

Trade Policy

Report 16

Trade in Services

**From Controlling to
Managing the Movement
of Persons
in SADC**

by Nkululeko Khumalo

The South African Institute of International Affairs



Trade in Services:

From Controlling to Managing the Movement of Persons in SADC

Nkululeko Khumalo

2007



Published in 2007 by

The South African Institute of International Affairs
Jan Smuts House, East Campus
University of the Witwatersrand
Johannesburg, South Africa

P O Box 31596, Braamfontein 2017

www.saiia.org.za

info@saiia.org.za

Tel +27 11 339-2021

Fax +27 11 339-2154

© SAIIA

All rights reserved. While copyright in the volume as a whole is vested in the South African Institute of International Affairs (SAIIA), copyright in the text rests with the individual authors, and no chapter may be reproduced in whole or in part without the express permission, in writing, of both author and publisher. It should be noted that any opinions expressed are the responsibility of the individual authors and not of SAIIA.

Please note that all amounts are in US\$ unless otherwise indicated.

ISBN 1-919969-10-1

Edited and produced by Acumen Publishing Solutions, Johannesburg
Printed by Lesedi Litho Printers, Pretoria

TABLE OF CONTENTS

ACRONYMS AND ABBREVIATIONS	5
1. INTRODUCTION	7
2. MODE 4 LIBERALISATION CHALLENGES	9
3. REGIONAL TRADE AGREEMENTS AND GATS	13
3.1 Visa regimes affecting the intra-SADC movement of people	15
3.2 Review of migration trends in SADC	20
4. REFORMS AFFECTING MODE 4 IN SADC	23
4.1 The SADC trade protocol and the draft annex on trade in services	24
4.2 Protocol on the facilitation of movement of persons	26
4.3 Protocol on the development of tourism	28
4.4 Other related protocols	29
5. CONCLUSION AND RECOMMENDATIONS	30
ANNEX 1: GATS LIBERALISATION FRAMEWORK	32
ANNEX 2: NON-TARIFF BARRIERS IN SADC	34
ANNEX 3: MODE 4 GATS COMMITMENTS BY SADC COUNTRIES	35

ABOUT THE AUTHORS

Nkululeko Khumalo is a Senior Researcher on Trade Policy in the Development through Trade Programme at the South African Institute of International Affairs.

ABOUT THE FUNDERS

SAIIA's Development through Trade Programme is funded by SIDA and AusAID.

ACRONYMS AND ABBREVIATIONS

ASCISA	Accelerated and Shared Growth Initiative of South Africa
Caricom	Caribbean Community
COMESA	Common Market for Eastern and Southern Africa
DFID	Department for International Development
DRC	Democratic Republic of Congo
ECOWAS	Economic Community of West African States
EEA	European Economic Area
EFTA	European Free Trade Association
FTA	free trade agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
IOM	International Organisation for Migration
MFN	most favoured nation
MOU	memorandum of understanding
NAFTA	North American Free Trade Agreement
NEPRU	Namibian Economic Policy Research Unit
NTB	non-tariff barrier
Retosa	Regional Tourism Organisation of Southern Africa
RTA	regional trade agreement
SADC	Southern African Development Community
SAMP	Southern African Migration Project
TMNP	temporary movement of natural persons
UNCTAD	UN Conference on Trade and Development
WTO	World Trade Organisation

1. INTRODUCTION

Services cover a wide variety of economic and social activities. They embrace communications, transport, finance, energy distribution, construction and business services (intermediate services), as well as final-demand services such as tourism, recreation, education, health and environmental services. As in goods trade, sovereign states often restrict the access of foreign services and service suppliers to their domestic markets by means of a number of policy instruments. In some cases competition by foreign suppliers is totally prohibited, while in others foreign suppliers may be required to pay an 'entry fee' or may be subjected to market share restrictions. The liberalisation of trade in services therefore entails measures that expand market access to foreign service providers (natural persons, companies etc), and/or diminish discrimination against them vis-à-vis domestic suppliers once market access has been granted.

Although most countries had already liberalised certain sectors of their services markets unilaterally and at a regional level, the General Agreement on Tariffs and Trade (GATT) contracting parties saw the need to come up with a multilateral framework for liberalisation of trade in services during the Uruguay Round of negotiations. These negotiations resulted in the creation of the General Agreement on Trade in Services (GATS), which came into force on 1 January 1995.

GATS provides the rules and regulations governing international trade in services, as well as the schedules of commitments by individual countries to allow external access to their domestic services markets.¹ This agreement aims to expand trade in services in a transparent manner, and through a process of progressive or continuous liberalisation, in order to promote the economic growth of World Trade Organisation (WTO) member states; and to enhance the participation of developing countries in international trade in services. Its legal provisions are underpinned and reflect the principle of non-discrimination against services and services suppliers of other members (generally known as the 'most favoured nation' [MFN] principle).

¹ For details on how the GATS liberalisation framework works, see annex 1 at the end of this paper.

GATS classifies trade in services into four broad categories or 'modes', according to the manner in which they are supplied: *cross-border*, *consumption abroad*, *commercial presence*, and *the presence of natural persons*.

- *Cross-border (Mode 1)* – covers services supplied from the territory of one member into the territory of another. In practice, it creates the possibility for a non-resident service supplier to supply services cross-border into the territory of a WTO member. For example, a service supplier of banking services can supply banking services through telecommunications cross-border into any WTO member. Call centres in India have succeeded in exporting services to developed countries through this mode.
- *Consumption abroad (Mode 2)* – covers services supplied in the territory of one member to the consumers of another. Examples include where the consumer moves to consume tourism or education services in other countries.
- *Commercial presence (Mode 3)* – covers services supplied through any type of business or professional establishment of one member in the territory of another. This allows a company to set up a branch or a subsidiary in a foreign country. This can take the form of a company, joint venture or partnership, and as such is a best considered investment.
- *Presence of natural persons (Mode 4)* – deals with the temporary movement of natural persons to the territory of other members as service suppliers or employees of service suppliers. This allows for the movement of intra-corporate transferees, as well as independent professionals (e.g. developing-country software engineers often move to developed countries to supply their services). This movement should be temporary, and service suppliers are supposed to go back to their home countries after completing a particular mission.

These modes of supply require the movement of the service itself (Mode 1), the service consumer (Mode 2) or the service supplier (Modes 3 and 4).

This paper explores the challenges surrounding the liberalisation of movement of natural persons in Southern Africa. In particular, it assesses progress in facilitating intra-regional trade through the liberalisation of cross-border movement of natural persons as service providers within the Southern African Development Community (SADC).

It is structured as follows. First we provide some background information on how WTO members, including SADC states, have generally responded to the need for liberalisation of temporary movement of service providers. We then give an

overview of the barriers affecting the movement of persons, including services providers, within SADC, and the general intra-region migration trends. We then examine current regional integration policies that have an impact on Mode 4 liberalisation in the region, and how the countries concerned are implementing them or responding to the challenges they pose. The final section sketches out recommendations and conclusions based on this study.

