The conclusion drawn from the cases reviewed in this study is that foreign experts are invited to represent cases in a given country for one reason or another when it fits certain high profile cases.[27] It is not surprising that tourism in all SACU member states is the most liberalised because of the need for foreign currency. This is because the sector brings Foreign Direct Investment (FDI), which fosters economic growth and development. This is what determines the liberalisation of TiS in SACU except for Lesotho in legal services.

The rules imposed by the countries, for example, the permanent residence requirement, violate the MFN, national treatment obligation, and restrict market access; they also infringe the constitutional framework of the respective countries. The impositions are discriminatory policies, offering preferential treatment to citizens against non-citizens and institutionalised favouritism.

The case of Lesotho sheds light on what liberalisation means. This is because all the countries require permanent residence status for admission, which is not the case for Lesotho. Lesotho is seen as a model as it affords equal opportunity between local and foreign legal practitioners. In practice, the country is also known for importing

23. C Hagenmeier *et al* 'The Admission and Enrolment of Foreign Legal Practitioners in South Africa under the Legal Practice Act: International Trade Law and Constitutional Perspectives' (2016)19 *Potchefstroom Electronic Law Journal* 3.
24. CT Sehoole 'Trade in Educational Services: Reflections on the African and South African Higher Education System' (2004) 8 (3) *Journal of Studies in International Education* 313.
25. As above.
26. D Collins 'Liberalizing Trade in Legal Services through Mutual Recognition Agreements'13 June 2018 https://www.cigionline.org/events/liberalizing-trade-legal-services-through-mutual-recognition-agreements/ (accessed 11 October 2021).
27. During the writing of this study the case of the members of Parliament Mduduzi Bacede Mabuza and Mntandeni Dube wherein the services of senior advocate was solicited. The case is still on-going as of the writing of this dissertation.

legal services and does not have the restrictions imposed by its counterparts. In short, the legislation dealing with the admission of foreign lawyers in the SACU countries is taken as a travesty of international GATS obligations and the countries' respective constitutions.

As observed by some writers, the conclusion drawn is that 'the main challenge to regional integration and cooperation in the African context, is the reluctance of African nationals to discard their nationalist mentalities and embrace, first, the Africanist and secondly, the global mentality'.[28] In this respect, if protectionist tendencies are not outgrown, the SACU region, in particular, and the SADC region, in general, can hardly fully harmonise and integrate in our time. All SACU countries ratified the SADC treaty, which advocates harmonisation, liberalisation regional integration; there is a need to repeal the said.[29] At present, laws and appended signatures are cosmetic and entered based on anticipated benefits to citizens.

5.3 Recommendations for regional integration, cooperation and development

The dissertation raises critical questions that warrant scholarly attention and were answered in this piece of work. The recommendations given are based on the ideas on how best to enhance harmonisation, integration and cooperation in the SACU region. The writer anticipates that these recommendations are publicly available for the immediate attention of relevant professional bodies (Law Societies), authorities and the government to tackle the problems faced by foreign legal practitioners seeking admission in the region. In light of the points raised in this dissertation, some recommendations are made. The recommendations relate to the findings of the study and are outlined as follows:

5.3.1 Cooperation by respective law societies of the SACU countries

As already outlined, the current position is that the Acts regulating the admission of foreign legal practitioners are not in line with the spirit of GATS and respective constitutions, which advocate harmonisation and equality. This is shown by the influx of cases discussed in this study wherein the Law Societies oppose applications for admission to protect their domestic market, as discussed in Chapter Three. As the

28. Ngandwe (n 22 above) 380.
29. Sec 5 of the SADC Treaty.

regulatory bodies, the Law Societies try to develop a raft of measures to frustrate aspiring foreign legal practitioners. *Prima facie,* the issue, as stated, has to do with the societies in SACU countries themselves and other regulating bodies. To solve this perennial problem, the writer recommends that the Law Societies cooperate to address this issue. There is a need, for example, that cooperation should be developed and nurtured in the legal framework between and among Member states.[30]

