

Assistance to the SADC Secretariat



The Legal Regime Governing Presence of Natural Persons (Mode 4) In SADC Member States

Final Report

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Strengthening of Economic and Trade Policy Capacities and
Competences in SADC, Phase II – Trade In Services

GFA
Consulting Group

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Acronyms and Abbreviations

COMESA	Common Market for Eastern and Southern Africa
DHA	Department of Home Affairs
DRC	Democratic Republic of Congo
EAC	East African Community
EBA	Everything But Arms
EPA	Economic Partnership Agreements
ESA	Eastern and Southern African Countries
EU	European Union
FTA	Free Trade Area
GATS	General Agreement on Trade in Services
GDP	Gross Domestic Product
ICT	Information Communication Technology
LDC	Least Developed Countries
MFN	Most Favoured Nation
Mode1	Cross border supply of services
Mode 2	Consumption abroad
Mode 3	Supply of services through commercial presence
Mode 4	Temporary movement of natural persons
SA	South Africa
SADC	Southern African Development Community
TIS Protocol	Trade in services protocol
WTO	World Trade Organization

Executive Summary

SADC States are involved in several services negotiations in the different regional groupings of which they are members. They are negotiating liberalisation commitments on trade in services in the communication, construction, finance, energy related, tourism and transport services sectors amongst themselves under the SADC Protocol on Trade in Services. The seven SADC States which are part of COMESA (the Democratic Republic of Congo, Malawi, Mauritius, Seychelles, Swaziland, Zambia and Zimbabwe) have already made initial offers in four key sectors, (namely: communication, transport, financial and tourism services) and are to conduct further negotiations to address three additional sectors, (business, construction and energy related services). At the EAC level, Tanzania made commitments in seven key sectors (including five of the six SADC priority sectors) with the intention to liberalise additional sectors.

In all these negotiations, movement of natural persons (Mode 4) is one of the critical and cross cutting aspect of the negotiations. On the one hand, in recent years, sensitivity to movement of persons has heightened, following a real or perceived increase of unemployment of locals in the different states and growing international security issues. On the other hand, countries are recognizing that the temporary availability of specialized skill, know-how and experience that movement of persons brings is an indispensable corollary of an open investment regime, and to address local skill gaps, particularly in many professional services. An important debate is taking place in many countries of how skill transfer to locals can be facilitated in the most effective and practical manner without endangering growth.

In the context of the SADC integration agenda, Member States have been tasked to balance ambitious integration objectives that have been agreed at high political level, and business needs for access to specialized qualified skills that need to be available at short notice with the very real domestic imperatives of security and ensuring growth of the proportion of locals in higher skilled jobs.

This Study has been commissioned to take stock of the existing applied immigration/ labour regimes in each SADC Member State to provide for a detailed description and comparison of the applied regimes in terms of the categories of persons that are permitted to temporarily enter a country with respect to the supply of services, the types of restrictions that exist for the entry and employment of foreign natural persons, a comparative analysis of each SADC State's Mode 4 GATS commitments and any other relevant issue.

It is the finding of this Study that in all the SADC States, temporary movement of natural persons for the supply of services is permitted, subject to several restrictions and requirements as summarised here below.

Angola

To be able to temporarily supply services in Angola, a person can obtain a Short Term Visa for up to seven days, an Ordinary Visa for thirty days, a Work Visa for twelve months, or a Privileged Visa for investors. Business Visitors can obtain the Short Term Visa or the Ordinary Visa, depending on the necessary period of stay. All other foreigners seeking employment in Angola would have to apply for the Work Visa. This would include the Intra Corporate Transferees, Contractual Service Suppliers, Independent Professionals, inter alia. There are several restrictions on the employment of foreigners in Angola. Generally, a foreign employee can only be employed after it has been certified by the National Employment Service that no citizen of Angola is qualified and available to take up the position. Further, employers can only hire foreigners if, in an enterprise of more than five employees, at least 70% of the workforce are nationals, unless there are no local employees to take up the positions.

Absent a horizontal section, Angola's GATS commitments differ from sector to sector. For a key banking sector (acceptance of deposits) the GATS regime is more liberal than the applied regime, as it requires a 50% minimum employment of locals, as opposed to the applied regime that stipulates 70%. For other sectors, such as hotels and restaurants, full commitments for senior managers and specialists are taken, while for

sporting and other recreational services, a full commitment for Mode 4 (“None”) is taken, none of the GATS commitments reflects the horizontally applicable labour market test.

Botswana

Business Visitors (employees of a service supplier who seek entry for the purpose of setting up a commercial presence or negotiating the sale of a service on behalf of an enterprise) interested in travelling to Botswana for a maximum of two weeks in any one calendar month can enter Botswana without the need to obtain a work permit, a certificate of exemption, or a residence permit. They would however need to obtain a visa, if their home country is one of the countries that are required to obtain visas prior to entry into Botswana. Persons seeking to supply services in Botswana would have to obtain a work permit which allows foreigners to be employed in and derive an income from Botswana. This would be the position for Contractual Service Suppliers, Intra Corporate Transferees, and Independent Professionals.

There are not many clearly specified restrictions on the employment of foreigners set out in the legislation. The Regional Immigrants Selection Board is vested with wide powers to decide on the type and range of work permits to be granted on a case by case basis, depending on an existing score system. The Board is to inter alia take into account whether the grant of such a permit would affect the opportunities of nationals for employment in the position in question and whether there are arrangements for training nationals to replace the foreigner over time.

Botswana’s GATS commitments limit the admission of foreign personnel to managers, executives, special technicians and highly qualified professionals, which is in principle more stringent than the applied regime. Furthermore, the GATS schedule is limited to employees of foreign investors, and does not cater for Business visitors, Contract Service Suppliers, and Independent Professionals. However, the applied regime foresees a form of labour market test (that is, whether the grant of a permit would affect the opportunities of nationals for employment in the position) which is a condition not stipulated in the GATS commitments.

Democratic Republic of Congo

Expatriates in DRC can only work if they have work visas issued to them. These include the Ordinary visa which is valid for three years usually given to intra corporate transferees, the Work Visa, issued for 1 to 2 years, the Specific Visa, granted for maximum 1 year non-renewable and the Special Visa, granted for 5 - 10 years to promoters or agents of new companies approved by the Investment Code.

There are several restrictions on the employment of foreigners. There are protective regulations to benefit the national workforce and expatriates are treated differently from nationals with respect to hiring conditions, work cards, resident permits and payment of income tax. The percentage of the total workforce of foreign remunerated workers in DRC is not to exceed 15%. There is also a fixed maximum percentage of foreign workers that can be gainfully contracted, compared to the overall number of workers. The key persons permitted are supervisors, executives and senior management. However, there are also certain jobs that are statutorily reserved exclusively for Congolese citizens, which in sum, are almost all the executive, managerial and higher skills level jobs in DRC. Further, it is the obligation of the employer to train Congolese counterparts during the period of validity of the work card. There are express penalties for employing foreigners in local’s positions.

In its GATS commitments, access of natural persons is provided for senior executives and specialists that possess knowledge essential for the provision of the service concerned. The access is permitted for a period of one year, (extendable), without the requirement of an economic needs test. While not covering Contractual Service Suppliers and Independent Professionals, GATS regime (no reservations or numerical quotas, no training requirements) does not fully take account of the existing restrictions applicable in DRC.

Lesotho

Foreigners can temporarily supply services in Lesotho if they hold a Work Permit that is issued for up to two

years. Business Visitors, Independent Professionals, Intra Corporate Transferees and Contract Service Suppliers would all have to apply for the work permits since they are seeking to supply services in Lesotho.

Lesotho's Labour Code stipulates that a foreign person can only be employed after it has been certified by the National Employment Service that no citizen of Lesotho is qualified and available to take up the position that the foreigner seeks to undertake. In practice, the foreign person would also be required to submit a localisation plan for the duration of the work permit that would show how the permit holder intends to train locals in order to enable locals to acquire skills and assume the specialised roles.

Lesotho's GATS commitments on the other hand stipulate that for four (4) expatriate senior executives and specialised skill personnel, "automatic" entry and work permits are guaranteed. In addition, the GATS commitments, as well as the practice in Lesotho (but not the law) foresee that training of local staff is required.

This guarantee of at least 4 automatic work permits provides for greater flexibility than the applied regime which administers a labour market test for each work permit requested.

Malawi

Mode 4 is permitted, as long as the foreigner is a holder of a Visitors Permit granted for thirty days, which can be extended to up to 90 days. Upon expiry of the 90 days, on application, a Temporary Residence Permit may be obtained, which is valid for six months. For persons entering Malawi for temporary employment, a Temporary Employment Permit may be granted, for two years and for those seeking investment opportunities, a Business Resident Permit, which is valid for five years.

The Business Residence Permit granted in Malawi makes provision for professionals, self-employed persons, or persons in any occupation, to establish their businesses and settle for a period of five years. Business Visitors would have to first be issued with a Visitors Permit, which is sometimes known as a Business Visit, which allows the holder to enter and reside in Malawi for a short period for purposes of business, inter alia.

Employers must justify the employment of a foreigner, and the Immigration Department must be convinced that there is need for the employee to be sourced from outside Malawi. The employer must show that the position was advertised in Malawi, and if any applications for the position were received from Malawians, these must be attached to the application. There must be a Malawian understudy and the employer must propose alternatives for localisation of the position.

Malawi's GATS commitments only extend to foreign nationals employed as managers and experts. Moreover the commitment states that the terms of employment must be approved by the Minister of Home Affairs. These commitments seem to be in sync with the applied regime in so far as the types of foreign expatriates sought are for key positions in investments. However, the GATS commitments do not specify the labour market test, and do not make reference to any localisation requirements.

Mauritius

Supply of services in Mauritius is permitted for holders of Occupational Permits which are valid for three years, Short Term Occupational Permits that are valid for 120 days. Business Visitors are also permitted on such conditions as the immigration officer deems fit.

The GATS Mode 4 commitments are limited to the grant of access to highly qualified persons, a limitation that is not specifically indicated in the domestic law.

Mauritius' initial offer to SADC in the context of the SADC negotiations provides for well-defined access in all key categories of Mode four (that is, including Contract Service Suppliers and Independent Professionals). The offer locks in a highly business-facilitative applied regime relating to the temporary presence of natural

persons.

Mozambique

Work related visas in Mozambique include a Business Visa which is valid for thirty days for persons who are not to be employed in Mozambique, a Work Visa, for ninety days for persons seeking to render paid or unpaid services, or a non-permanent resident visa that can be valid for ninety days to five years.

There is considerable restriction on the numbers of foreign employees that can be employed. Depending on the size of a company, the numbers of foreign employees that may be employed are restricted to up to 5% of the total number of workers in large firms, 8% of the total number of workers in medium firms and up to 10% of the total number of workers in small firms. Exception is made in respect to investment projects approved by the Government for which the number of foreign workers can be greater than the above quota.

Mozambique has not made any horizontal commitments under the GATS. In its only sectoral commitment for Banking and other Financial Services, where it has not inscribed any specific limitation in Market Access, and only stated that a work permit is required. While Mozambique remains free to mould its SADC horizontal commitments along the lines of its labour regime, the absence of any inscription of limitations for banking services needs to be addressed during the negotiations.

Namibia

Namibia has express provisions and categories of persons that can obtain Business Visas for ninety days per annum, and issues Employment Permits for those seeking employment beyond three months. Whereas the employment permits can be obtained by independent professionals and contractual service suppliers, inter alia, the definition accorded to this Permit in the law does not fit squarely into the Mode 4 categorizations for independent professionals and contractual service suppliers.

In general, a foreign national may invest and engage in any business activity in Namibia which any Namibian may undertake and for the purposes of any law governing the establishment and carrying on of any business activity or the taxation of the income, a foreign national shall be in no different position than a Namibian. No labour market tests or training/mentoring requirements are contained in the national legislation.

Namibia's horizontal commitments relate only to employment of managers and experts in the context of foreign investment. The applied regime permits expansion of the commitment to Business Visitors, and possibly Contractual Service Suppliers and Independent Professionals.

Seychelles

Three categories of permits are issued to persons seeking to provide temporary services in Seychelles. Business Visas for twelve months, Gainful Occupation Permits for persons wishing to stay for longer than twelve months, or ITZ Work Permits for persons seeking to work in the International Trade Zone.

Seychelles is not a Member of the World Trade Organisation. It however made its accession application in 1995, which was reviewed in 2012.

The Mode 4 offer provided by Seychelles in the SADC services negotiations is relatively more liberal than the applied regime.

Republic of South Africa

The foreign service suppliers permitted to supply services in Republic of South Africa (RSA) are principally issued temporary residence permits that include; business permits, work permits, corporate permits and exchange permits. The work permits issued are categorized into General Work Permits, Quota Work Permits, Exceptional Skills Permits and Intra-company transfer work permits.

The persons that are permitted to supply services in RSA are generally highly skilled foreigners. The unskilled or semi-skilled foreigners are generally not permitted to supply services and there are quota restrictions on the number and type of foreigners that are permitted to supply services for each year.