2. MODE 4 LIBERALISATION CHALLENGES

Of all the service sectors under GATS, Mode 4 is currently the least liberalised. Sector-specific commitments have focused on measures regulating commercial presence, rather than those regulating the movement of natural persons involved in supplying services. In general, WTO countries have not significantly opened markets in their sector-specific commitments² on Mode 4. As for horizontal commitments,³ they do not refer to the movement of people in all categories and occupations.⁴ The main categories scheduled are for the most part those related to Mode 3, such as inter-corporate transferees, business visitors, independent professionals (including those providing services within a service contract), executives, managers and specialists.⁵

Yet the prevailing economic environment seems to be in favour of increased temporary movement of service providers. Businesses, particularly but not exclusively multinational corporations, press for access to a global labour market for their recruitment of both skilled and unskilled personnel.⁶ This trend is generally

² A specific commitment in a country's schedule represents an undertaking by such country to provide market access and national treatment for the service activity in question, according to the terms and conditions in that schedule.

³ Horizontal commitments apply to all service sectors included in a country's schedule of commitments.

⁴ There are usually three types of entries made against a mode of supply in a country's schedule of commitments: none, unbound, and limited. None – denotes a fully binding commitment with no restrictions. Unbound – means no binding commitments are made. Limited – refers to a situation where a binding commitment is qualified in one way or another.

⁵ Haque S, 'Quest for an implementation mechanism for movement of service providers'. TRADE Occasional Papers 7, 2001.

⁶ International Organisation for Migration (IOM), 'IOM migration policy framework for sub-Saharan Africa', 17 November 2000.

attributed to a number of key developments related to the broader process of globalisation, some of which are outlined below.

Firstly, progress in transport and communications make it possible for people to move faster and cheaper, and to obtain information about opportunities elsewhere, while at the same time maintaining contacts with their families and home communities. This has made temporary or circulatory flows much more frequent than in the past.⁷ Secondly, the new 'knowledge economy', especially in the US and Europe, requires an increasing number of highly qualified 'knowledge workers'. To meet the rising demand for skilled labour, laws relating to the movement of knowledge workers need to be amended.⁸ Finally, the changing demographic profile in developed countries, with ageing populations, shrinking workforces and growing skills gaps in key sectors, undoubtedly calls for freer movement of labour to fill the gaps and maintain economic viability. As such, the movement of natural persons constitutes the human side of globalisation.

However, freeing the movement of people involved in supplying services is adversely affected by political considerations, and in many countries immigration rules have not changed to reflect GATS commitments. For example, though GATS focuses on the temporary movement of service suppliers, some countries fear that this may facilitate permanent migration.⁹ The fact that 'temporary' movement is not defined (perhaps for reasons of flexibility), and can last from a few months to a few years, has reinforced this concern.¹⁰

The difficulties with Mode 4 liberalisation are aptly described by Hollifield as follows:¹¹

⁷ Department for International Development (DFID), Memorandum submitted to the United Kingdom Parliament, 2004, <http://www.parliament.the-stationery-office.co.uk/pa/cm200304/cmselect/cmintdev/uc>.

⁸ Haque S, *op. cit.*

⁹ Pillay P, 'The General Agreement on Trade in Services (GATS): implications and possible ways forward for the Southern African Development Community (SADC)', paper presented at UNESCO Conference on Globalization and Higher Education. Oslo, 26–27 May 2003.

¹⁰ Though 'temporary' movement is not defined, permanent migration is explicitly excluded, as well as workers in non-service sectors such as agriculture.

¹¹ Hollifield JF, 'Migration, trade and the nation-state: the myth of globalisation', in Messina AM and G Lahav (eds), *The Migration Reader: Exploring Politics and Policies*. Colorado: Lynne Rienner, 2006.

But if the logic of trade and finance is that of openness, the logic of migration is one of closure. From a political standpoint, international migration is the mirror image of international trade and finance. The wealthier states push hard to keep the lines of trade and investment open, while the poorer states are more sceptical, fearing dependency. With migration it is the opposite: By and large, the wealthier states push hard to keep foreigners out, usually for reasons of national security or identity; whereas many poorer states want to export people, in order to reap benefit of remittances or simply to maintain a social safety valve.

From an economic standpoint, it is difficult to separate trade and investment from migration. The movement of goods, services, and capital necessarily entails the movement of labour and people. Conventional economic wisdom has it that in the long run, trade can substitute for migration through a process of factor-price equalization. But in the short run, historical and empirical studies demonstrate that free trade can lead to increased migration, especially when disparities in wages and incomes are very high, as between the US and Mexico. Although paradoxical, the reasons for this are simple: When backward economies are exposed to strong exogenous pressures, the agricultural sector can collapse and lead to a rural exodus, swelling the population of cities and increasing pressures to emigrate. Likewise, increased trade in services leads to high-end migration, because technical and professional staff are integral parts of those services.

It is therefore not surprising that recent estimates, based on limited empirical information, suggest that Mode 3, commercial presence, accounts for more than half of world trade in services, and Mode 1, cross-border trade, for about a fourth, while Mode 2, consumption abroad, contributes less than one-fifth. Mode 4 was found to be nearly insignificant, accounting for just over 1% of world services trade.¹²

However, according to Winters,¹³ the current low percentage contributed by Mode 4 does not mean that it has little promise for large gains. Rather, 'the low

¹² WTO, 'GATS, Mode 4, and the pattern of commitments: background information', WTO Secretariat Paper, April 2002.

¹³ Winters A, 'The economic implications of liberalising Mode 4 trade'. Geneva: WTO, 11-12 April 2002, http://www.wto.org/english/tratop_e/serv_e/symp_apr_02_winters_e.doc, p. 4.

figure arises from the very high barriers to TMNP [temporary movement of natural persons], and so offers the greatest potential returns to liberalization'. Moreover, a recent study has shown that even a small increase in developed countries' quotas on the inward movements of both skilled and unskilled temporary workers, equivalent to 3% of their workforces, would generate an estimated increase in world welfare of more than \$150 billion a year.¹⁴ Remittances alone are estimated to have reached \$72.3 billion in 2001, an amount far greater than the total official development assistance for that year. However, these benefits do not exclusively emanate from Mode 4 flows – not all migrant workers or labourers are engaged in service provision.

Existing barriers to market access Mode 4 include:

- visa formalities, prohibitions and quotas;
- economic needs tests (some countries require a search for national service providers before access is given to foreigners);
- procedures that are often discretionary, administratively cumbersome and non-transparent;
- wage parity requirements – which erode the cost advantage of poorer countries' services providers;
- discriminatory treatment, such as residence and nationality requirements and tax obstacles; and
- non-recognition of qualifications and stringent requirements (ostensibly as prudential regulations) for members of professional organisations, such as legal and medical societies.