To achieve the free flow of legal services among member states requires cooperation and synchronicity of the relevant laws and policies in operation in the state parties involved, as contemplated by Article 5 of the SADC Treaty. There is a need for the law society to collaborate and revisit the laws governing the admission and enrolment of the legal practitioners to harmonise all disparities. For the writer, the starting point is the collaboration of all the Law Societies in the SACU member states to join and amend the Acts dealing with the admission of foreign legal practitioners. These have to be at par, and members made accountable for the infringement of agreed conditions.

5.3.2 The amendment of the Acts dealing with the admission of foreign legal practitioners and the enactment of provisions regulating the presence of natural persons and cross-border legal practice

As stated earlier on, Modes 1 and 4 are the most restricted in selected countries, as highlighted in Chapter Two. This is because legal services are fully supplied when a lawyer is allowed presence in another country or when 'a service from the territory of one Member into the territory of any other Member'[31] is seriously constrained. As shown in Chapter Three, these modes are restricted by requirements such as permanent resident imposed by the Acts. As shown in the preceding chapters, these countries also make acquiring permanent residence status difficult for legal practitioners. The observation is that these countries are out to protect their markets by imposing strict measures. In light of this, it is recommended that legislation dealing with the admission of foreign lawyers into legal practice in selected SACU countries be amended. This is possible by enacting provisions that expressly regulate cross-

30. Ngandwe (n 22 above) 368.
31. Art 1(2) (a) of GATS.

border legal practise and facilitate the provision of mode 4 in light of GATS. It facilitates cross-border practice and enacts provisions that promote harmonisation and integration of the region. The amendment of the Act is a first step in achieving the full benefits of globalisation.

5.3.3 The need for the conclusion of Mutual recognition Agreements (MRA)

The issue of South Africa not reciprocating to its neighbours, as highlighted in Chapter Four, wherein Lesotho allows advocates from this country to freely practice in the country and yet such reciprocity is not extended also is a cause of concern as Lesotho may be forced to institute proceedings to compel South Africa for specific performance. According to the South Africa 2014 Act, it is the Minister's discretion to determine the admission and enrolment of foreign legal practitioners.[32] The question remains whether the countries are going to wait for another endless period before the Minister promulgate regulations governing the admission of foreign Advocates as occurred under the repealed Act (section 5 of Admission of Advocates Act).[33] It may also be in the best interest of the SACU family to consider, following the example set by the EU, introducing the principle of mutual recognition regarding professional qualifications.[34] In the SACU and SADC region in general, this study recommends that MRA be the best solution. They set common benchmarks to eliminate some of the practical difficulties of recognising foreign legal qualifications and experience.

The issue of the BOLESWA family wherein preferential treatment is afforded to only candidates of the three countries: Botswana, Eswatini and Lesotho. This reciprocity must also be extended to the rest of SACU members so that admission examinations are either afforded to all candidates or everyone is exempted from such, just like the case of the BOLESWA candidate. This recommendation is to afford equal opportunities in light of the GATS aspirations and the constitutional framework of the respective countries. Given that GATS allows countries to set up MRAs conclusion of such agreements can facilitate the movement of professional services suppliers. While maintaining the diversity of services that come onto the markets, the lack of recognition

32. Sec 24(3) of the Legal Practice Act 2014.
33. Africa Press The globalization of Advocates Legal Services: Lesotho Perspective 20 September 2021 https://www.africa-press.net/lesotho/all-news/the-globalization-of- advocates-legal-services-lesotho-perspective-2 (accessed 13 October 2021).
34. The Admission and Enrolment of Foreign Legal Practitioners in South Africa under the Legal Practice Act https://muhaz.org/the-admission-and-enrolment-of-foreign-legal-practitioners-in.html?page=3 (accessed 24 August 2021).

of professional countries' qualifications remains a major obstacle for professionals from developing countries willing to provide their services in another country.