South Africa's Mode 4 GATS commitments are as detailed as its law that govern work permits. The GATS regime is in sync with the applied regime. The categories of persons permitted to supply services in SA according to the applied regime are the highly skilled persons. This is also reflected generally in the horizontal commitments where categories permitted include executives, managers, specialists, intra corporate transferees and professionals, inter alia.

Swaziland

Movement of persons to supply services in Swaziland is permitted on the basis of the Permit Classes. A – for specific employment by a specific employer, B – dependent pass holder seeking specific employment, D – engaging in business, agriculture or animal husbandry. E – prospecting for minerals or mining, F – specific trade, business or profession, G – specific manufacture, and H- prescribed profession.

The only foreign professionals (under category H) that are permitted to supply services in Swaziland are medical professionals, dentists, legal professionals, surveyors (land, estate agents, valuers and land agents), architects, pharmacists, veterinary surgeons, engineers, nursing professionals, physiotherapists, accountants, chartered secretaries. These professionals however must have the necessary qualifications, must have in their own right and at their full and free disposition sufficient capital and other resources for the purpose and their practice must be of benefit to Swaziland.

Swaziland's GATS regime shows that there are market access restrictions in the committed sectors, with access principally granted to specialists, senior qualified personnel and professionals who are not available in Swaziland.

Tanzania

Three types of permits are issued in Tanzania. Class A permits, for persons seeking to engage in certain services, Class B for those seeking employment, and Class C for those outside the scope of the above two classes.

There are some restrictions on the employment of foreign natural persons. Foreign investors can hire up to five foreign personnel to work in their companies during the start-up period of the investment. The investor however can hire foreign employees at any skill or education level as long as there are no Tanzanians qualified to do the same job. In the event of need for more foreign employees, an application must be filed with the Tanzania Investment Centre which in consultation with the Immigration Department, determines the merits of the application and the availability of qualified local personnel. If satisfied that there is a need that cannot be locally met, it will then authorise the employment of extra foreigners.

Tanzania's GATS commitments are only in respect to one subsector – hotels and even here, access is only granted to senior managers with skills that are not prevalent in Tanzania. This is a very restrictive regime, compared to the applied regime.

Zambia

Business visitors entering Zambia for a maximum period of thirty (30) days are entitled to a free stay for this period, without the need for applying for an employment permit. If they wish to stay for longer than thirty days, would have to apply for a Temporary Employment Permit for maximum 6 months in a 12 month period or an Employment Permit. Investors would apply for an investors' permit or a resident Permits if seeking ten years or more.

There are generally no major restrictions on the employment of foreign service suppliers. The key criterion

is that it must be proved that there are no Zambians ably qualified to do the same job and that it is for the benefit of Zambia. Further, the foreign investor should mentor or develop the skills of Zambian under studies to be able to take on the job when the foreigner's permit expires. Proficiency tests may be conducted where the immigration officer deems it necessary.

In its Mode 4 GATS commitments, Zambia only opened access to management and expert jobs that implement foreign investment. Further, employment of the foreigners is to be agreed upon between the employer and the Ministry of home affairs and there must be a plan that provides for training the Zambians to enable them to obtain the specialized skills that the foreigner is holding. These GATS Mode 4 commitments are more stringent than the applied regime as unlike GATS, the Immigration law permits several categories of service suppliers as long as there no Zambians available to take on the positions.

Zimbabwe

Professionals offering scarce skills that are not easily available in Zimbabwe, journalists on assignments, personnel on short contracts and foreign researchers can apply for a Temporary Employment Permit for three to five years. Business Visitors can obtain relevant visas for thirty days, and investors, Investor Residence Permits, for a period of not less than three years. Missionaries are also given special permits for a short period of time. There are restrictions to the type of persons that can apply for temporary permits and for the business visas.

There is emphasis on the need to train an understudy for each foreign employee, who is expected to take over from the foreign employee at the conclusion of the contract.

The mode 4 GATS commitments are more stringent than the applied regime, which does not restrict market access to the categories of service suppliers that are permitted in the GATS schedules.

1. BACKGROUND

This Report is a study of the legal regimes governing the movement of natural persons in the different SADC Member States.

1.1 Context

In the last two decades, trade in services has gained prominence in Africa as one of the key sectors for inclusion in trade negotiations. This is partly because the service sector has increasingly contributed to the GDP of most African States during this period. In most SADC States for example, the service sector makes up half of the GDP in the States. This increasing growth in importance in the service sector has inspired deliberate attention to the choice of laws and policies that are being adopted in the service sector.

This conscious awareness has awakened in a point in time where African countries are involved in several trade negotiations with each other and with other continents. For example, SADC States are currently negotiating liberalisation commitments on trade in services in the communication, construction, finance, energy related, tourism and transport services sectors. Negotiations in COMESA on services are also underway with initial commitments being made in four key sectors, with further negotiations to address three additional sectors. At the EAC level, service negotiations have been concluded in seven key sectors with intention to liberalise additional sectors. All these negotiations are addressing trade in services as the supply of a service through the four WTO modes of supply.

Of particular importance is the supply of services through the movement of natural persons, (Mode 4), which principally revolves around the temporary entry of an individual into the territory of another Member State for the purpose of supplying a service. Every SADC Member State has made varying commitments on Mode 4 at the WTO. It is however not clear whether these commitments are fully reflective of the regulatory situation that prevails in each SADC State.

Therefore to facilitate a more informed discussion on Mode 4, there has arisen the need to take stock of the existing applied regimes in each SADC Member State, to provide for a detailed description and comparison of the regimes in terms of categories of persons and skill levels admitted, numerical quotas and existence of labour market tests, maximum periods of stay, and other relevant issues.

1.2 The Four Modes of Service Supply

The WTO Agreement that principally governs trade in services between the Member States (GATS) defines trade in services as the supply of services through four different Modes of Supply.¹ These include Mode 1, which principally refers to Cross-Border Supply. This is the supply of a service from the territory of one Member into the territory of any other Member. For example, the supply of a service through telecommunication or mail. The second type, Mode 2, relates to Consumption Abroad, which happens when the consumer moves to the territory of another country and buys services there. For example, when a Zambian patient goes to South Africa for treatment. Mode 3 on the other hand relates to the supply of services through Commercial Presence and this involves direct investment in the export market through the establishment of a business there for the purpose of supplying a service. For example, where Mauritius allows the establishment of foreign banks or hotels in its territory. The last type of service supply, Mode 4, relates to the supply of a service through the Movement of Natural Persons. It is this mode that is the focus of this Report.

¹. Article 1:2 GATS.

1.3 Mode 4 - Context

Mode 4 is one of the four modes of supply through which services may be traded under the GATS. It occurs when a natural person of one WTO Member seeks to enter the territory of another Member, with respect to the supply of a service. The key objective here of the movement of the person is to temporarily supply a service in another Member State.

Generally, there are two key types of natural persons: (1) those who are themselves the service suppliers and (2) those who are employed by a service supplier.² The first type, "natural persons who are service suppliers", refers to the actual presence and supply of a service by the foreigner in the territory of another Member. This covers for example self-employed persons who are remunerated directly for the supply of a service by customers in the host country. In this category, the service supplier can operate either from a base in the host country (thereby having to comply with Mode 3 commitments) or from a foreign base. The second type, "natural persons of a Member who are employed by a service supplier of a Member" refers to the service supplier's employee who is present in the host country and who delivers the service. In this case, usually, the supplier is a juridical person.³

According to Article 1.2 (d) of GATS and Article 3:2 (d) of the SADC Trade in Services (TIS) Protocol, the moving person must be in the territory of the host Member, and, as discussed above, the service supplier must also be "of any other Member". Therefore they both must be of foreign origin. This thus means that nationally-owned service companies are not service suppliers "of another Member", hence any foreign natural persons they employ are not within the ambit of Mode 4. As a result, a foreigner supplying services to a host-country company on a contractual basis as a self-employed person would be covered by Mode 4, but the same person would fall outside the scope of Mode 4 if they were an employee of the host country company.

Another critical component of Mode 4 is its temporary aspect. GATS does not apply to measures regarding citizenship, residence or employment on a permanent basis. Article 17:2 of the SADC TIS Protocol, also notes that Mode 4 is not to extend to measures affecting natural persons who are seeking employment in the labour market. As such, Mode 4 is referred to as the temporary presence of natural persons with respect to the provision of services. There is no specified timeframe in GATS to determine what might constitute temporary presence.

Conclusively, to facilitate a better understanding of this Study, Mode 4 will be distinguished from Mode 3. Whereas Mode 3 deals with establishment, maintenance or acquisition of a business by a foreigner in another country, Mode 4 simply deals with the movement of the foreign persons to supply the service. As such, a South African company can decide to invest in the banking sector in Zambia, by opening up a bank therein. The modalities and logistics of establishing and running the bank will relate to Mode 3, whereas the South African persons that will be employed by the South African bank in Zambia will be governed by the Mode 4 modalities. In other words, Mode 4 does not go into the logistics of setting up a business in a host country to provide a service. Mode 4 only focuses on the persons who are moving to supply the service by the foreign company that has been set up in the host country.

². WTO Background Note by the Secretariat, Presence of Natural Persons (Mode 4), WTO S/C/W/ 301. Dated 15 September 2009.

³. WTO Background Note, WTO S/C/W/ 301, supra.

1.4 Objective of the Study

The purpose of this Study is to take stock of existing restrictions in Member States' laws and regulations relevant for regulating the movement of natural persons for the purpose of supplying services in the SADC region, and to compare the applied regime in these countries with their existing GATS commitments.

1.5 Scope of the Study

The Study is intended to identify the relevant legislative or regulatory framework for the movement of natural persons for the purpose of supplying services (Mode 4) across SADC countries.

1.6 Methodology

As required by the Terms of Reference, this research was principally based on desk research, since it revolved around the legal regimes of the various SADC Member States, which are explicitly stated in the different laws of the SADC States. Consultations were also carried out, where there were gaps in the desk research. As such, the applied methodology was:

- Literature Review

A comprehensive review of literature was carried out, in the context of the scope provided by the Terms of Reference. In particular, the following laws and regulatory regimes were scrutinised, for the different SADC States. The Immigration laws, the Investment laws, the laws governing the Trade Licensing regime, Employment laws, the mode 4 GATS commitments, among others. The Study also analysed various literature on the trade of the different countries, and the SADC, EAC, COMESA and EPA discussions on services.

- Consultations

Consultations with the relevant stakeholders were carried out, where there were gaps or inadequate information in the literature review. Consultations were in the form of interviews, and or email inquiries. In certain incidents, where this was not yielding the required results, the consultant travelled to the relevant Member State to conduct further research.

2. STATE OF PLAY OF SERVICES NEGOTIATIONS IN REGIONAL GROUPINGS WHERE SADC STATES ARE MEMBERS

The discussion in this section of the Report provides an analysis of the status quo of the different services negotiations in which the different SADC States are members.

The SADC region is made up of fifteen States viz: Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar,⁴ Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. These different States are conducting services negotiations amongst themselves under the SADC configuration. These States however are also Members of other regional groupings, in which incidentally, parallel services negotiations are being conducted. The following is a highlight of these parallel negotiations.

2.1 Services Negotiations in SADC

The SADC services negotiations started in 2000 with the development of the Draft Protocol on Trade in Services, which was signed by the Heads of State in August 2012. The Protocol provides for the progressive removal of barriers to trade in services, initially in six priority sectors: communication, construction, energy related services, financial services, tourism and transport services.

In November 2011, the Ministers responsible for Trade, at a meeting in Angola, mandated the States to start negotiating liberalization commitments in the six priority sectors. The meeting for commencing negotiations (17th TNF Services) was held on 2 - 4 April 2012 and its main output was the roadmap for negotiations. At present, requests and offers are being made in the aforesaid sectors. In the Roadmap, offers for Communication, Financial services, Transport services and Tourism are supposed to be completed by the end of June 2013. For Energy Related services and Construction Services, offers are supposed to end by November 2013.⁵

At the time of writing this Report, some Member States have submitted their initial offers with some commitments and qualifications made on Mode 4. These are discussed in the different Member States' analysis, in chapter four of this Report.

The States also signed the Protocol on the Facilitation of Movement of Persons, which is yet to be ratified by all the Members. The overall objective of the Protocol is to develop policies that are aimed at the progressive elimination of obstacles to the movement of persons within the SADC region.

2.2. Services Negotiations in COMESA

Several SADC Member States also fall within the COMESA regional configuration. These include the Democratic Republic of Congo, Malawi, Mauritius, Seychelles, Swaziland, Zambia and Zimbabwe. These countries are involved in services negotiations with the rest of the COMESA Members and these negotiations commenced in 2010, with seven priority sectors. Draft commitments have been presented in the four priority sectors of communication, transport, financial and tourism. The three additional sectors (that is, business, construction and energy related services) will be addressed once negotiations on

⁴. Madagascar is currently suspended from SADC and thus is not covered in this Study.