Sensitivities to immigration, especially in developed countries, have been worsened by increases in international terrorism and organised crime. This makes it unlikely for the GATS negotiations to liberalise Mode 4 effectively any time soon, even though this is a viable option in dealing with migration, as it promotes temporary and circulatory flows, as opposed to long-term or permanent migration. Because of these difficulties, regional and bilateral Mode 4 liberalisation pacts are increasingly seen as an alternative option.

¹⁴ Walmsey T *et al*, 'Relaxing the restrictions on the temporary movements of natural persons: a simulation analysis'. London: Centre for Economic Research. 2003.

3. REGIONAL TRADE AGREEMENTS AND GATS

Non-discrimination or MFN is the fundamental principle that undergirds the WTO legal framework.¹⁵ However, under conditions set out in GATS article V, countries are allowed to enter into a regional trade agreement (RTA), offering more favourable treatment to services or services suppliers of its parties than what is granted to other WTO members (this an exception to the MFN rule). In terms of GATS article V, an RTA must have substantial sectoral coverage; and it must provide for the absence or elimination of substantially all discrimination through elimination of existing discriminatory measures, and/or prohibition of new or more discriminatory measures, either at the entry into force of that agreement, or on the basis of a reasonable time-frame in order to qualify for the exemption.¹⁶

However, in determining whether an RTA meets these requirements, paragraph 2 of GATS article V states that consideration may be given to the relationship of the agreement to a wider process of economic integration or trade liberalisation among the countries concerned. Paragraph 3 calls for additional flexibility where developing countries are parties to a regional integration agreement – this should result in a less strict application of the aforementioned requirements, since, among other things, the level of development of the countries concerned has to be taken into account.

Facilitating the temporary movement of natural persons is better accomplished in bilateral and regional, rather than multilateral, contexts. The multilateral framework is weak in the sense that it fails to provide guarantees that the movement of persons will be temporary. This may require both the receiving and sending country to work together. Indeed, international experience shows that it is relatively easier to make headway on certain issues of developmental importance (such as regulatory harmonisation in transport, etc) in RTAs among a smaller subset of countries, than in the slow-moving multilateral negotiations forum in terms of GATS. These RTAs are also important as a means of 'testing the waters', and then provide lessons for the multilateral trading system. The liberalisation of movement of natural persons is a classic example in this regard.

Indeed, several regional agreements have achieved more liberalisation of

¹⁵ It is found in GATT article I and GATS article II.

¹⁶ GATS article V, paragraph 1.

movement of natural persons than has been achieved under the GATS.¹⁷ Some RTAs, such as the EU, the European Economic Area (EEA), and the European Free Trade Association (EFTA), provide for full mobility of labour. Others, such as the Caribbean Community (Caricom),¹⁸ the North American Free Trade Agreement (NAFTA), and the Canada–Chile Free Trade Agreement (FTA) provide market access that covers other categories of persons, beyond service suppliers.¹⁹ There are still other agreements that make additional elements to GATS (US–Jordan FTA, EU–Mexico FTA); or simply use the GATS model (Southern Common Market Agreement (MERCOSUR)); or just provide for facilitated entry without market access (Asia Pacific Economic Cooperation Forum).

In Africa, the 16 member states comprising the Economic Community of West African States (ECOWAS) have implemented a regional framework for the free movement of natural persons. These countries have, since 1999, established a common passport, issued by all member states, and no visa is required from any national originating from ECOWAS countries for travel within the region. All these examples demonstrate the great potential RTAs have for providing customised rules that are acceptable for the countries involved, which often go beyond what GATS can reasonably offer.

It is in the context of an RTA that SADC countries wish to liberalise the intra-regional movement of natural persons. However, owing to different levels of economic development, SADC, to a certain extent, mirrors the Mode 4 liberalisation challenges encountered in the multilateral trading system.²⁰ Yet the additional

¹⁷ For details see Nielson J, 'Current regimes for temporary movement of service providers: labour mobility in regional trade agreements', paper prepared for the Joint WTO–World Bank Symposium on Movement of Natural Persons (Mode 4) under the GATS, 11–12 April 2002. Also available online: http://www.wto.int/english/tratop_e/serv_e/symp_apr_02_nielson1_e.doc.

¹⁸ This agreement grants work permits for all Caricom nationals. The free-movement clause extends to university graduates, other professionals and skilled workers in entertainment and tourism industry.

¹⁹ Under NAFTA and the Canada–Chile FTA, free movement of traders, investors, intra-company transferees, business visitors and professionals is provided for.

²⁰ For instance, South Africa, Botswana and Namibia, which have relatively high incomes and better standards of living, are seen as attractive destinations by regional migrants, which makes them less keen on liberalising Mode 4 in the region. Most other countries would like to see a liberalised regime as soon as possible, except when it comes to areas such as health, where they are affected by debilitating brain drain.

GATS flexibilities for developing-country RTAs, geographic proximity, cultural and historical ties, and economic inter-dependencies among SADC states make the potential for GATS-plus Mode 4 liberalisation possible within certain parameters.

3.1 Visa regimes affecting the intra-SADC movement of people

The bureaucracy and cost involved in obtaining entry visas and temporary residence permits are significant barriers to the freer movement of people involved in service provision in the SADC region. While the movement of consumers is also restricted, the real difficulty has been to obtain temporary residence permits, and particularly work permits, in these countries. Prospective employers in SADC often find it very difficult to recruit specialists and professionals from elsewhere in the region, and abroad, when local skills are inadequate or unavailable. This barrier also adversely affects trade in health and educational services.

The underlying policy goals behind these restrictions are mainly twofold: to protect low-skilled local people against excessive competition from foreigners for scarce work, and to avoid a situation in which importing foreign skills becomes a substitute for firms investing in domestic labour. These are legitimate social concerns for any government; however, problems often arise from the way in which the measures aimed at achieving these goals are applied in practice. SADC countries²¹ currently have a less transparent approach characterised, by less formal assessments of economic needs, and non-transparent criteria for selection.

Immigration restrictions in SADC have been fingered by the Imani Development study titled 'Inventory of regional non-tariff barriers: Synthesis report'²² as one of the many non-tariff barriers (NTBs) inhibiting the free flow of goods, services and services providers within the region (see Annex 2). We briefly sketch out the visa regimes of SADC countries affecting intra-regional movement of persons, and indicate, where information is available, the Mode 4 horizontal commitments

²¹ The recruitment of foreign services suppliers is not only problematic in South Africa; this is a general trend in SADC countries, mainly because it is subject to immigration legislation.

²² See Draft Final Report of November 2004.

individual countries have made at the multilateral level (see Annex 3).²³ This is important because all SADC states are GATS members, and in the absence of a regional immigration policy or Mode 4 liberalisation agreement, the intra-SADC movement of natural-person service providers is subject to the same rules that apply to the rest of WTO members. According to the Imani report and a study by Mburu,²⁴ and some preliminary findings of research undertaken by the Regional Tourism Organisation of Southern Africa (Retosa),²⁵ the movement of persons in individual SADC countries is governed as described below.