One way to address this is to put mechanisms to effectively facilitate SACU countries' participation in MRAs. The ongoing GATS negotiations may provide an opportunity to develop mechanisms that would ensure that MRAs become effective tools for facilitating the international movement of all professionals.[35] Article VII directs Members to base any MRA on multilaterally agreed criteria and to work toward establishing 'common international standards and criteria for recognition' for the relevant services, trades and professions.[36] It is important to use this as a working tool in this respect. MRA recommended for the legal services are to facilitate the free movement of lawyers within the region. It would be beneficial for these MRAs to be signed between SACU countries as they already trust each other, given that they are in a union already. This trust must likely start a quick implementation of certain treaties to integrate and harmonise for sustainable development fully.

5.3.4 Amendment of GATS specific commitments

Chapter Two found that only two countries in SACU, Lesotho and South Africa, took commitments in the legal sector. Being the least liberalised sector than tourism, the countries are reluctant to commit themselves to this sector. The writer thinks that the requirements of GATS are intimidating for some of these countries. This is partly explained by the non-commitment and selective choice of TiS in the schedule of specific commitments of the said countries. The common requirement of being a permanent residents/ordinary resident and local qualification requirements constitute national treatment limitations under Article XVII of the GATS. If sustained, these concepts should be registered in the list of schedule of specific GATS commitments of the country.[37] This only requires the amendment of the country's list of specific commitments under GATS. If requested by a particular country concerned, the

35. https://unctad.org/system/files/official-document/ditctncd20052_en.pdf (accessed 11 October 2021).
36. International Trade Centre https://www.intracen.org/General-Obligations-Part-II- Mutual-Recognition-Agreements-Competition-Issues-and-Progressive-Liberalisation (accessed 11 October 2021).
37. A Ifubwa 'The implementation of trade in services liberalisation: challenges to enhancing the movement of natural persons across borders (Mode IV) and the recognition of foreign qualifications in South Africa' Mini thesis, University of the Western Cape, 2015 80.

negotiation of compensatory adjustments in such agreements must be notified to WTO members.[38]

Notably, SACU countries should modify their schedule of specific commitments under GATS if the countries wish to maintain permanent residence requirements.[39] The non-conforming measure can be brought into a state of conformity with GATS provisions and the SADC Treaty by either withdrawing such measure completely or modifying it.[40] One can only assume that a WTO Member can withdraw or modify a domestic rule precisely because it makes the promise to respect the conformity obligation. In case of withdrawal, a normative act should terminate the non-conforming measure which ceases to exist. In case of modification, the measure is amended by correcting the offending measure involved, as this was iteratively confirmed in the WTO case law.[41]

5.3.5 Bar examination for all SADC countries

As highlighted in the case of Lesotho, which was used as a model in this study, practical examinations are administered to citizens and non-citizens.[42] There is a need to have a joint and regulated examination for all SADC countries. The issue of writing Bar examinations to selected group is not only discriminatory but also violates the MFN obligation under GATS as discussed in Chapter Three. It is anticipated that just as in Lesotho, one a developing country forming part of the SACU and SADC region to allow that practical examinations be administered to both citizens and non-citizens. This will allow equal opportunities and harmonisation of the whole region. It is recommended that the SADC should create a body and make all persons seeking admission to write one examination and get a certificate which can be used by the persons in any county to enable him or her to practise freely.