⁵. www.sadc.int.

commitments in the four priority sectors have been concluded.⁶ The Mode 4 offers in these negotiations will also not be included in this Report, owing to the fact that they are confidential documents.

2.3 Services Negotiations in EAC

Tanzania is the only SADC State that belongs to the East African Community. Following the completion of the EAC Common Market Protocol Negotiations in 2009, services negotiations in seven key sectors were completed. These included Educational services, Tourism and Travel Related services, Communication, Business and Professional Services, Financial, Transport and Distribution services. The EAC Partner States agreed to undertake further commitment in the following five sectors: Health and Social services, Construction and Related services, Energy services, Environment, and Movement of Natural Persons, plus additional commitments on the seven committed sectors.⁷ Further analysis on Tanzania's commitments at the EAC are discussed in chapter four herein, in the analysis on Tanzania.

2.4 Business Persons in the Tripartite Negotiations

In 2001, a decision was taken to have SADC and COMESA collaborate on their regional integration programmes. This Collaboration was extended to include EAC in 2005. In 2008, at Kampala, the Summit of Heads of State and Government for EAC, COMESA and SADC States provided political impetus for guiding/enabling the process of establishing the grand Free Trade Agreement by directing the three Secretariats to prepare all legal documents and necessary steps for establishing the single Free Trade Agreement.

The 2nd Tripartite Summit of Heads of States and Government held in June, 2011 launched the process of establishing a Tripartite Free Trade Area by adopting; a) the Tripartite FTA Negotiating Principles, Processes and Institutional Framework; b) a Road Map for Establishing the Tripartite FTA and c) Signature of the Declaration Launching the Tripartite FTA.

One of the areas for negotiation is the movement of business persons within the FTA. A Committee on Movement of Business Persons has already been formed to implement the Tripartite programme on Movement of Business Persons and negotiations on Movement of Business Persons are to be concluded by 2014.

In sum, this Chapter shows that whereas the SADC States are involved in services negotiations in the SADC region, they are also making commitments in other services negotiations in the different regional groupings they belong. This therefore makes it critical that the States exercise caution to avoid conflicting commitments in the different services negotiations.

This is especially so for States which have dual membership, (like Malawi, which is both a Member of COMESA and SADC,) when they have to determine the conditions to apply to another State that has dual membership (such as Zimbabwe). If it has made varying commitments in the two regions, it will be difficult for such a State to determine which regime to apply for the dual membership State.

⁶. www.comesa.int.

⁷. <http://www.eac.int>.

3. SADC STATES MODE 4 OVERVIEW

This section of the Report provides an overview of the Mode 4 commitments made by the SADC States in GATS, as well as in their domestic/ applied regime.

3.1 Overview of GATS Mode 4 Commitments

In 1995, all the SADC States except the Seychelles became Members of the World Trade Organisation (WTO) and undertook binding liberalization commitments in different service sectors as will be seen in the next chapter. For some, such as Mauritius and South Africa, supplementary commitments have been made over time, in some of the sectors that were committed in. Mauritius also made a submission for the Doha Development Agenda.

All regional agreements that offer preferential liberalization in services among WTO Members are supposed to comply with Article V of GATS which requires that the regional agreements have a substantial coverage and provide for an elimination of substantially all discrimination among the Members in the covered sectors. As such, on-going SADC services negotiations are supposed to ensure that whatever is agreed to is creating a relatively more liberal services regime among the SADC States, than what already exists.

On the whole, in most of the States, Mode 4 commitments are unbound save as is indicated in the horizontal section of the States' Commitments. This means that the temporary movement of persons into these States is not binding for access conditions, except as is indicated in the horizontal section, where access is in most cases limited to top executives and specialised personnel, whose movement is to be regulated by domestic law.

For the Mode 4 MFN exemptions, most of the commitments therein are stipulated in the horizontal section and point to the market access conditions committed and where professionals are involved, the need to be registered by the professional bodies.

It is interesting to note that whereas the GATS Mode 4 access permitted by most SADC States is for top executives and specialised personnel, some literature⁸ shows that LDC Mode 4 supply capacity principally corresponds to the low and semi-skilled services. For example, in the case of Lesotho, the largest number of service suppliers moving from Lesotho to South Africa are principally farmers and persons working in mines,⁹ even when there is in place a Labour Agreement between RSA and Lesotho to facilitate the movement of labour between the two States. There is need therefore to consider whether the SADC services negotiations will stand to benefit from discussions on the types of persons that will be moving from simply being executives, top management and highly qualified personnel as is reflected in most of the GATS commitments, to persons with semi and low skills, which are on high supply within the region.

On the whole, the SADC States' GATS commitments do not provide a complete picture of the extent of the application of Mode 4 in the individual States. In some States, as will be seen, the GATS commitments are less liberal than the applied regime in the States. This is probably because some of these SADC countries

⁸. Daniel Crosby, *Advancing Services Export Interests of Least Developed Countries*. ICTSD Programme on Trade and Services and Sustainable Development. June 2009.

⁹. Interview with the Principal Migrant Officer, Labour Department, Lesotho.

have undergone significant reform in their economies since 1995 and these reforms have not been committed in GATS. For example, Botswana abolished all forms of exchange control in its financial sector, but did not make such a commitment in GATS. This failure to update its GATS commitments is an indication that some SADC States, like many other African States, do not want to bind themselves to certain liberal measures at the international level, lest they may not be able to reverse the situation, in the event that the reforms have negative effects on their economies. It also shows, to some degree, that some SADC States are not actively participating in the GATS services negotiations. States however such as South Africa and Mauritius have updated their commitments, in certain instances only supplementing the already made commitments and in others, replacing some aspects of their existing commitments.

In other States, such as Angola, GATS is more liberal than the applied regime. GATS in the financial services for example stipulates a 50% ratio for foreigners and locals but the law in Angola stipulates a 70% to 30% ratio for nationals and foreigners respectively, save if there are no nationals to take on the position. This is also true for the Democratic Republic of Congo. This is seen in the high degree of limitation of the categories of persons permitted to move into Congo in the domestic law, which is not reflected in its GATS commitments. (A summary comparison of the applied regime and the GATS Mode 4 commitments is provided herein in Annex Table 1.)

This shows that in some SADC States, yet again, as is the case with other African States, barriers to services trade are mostly embedded in the national laws and regulations. This is because States usually try to create a delicate balance between introducing competition that will spur their economies forward, while at the same time effectively regulating the sectors to prevent overwhelming the local population which is in most cases highly unemployed. As such, as the SADC States undertake liberalization in services, they will have to toe the line carefully, and design commitments that are able to strike the above balance.

On the whole, the following are some of the Mode 4 GATS horizontal measures that are common to most of the SADC States.

- Foreign entities should have work and residency permits in order to supply certain services.
- Where a supplier of a service belongs to a professional body, proof of membership in such professional body has to be shown.
- Employment of the Foreign Service supplier must be in accordance with the domestic law.
- Access is restriction to specialists, managers, executives, and or highly qualified personnel.

3.2 Overview of Existing Permits Viz Mode 4 Categorisation

Whereas the GATS definition of Mode 4 does not distinguish between different categories of persons, WTO Member States are commonly using the following categories for the purposes of specifying the commitments that they are taking on, for different types of natural persons. Business visitors, contractual service suppliers, independent contractors and intra-corporate transferees. With regard to the temporary movement of persons, these categories are usually given specific attention in the different Mode 4 country commitments.

Since the SADC negotiations committed to conducting the services negotiations in accordance with GATS, the States would have to decide whether or not they are going to adopt the above Mode 4 categorisations in their negotiations. At this point it should also be noted that in the LDC Group Submission on Mode 4 in 2006, it was requested that commitments be made on the above Mode 4 categories, among other categories. To this end, it is therefore important to identify which SADC States already have the said categorisations in their applied regime. The above categories are defined here below:

In WTO Members' commitments, Business Visitors are typically defined as employees of a service supplier who are seeking entry into a host country for the purpose of setting up a commercial presence or of negotiating the sale of a service on behalf of an enterprise.¹⁰ According to this definition, Business Visitors do not receive any remuneration from a source located within the host country and are not engaged in making direct sales to the general public or supplying the services themselves. They are just facilitating future trade, which may take place through a variety of modes of supply.

Contractual Service Suppliers on the other hand are typically defined as employees of a service supplier of a country without a commercial presence in the host country, who are present in the host country to provide a service pursuant to a service contract concluded between their employer and a local client. These services suppliers receive their remuneration from their employer, and not from the client.¹¹

Independent Professionals are self-employed persons of a service supplier who are present in the host country to supply a service to a local client pursuant to a service contract.¹²

Intra Corporate Transferees are employees of a Foreign Service supplier that has commercial presence in the host country, who are transferred to the affiliate company in the host country, to supply a service for the Foreign Service supplier.

There are also other categories that are not linked to commercial presence, such as installers and servicers of machinery and or equipment, transport personnel, graduate trainees, inter alia. This Study is going to restrict its analysis however to the Contractual Service Providers, Independent Professionals, Intra Corporate Transferees and the Business Visitors.

In the applied regimes of the different States, this Study has noted that several States already have some of the above Mode 4 categorisations in their laws, although in some instances, the permits are named differently, as shown in table 1 below:

¹⁰. S/C/W/301 *supra*, at 7.

¹¹. S/C/W/301 at 6.

¹². S/C/W/301 at 6.

Table 1: Permits in Applied Regime as They Relate to Mode 4 Categories

SADC Member State	Business Visitors	Independent Professional	Contractual Service Suppliers	Intra Corporate Transferees
Angola	Short Term and Ordinary Visa	Work Visa Type B	Work Visa	Work Visa
Botswana	- No permit - Work Permit	Work Permit	Work Permit	Work Permit
DRC	Work Permit	Ordinary Visa/ Specific Visa Work Permit	Specific Visa Work Permit	Ordinary Visa/ Special Visa
Lesotho	Work Permit	Work Permit	Work Permit	Work Permit
Malawi	Visitors Permit and the Temporary Employment Permit	Business Resident Permit	Business Resident Permit	Business Residence Permit
Mauritius	Short Term Occupation Permit and the Business Visitor Permit	Occupation Permit	Occupation Permit	Work Permit
Mozambique	Business Visa	Work/ Resident Visa	Work/ Resident Visa	Work/ Resident Visa
Namibia	Business Visa	Employment Permit	Employment Permit	Employment Permit
Seychelles	Gainful Occupation Permit	Gainful Occupation Permit	Gainful Occupation Permit	Gainful Occupation Permit
South Africa	Business Permit	Work Permit	Work Permit	Intra Company Work Permit
Swaziland	Class E, D	Class H, F, D, F	Class H, F, D,G	All Classes
Tanzania	Class A	Class A, C	Class A, C	Class B, C
Zambia	Business Permit - presently suspended Temporary Employment Permit	Employment Permit	Employment Permit	Investment Permit
Zimbabwe	Business Visa	Temporary Employment Permit	Temporary Employment	Investor Residence Permit

Source: Author's Analysis

The table shows the different permits that are issued by the different SADC States as compared to the existing Mode 4 categorisations. The permits that are printed in bold are the ones that fit squarely into the respective Mode 4 categorisations, even though the names of the permits are different. The rights ascribed to those permits are the same as the Mode 4 categorisation permits. The non bold permits are the permits

that one would have to obtain if the applicant falls within any of the stipulated Mode 4 categorisations. Particulars of these permits/ visas are further discussed in the subsequent chapter, under the different country analysis.

3.3 Overview of Restrictions on Mode 4 in SADC States' Applied Regime

Whereas negotiations on Mode 4 are being conducted, access of Mode 4 in the applied regime in most States is generally very limited, or even nonexistent. The following are the general characteristics that are prevalent in the applied regime of the majority of SADC States.