Angola

Angola requires visas from all SADC citizens except Namibians. Visas to enter Angola can take over a month. The process surrounding the obtaining of work permits in respect to the employment of foreign workers is unclear, with officials appearing to be uncertain of the process themselves.

In terms of GATS, Angola did not make any horizontal commitments – only sector-specific commitments.

Botswana

Botswana requires entry visas from citizens of Angola, the Democratic Republic of Congo (DRC), Madagascar and Mozambique. According to the Imani synthesis report, the process of getting work permits approved and issued is extremely slow. This problem was apparently cited by '[e]very business person interviewed' as part of the Imani study as a major NTB to intra-regional trade.

Under GATS, the presence of natural persons in Botswana is subject to immigration laws, regulations and procedures.

²³ Here we outline only horizontal commitments (which apply to all sectors); for information on specific sectors see Mburu EN, 'SADC: GATS, the specific commitments of the countries and state of liberalisation of Trade in Services', UN Conference on Trade and Development (UNCTAD), 2002.

²⁴ Ibid.

²⁵ See Retosa, 'Study on the implementation of a Univisa system in the SADC region', draft Univisa Analysis and Implementation Report prepared by Tourism Intelligence International (Germany) in collaboration with ASA (South Africa) and Austral (Angola and Mozambique), 2006.

DRC

The DRC requires entry visas from citizens of all SADC states and the converse is true.

In terms of its GATS commitments, Mode 4 is unbound except for the entry and temporary stay of up to one year for senior executives and specialists, covering both market access and national treatment.

Lesotho

Lesotho requires entry visas from citizens of Angola, DRC, Madagascar and Mozambique. Visa procedures are cumbersome, and there are separate government offices for applications for different categories of visas.

In terms of Lesotho's GATS commitments, the presence of natural persons is automatic for up to four senior expatriates and specialised skill personnel, in accordance with the laws of this country.

Madagascar

Madagascar requires entry visas from all SADC citizens. These can be obtained at the airport in Antananarivo.

Malawi

Malawi does not require entry visas from SADC citizens, except for those from Angola and the DRC.

In terms of Malawi's GATS commitments, the presence of natural persons is unbound, and is limited to the entry and temporary stay of the management and experts connected to commercial presence.

Mauritius

Mauritius does not require entry visas from SADC citizens, except for those from Angola, the DRC, and Madagascar (citizens of Madagascar can, however, get a two-week visa at the point of entry).

In terms of its GATS commitments, market access in Mode 4 is unbound, except for measures affecting the entry and stay of highly qualified persons governed, inter alia, by the Passport Act of 1969 and the Immigration Act of 1973. National treatment is also unbound, save for the categories of persons mentioned above, and

is governed, inter alia, by the Income Tax Act and the Non-Citizens Employment Restrictions Act of 1970.

Mozambique

Mozambique requires entry visas from nationals of Angola, the DRC, Lesotho, Mauritius and Zimbabwe. Protection of security, labour stability, and diplomatic and political standards are the reasons given for visa requirements, though this issue is listed as having low impact on regional trade, business costs and efficiency, and domestic market access.

Mozambique did not make horizontal commitments in Mode 4 under GATS – it made only sector-specific commitments.

Namibia

Namibia requires entry visas from nationals of the DRC, Madagascar and Mauritius.

Under GATS, the entry and residence of foreign natural persons is subject to Namibia's Immigrations Control Act of 1993 and labour laws. This applies to management and expert jobs only, and where foreign investment is involved, depending on the contracting parties, subject to government approval.

South Africa

South Africa requires entry visas from nationals of Angola, the DRC, Madagascar, Tanzania and Zimbabwe (except for government officials, including police on cross-border crime investigation).

South African immigration legislation, and its application by officials, hinder the ability of firms to obtain work permits for foreign workers. The quota system also leads to opportunities for corruption, and the law is criticised for lacking transparency. Normal business visas are also difficult to obtain, and the efficacy of the visa system is questioned, particularly since South Africa's borders appear to be porous to all but legitimate travellers and potential investors.

Under GATS, market access is provided for in Mode 4, but is unbound, except for entry and stay for up to three years without requiring compliance, with economic needs tests for services salespersons, intra-corporate transferees, executives, managers, specialists, professionals, and personnel involved establishing commercial presence.

Swaziland

Swaziland requires entry visas from nationals of Angola and the DRC.

Under GATS, Swaziland did not make any horizontal commitments in Mode 4.

Tanzania

Tanzania requires entry visas from nationals of Angola, the DRC, Madagascar and South Africa. Under GATS, Tanzania did not make any horizontal commitments in Mode 4.

Zambia

Only nationals of Angola, Madagascar, Mozambique and the DRC require visas to enter Zambia.

In terms of its GATS commitments, market access horizontal limitations apply to Mode 4. It is unbound, except for the entry and temporary stay of management and experts for the purposes of implementation of foreign investment, which should be agreed by the contracting parties and approved by the home affairs ministry.

Zimbabwe

Only nationals from Angola, the DRC, Madagascar, Mozambique and South Africa require visas to enter Zimbabwe (South Africans can obtain their visas free at the point of entry).

In terms of its GATS commitments, Mode 4 is unbound, except for measures regulating the entry and temporary stay of executives, senior managers and specialists subject to lack of availability in the local market.

Before we examine the kind of policies SADC countries wish to implement in order to ease the movement of persons, it is important to get a sense of the anti-reform difficulties these countries are facing, by looking at the general labour migration trends within the region.

3.2 Review of migration trends in SADC²⁶

As already mentioned, GATS does not cover labour migration per se, but rather the narrower concept of 'temporary' movement of persons across borders for the purpose of supplying a service. However, it is important to understand the general labour migration trends in order to determine how, and to what extent, Mode 4 liberalisation could be of benefit to the SADC region as a whole.

Since colonial times, cross-border labour migration within Southern Africa has been both a cause and an effect of economic interdependence. Currently, variation in wealth and remuneration results in a net flow of skilled personnel from poor to richer countries. Crush and Williams aptly describe this trend as follows:²⁷

The relatively higher employment and wage standards of Botswana, Namibia and South Africa attract unemployed migrants from other states. But it is not only the unskilled or semi-skilled who migrate; skilled labourers also gravitate towards labour markets in which incomes are higher. However, labour markets paying higher wages also experience skills deficits. In Namibia this has resulted in a considerable dependence in the public sector on skilled foreign workers who, in 1997, constituted 18 per cent of senior officials and 14 per cent of professionals in public posts. The proportions are higher in the private sector. Botswana has also drawn on nurses, doctors, university teachers and artisans from neighbouring states and overseas.