5.3.6 Amendment of the SACU Agreement of 2002 to incorporate services

As indicated in Chapter Two, the SACU Agreement does not incorporate services as it mainly deals with trade in goods. However, the discussion of TiS was put on the

38. Afubula (n 38 above)80.
39. Cronjé (n 8 above) 20.
40. J Chaisse 'Deconstructing the WTO Conformity Obligation: A Theory of Compliance as a Process' (2015) 38 *Fordham International Law Journal* 77.
41. Chaisse (n 41 above)78.
42. Sec 8 of the 1983 Act.

agenda of the SACU agreement but this has not been implemented.[43] It can be recommended that the SACU Agreement which binds the countries discussed in this dissertation, should also include services to enable the countries to fully experience the benefits of the service sector. The SACU Agreement of 2002 should recognise the need for the Customs Union to be aligned with current developments in international trade relations. To do this, it is important to take into account the results of the Uruguay Round of multilateral trade negotiations on global trade liberalisation. In 2008, the SACU Council of Ministers agreed that new generation issues such as services, investment and Intellectual Property Rights should be incorporated into the SACU Agenda. Research shows compelling reasons to suggest that, excluding trade in services from the scope of the SACU Agreement was, in the longer term, an unviable strategy with potentially significant negative effects on export competitiveness for SACU member states.[44]

A recent study assessing the COMESA-EAC-SADC Free Trade Area (T-FTA) on SACU and its member states also revealed that SACU has a comparative advantage on TiS.[45] What this means is that, services liberalisation would provide a balance of benefits in the Tripartite Free Trade Agreement negotiations for countries that had been identified as net losers under trade in goods.[46] Liberalisation of TiS would also facilitate trade and reduce logistics and transaction costs, resulting in welfare gains for SACU countries. The development of and access to services will be very important to the region's vision of promoting value-addition and diversification in order to enhance regional industrialisation given that services constitute essential inputs to other products and services and, efficient services are a catalytic to the expansion of value chains.[47]

5.3.7 Repeal the Acts dealing with admission of foreign legal practitioners

The main problem identified in the research problem in Chapter One is the retention of the permanent residence requirement by the laws governing the admission of foreign legal practitioners in the SACU region. The writer recommends that, the only

43. SACU https://www.sacu.int/category.php?cat=Trade%20in%20Services (accessed 5 October 2021).
44. SACU https://www.sacu.int/category.php?cat=Trade%20in%20Services(accessed 5 October 2021).
45. As above.
46. As above.
47. As above.

way to harmonise and liberalise the legal sector is to relax rules and regulations regulating admission of foreigners into the legal fraternity to practice in jurisdictions of their choice by eliminating the requirements such as permanent residence.[48] This means that countries like South Africa, Eswatini and Namibia need to remove citizenship, ordinary residence, and permanent residence requirements to develop the legal service sector. To achieve this, it calls for the legislature to repeal the Acts to remove these inconsistent measures with the GATS. Once these stringent requirements are eliminated from the statutes dealing with foreign admission and open up their legal services sector, an entire region becomes a market for legal services.[49]

5.3.8 South Africa open up to its immediate neighbours

The main problem identified are rules which are discriminatory against foreigners, for example, the South African case wherein, during the writing of this dissertation, there was an influx of cases in which foreigners are challenging the constitutionality of the 2014 Act. As highlighted in the previous chapter wherein Lesotho has opened its doors for South African advocates and the reciprocity is not returned. This negates the idea of extending a hand to member states. The superior courts of the country are adjudicated by South African judges and judges form other African countries.[50] From a policy perspective, this dissertation recommends that South Africa leads the way in the region and the continent on the liberalisation of trade in legal services. The reason being that, South Africa strategically positioned and usually regarded as the big brother/sister of the region and it will make it easy if the country start opening up to its two more neighbours Mozambique and Zimbabwe. What is important to note is that, the country is no under obligation to open legal admission to foreigners as long as it complies with GATS and the Constitution.[51] The writer submits that, given that there is no such obligation, it is in the best interest to foster harmonisation and integration

48. GEF Npom 'Eliminating the Barriers to cross Boarder Legal Practice in Africa'4 April 2018 http://elf-fae.eu/wp-content/uploads/2018/04/Trends-in-law-firm-management.pdf (accessed 11 July 2021).
49. ILI Ikimi 'The Nigerian Legal Practitioner and Economic Development of Africa: Prospects and Challenges' (2019)1 *International Journal of Comparative Law and Legal Philosophy* 13; https://www.nigerianjournalsonline.com/index.php/IJOCLLEP/article/view/1170/1153 (accessed 12 August 2021).
50. Africa Press (n 34 above).
51. https://muhaz.org/the-admission-and-enrolment-of-foreign-legal-practitioners-in.html?page=3(accessed 14 August 2021).

of the region if the country sets an example to the other countries, making it easy for them to follow.