- a. Persons permitted to supply services are mainly restricted to specialist, executives and highly qualified professionals. The persons that are available to supply services from most SADC States are mainly low skilled and semi-skilled workers. Hence there is a disparity between the supply and demand of Mode 4, which is perpetuated by the existing applied regime. (See Annex Table 2 for a summary comparison).
- b. Mode 4 in most States is only permitted where there are no locals readily available to take on the jobs as seen in for example, the Democratic Republic of Congo, Zambia, among others. In other instances, there must be proof or an undertaking that at least a particular number of citizens or permanent residents shall be permanently employed by the permit applicant. This is for example seen in the Republic of South Africa. Further, in some States, there is a need to advertise the posting and to provide proof of the advert in the application for permits. This is so for Zambia, South Africa and Malawi, inter alia. As a result of these restrictions, Mode 4 is seen to be highly curtailed. See Annex Table 3 for a summary comparison).
- c. In most States, the officers that grant the permits are given a relatively high degree of discretion for the grant of permits. In most States, the discretion is in relation to the duration of the permit and the type of permit. The officer's discretion is supposed to be based on a given criteria which in some but not all cases, is readily published. This means that in some States, the persons applying for a permit have the ability to know whether they will be given a permit or not, as long as they meet the required criteria. (See Annex Table 4 herein.)
- d. In a majority of States, if a foreigner is to supply services, the employer of the Foreign Service supplier is required to declare responsibility for stay and repatriation of the foreigner. This is so for States such as Angola for the work visa, Mauritius, Namibia, Seychelles, etc. This means that the foreign persons are put at a competitive disadvantage compared to the nationals for whom such requirements do not exist.
- e. Most States do not have the requirement for proficiency tests but have the requirement for professionals to be registered with local professional bodies or for endorsement from a relevant ministry or body. For example, in Angola, for the work visa, there is need for endorsement in Portuguese from the Ministry of Public Administration, Employment and Social Security in case of institutions or public companies or in case of Private Companies, an endorsement from the Ministry related to the company's business. These approvals/ registrations are always granted subject to the relevant body's being satisfied that the applicant is proficient. This restriction automatically knocks out several foreign service providers because they are usually costly and time consuming. Thus if

the SADC negotiations are to achieve meaningful liberalisation, care should be exercised on how to balance maintenance of standards without at the same time preventing the achievement of meaningful Mode 4.

f. There are quota restrictions on the number of foreigners that can supply services in some States. This is meant to ensure that no jobs that can be done by citizens are taken by foreigners. For example in DRC, several jobs are statutorily reserved for Congolese. Annex Table 5 summarises the different quota restrictions that are provided by some States.

f. In some States, the permits must be applied for while the applicant is outside the State. For example for the business and work visas for Mozambique and the employment permits for Namibia, among others. This is an additional cost to service suppliers who in some instances might have to travel abroad to apply for the permit, even when they were already in the State.

The aforesaid are just some of the highlights of the restrictions to Mode 4 that are prevalent in the applied regimes of most SADC States. These restrictions in the law must be put in mind while the negotiations are being conducted, to ensure that receiving States obtain meaningful access. The next chapter highlights the details of these restrictions, in each State.

4. MODE 4 REGIME IN SADC STATES

This section analyses the Mode 4 legal regime for each of the SADC States. It principally examines the degree to which Mode 4 is permitted in each of the States, the existing restrictions on the employment of foreigners, and the Mode 4 GATS commitments of each State.

4.1 ANGOLA

4.1.1 Context in which Mode 4 is permitted

Movement of persons into Angola is permitted, as long as the foreign person is a holder of a valid visa relevant to the nature of activity they intend to engage in. Such visas include the short term visa, the ordinary visa, the work visa and the privilege visa.

i. Short Term Visa

This visa must be used within 72 hours and allows the foreign citizen to stay in Angola for up to 7 days, and it is extendable for a further seven days.¹³ In practice, it is issued to visitors who need to be in Angola for short periods of time, engaging in meetings and prospecting for business.¹⁴ The reasons for the grant of this visa make it the equivalent of a classical Business Visitor visa.

ii. Ordinary Visa

This visa permits entry into Angola for family reasons or business prospecting.¹⁵ As with the Short Term Visa, the holder of an Ordinary Visa cannot establish residence or engage in any remunerated activity. The visa is valid for 30 days, though it is renewable for a further thirty days. This visa is distinguished from the Short Term Visa in that this is granted for a slightly longer period of time than the Short Term Visa. This visa also fits into the Mode 4 category of a business visa for a business visitor.

iii. Work Visa

The work visa allows its holder to exercise temporarily, a remunerated professional activity in the State's interest or as an employee.¹⁶ This type of visa is valid for multiple entries and is granted for a 12-month period, renewable for equal periods, up to the term of the individual's working contract. There are different types of Work Visas that are issued:¹⁷

- Work Visa Type A – for work for an institution or public company;
- Work Visa Type B - for foreigners to work independently as service providers. Independent Professionals would fit Work Visa B.
- Work Visa Type C – for work in the oil, mining and building sectors;
- Work Visa Type D – for work in the commerce, industry, fishing, sea and aeronautical sectors;

¹³. Article 45 of the Juridical System of Foreigners in the Republic of Angola.

¹⁴. How to do Business in Angola, A Detailed Guide, 2011 Edition, INTSOK.

¹⁵. Article 46 of the Legal Regime for Foreigners.

¹⁶. Article 51 of the Legal Regime for Foreigners.

¹⁷. Article 52(b), Law No 2/07 of May 31.

- Work Visa Type E – for work that is integrated on cooperation agreements;
- Work Visa Type F – for work on any other sector besides the above categories.

iv. Privileged Visas

This visa is issued to persons entering the country for the purpose of establishment of investment, (commercial presence). The Privileged Visa is only available to investors or their personal representatives and does not cater for employees. Persons in this category would therefore be issued with the relevant Privileged Visa as follows:

- Privileged Visa Type A – granted to foreign citizens with investments exceeding the equivalent of USD 50,000,000.
- Privileged Visa Type B – granted to foreign citizens with investments that are less than the equivalent of USD 50,000,000 and over USD 15,000,000.
- Privileged Visa Type C – granted to foreign citizens with investments that are less than the equivalent of USD 15,000,000 and above USD 5000.
- Privileged Visa Type D – granted to foreign citizens with investments that are less than the equivalent of USD 5000.

In instances therefore where the company establishing presence in Angola would want to send a person to set up the commercial presence, such person, would only qualify for a privileged visa if that person is the investor or his representative. He will not qualify for this visa if he is an employee of the intending company. The employee would have to obtain a work permit.

In sum, Mode 4 in Angola is permitted for business visitors, who would have to obtain the Short Term Visa or the Ordinary Visa, with the difference being that if the business visitor intends to stay for a shorter period of time, (7 days), they will be granted the Short Term Visa as opposed to an Ordinary Visa. Independent Professionals would also be able to obtain the Work Visa Type B. Self-employed persons would apply for the Privileged Visa depending on their capital contributions.

4.1.2. Restrictions on Employment of Foreigners

Foreign professionals can be employed in Angola by both locals and by foreigners.¹⁸ A foreign employee can only be employed after it has been certified by the National Employment Service that no citizen of Angola is qualified and available to take up the position that the foreigner seeks to undertake.¹⁹

Further, employers can only hire foreigners if, in an enterprise of more than five employees, at least 70% are nationals.²⁰ The employment of the remaining 30%, who may be foreigners, is also regulated by the law. There is however an exception to the 70% minimum local requirement which allows the employment of foreign workers if there is no national available and able to occupy the position.²¹

¹⁸. S. 165 Labour Code.

¹⁹. S.166:2 Labour Code.

²⁰. Article 3 of Decree No. 95.

²¹.Article 4 of the Decree No. 95.

While no specific tests are laid out, the law requires that foreign applicants seeking work in Angola must have their technical or scientific qualifications attested to by the employer and they must possess physical and mental fitness proved by medical certificate from the country where the contract is made and confirmed by an entity for the purpose designated by the Ministry of Health of the Republic of Angola.²²

There are no legal requirements that foreign employees must mentor or develop the skills of local employees or be replaced by local employees within a specified time period.

4.1.3. Angola's Mode 4 GATS Commitments

Angola's GATS commitments are principally in two sectors: financial services and tourism and travel related services. Incidentally, these two sectors are part of the six sectors in which commitments have to be made in the SADC services negotiations.

The GATS Mode 4 commitments in these sectors are enshrined in the sector specific commitments. Angola does not have a horizontal section to its schedule of commitments. Its Mode 4 commitments are as stipulated in Table 2 herein.

Table 2: Angola's Mode 4 GATS Commitments

Sub sector	Limitations on Market Access	Limitations on National Treatment
FINANCIAL SERVICES		
Banking and other Financial Services (excl. Insurance) Acceptance of deposits and other repayable funds from the public,	Mode 4 – At least half of the personnel of subsidiaries, branch offices and agencies of foreign financial institutions must be Angolan citizens.	Mode 4 - None
Lending of all types	Mode 4 – Unbound	Mode 4 - None
Liquidation and Monetary Transfer Services	Mode 4 – Unbound	Mode 4 - None
TOURISM AND TRAVEL RELATED SERVICES		
Hotels	Mode 4 – Unbound except for measures affecting senior managers and specialists with knowledge essential for the provision of the service.	Mode 4- Unbound except for measures affecting senior managers and specialists with knowledge essential for the provision of the service.
Restaurants	Mode 4 – Unbound except for measures affecting natural persons in the following categories: directors, senior managers, and	Mode 4 – Unbound except for measures affecting natural persons in the following categories: directors, senior managers, and specialists with

²². Article 4 of Decree No. 6-01 of January 19.

	specialists with knowledge essential for the provision of the service.	knowledge essential for the provision of the service.
Recreational, Cultural and Sporting Services	Mode 4 –None	Mode 4 –None

Source: Angola's Schedule of Specific Commitments, GATS/SC/115

The above table shows that in the banking and other financial services sector, Angola committed that up to 50% of the personnel in the branches, subsidiaries, inter alia, of foreign institutions can be foreign citizens. This commitment is much more liberal than the existing law in Angola which requires locals to occupy at least 70% of all positions in an enterprise of more than five employees.²³

It is interesting to note that under the GATS commitments, lending, liquidation and monetary transfer services are not open to foreign participation in Modes 3 and 4. It is difficult to see how the liberal commitment on one key element of commercial banking (acceptance of deposits) can practically co-exist with a very restrictive commitment on another element, namely lending of all types. The SADC negotiating guidelines mandate SADC States to improve their existing commitments in each of the six priority sectors.

Tourism is another sector in which Angola has to improve its existing commitments in the context of the SADC negotiations. In its Mode 4 GATS commitments for Hotels, Angola limited its commitments to "senior managers and specialists with knowledge essential for the provision of the hotel service." For Restaurants, permission is also granted to directors, in addition to the senior managers and specialists. These commitments do not provide for any numerical limit to the number of foreigners that foreign suppliers can engage in the sectors, but only put a limit on the types of persons that can engage in the sectors; "senior managers," "specialists' who have essential knowledge and for restaurants, "directors". There is however no reference to these types of persons in the legislation in Angola. In this respect, the GATS commitments are seen to be more specific than the applied legislation, while they also ignore the 70% local employment condition and the cross cutting labour market test.

For recreational, cultural and sporting services, the sector has been opened to foreign participation without any limitations. Angola should extend the same commitment for SADC services negotiations in the future, since it has been fully liberalized in GATS.

4.1.4. Points to Note When Applying for Work Visas

The administration of visas in Angola is under the authority of the Migration and Foreigners Service ("SME – *Serviço de Migração eEstrangeiros*") under the Ministry of the Interior.²⁴ The immigration process is reported to be very bureaucratic and time consuming. There are tight controls, and rejections of work visa applications are very common. Granting of work visas is reported to easily take more than six months from the time of application. Granting of short-term and ordinary visas usually take less time and are issued in the Angolan Consulate of the foreigner's country of origin.²⁵

²³. Article 3 of Decree No. 95.

²⁴. Article 1, Organic Regulation of the Migration and Foreigners Service.

²⁵. INTSOK - How to do Business in Angola, supra at 32.

The Short Term Visa is applied for prior to travel to Angola, and must be used within three days of issue. Among the documents to be submitted, the invitation letter must be in Portuguese and for oil sector related visits, the letter must be endorsed by the Ministry of Petroleum. For business purposes, the letter must be endorsed by the associated Angolan Ministry. These requirements and the conditions attached to the visa are comparatively stringent.

For Work Visas, among other things, the applicant must provide an endorsement in Portuguese from the Ministry of Public Administration, Employment and Social Security in case of institutions or public companies and in case of Private Companies, an endorsement from the Ministry related to the company's business. The applicant must also provide a certificate of professional or academic qualifications. There is limited room for alteration of a visa, if for example, the holder changes employment.

4.2. BOTSWANA

4.2.1. Context in Which Mode 4 is Permitted

The Employment of Non-Citizens Act²⁶ is the principal law that regulates the presence of foreign natural persons in Botswana. This is supplemented with the Points Based System (PBS)²⁷ which guides the Ministry of Labour and Home Affairs on who can work in Botswana, depending on the number of points scored by the applicant.

The law provides specifically for the entry and stay in Botswana of foreigners seeking employment, or generally to carry on trade or professions as long as the foreigner is a holder of a valid visa relevant to the nature of activity they intend to engage in.

i. Work Permits

The Employment of Non-Citizens Act is silent as to the categories of persons eligible for the work permit. The Immigration Act and the Employment Act also do not mention any specifications as to who would qualify for the work permit, or even any other visa for that matter.

The duration of the work permits is not expressly stated in the law. However, under Section 6 of the Act, the Board making the decision on the issuance of a work permit is to make recommendations as to the validity period for each permit.

In practice, however, there are Temporary Permits that are given for a period of four (4) weeks to six (6) months and there are Longer Term Permits, which are the work permits issued for between six (6) months to ten (10) years.

ii. No Work Permit Required

In practice, visitors entering Botswana for less than two weeks do not have to obtain a visa or work permit. They simply need to obtain a letter from the Commissioner of Labour and the maximum period of stay for such persons is two weeks.