As could be expected, South Africa, by far the richest country in the region, is the biggest recipient of SADC migrants. It is also experiencing a huge outflow of semi-skilled and skilled people to developed countries such as the UK, Canada and Australia.²⁸

²⁶ Much attention in this section is devoted to analysing the South African immigration situation, and how immigration-policy thinking has evolved. This is important because this country is very influential in overall policy-making, owing to the size of its economy, which makes it the most attractive destination for most regional immigrants.

²⁷ Crush J and V Williams, 'Regional migration regime: can it work in Southern Africa?', Southern African Migration Project (SAMP), 2004.

²⁸ See Pillay P, *op. cit.*, p. 5.

On the one hand, wealthier SADC countries (like most migrant-receiving countries worldwide) are particularly concerned that mass movement of mainly undocumented and unskilled people into their territories would constitute a burden to their welfare and social services infrastructure, and also displace locals in low-skilled jobs, thereby exacerbating unemployment. Migrant-sending countries, on the other hand, worry about potential brain drain as skilled people move to those countries where their skills are likely to be more rewarded.²⁹

This knowledge and skill loss from the poorer to the richer countries can be considered as a form of reverse (poor to rich) subsidy. Globally, developing countries are estimated to be subsidising the industrialised world by about \$500 million a year through the migration of health-care professionals alone.³⁰ The cost of training professionals is often a significant investment of a country's available budget. As such, the high incidence of migration by professionals from their home countries to proverbial greener pastures (even when migration takes place within the region) is a significant challenge for some SADC states.

Unsurprisingly, the demise of apartheid sparked fears of brain drain to a democratic South Africa. According to Prof Oliver Saasa of the University of Zambia,³¹ such fears were apparently justified, since skilled migration to South Africa from its neighbours significantly increased prior to the 1994 election. Key skills had started moving to South Africa in droves. For example, about 200 medical doctors had reportedly left Zimbabwe for Botswana and South Africa in 1992 alone.³²

However, post-apartheid South Africa promptly responded with laws aimed at stemming what appeared to be a looming immigration tide. While these policies may not have been effective in reducing illegal immigration, they did result in a steady decline of both temporary and permanent immigration of skilled people, as work and permanent residence permits became extremely difficult to obtain.

²⁹ See Mwebeihla C, 'Steps to liberalise services trade', *Business Law Review*, *Business Day*, 12 September 2005.

³⁰ Padarath A *et al.*, 'Health Personnel in Southern Africa: Confronting maldistribution and brain drain', Equinet, 2003, <http://www.medact.org/tbx/docs/Padarath%20et%20al.%20-%20Medact-HST-Equient.pdf>.

³¹ Quoted in Crush J and D McDonald, 'Thinking about the brain drain in Southern Africa'. SAMP Migration Policy Briefs no. 8, 2002, <http://www.queensu.ca/samp/migrationresources/braindrain/>.

³² *Ibid.*

During this period, a study by Bhorat et al³³ reveals that contrary to being a net skills absorber, South Africa was actually sending more skilled people to its neighbours, such as Namibia, than it received.

However, in the late 1990s, it became increasingly clear that the 'fortress South Africa' approach was unsustainable in a globalised world. The business community, in particular, began to exert pressure on government to relax stringent immigration laws so as to enable them to import critical foreign skills. The skills shortage was exacerbated by the fact that, even as this country continued to restrict skilled immigration, South African skilled people were being lost to competitors overseas. This prompted a policy shift, informed by a realisation that skilled immigration is not necessarily disadvantageous. The 1999 white paper on international migration recognised the need to 'attract qualified people in[to] South Africa to offset the brain drain'.³⁴

Indeed, the South African Immigration Amendment Act of October 18, 2004 of the Principal Act of 2002 (The Aliens Control Act) recognises the fact that facilitating the entry of exceptionally skilled foreign labour is vital for the economic growth of any country. In this regard, the act aims to ensure that, though foreign labour is welcomed to South Africa, such labour should not adversely impact upon the existing standards in the South African labour market, and the rights and expectations of South African workers.

This apparent policy shift in favour of Mode 4 liberalisation has also been enhanced by the Accelerated and Shared Growth Initiative of South Africa (ASGISA), which seeks to increase average economic growth to about 6% from 2010 to 2014, in order for the country to be able to fight poverty and unemployment effectively. Among the many identified obstacles to higher economic growth in South Africa is a lack of sufficient skills in key sectors. According to the ASGISA report,³⁵ 'it is evident that we lack sufficient skilled professionals, managers and artisans, and that the uneven quality of education remains a contributory factor'. Current policy therefore aims to strike a virtuous balance between local skills development and

³³ Bhorat H, J Meyer and C Mlatsheni. 'Skilled labour migration from developing countries: study on South and Southern Africa'. Geneva: International Migration Programme, July 2002.

³⁴ See *ibid.*

³⁵ <http://www.info.gov.za/asgisa/asgisa.htm>.

foreign recruitment. This approach was eloquently expressed by the Deputy Minister of Home Affairs as follows³⁶:

It stands to reason therefore that South Africa should also join the ranks of those countries that import scarce and critical labour, mindful of the fact that this is not just a stop-gap measure, but as part of the global economy, our country will also attract foreign skills and export skills to other countries. We can no longer sustain the false belief that the import and export of skills is a temporary sojourn that we will abandon as soon as we have developed enough local skills to fill the gaps we have. We must tell our people the truth and shake off the fear we have for skilled migration, as this will among others result in the necessary skills transfer.

Rather than impede national skills development, this is a spur towards a more accelerated skills development because whether we like it or not, our skilled professionals and managers are going to continue increasingly to be recruited elsewhere or will leave in search of better incomes and opportunities, leaving us sulking with a vast skills gap if we do not prepare for this. It is obvious that companies must be encouraged both to raise the skills levels and competencies of their employees as well as seek to gain more skills through learnerships if they must seize the opportunities offered by both the global and national economies.

The current positive thinking in South Africa on foreign skills recruitment should extend to, and be reflected at, the SADC policy-making level. Indeed, this policy stance presents a window of opportunity for a viable regional Mode 4 liberalisation regime.

4. REFORMS AFFECTING MODE 4 IN SADC

It is encouraging to note that SADC member states are currently engaged in a number of developments aimed at liberalising the movement of persons within

³⁶ See Gigaba M, 'Address by Mr. Malusi Gigaba MP, Deputy Minister of Home Affairs, at the 5th National Annual Conference of the Services SETA in Sandton on 27th October 2005', <http://home-affairs.pwv.gov.za/speeches.asp?id=146>.

the region. This is clearly in conformity with the SADC treaty,³⁷ which mandates its signatories to progressively 'eliminate obstacles to the free movement of capital and labour, goods and services and of people in the region generally among Member States'.