5.3.9 Countries must adopt the principle of reciprocity

As indicated earlier, Lesotho, one of the SACU countries, has opened its borders to other countries and not only to SACU members but to the whole of Africa in general and is one of the well-known importers of legal services.[52] Notably, South Africa's neighbours have allowed lawyers from South Africa to practise freely. This has enabled South Africans to develop legal professions in neighbouring countries without getting the same benefits. Such reciprocity needs to be reciprocated by South Africa and calls for the country to open up to its neighbours. All SACU countries must also extend this reciprocity. No one can deny the cross-pollination of ideas that enrich these jurisdictions that the country does not get.[53]

From an international trade and investment point of view, it is more attractive for foreign investors from developed countries to bring from their own countries or hire legal expertise from anywhere in the world and of their preference than being restricted to local practitioners.[54] For this reason, the writer supports the resolution of the 2005 Conference of the SADC Lawyers Association that the government should be lobbied to take suitable legislative measures to allow lawyers to practice in SADC countries other than their own countries.[55] In this regard, SACU countries and SADC now need to realise that it is now time to open their borders and doors by removing all stringent measures acting as impediments to foreign legal practice.

To this end, the study recommends the amendments of the Acts dealing with the admission of lawyers to be friendlier and open up to foreigners. As long as these suggestions are not considered, the dissertation assents that the admission of lawyers in the SACU region will remain a perennial TiS issue.

52. Africa Press (n 34 above).
53. https://muhaz.org/the-admission-and-enrolment-of-foreign-legal-practitioners-in.html?page=3 (accessed 14 August 2021)
54. https://muhaz.org/the-admission-and-enrolment-of-foreign-legal-practitioners-in.html?page=3 (accessed 14 August 2021)
55. https://muhaz.org/the-admission-and-enrolment-of-foreign-legal-practitioners-in.html?page=3 (accessed 14 August 2021)

5.4 Conclusion

When one looks at the issue at hand, it is evident that countries are moving towards integration to facilitate the free movement of goods and persons. This is why countries sharing the same borders, such as SACU or within the same region, such as SADC, have formed unions, among other aspirations, to facilitate the free movement of goods and persons. The newly established African Continental Free Trade Area, for example, seeks to promote liberalisation on a much greater scale. However, it is also evident that most of these countries are hesitant to commit themselves to TiS fully. The study has shown how respective countries enact some provisions to keep away foreign legal practitioners. The condition that foreign legal practitioners must be permanently resident or ordinarily resident to be admitted and enrolled into the legal fraternity violates the national treatment obligation and the MFN. These respective measures violate the supreme laws of the land and international laws under GATS as well.

The admission and enrolment of legal practitioners in the SACU region remains a contentious issue under international laws, which these countries accede to from the inception. This is because of the undue preferential treatment accorded to citizens against non-citizens. This development is not in tandem with the laws across the globe in that they are discriminatory. In a globalised world, the law is that all persons are global citizens, free to live and work freely in any part of the world. In this respect, the writer proposed policies that could be developed as a panacea to challenges faced by foreign legal practitioners in the region and other professionals in some pockets of the global village. This is possible if countries begin to appreciate the benefits of regional integration, cooperation and harmonisation, as in the case of Lesotho and other bodies such as the EU and the much anticipated African Continental Free Trade Area. This is one of the initial steps that the region could take in its aspirations to fulfil the African Agenda of 2063.

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