²⁶. Chapter 47:02.

²⁷. Implemented on 18th April 2012. <http://www.gov.bw>.

4.2.2. Restrictions on Employment of Foreigners

The Employment of Non-Citizens Act puts in place mechanisms for the employment of foreigners and specifies that where a foreigner has applied for a work permit, the Regional Immigrants Selection Board shall take into account whether the grant of such a permit would affect the opportunities of nationals for employment in the position in question.

Section 5(6)(b) of the Employment of Non-Citizens Act requires the Board to take into account whether there are arrangements for training nationals to replace the applicant for a work permit over time. In practice, foreign employees must have an understudy to eventually localise the post held by the foreigner.

The Board mainly bases its decision on the Point Based System, (PBS). The PBS was introduced in 2012 to lend more objectivity to the immigration process by assigning points to the applicants who are able to demonstrate that they have the required skills. The more educated the applicant is, the more marks are earned according to the PBS, with a pass mark of 60. In case an applicant is not pleased with the decision of the Board, they can appeal to the Minister.

The Board further bases its decision on a Scarce List. If an applicant has skills that are on the Scarce List, they automatically qualify for the permit being sought. This List is developed by the Labour department and in practice usually covers executives, managers and persons with special skills.

There are no specifications as to the requirement of prior employment of the foreign employee or on the number of foreigners that can be employed by an enterprise. However, foreigners can only be issued work permits after assessing the possibility of nationals filling the positions they seek to fill.

There are no requirements for proficiency tests to be done by a prospective foreign employee. However professional bodies must approve the application. There are no quotas in Botswana.

4.2.3. Botswana's Mode 4 GATS Commitments

Botswana made commitments in business/professional services, computer and related services, research and development, real estate, communication and tourism and hotel related services. The following table highlights the relevant commitments in these sectors, with respect to Mode 4.

Table 3: Botswana's GATS Commitments That Relate to Mode 4

HORIZONTAL COMMITMENTS
Employment in Botswana of foreign natural persons is subject to labour laws, regulations and procedures.
For a foreign natural person to work in Botswana, a residence and work permit is required.
Foreign natural persons shall be employed by companies that provide services within Botswana only as managers, executives, special technicians and highly qualified professionals.
Investors are required to conform to the requirements of the localisation policy. They are to train citizens in order to enable them to assume senior management positions over time.
Professionals are required to register with the appropriate professional body.

SECTOR SPECIFIC COMMITMENTS
BUSINESS SERVICES – Unbound Save as Stipulated in Horizontal Commitments
<p>Professional Services</p> <p>Architectural Services</p> <p>Engineering Services</p> <p>Integrated Engineering Services</p> <p>Medical and Dental Services (For national treatment, all medical dental practitioners should be registered with the Botswana Medical Council.)</p> <p>Services provided by mid-wives, nurses, physiotherapists, and paramedical personnel</p> <p>Other specialised medical services including forensic medicine, neurosurgery, cardio-thoracic surgery, plastic surgery, geriatrics, traumatology, anaesthesiology, clinical immunology and oncology, child psychiatry, physical medicine and intensive care specialist.</p>
COMPUTER AND RELATED SERVICES - Unbound Save as Stipulated in Horizontal Commitments
<p>Consultancy services related to the installation of computer hardware</p> <p>Software Implementation Services</p> <p>Data Processing Services</p> <p>Database Services</p> <p>Maintenance and repair services of office machinery and equipment including computers</p>
RESEARCH AND DEVELOPMENT SERVICES - Unbound Save as Stipulated in Horizontal Commitments
<p>Research and experimental development services of social sciences and humanities, including law and economics.</p>
REAL ESTATE SERVICES - Unbound Save as Stipulated in Horizontal Commitments
<p>Involving own or leased property</p> <p>Real estate on a fee or contract basis</p>
OTHER BUSINESS SERVICES - Unbound Save as Stipulated in Horizontal Commitments
<p>Maintenance and repair of equipment (not including maritime vessels, aircraft or other transport equipment)</p> <p>Translation and Interpretation Services.</p>
COMMUNICATION SERVICES - Unbound Save as Stipulated in Horizontal Commitments
<p>Courier Services - Commercial courier services, including by public transport of self-owned transport</p>

TOURISM AND HOTEL RELATED SERVICES - Unbound Save as Stipulated in Horizontal Commitments
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Hotels and Restaurants, including Catering
--

Travel agencies and tour operators.

Source: Botswana's Schedule of Specific Commitments, GATS/SC/109

Table 3 above indicates Botswana's Mode 4 horizontal and sector specific GATS commitments. The horizontal commitments are: Firstly; that foreign natural persons entering Botswana to engage in trade in services must comply with the existing domestic law. Secondly; that Botswana restricts the admission of foreign personnel to managers, executives, special technicians and highly qualified professionals. Thirdly, there is a requirement that investors must train citizens to enable them obtain senior management positions over time. Lastly, professionals must be registered with Botswana professional bodies. These commitments are examined here below.

i. Compliance with existing domestic law

The Employment of Non-Citizens Act does not specify any categories of persons, skills levels or sectors in which employment of foreigners can be sought. Neither does it identify any limits on the numbers of foreigners that can be employed. It does however specify that where a foreigner has applied for a work permit, the Board shall take into account whether the grant of such a permit would affect the opportunities of nationals for employment in the position in question. There are no requirements for proficiency tests to be done by a prospective foreign employee.

ii. Restriction of categories of service suppliers

Botswana's GATS commitments restrict the admission of foreign personnel to managers, executives, special technicians and highly qualified professionals. This provision is not reflected in the law. In practice however, it comes out strongly with the existence of the Scarce Skills List which principally focuses on specialised skills, managers and executives. This tallies with the GATS commitment.

iii. Localisation requirement

Section 5 (6) (b) of the Employment of Non-Citizens Act requires the Board to take into account whether there are arrangements for training nationals to replace the applicant for a work permit over time. Further, in the exercise of its discretion on whether to grant a work permit or not, the Board relies on the Localization Programme, which requirement is directly reflected in Botswana's GATS schedule

iv. Professional registration with Professional bodies

The registration requirement for professionals by Botswana professional bodies allows for the verification of professional competencies. Such tests are meant to establish equivalence between foreign and local suppliers, to ensure the quality of the service.

The above four provisions stipulated in the Horizontal section do not need to be entered in a Member States' schedule. This is because they do not specify any restriction in the sense of Article XVI GATS (Market Access). They merely impose formal requirements which do not restrict the access of the foreigner to assume a position in Botswana. As such, they are redundant.

There are also other points that are worth noting, with respect to the sector specific commitments. In the Medical and Dental services, Botswana committed in Mode 3 on national treatment that the hospitals and clinics should employ Botswana nationals as doctors, medical personnel and supporting staff. This strict requirement of use of nationals is not reflected in the applied regime. The applied regime principally focuses on a localisation programme and a scarce skills list and not on any specific profession as stipulated in GATS.

Further on the medical and dental sector, on market access, Botswana committed in Mode 3 that foreign owned hospitals are encouraged to enter into joint ventures with local hospitals and clinics and that the service should only be supplied by natural persons, and then Botswana registered unbound, with regard to Mode 4. This is an outright contraction between the commitments in Mode 3 and Mode 4. This contradiction is also seen in the veterinary services, services provided by mid-wives, nurses, physiotherapists, and paramedical personnel, on market access.

4.2.4. Points to Note When Applying for Work Visas

Immigration in Botswana is the domain of the Immigration and Citizenship Department, a department under the Ministry of Labour and Home Affairs.²⁸

Section 17 of the Immigration Act provides that a visitor may remain in Botswana for a maximum of 7 days in aggregate in any one calendar month, or at any one time. Any stay longer than that would require the visitor to acquire a visitor's work permit or a residence permit.²⁹ In practice, for a number of nationalities, up to 90 days visa free are granted, without permission to work.

The immigration process in Botswana has been reported to be comparatively simpler than in other observed jurisdictions. The application for visas and permits is done, where applicable, at the embassies or consulates of Botswana in the applicant's country of origin.³⁰ The aforesaid notwithstanding, the system has been reported to be slow, with decisions taking many months and applicants being placed on successive 3-month waivers with no indication as to how or when the process will be resolved. This applies even when companies have applied for permits for employees to fill vacant posts for which citizens are unavailable.³¹

Further, the grant of an application has been reported to be more focused on qualifications and not experience, hence the tendency to localise positions with citizens who may have the same qualifications as the expatriate, but who lack the necessary experience to do a particular job effectively.³²

Visas are extended by the Department of Immigration and Citizenship, and the process is similar to that involved in applying for a fresh work permit. The Regional Immigrants Selection Board will consider the application, taking into account whether the presence of the applicant is still necessary and not an impediment to qualified and available nationals finding employment. It will also evaluate efforts by the

²⁸. Department of Immigration and Citizenship website - <http://www.gov.bw>.

²⁹. Chapter 25:04.

³⁰. Botswana Export Development and Investment Authority (BEDIA) - <http://www.bedia.co>.

³¹. Keith Jeferis, Proposals for Business Friendly Immigration Reform in Botswana, July 2011 at 5.

³². Keith Ibid.

applicant and his employers to train nationals in order to enable them take up the position held by the applicant.³³

4.3. DEMOCRATIC REPUBLIC OF CONGO

4.3.1. Context in Which Mode 4 is Permitted

Mode 4 in the Democratic Republic of the Congo (DRC) is governed by four key Documents: (i) Ordonnance No 74/098 du 6 Juin 1974 révisée par l'O. No 75/304 bis du 26 Novembre 1975 sur la protection de la main d'œuvre nationale (ii) Ordonnance-LOI 83-033 relative à la police des étrangers 915 Septembre 1983), (iii) Ordonnance No. 87-281 du 13 août 1987 portant mesures d'exécution de l'Ordonnance-Loi 83-033 du 12 Septembre 1983, relative à la police des étrangers, (iv) the labour legislation called the « Code du Travail" which was modified by the October 2002 Labour Code.

Foreigners in DRC can only work if they have visas issued to them for the purpose of work.³⁴ There are several types of work related visas that are issued.³⁵

i. Establishment Ordinary Visa

This visa is valid for three years and is particularly granted to merchants of large businesses, liberal professionals in gainful work, professional philanthropic persons (missionaries), and counters for diamond and gold. This is the type of visa granted to Intra Corporate Transferees where the work involved in is not part of the priority sectors stipulated in the Investment Code.

ii. Establishment of Work Visa

This is issued to foreigners who wish to work under an employment contract in DRC. It is usually issued for 1 to 2 years but the validity of the visa depends on the validity of the work contract.

Applicants for this visa must have a foreign work permit, a work contract covered by the National Employment Office, proof of qualifications and a certificate of service.³⁶

iii. Establishment of Specific Visa Work

This is granted for a period not exceeding one year and it is not renewable. This is the visa that is usually granted to contractual service suppliers and independent professionals.

iv. Establishment of Special Visa

This is granted for 5 – 10 years and it is granted to promoters or agents of new companies, approved under the investment code. Applicants for this visa must provide an approval from the National Agency for Investment Promotion, attach an Inter-ministerial Order of Approval of the project, inter alia. Intra corporate transferees would be granted this visa if the sector is a part of the priority sectors of the investment code. Otherwise, the ICT would obtain the Establishment Ordinary Visa.

³³. Section 5, Employment of Non-Citizens Act.

³⁴. Art. 2 of the Adopted Departemental 87/005 of 21 January 1987 Laying Down the Conditions of Employment of Expatriates.

³⁵. <http://www.dgm.cd/delivrance.php>.

³⁶. Art. 9 of the Domestic Workers Protection Law (Ordonnance No 74/098 Du 6 Juin 1974 Révisée Par L'O. No 75/304 Bis Du 26 Novembre 1975 Sur La Protection De La Main D'œuvre Nationale).

Persons seeking employment as business visitors are not specifically provided for in DRC. They would, like all other persons seeking to supply services in DRC have to obtain a work permit. The Establishment visa is suitable for contractual service suppliers and independent professionals.

4.3.2. Restrictions on Employment of Foreigners

Like other African States, the DRC labour law promotes the hiring of the nationals. Therefore, protective regulations towards the national workforce have been laid down and expatriates are treated differently from nationals with respect to hiring conditions, work cards, resident permits and payment of income tax.