Although not necessarily under the aegis of GATS, liberalisation of trade in services has been slowly taking place in SADC. Such liberalisation has been primarily driven by protocols and memoranda of understanding (MOUs) aimed at fostering greater economic integration and development in the region. As such, a number of services-trade-related protocols and MOUs contain provisions that mandate signatory countries to liberalise, inter alia, the movement of natural-person services providers regionally. In the following paragraphs we discuss a few directly relevant legal instruments affecting Mode 4, with a view to giving a broad picture of progress that has been made.

4.1 The SADC trade protocol and the draft annex on trade in services

Although the Trade Protocol provides for the liberalisation of services, it does not impose any obligations. Its major focus is tariff liberalisation or liberalisation of trade in goods. Article 23 of the protocol merely states:³⁸

1. Member States recognise the importance of trade in services for the development of the economies of SADC countries.
2. Member States shall adopt policies and implement measures in accordance with their obligations in terms of the WTO's General Agreement on Trade in Services (GATS), with a view to liberalizing their services sectors within the Community.

However, steps have been taken to pave the way for the liberalisation of trade in services among SADC countries in accordance to article 23 of the trade protocol.

Already there is an initial draft annex on services which, if approved by all member states, shall serve as a basis for negotiations on trade in services. The Draft Annex on Trade in Services sets out the framework for the liberalisation of trade

³⁷ Article 5.2(d) of the treaty.

³⁸ SADC Trade Protocol, part Six, article 23. Available online: <http://www.sadcstan.co.za/Secure/downloads/protocol.pdf>.

in services between SADC members. The ultimate aim of the liberalisation process is that each member will treat the services emanating from other members, and the suppliers of such services, in the same way as its own services suppliers, and the services they supply. All methods of supplying a service are included, and the standard accorded is called 'national treatment'.

Apart from national treatment, article 5 of the draft annex provides for the MFN principle, which prohibits a member state from granting less favourable treatment to service suppliers and services of one member than that which it accords to any other member. In other words, a liberalising commitment to one member is extended to all SADC members, with the exception of treatment provided for in the context of a regional integration agreement (in accordance with GATS article 5, this may eventually be so in the case of the Common Market for Eastern and Southern Africa [COMESA], for instance)³⁹ and mutual recognition agreements entered into with a third party (in accordance with GATS Article VII).

The SADC internal liberalisation negotiations will be carried out parallel to the ongoing GATS negotiations in Geneva. The process of liberalisation of trade in services among SADC member states aims eventually to cover substantially all sectors and modes of supply. Six key services sectors have been identified for the initial liberalisation phase, namely construction, communication, transport, energy, tourism and financial.⁴⁰ The modalities for the negotiations on trade in services would then incorporate a work programme for the progressive inclusion of other sectors into the liberalisation process.

It should be noted that different services modes and sectors are very interrelated and supportive of one another, so that the liberalisation the initial six sectors would most likely require Mode 4 liberalisation to make it more meaningful. This is because a shortage of human skills can cripple efforts to develop the targeted core infrastructure services sectors. For example, South African construction firms have reportedly embarked on a serious recruitment drive for Zimbabwean engineers, quantity surveyors, senior managers and all disciplines of artisans, among

³⁹ Note that in this context the term 'measure' covers laws, regulations, rules, procedures, decisions, administrative actions, or any other such action taken by governments. The supply of a service includes the production, distribution, marketing, sale and delivery of a service.

⁴⁰ Some member states made a recommendation to expand the priority sectors to all services sectors as identified under the GATS.

other skills categories, to help them meet tight deadlines on their 2010 World Cup projects.⁴¹ This would have been fairly easy if the movement of skills were already liberalised in the region. Further, there is a strong case for such liberalisation to extend to the multilateral level, since the SADC region may not have all the skills needed to boost the key services sectors mentioned above.

4.2 Protocol on the facilitation of movement of persons

At their 2005 summit in Botswana, SADC states finally adopted a comprehensive Protocol on the Facilitation of Movement of Persons, about ten years after the original document was announced. According to Matlosa,⁴² the reasons for such delay and apparent reluctance to liberalise human movement in this region include:

... (a) individual states clinging to national sovereignty; (b) the perception of migration as a security and not a developmental issue; (c) protectionist immigration laws and policies; (d) the criminalisation of foreign migrants and (e) the all-pervasive xenophobia in most countries. States perceive migration through security lenses and began to tighten their economic fortresses by militarising boundaries and developing electric fences. Xenophobia is, therefore, rife in southern Africa.

The protocol has three main objectives: to facilitate visa-free entry (for a renewable period of 90 days); to facilitate the issuing of residence permits, within three years of its entry into force; and to facilitate the granting of the freedom of establishment by a member state to citizens of other SADC countries, within five years of its entry into force.⁴³ The protocol allows for citizens of one state party to enter into another state party's territory to seek and take up employment, and to reside in such a territory according to the laws of the receiving state.⁴⁴

⁴¹ Thondhlana B, 'SA construction firms woo Zimbabweans as industry booms', *Creamer Media's Mining Weekly*, 15 December 2006.

⁴² Matlosa K, 'Human movements, common regional citizenship and identity in Southern Africa: prospects for deeper integration between Lesotho and South Africa', *Policy, Issues & Actors*, 19, 3. Johannesburg: Centre for Policy Studies. March 2006.

⁴³ See articles 14, 17, 18 and 21 of the protocol.

⁴⁴ See articles 17 and 18 of the protocol.

Table 1: Protocol tabled for signature on 18 August 2005

Protocol	Member states that have signed	Member states that have ratified	Member states that have acceded	Member states that have to sign	Member states that have to ratify	Member states that have to accede
SADC Protocol on the Facilitation of Movement of Persons Has not yet entered into force	Lesotho Mozambique Namibia South Africa Swaziland Zimbabwe	Mozambique		Angola Botswana Malawi Mauritius Tanzania Zambia		Madagascar

Source: SADC Secretariat.

Already six member states have signed the protocol, which will come into force when ratified by two-thirds of the members. As the table below shows, the DRC, Lesotho, Namibia, Mozambique, South Africa, Swaziland and Zimbabwe have signed the protocol. Mozambique is the only country that has ratified the protocol as yet. Angola, Botswana, Malawi, Mauritius, Tanzania and Zambia are required to sign, whereas Madagascar is only required to accede to the protocol once it is in force.

The protocol seems strong on provisions on facilitating general free movement of all categories of natural persons⁴⁵ beyond service providers and/or skilled professionals. It fosters a general trend towards reviewing and relaxing the criteria countries use to grant residence permits to citizens of fellow SADC members.⁴⁶ The protocol clearly goes beyond the narrow liberalisation of 'temporary' movement of persons provided for by GATS, as it covers issues of permanent migration, and also urges member states to amend their immigration policies in order to give effect to its objectives.

⁴⁵ Article 13 of the protocol covers harmonisation of immigration practices and adoption of 'simple and uniform' migration forms, for use by SADC members' citizens and Third States citizens who wish to enter or exit the region. Further, article 14, which deals with visa-free entry, is primarily aimed at general visitors, who may be tourists or consumers, but not service providers.