The percentage [of the total workforce] of foreign remunerated workers allowed in DRC is fixed by law and may not exceed 15% of total employment in the country. The maximum percentage of foreign workers that can be gainfully contracted, compared to the overall number of workers, are fixed as stated in the following table:

Table 4: Percentage of Foreigners that can be Employed in DRC

Line of Business	Categories I General Job Classification	Supervisors	Executives and Senior Management
Services	0%	2%	2%
Commerce, banking, insurance	0%	2%	2%
Transport	0%	2%	2%
Construction and public works	2%	2.5%	2%
Electricity, water and sanitary services	2%	2.5%	2%
Agriculture	2%	2.5%	2%
Extractive Industries	2%	2.5%	2%
Manufacturing	2%	2.5%	2%
ICT	0%	2%	2%
Commerce	0%	2%	2%

Source: *Arrêté Ministériel No. 121/CAB.MIN/TPS/112/2005 Du 26 Octobre 2005 Fixant Les Pourcentages Maxima Autorisés Des Travailleurs Etrangers Au Sein Des Entreprises*

The above table shows that the percentage of foreigners that can be employed in DRC is very small, especially with respect to services. Even so, the key persons permitted are top managerial positions, that is, supervisors, executives and senior management.

The above table is periodically revised. The current revision (of 2005) is more restrictive than the 1970 table³⁷ which for example permitted 4% for supervisors and 4% for executives and top management for

³⁷. Art. 1, Ministerial Order 70/0010 of 27 July 1970.

services. There are also certain jobs that are statutorily reserved exclusively for Congolese citizens.³⁸ These are listed here below, in table 5.

Table 5: List of Jobs Prohibited for Expatriates

Sector	Positions
Construction and Civil Engineering	Executive Secretary, Executive Assistant, Assistant to the Manager, Executive Director, Deputy Chief Financial Officer, Driver Assistant Construction, Legal Adviser, Economic and Financial, Sales Manager, Medical Assistant, Secretary translator, Computer Programmer, Assistant foreman, Carpenter, Building Electrician, Electricians light gear, Cashier, Librarian, Operator of accounting machines, Chief of Staff, Director of Public Relations, Welder, Adjuster, Mechanic, Locksmith, Head of Statistical Services, Operator of computing machines, Plumber.
Agriculture, Fisheries and Livestock	Executive Secretary (bilingual or trilingual), Assistant to the Manager, Executive Director, Cashier, Driver agricultural machinery, Agent planting, Assistant Manager planting, Veterinary Assistant, Veterinary Medicine, Mechanic light gear, Building Electrician, Electricians cars, Driver Assistant Construction, Counsel or economic, Manager Supply, Accountant, Chief of Staff, Sales Manager, Medical Assistant, Librarian, Computer Programmer, Welder, Adjuster, Head of statistical service, Agronomist, Purchasing Manager of local agricultural products, Operator of computing machines, Head of legal department, Reinforcing, Director of Public Relations.
Mining	Executive Secretary (bilingual or trilingual), Assistant to the Manager, Executive Assistant, Executive Director, Driver of mining equipment, Building Electrician, Electricians cars, Driver Assistant Construction, Counsel or economic, Accountant, Investigator, Medical Assistant, Computer Programmer, Welder (under water), Adjuster, Car Mechanic, Head of statistical service, Director of Purchasing local products, Operator of accounting and computing machinery, Director, Sales Manager, Chef Career, Team Leader preparation mines, Chief of Staff, Director of Public Relations, Operator of electrical computer, Librarian, Cashier, Head of legal department, Reinforcing.
Manufacturing	Executive Secretary (bilingual or trilingual), Assistant to the Manager, Executive Assistant, Executive Director, Deputy Chief Financial Officer, Building Electrician, Electricians cars, Car Mechanic, Legal Adviser, Economic and Financial, Head of Statistical Services, Operator of data processing machines, Operator of accounting and computing machinery, Weaver, Tanner, Accountant, Cashier, Sales Manager, Medical Assistant, Tailor, Fashion, Driver Secretary, Computer Programmer, Welder, Adjuster, Driver Printing Press, Driver oven, Driver casting machines, Librarian, Chief of Staff, Director of Public Relations.
Electricity and Water	Executive Secretary, Executive Assistant, Assistant to the Manager, Accountant Executive Director, Electrician, Electricians cars, Mechanic, Librarian, Chief of Staff, Director of Public Relations, Sales Manager, Director of Purchasing local products, Assistant Director, Head of Statistical Services, Operator of computing machines, Operator of accounting and computing machinery, Adjuster, Cashier, Welder.
Transport Storage and Communication	Executive Secretary, Assistant to the Manager, Executive Assistant, Executive Director, Driver gear / road / transportation, Legal Adviser, Economic and Financial, Cashier, Manager code, Driver handling gear, Responsible clear-finding services, Warehouse Manager, Librarian, Director of Public Relations, Inspector of passenger services, Accountant, Sales Manager, Sales Manager, Computer Programmer, Welder, Adjuster, Head of Statistical Services, Purchasing Manager, Head of Procurement, Cashier, Chief of Staff.

³⁸. Article 1 of the Adopted Departemental 86/001 of 31 March 1986 Establishing the List of Banned Foreign Jobs.

Trade, Banking, Insurance, Real Estate	Executive Secretary, Executive Assistant, Assistant to the Manager, Executive Director, Accountant, Sales Manager, Purchasing Manager, Assistant Manager, Deputy Assistant Director, Heads of Procurement Services, Economic Advisor, Counsel, Secretary translator, Programmer, Chief of Staff, Mechanic, Medical Assistant, Welder, Adjuster, Head of Statistical Services, Building Electrician, Operator of computing machines, Operator of accounting machines, Computer Operator, Commercial Agent, Cashier, Manager code, Driver handling gear, Responsible Service clear-statement, Warehouse Manager, Librarian, Director of Public Relations.
Services	Executive Secretary, Executive Assistant, Assistant to the Manager, Executive Director, Accountant, Sales Manager, Purchasing Manager, Assistant Manager, Head of Procurement Services, Legal Adviser, Economic and Financial, Cashier, Secretary translator, Programmer, Mechanic, Welder, Adjuster, Head of statistical service, Building Electrician, Pharmacist, Operator of computing machines, Operator of accounting machines, Librarian, Chief of Staff, Director of Public Relations.

Source: Article 1 of the Adopted Departemental 86/001 of 31 March 1986 Establishing the List of Banned Foreign Jobs.

As an exception however, the above categories that are listed in the table as being excluded from foreigners will not be excluded where there is an agreement between the government and a natural or legal person under the investment code.³⁹

The list in table 6 is so extensive, that it excludes almost all conceivable jobs in DRC from foreign participation. It is interesting to note that in the sectors where DRC is to make commitments in the SADC negotiations, the applied regime already has restrictions as to the percentage number and types of foreigners that can be employed.

Exemptions from following the above percentage requirements can only be granted by a Ministerial Order which is granted after putting into consideration the condition of the organization of the company, the state of the labour market and training programs, professional development or adaptation that the company may adopt.⁴⁰

The exemption from the requirement to employ Congolese is only granted subject to the commitment by the employer that the jobs granted to the foreigners will be available to the Congolese within two years from the date of exemption⁴¹ and that a compensatory tax is made. The exemption is not renewed at the expiration of two years.

Any exemption request must be sent to the National Employment Service and must be accompanied by an organization chart, a note on the programs mentioned above, and the status of the Foreign Service personnel.

Further, it is the obligation of the employer to train Congolese counterparts during the period of validity of the work card.⁴² No specific proficiency tests are required. But Article 7 of 87/005 stipulates that it is forbidden to use expatriate graduates without experience when there exists surplus capacity of locals in the labour market.

³⁹. Article 2 of the Adopted Departemental 86/001 of 31 March 1986 Establishing the List of Banned Foreign Jobs.

⁴⁰. Article 3 of Ministerial Order 70/0010 of 1970.

⁴¹. Art 4 of 86/001.

⁴². Article 6 of 87/005.

Consequences for Employing Foreigners in Locals' Positions

The Minister of Labour and Social Welfare may, after notice, on a proposal from the labour inspector and opinion of the Minister of National Economy and Industry order the closure of the business or the establishment of any employer who employs foreigners in provisions that are meant to be occupied by nationals.⁴³

African Expatriates

Foreign workers originating from other African countries that became independent after June 6 1974 that have a reciprocal arrangement or that maintain friendly relations with DRC without any agreement on employment are to be treated in a similar way when being hired and employed in DRC depending on whether they are line managers or ordinary workers, under the general classifications of employment in DRC. This preferential treatment is subject to the requirement that the company must submit for approval to the National Employment Service a list of workers concerned and this list should give each person the complete identity, education and employment assigned.⁴⁴

DRC has the highest number of restrictions on the employment of foreigners in the SADC States. It has however been reported that there are no discriminatory or excessively onerous visas, residence or work permit requirements designed to prevent or discourage foreigners from investing in the DRC.⁴⁵ Investors are welcomed and are encouraged to invest in DRC, but expatriate employment, is very restrictive, as has been shown in the existing legislation.

4.3.3. DRC's Mode 4 GATS Commitments

The following table highlights DRC'S commitments with respect to Mode 4.

Table 6: DRC's GATS Commitments That Relate to Mode 4

HORIZONTAL COMMITMENTS
The sector is unbound for market access and national treatment except for measures affecting temporary movement for a period of one year, which may be extended without requirement of the economic need test, for persons in the categories of senior executives, specialists that possess knowledge essential for the provision of the service concerned.
SECTOR SPECIFIC COMMITMENTS
PROFESSIONAL SERVICES - Unbound Except as Indicated in Horizontal Commitments.
Medical and Dental Services Veterinary Services Services Incidental to Agriculture, Hunting and Forestry Services Incidental to Fishing

⁴³Article 5 of 86/001.

⁴⁴12/DTPS/CAB/0730/105/83 LETTER. August 13 1983. Protection of the National Labor Force (In case of nationals of African countries that became independent after June 6 1974.)

⁴⁵KPMG: Democratic Republic of Congo Fiscal Guide, 2012/2013.

COMMUNICATION SERVICES- Unbound Except as Indicated in Horizontal Commitments.
Telecommunication services a)Voice telephone services
CONSTRUCTION AND RELATED ENGINEERING SERVICES- Unbound Except as Indicated in Horizontal Commitments.
a. General Construction work for buildings b. General Construction work for Civil Engineering
EDUCATIONAL SERVICES- Unbound Except as Indicated in Horizontal Commitments.
Higher Education services
TOURISM AND TRAVEL RELATED SERVICES- Unbound Except as Indicated in Horizontal Commitments.
Hotels Restaurants Travel Agencies and Tour Operators Tourist Guide Services
RECREATIONAL, CULTURAL AND SPORTING SERVICES- Unbound Except as Indicated in Horizontal Commitments.
Sporting and Other Recreational Services

Source: GATS/SC/103. 30 August 1995

The table shows that in the above committed sectors, access to Mode 4 is only going to be permitted for measures affecting temporary movement for senior executives and specialists that possess knowledge essential for the provision of the service concerned. These persons are granted access for a period of one year, which may be extended without requirement of the economic need test.

In contrast, the applied legal regime excludes almost all top executive level jobs from being taken on by foreigners. There is hence a serious conflict between the applied regime and the committed regime.

It should be noted that DRC's GATS commitments are permitting entry in the stipulated sectors for only one year subject to renewal.

Of the six priority sectors for negotiation in the SADC Services negotiations, DRC has already committed Communication, Tourism and Construction at the GATS level. But entry in these sectors as per GATS is subject to the above restrictions.

4.3.4. Points to Note When Applying for Work Visas

Every foreign employee is expected to apply for a work permit from the National Committee of Employment of Foreigners within the Ministry of Labor.⁴⁶

Application for a work permit must be made on arrival in the DRC. Any employer who intends to hire an expatriate worker must first file the job in the placement office of the Department of Employment and Vocational Training. In the event that the offer remains unsatisfied within 30 days, the employer can then submit the case to the National Commission on the employment of foreigners for review.⁴⁷ This is meant to ensure that no jobs that can be done by citizens of DRC are being done by foreigners. This requirement, which is akin to a Labour market test, is specifically excluded by the GATS commitments of DRC for those sectors committed in the GATS schedule.

4.4. LESOTHO

4.4.1. Context in Which Mode 4 is Permitted

The temporary movement of foreigners into Lesotho to supply services is principally governed by the Aliens Control Act of 1966 and the Labour Code Act of 1992. Lesotho is open to investments from abroad as well as expatriate labour, as long as the foreigner is a holder of a valid visa relevant to the nature of activity they intend to engage in. Two types of working visas are permitted: Work Permits and Permits for Temporary Sojourn.

i. Permit for Temporary Sojourn

Section 7 of the Alien Control Act creates the Permit for Temporary Sojourn (PTS). In accordance with the First Schedule to the Act, the PTS is issued to, among others, persons entering Lesotho to carry out trade, industry or commerce, or to engage in professional work approved by the Minister. The issued permit specifies the purpose and the period of validity, for which neither a minimum nor a maximum period is specified in the Act.

ii. Work Permit

No person can be employed or be a partner in a business in Lesotho without first obtaining a work permit issued by the Labour Commissioner.⁴⁸ The work permit is issued for two years and is subject to renewal, depending on the nature of the work done.

From reading the letter of the law, it appears that the appropriate permit for short term Business Visitors, Independent Professionals, and Contract Service Suppliers would be the Permits for Temporary Sojourn, as these persons would not be “employed” in Lesotho. The Intra Corporate Transferees would have to obtain work permits so as to supply services in Lesotho.

In practice however, all persons are simply issued work permits which would vary depending on the period of stay. The only exception to this in practice, are the persons who enter Lesotho for every week from

⁴⁶. Ministerial Order No. 22 of July 2011.

⁴⁷. Art 4 of Adopted Departemental 87/005.

⁴⁸. S. 165 of the Labour Code Act of 1992.

South Africa, to service machinery in the mines. These do not have to obtain work permits. They only have to notify the Labour Department of their presence and would have to leave within the stated week.

The aforesaid notwithstanding, none of the permits issued in Lesotho correspond with the typical Mode 4 categories of service supply.

4.4.2. Restrictions on Employment of Foreigners

Section 165 of the Labour Code allows foreign professionals to be employed in Lesotho, both by locals and by foreigners. Under Section 166(2) of the same law, a foreign employee can only be employed after it has been certified by the National Employment Service that no citizen of Lesotho is qualified and available to take up the position that the foreigner seeks to undertake.

Neither the Aliens Control Act nor the Labour Code create the requirement for proficiency tests for foreign employees and there are no legal requirements that foreign employees must mentor or develop the skills of local employees or be replaced by local employees within a specified time period. In practice however, there is a requirement to mentor local employees and every foreign employee must submit a localisation plan (that shows how locals are going to be trained for the foreigner’s skills,) for the period of duration of the work permit.

The law does not also provide any quotas on the number of foreign employees that can be employed. In practice however, quotas have been developed over time on the number of foreigners that can be employed in some sectors. For example, in the textile and garment industry, for every one expatriate, there should be twenty locals. In the retail sector, for every one expatriate, there must be at least five locals.

4.4.3. Lesotho’s GATS Commitments

Lesotho made both sector specific and horizontal commitments at the WTO. All the sector specific commitments shown in the table below pointed to the horizontal commitments as far as Mode 4 is concerned. The table below first shows the horizontal commitments and then the sectors and subsectors that were committed by Lesotho at the WTO.

Table 7: Lesotho’s Mode 4 GATS Commitments

HORIZONTAL COMMITMENTS
On Market access, automatic entry and work permits are granted for up to 4 expatriate senior executives and specialized skill personnel in accordance with relevant provisions in the Laws of Lesotho. Approval is required for any additional expatriate workers beyond the automatic level. Enterprises must also provide for training in higher skills for the locals to enable them to assume specialized roles.
SECTOR SPECIFIC COMMITMENTS
PROFESSIONAL SERVICES - Unbound Save as Stipulated in Horizontal Commitments

<p>Legal Services (advisory services in foreign and international law only)</p> <p>Legal Services (domestic law only)</p> <p>Auditing</p> <p>Taxation Services (excluding legal services)</p> <p>Architectural Services</p> <p>Engineering Services</p> <p>Integrated Engineering Services</p>	<p>Urban Planning Services</p> <p>Landscape Architectural Services</p> <p>Medical and Dental Services</p> <p>Veterinary Services</p> <p>Services Provided by Midwives and Nurses</p> <p>Services Provided by Physiotherapists and Paramedical Personnel</p>
<p>COMPUTER AND RELATED SERVICES- Unbound Save as Stipulated in Horizontal Commitments</p>	
<p>Consultancy Services Related to the Installation of Computer Hardware</p> <p>Software Implementation Services</p>	<p>Data Processing Services</p> <p>Database Services</p> <p>Maintenance and Repair Services of Office Machinery and Equipment Including Computers</p>
<p>REAL ESTATE SERVICES - Unbound Save as Stipulated in Horizontal Commitments</p>	
<p>Involving own or leased property</p>	<p>On a fee or contracting basis</p>
<p>RENTAL LEASING SERVICES WITHOUT OPERATORS - Unbound Save as Stipulated in Horizontal Commitments</p>	
<p>Relating to aircraft</p> <p>Relating to other transport equipment</p>	<p>Relating to other Machinery and equipment</p>
<p>OTHER BUSINESS SERVICES - Unbound Save as Stipulated in Horizontal Commitments</p>	
<p>Market research and public opinion polling services</p> <p>Management consulting services</p> <p>Services related to management consulting</p> <p>Technical testing and analysis serves</p> <p>Services incidental to agriculture, hunting and forestry</p> <p>Photographic Services</p> <p>Services incidental to mining</p>	<p>Services incidental to manufacturing</p> <p>Placement and supply of services of personnel</p> <p>Investigation and security</p> <p>Engineering related scientific and technical consulting services</p> <p>Maintenance and repair of equipment</p> <p>Building/cleaning services</p> <p>Convention services</p>
<p>COMMUNICATION SERVICES - Unbound Save as Stipulated in Horizontal Commitments</p>	

Electronic mail	Enhanced/value added facsimile services, including store and forward, store and retrieve
Online information and data base retrieval	Code and protocol conversion
Electronic data interchange (EDI)	Online information and/or data processing (including transaction processing)
AUDIO VISUAL SERVICES- Unbound Save as Stipulated in Horizontal Commitments	
Motion picture and video tape production and distribution services	Radio and Television Services
Motion picture projection services	Radio and Television Transmission
CONSTRUCTION AND RELATED ENGINEERING SERVICES - Unbound Save as Stipulated in Horizontal Commitments	
General construction work for buildings	Installation and assembly work
General construction work for civil engineering	Building completion and finishing work
DISTRIBUTION - Unbound Save as Stipulated in Horizontal Commitments	
Wholesale trade services	Franchising
Retailing services	
EDUCATION SERVICES - Unbound Save as Stipulated in Horizontal Commitments	
Secondary Education Services	Adult Education Services
Higher Education Services	Other Educational Services
ENVIRONMENTAL SERVICES - Unbound Save as Stipulated in Horizontal Commitments	
Sewerage Consultancy Services	Sanitation and Similar Consultancy Services
Refuse Disposal Consultancy Services	Other Consultancy (Cleaning services of exhaust gases, noise abatement services and landscape protection services)
FINANCIAL SERVICES - Unbound Save as Stipulated in Horizontal Commitments	

All Insurance Related Services Direct Life Insurance Non-life Insurance Services Reinsurance and Retrocession Banking and Other Financial Services (excluding insurance) Acceptance of deposits and repayable funds from the public Lending of all types, including, inter alia, consumer credit, mortgage credit, factoring and financing of commercial transactions Money Brokering	All payments and money transmission services, including credit, charge and debit cards, travellers cheques and bank drafts Guarantees and Commitments Trading for own account or for account of customers whether on an exchange in an over-the-counter market or otherwise, the following: i. Money market instruments, cheques, bills, certificates of deposit, etc. ii. Foreign exchange iii. derivative products including but not limited to futures and options iv. exchange rate and interest rate instruments
TOURISM AND TRAVEL RELATED SERVICES - Unbound Save as Stipulated in Horizontal Commitments	
Hotels and Restaurants (including catering) Travel Agencies and Tour Operators Services	Tourist Guide Services
TRANSPORT SERVICES - Unbound Save as Stipulated in Horizontal Commitments	
Road Transport Services Passenger transportation	Freight transportation Maintenance and repair of road transport equipment
OTHER SERVICES NOT INCLUDED ELSEWHERE - Unbound Save as Stipulated in Horizontal Commitments	
Washing, cleaning, drying and labelling	Hairdressing and other services

Source: Lesotho's Schedule of Specific Commitments, GATS/SC/114

As noted, in all the above sectors, Mode 4 is to be interpreted according to the horizontal section, which stipulates that for four (4) expatriate senior executives and specialised skill personnel, automatic entry and work permits will be issued. It therefore means that for any executives or personnel beyond the first four, the entry and work permits will be issued subject to approval, which implies the fulfilment of certain criteria, which have not been specified in the schedule, but would in principle allow the exercise of a labour market text, as foreseen in Section 166(2) of the Labour Code. Lesotho's GATS commitment to a quota of four persons per commercial presence who are not subject to a labour market text is hence more liberal than the applied regime.

In addition, and unlike in the applicable local laws, (although being carried out in practice), training of local staff is required in order to enable the locals to acquire skills and assume specialised roles.

4.4.4. Points to Note When Applying for Work Visas

The review and grant of applications for work permits is done by the Department of Labour. The actual permit however is not issued by the Labour Commissioner. The Commissioner only issues a letter of approval, which the applicant must take to the police station in Maseru, which then issues the permit, after taking the photograph of the applicant and other relevant details.⁴⁹

4.5. MALAWI

4.5.1. Context in Which Mode 4 is Permitted.

The temporary movement of foreigners into Malawi with respect to the supply of services is principally governed by the Immigration Act of 1988 and the Investment Promotion Act of 1991. The main motivation behind this legislation is to increase private sector investment and trade⁵⁰ through the creation of an appropriate environment for both local and foreign players.⁵¹

Generally, Mode 4 is permitted, as long as the foreigner is a holder of a valid permit relevant to the nature of activity they intend to engage in. There are three types of such permits: a Visitors Permit, a Temporary Employment Permit and a Business Resident Permit. These are explained subsequently.

i. Visitors Permit

Section 26 of the Immigration Act creates the Visitors Permit, which allows the holder to enter and reside in Malawi for a short period for purposes of business, tourism or visiting relatives. It is valid for 30 days which may be extended for further 90 days upon payment of the appropriate fees.⁵² Upon expiry of the 90 days, a Temporary Residence Permit that is valid for 6 months is granted, on application. This permit category which explicitly covers travel for business persons would accommodate the typical short term Business Visitors. It is not clear if also persons who receive remuneration from a source within Malawi would be covered by this permit category.

ii. Temporary Employment Permit

Section 25 of the Immigration Act allows a person engaging in an occupation specified by the Minister to obtain a Temporary Employment Permit. This permit is valid for two years. It is renewable for periods of 6 months to 2 years and renewal is dependent on the satisfaction of the Minister that the holder is still engaged in the employment specified in the Permit. It can only be renewed twice.⁵³ The application for renewal must be made three months before the expiry of the current Permit.

iii. Business Residence Permit

Section 24A of the Immigration Act creates the Business Residence Permit. It is issued to persons wishing to reside in Malawi for the purpose of carrying on a business, practicing a profession, or engaging in an occupation for gain, profit, or reward. It is issued to persons who are self-employed, a partner in a

⁴⁹. A Guide to Establishing a Tourism Business in Lesotho.

⁵⁰. Malawi Growth and Development Strategy (MGDS).

⁵¹. Malawi Economic Growth Strategy 2004 (MEGS).

⁵². Department of Immigration, Visitor's Permit/Business Visitor's Permit, <http://www.immigration.gov.mw>

⁵³. <http://www.immigration.gov.mw>.

business, or a proprietor of a business or professional practice. The Permit is valid for five years, and can be renewed for periods of five years at each renewal. The Act is silent on the maximum number of renewals, or total duration of the permit. Applications for renewal must be made three months before the expiry of the current Permit.

4.5.2. Restrictions on Employment of Foreigners

The Statement of Investment Policies, incorporated in the Investment Promotion Act of 1991, grants investors the freedom to employ expatriates according to need. The section on labour practices produced herein verbatim, reads:

“The Government will not interfere in employers' choice of workforce. Further, the Government recognizes that investments may require expertise not available in Malawi. Accordingly, it will continue to make Temporary Employment Permits for expatriate personnel readily available for key positions in investments.”

From the above, it can be deduced that foreign investors can hire foreigners to work in their investments. However, the application form (Form 21) for the Temporary Employment Permit requires the employer of an applicant to justify the employment of a foreigner, and the requirement seems to suggest that a Temporary Employment Permit will only be granted if the Immigration Department is satisfied that there was indeed need for the employee to be sourced from outside Malawi. The employer must show that the position was advertised in Malawi, and if any applications for the position were received from Malawians, these must be attached to the application.

Unlike several other SADC States, there are no legal requirements that foreign employees must mentor or develop the skills of local employees or be replaced by local employees within a specified time period. However, the application form for the Temporary Employment Permit indicates a requirement for localisation of the position to be occupied by an applicant for a Temporary Employment Permit. The form enquires as to whether there will be a Malawian understudy to the applicant, and if not, requires the applicant's employer to propose alternatives for localisation of the position.

4.5.3. Malawi's Mode 4 GATS Commitments

Malawi made both horizontal and sector specific commitments in its GATS schedule as seen below.