⁴⁶ This is covered in article 17 of the protocol.

Table 2: Protocol tabled for signature on 14 September 1998

Protocol	Member states that have signed	Member states that have ratified	Member states that have acceded	Member states that have to sign	Member states that have to ratify	Member states that have to accede
SADC Protocol on the Development of Tourism Entered into force: 26 November 2002	Botswana Lesotho Malawi Mauritius Mozambique Namibia South Africa Swaziland Tanzania Zambia Zimbabwe	Botswana Lesotho Mauritius Mozambique Namibia South Africa Swaziland Tanzania Zimbabwe				Angola DRC Madagascar Malawi Zambia

Source: SADC Secretariat.

4.3 Protocol on the development of tourism

The general objective of the SADC tourism sector is to develop, promote and market the region as a single, but multifaceted, tourism destination; and to improve the quality, competitiveness and standards of service of the tourism industry in the SADC region.

The Protocol on Development of Tourism, which was signed in 1998 and came into force on 26 November 2002, provides the legal policy instrument for the sector. The objectives of the protocol are to ensure equitable, balanced and complementary development of the tourism industry in the region; to optimise resource usage through joint development of infrastructure; to involve small and micro-enterprises, local communities, and women and youth; and to facilitate intra-regional travel through the easing of visa restrictions. As the table below shows, most member states have acceded, except Angola, the DRC, Madagascar, Malawi and Zambia.

So far, most programmes under this protocol are being implemented. The protocol also provides for setting up a regional body to market the SADC region as a collective tourism destination. Accordingly, the Retosa was established in 1998. Retosa is governed by a charter, which was signed by all member states and is in force.

Retosa aims to boost marketing and promotional activities, and to ensure greater private-sector involvement in the development of the SADC tourism sector. Retosa has developed a business plan (2003–2007), whose main objectives are to market the SADC region as a preferred destination, and to mobilise resources for tourism investment and development.

There are a plethora of projects at various stages of implementation to give effect to the goals of the protocol. These include proposals to abolish visa requirements for regional tourists who wish to enter another member state's territory as visitors in order to help facilitate intra-regional travel; the establishment of single visa (Univisa) for all SADC countries; and harmonisation of immigration procedures in order to facilitate the movement of international tourists in the region. Such policies are expected to result in an increase of the region's world tourism market share and revenue; and to ensure that all SADC member states participate in, and benefit from, South Africa's hosting of the FIFA World Cup in 2010.⁴⁷

4.4 Other related protocols

The removal of impediments to the movement of persons is also to be addressed in some provisions of the Protocol on Education and Training and the Protocol on Health.

In particular, article 28 of the health protocol, which deals with referral systems or co-operation in tertiary care services, calls upon member states, *inter alia*, to build capacity progressively in their countries to provide appropriate high-quality specialised care through the exchange and attachment of specialists in the region, and the sharing of information on centres of excellence in the region. The issue of exchange and attachment of health specialists clearly relates to liberalisation of movement of natural-person service providers (Mode 4, in WTO parlance), and, at regional level, the Protocol on the Facilitation of Movement of Persons constitutes the legal framework.

Further, one of the key interventions being addressed in the education implementation plan is the development of a SADC qualifications framework, aimed at

⁴⁷ SADC member states were requested to submit, by 30 June 2006, their views on how they intend to participate and benefit from the 2010 event, for consideration by ministers responsible for tourism.

promoting comparability of qualifications in the educational systems of all SADC member states. This is important both for facilitating mobility of students and academic staff, especially to our higher institutions of learning, and, subsequently, for enhancing labour mobility, and clearly relates to the Protocol on Facilitation of Movement of Persons.

5. CONCLUSION AND RECOMMENDATIONS

It is increasingly acknowledged that the temporary movement of highly skilled people, in particular, is not necessarily a net loss, and that this may in fact benefit both receiving and sending countries. Countries of origin potentially stand to benefit from the inflow of remittances, but also from access to knowledge, new technologies, and new markets via linkages with their migrant communities, as well as the eventual return of skilled expatriates with their superior training and skills, management experience, ties to foreign institutions, and networking capacity acquired while abroad.⁴⁸

Further, it is submitted that the concerns that GATS might exacerbate brain drain are sometimes exaggerated. Mode 4 liberalisation could provide a panacea to this pandemic as it explicitly seeks to promote circulatory flows as opposed to permanent migration. Admittedly, the GATS mechanism still needs to be improved, particularly by ensuring that the movement of people really becomes temporary, and that visa holders do not use GATS Mode 4 processes to become permanent migrants.

A number of bilateral and regional integration groups, some of which are mentioned in the foregoing discussion, seem to have found ways of getting around the problem of ensuring that the movement of natural persons is temporary. This is mainly because such agreements are based on effective co-operation between countries of origin and destination. In effect, countries of origin also do their part to ensure that their citizens return home (if the agreement provides only for temporary movement) after a specified period, and the destination countries use such guarantees to suppress anti-immigration fears and concerns in their constituencies. Some of these agreements cover both low-skilled and high-skilled migrants, and embrace both temporary and permanent migration. This shows that the

⁴⁸ Singh K, 'Brain gain vs. brain drain', *The Indian Express*, 26 April 2004, http://www.indianexpress.com/full_story.php?content_id=45762.

fundamental issue here is finding appropriate means to manage migration in a particular context.

SADC can learn critical lessons from other regional groupings in its quest to liberalise progressively the movement of natural persons. It is clear from the discussions above that the liberalisation agenda envisaged by SADC goes far beyond the narrow GATS Mode 4 parameters. This comprehensive agenda must be pursued, and emphasis must be placed on liberalising the circulatory movement of skilled professionals, in particular. Such measures should be attempted at the level of training, as well: the health protocol provides for SADC countries to introduce regional exchange and internship programmes, especially in the health profession. These countries need to think regionally, so that professionals can move freely across the region for the benefit of all the countries concerned. Efforts to confine highly skilled people are doomed to fail, since they are often welcome, even to stay permanently, in many developed countries.

It is acknowledged that clandestine migration of skills can severely affect the sending country, especially in a very important sector like health. For this reason, South Africa recently entered into bilateral agreements with some SADC countries, whereby it undertakes not to recruit their health professionals.⁴⁹ However, such policies may backfire, as some professionals could be forced to seek opportunities overseas, resulting in a net loss for the region. This underlines the need for a policy shift from migration control to migration management. Regional circulatory flows under a properly designed Mode 4 liberalisation programme where professionals temporarily work in different member states could be a positive strategy for the ailing health sector. Besides, there are serious ethical concerns posed by restrictive migration control policies, as they can infringe on the rights of the professionals targeted.

SADC countries could approach Mode 4 liberalisation in two ways. Firstly, the region must continue to pursue its comprehensive liberalisation agenda, arguably on a step by step basis (this is strongly encouraged to avoid any potential 'big-bang' effect and its associated backlashes). The Protocol on the Facilitation of Movement of Persons could be used as the primary instrument, provided it is tweaked with a view to consolidating and reflecting other liberalising provisions

⁴⁹ See Dovlo D, 'The brain drain in Africa: an emerging challenge to health professionals' education', *JHEA/RESA*, 2, 3, Boston College & Council for the Development of Social Science Research in Africa, 2004, pp. 1–18. Available online: http://www.codesria.org/Links/Publications/jhea3_04/dovlo.pdf.

in related protocols. Secondly, the narrower GATS Mode 4 liberalisation should also continue to govern liberalisation progressively to the non-SADC WTO members. This is because, while the regional efforts towards comprehensive free movement of persons are laudable, they are not sufficient to solve the skills problem in the region. In fact, all SADC countries have high skills shortages in one service sector or another;⁵⁰ therefore any liberalisation at a regional level would still need to be gradually complemented by more open policies towards the rest of the world, particularly with regards to recruiting critical skills.

Finally, a paradigm shift, whereby skilled labour migration is seen as a development resource that can be harnessed for the benefit of all countries, rather than as a threat, is sorely needed in this region. As Crush and Williams⁵¹ correctly put it, SADC should aim 'to manage migration in order to harness human mobility – as an agent of the exchange of goods, services, ideas and skills – to the development process'.

ANNEX 1: GATS LIBERALISATION FRAMEWORK

Measurement of liberalisation

GATS has two sets of rules. Firstly, general rules impose obligations on all countries with regard to measures affecting trade in services. A good example of this is article II, which requires each member to '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'.⁵² Secondly, there is a set of sector-specific commitments (negotiations revolve around these) that determine the extent of liberalisation each member undertakes.

The GATS framework is built on two pivotal principles: namely, market access (article XVI) and national treatment (article XVII). Market access deals with the extent to which foreign services suppliers have access to a country's markets;

⁵⁰ See Hansohm D *et al.*, 'State of trade in services and service trade reform in Southern Africa', NEPRU Research Report no. 31. Windhoek: Namibian Economic Policy Research Unit (NEPRU), May 2005, at <http://www.nepru.org.na/index.php?id=126>.

⁵¹ Crush J and V Williams, *op. cit.*

⁵² GATS article V provides for a notable exception to this principle, as it allows members of a regional trade agreement to give each other preferential treatment if the agreement provides substantial sectoral coverage and substantially eliminates all discrimination.

national treatment is a requirement that foreign suppliers (once inside a member's territory) be treated the same as locals, and be subject to the same regulations. A country's level of liberalisation in a particular services sector is assessed using these two principles, according to the mode of supply.

Market access

Six specific limitations are proscribed under the market-access provision, but a country is allowed to maintain a limitation, provided it inscribes such limitation in its schedule of commitments. The prohibited limitations are:

- limitations on the number of suppliers;
- limitations on the total value of service transactions or assets;
- limitations on the number of service operations or on the total quantity of service output;
- limitations on the total number of natural persons that may be employed;
- measures that restrict or require specific types of legal entity or joint venture; and
- limitations on the participation of foreign capital.

National treatment

As with market access, the principle of national treatment allows that a country may provide for some restrictions under its national treatment obligations by entering them in its commitment schedule. Restrictions on national treatment sometimes take the form of regulations providing for less favourable access to essential facilities, such ports and communications infrastructure, to foreign service providers, compared to their domestic counterparts.

Therefore, each WTO member's specific commitments can be seen as the outcome of a two-step decision. Firstly, the member decides which service sectors will be subject to market access and national treatment disciplines. Secondly, it then decides what measures will be kept in place for that sector that violate market access and/or national treatment measures.⁵³

⁵³ Mattoo A, 2000 'Trade in services: economics and law', mimeo.

ANNEX 2: NON-TARIFF BARRIERS IN SADC

Activity	SADC MEMBER STATES											
	Angola	Botswana	Lesotho	Malawi	Mauritius	Mozambique	Namibia	SA	Swaziland	Tanzania	Zambia	Zimbabwe
Notification of NTB national contact points	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Core NTBs												
Cumbersome customs procedures and documentation	5	2	3	3	1	5	3	2	3	4	3	3
Cumbersome import licensing/permits	4	3	2	3	2	3	3	2	2	2	3	3
Cumbersome export licensing/permits	3	2	2	2	3	3	2	1	2	2	2	2
Import and export quotas	1	2	2	1	2	2	2	3	2	1	1	2
Unnecessary import bans/prohibitions	1	3	1	2	2	1	1	1	1	1	2	1
Other NTBs												
Restrictive charges not being import or export duties	3	1	1	1	2	3	2	1	1	1	1	1
Restrictive single-channel marketing	4	2	1	2	3	2	2	1	3	2	1	3
Prohibitive transit charges	3	3	1	2	1	4	2	2	1	3	2	2
Cumbersome visa requirements	4	3	3	2	2	3	2	3	2	2	2	2
Restrictive technical regulations	1	2	2	2	2	2	3	3	2	3	2	2

Scale 1-5 5. Very serious; 4. Serious; 3. Moderate; 2. Low; 1. Nil.

Source: Imani Development Austral Pty Ltd.

ANNEX 3: MODE 4 GATS COMMITMENTS BY SADC COUNTRIES**Horizontal commitments**

Country	Market access limitations	National Treatment limitations
Angola	No commitment	No commitment
Botswana	ABC	DE
DRC	No commitment	No commitment
Lesotho	ABC	None
Madagascar	–	–
Malawi	ABC	D
Mauritius	A	D
Mozambique	No commitment	No commitment
Namibia	AB	No commitment
South Africa	ABE	D
Swaziland	No commitment	No commitment
Tanzania	No commitment	No commitment
Zambia	ABC	D
Zimbabwe	ABC	D

A = limited access to highly skilled persons only; B = limited to employees of companies operating in the country; C = development of locals required; D = no discrimination for those permitted to enter under market access commitment only; E = professionals need to be domestically registered.

Source: Adapted from Hansohm et al.

The Trade Policy Reports series examines topical issues concerning South Africa's international trade relations. Coverage ranges from the World Trade Organization, through regional economic integration, to South Africa's bilateral free trade area negotiations. Reports are written in an accessible manner for non-specialist but concerned readers, contain cutting edge analysis, and put forward recommendations for improving South Africa's international economic positions through the use of trade policy.

**SAIIA's Development Through Trade Programme
is funded by SIDA and AusAid.**



ISBN: 1-919969-10-1
The South African Institute of International Affairs (SAIIA)
P.O. Box 31596 | Braamfontein 2017, South Africa
Jan Smuts House, East Campus
University of the Witwatersrand, Johannesburg
Tel: 27-11-339-2021
Fax: 27-11-339-2154
www.saiia.org.za
e-mail: info@saiia.org.za