Table 8: Malawi's Mode 4 GATS Commitments

HORIZONTAL COMMITMENTS
Unbound except for measures concerning the entry and temporary stay of natural persons employed in management and expert jobs for the implementation of foreign investment.
The employment of such persons shall be agreed upon by the contracting parties and approved by the Ministry of home Affairs.
SECTOR SPECIFIC COMMITMENTS
PROFESSIONAL SERVICES - Unbound Except as Indicated in the Horizontal Section

Accountancy
Medical and Dental Services
Services Provided By Midwives, Physiotherapists, Nurses, and Paramedical Personnel
OTHER BUSINESS SERVICES- Unbound Except as Indicated in the Horizontal Section
Technical Testing and Analysis Services
Services Incidental to Mining, Exploration
CONSTRUCTION AND RELATED ENGINEERING SERVICES- Unbound Except as Indicated in the Horizontal Section
Construction
HEALTH RELATED AND SOCIAL SERVICES- Unbound Except as Indicated in the Horizontal Section
Hospital Services
Other Human Health Services
TOURISM AND TRAVEL RELATED SERVICES- Unbound Except as Indicated in the Horizontal Section
Tourism and Travel Related Services
BANKING SERVICES- Unbound Except as Indicated in the Horizontal Section
Banking Services

Source: Malawi's Schedule of Specific Commitments, GATS/SC/100

In all of the above sectors, Malawi's commitments in Mode 4 are to be in accordance with the horizontal section which stipulates that only persons employed in management and expert jobs for the implementation of foreign investment" are permitted to temporarily enter Malawi to take up employment.

The categories of persons covered by the commitment reflect the policy objectives set out in the Investment Promotion Act with regard to the application of the temporary employment permit. However, while under the applied regime evidence is required that the needed skills cannot be sourced locally, the GATS commitments merely refer to an unspecific government approval of any hiring of foreigners. The commitment does not specify the labour market test that appears to be employed in practice.

4.5.4. Points to Note When Applying for Work Visas

The administration of temporary permits (BRPs, TEPs and Visitor's Permits) in Malawi is the province of the Department of Immigration, which is under the Ministry of Internal Affairs and Public Security.⁵⁴

⁵⁴<http://www.immigration.gov.mw>.

Applications for Temporary Employment Permits are to be accompanied by the applicants CV, copies of advertisements for the position in Malawi, as well as applications received from Malawians. In case there is to be a Malawian understudy, details including the name and qualifications of the understudy are to be attached.

4.6. MAURITIUS

4.6.1. Context in Which Mode 4 is Permitted

Mode 4 in Mauritius is regulated principally by the Immigration Act⁵⁵ and the Employment (Non-Citizens) (Restriction) Act.⁵⁶ These laws provide for the entry of foreigners into Mauritius, and for the employment and engagement of the same in economic activities. Another legislation to note is the Investment Promotion Act, which regulates the registration of foreign employees, professionals and service providers in Mauritius. The Non-Citizens (Employment Restriction) Act stipulates that no foreigner may be employed except after they have been issued with a valid work permit or occupation permit, specifying the nature of work they are to do, and their intended employer. The relevant permits are discussed below.

i. The Occupation Permit

Section 9A of the Immigration Act provides that any investor, self-employed non-citizen, or professional, registered with the Board of Investment, shall, through the Board of Investment, apply to the immigration officer for an occupation permit authorising the investor, self-employed non-citizen or professional, as the case may be, to work and live and -

- (a) in the case of the investor or self-employed non-citizen, to carry on any occupation in Mauritius for reward or profit;
- (b) in the case of the professional, to take up employment in Mauritius;

The Occupation Permit is valid for three years, in the case of investors, self-employed non-citizens, and for the duration of the contract in the case of professionals, as long as the contract is not more than three years long or where the contract is longer than three years, the Permit is issued for a period of three years, and may be renewed.

After three years and subject to the annual turnover of MUR 600,000 (about USD 18,656) being met, the self-employed person can apply for a renewal of the Permit. If the annual turnover is over MUR 3 million (about USD 93,278) for three consecutive years, the self-employed is eligible to apply for the Permanent Residence Permit, valid for ten years. Application is made to the Prime Minister's Office. The second application should be submitted at least 15 days prior to expiry of the permit. After three years and subject to the annual turnover of MUR 4 million (about USD 133,000) being met, the investor may apply for a renewal of the Permit.

ii. The Short Term Occupation Permit

⁵⁵. Act 13 of 1970, as amended.

⁵⁶. Act 15 of 1970, as amended.

The Immigration Act also provides for the Short Term Occupation permit⁵⁷ which is issued under similar terms as the Occupation Permit, but is only valid for nine months, and can be extended once for not more than three months. This permit may fit into the Mode 4 category for Independent Professionals and Contractual Service Suppliers, and also address the need of installers and servicers.

iii. The Work Permit

The work permit is defined in relation to a person seeking employment and is issued by the Minister. The Non-Citizens (Employment Restriction) Act specifies that work permits do not apply to people applying for or issued with Occupation Permits under the Immigration Act.⁵⁸

iv. Visitors Entering for Business

- (a) A Business Visa will be granted for a total of 120 days in a calendar year, and the stay during each trip should not exceed 90 days;
- (b) Bona fide business-persons will be granted a multiple-entry Business Visa valid for a period of two years at the rate of 120 days in a calendar year and their stay during each trip should not exceed 90 days, provided they submit to the Passport and Immigration Office the necessary evidence that they have business dealings in Mauritius;
- (c) Tourist visa will be granted for a maximum period of six months in a calendar year on a case to case basis, subject to immigration requirements.
- (d) In practice, admittance under this section is done at the port of entry, except for countries whose citizens require a visa prior to travel.

4.6.2. Restrictions on Employment of Foreigners

There are no specifications in the law as to the prior employment of the foreign employee or on the number of foreigners that can be employed by an enterprise. There is also no requirement for a needs assessment and there are no requirements for proficiency tests to be done by a prospective foreign employee. There are also no requirements to mentor local employees by foreign employees.

However the application for a work permit is to be addressed to the Minister “who in his absolute discretion” can grant or refuse the permit subject to such conditions as he may think fit.

4.6.3. Mauritius’ Mode 4 GATS Commitments

Mauritius made both sector specific and horizontal commitments at the WTO. The table below shows the sectors and subsectors in which Mauritius made commitments in GATS. The table first shows the horizontal commitments and then lists the different subsectors committed, showing that for each subsector, the Mode 4 commitments on market access and national treatment are to be as stipulated in the horizontal section.

⁵⁷. Section 9C of the Immigration Act.

⁵⁸. Section 4(3) of the Non-Citizens (Employment Restriction) Act.

Table 9: Mauritius’ Mode 4 GATS Commitments

HORIZONTAL COMMITMENTS	
Market Access – Unbound except for measures affecting the entry and temporary stay of highly qualified natural persons and will be governed by the Passport Act of 1969 and the Immigration Act of 1973.	National Treatment – Unbound except for measures concerning the categories of natural persons referred to in the market access column and will be governed by the Income Tax Act and the Non-Citizens Employment Restrictions Act 1970.
SECTOR SPECIFIC COMMITMENTS	
TELECOMMUNICATIONS SERVICES – Unbound Save as Stipulated in Horizontal Commitments	
Telephone and Facsimile Telex Leased-Circuits Data Transmission	Packet-Switching Data Transmission Telegraphy Radio Maritime
TOURISM SERVICES - Unbound Save as Stipulated in Horizontal Commitments	
Hotel Operators Restaurant Operators Travel Agencies Tour Operators	Tourist guides Services Tourist Transport Operation (Car Rental) Yacht Chartering and Cruising Services Tourist Duty-Free Shops
SUPPLEMENT ONE – 11 th April 1997	
TELECOMMUNICATION SERVICES - Unbound Save as Stipulated in Horizontal Commitments	
<ul style="list-style-type: none"> a. Voice telephone services b. Packet switched data transmission services c. Circuit switched data transmission services d. Telex services e. Telegraph services f. Private leased circuit services g. Facsimile services 	<ul style="list-style-type: none"> h. Others <ul style="list-style-type: none"> i. Pagers ii. Private Mobile Radio iii. Equipment rental services iv. Equipment sales services v. Equipment maintenance services Mobile services (satellite based)

SUPPLEMENT TWO – 26th February 1998	
<u>Head Note:</u> The commitments indicated below are subject to an economic needs test.	
INSURANCE AND INSURANCE RELATED SERVICES - Unbound Save as Stipulated in Horizontal Commitments	
Direct Insurance, Life and non-life Re-insurance and retrocession Insurance Intermediation comprising Agents and Brokers	Services auxiliary to insurance, such as consultancy, actuarial, risk assessment and claim settlement services.
BANKING AND OTHER FINANCIAL SERVICES (excluding insurance) - Unbound Save as Stipulated in Horizontal Commitments	
Acceptance of deposits Lending of all types (excluding factoring and specialised and structured products) All payment and money transmission services, including credit, charge and debit cards, travellers' cheques and bankers drafts. Guarantees and Commitments Trading for own account or for account of customers in the following: <ul style="list-style-type: none"> - Money market instruments (including cheques, bills, certificates of deposits) - Transferable securities - Foreign exchange 	Participation in issues of all kinds of securities, including underwriting and placement as agent (whether publicly or privately) and provision of services related to such issues Settlement and Clearing services for the following: <ul style="list-style-type: none"> i. Inter-bank transactions ii. Securities Provision and transfer of financial information, and financial data processing and related software by suppliers of other financial services.

Source: *Mauritius's Schedule of Specific Commitments, GATS/SC/55, GATS/SC/55 Suppl. and GATS/SC/55 Suppl.2*

The Mode 4 regime in GATS grants access to highly qualified persons. As expressed in the commitment, the entry appears not to be limited to persons employed by a foreign service supplier and could cover all types of categories, including Contract Service Suppliers and Independent Professionals. There is no specific reference to highly qualified personnel in domestic law.

Mauritius, like South Africa submitted supplements to its commitments which shows that Mauritius is paying attention to ensure that it updates its commitments in line with the changes in its economy, a characteristic that is not true of many African States.

4.6.4. Mauritius' Initial SADC Offer

In early June 2013, Mauritius submitted an initial offer in the context of the SADC negotiations on trade in Services. The offer greatly clarifies and improves upon the dated GATS commitments. The offer comprises

Business Visitors (with clearly specified subcategories for service sellers, persons establishing a commercial presence, persons participating in business meetings, as well as Installers and Servicicers. The offer further encompasses “employees of foreign service suppliers” in the subcategories of managers, executives and specialists (subject to a training requirement), as well as Contractual Services Suppliers and Independent Professionals. All categories are well defined and contain time frames for admission. The categories flesh out the different permit categories in a very useful way that allows foreign investors and service suppliers to identify clearly under what circumstances and parameters entry for the supply of service will be granted into Mauritius.

4.6.5. Points to Note When Applying for Work Visas

Immigration issues in Mauritius are handled by the Passport and Immigration Office, which is a branch of the Mauritius Police Force and functions under the command of the Commissioner of Police.⁵⁹

An applicant applying for an Occupation Permit has to be physically present in Mauritius at time of application.

Investors, Self Employed persons and professionals have to request for a business visa on their arrival into the country for a minimum period of one month. Holders of passports of countries requiring a visa to enter Mauritius should apply and obtain the business visa prior to undertaking their travel. At time of submission of application, the business visa should be valid for at least fifteen days.

4.7. MOZAMBIQUE

4.7.1 Context in Which Mode 4 is Permitted

Mode 4 in Mozambique is principally governed by the 2004 Constitution of the Republic, the Immigration Law No. 5 of 1993 and the Labour Law No. 23 of 2007. Other legal resources are Decree 38 of 2000, which regulates the issuance of visas at the port of entry, and Decree 26 of 1999, which regulates work visas.

Mode 4 in Mozambique is permitted, as long as the foreigner is a holder of a valid visa relevant to the nature of activity they intend to engage in. However, without obtaining residency, one can only stay in Mozambique for short periods of time, with the longest possible one being 90 days.⁶⁰ There are two main types of work related visas: A Business Visa and a Work Visa as explained below. This section will also review the Non-Permanent Residence Permit and the Temporary Residence Permit as far as they relate to Mode 4.

i. Business Visa

A business visa is issued to a foreign citizen who seeks to enter Mozambique in connection with a planned or existing business or economic activity. This visa must be applied for at an embassy or consulate before travelling to Mozambique and is valid for 30 days, though it can be renewed twice for a further 30 days, to a maximum total validity of 90 days. Applications for renewal are made within Mozambique at the Immigration Services, and must be made before the Visa expires.⁶¹ Under Article 33 of the Labour Law,

⁵⁹. Passport and Immigration Office Website; <http://passport.gov.mu>.

⁶⁰. The only way to stay longer is to apply for residency after the relevant visa has been granted and the foreigner is within the country.

⁶¹. Article 14 of the Immigration Law.

persons entering Mozambique on a Business Visa may not be employed. This visa fits into the Mode 4 categorisation for Business Visitors.

ii. Work Visa

A work visa may be granted to a foreigner who seeks to enter Mozambique to render services to a third party in either a paid, or unpaid capacity. As with Business visas, the application for a work visa is done outside Mozambique, usually at an embassy or consulate, which first consults the Immigration Service in Mozambique before the issuing such a visa. This Visa is valid for 30 days, and may be renewed for a total of 60 days. Comparatively, the work visa issued by Mozambique is for a much shorter period than those issued by other SADC jurisdictions. The parameters of the visa would appear to apply to persons rendering services (that is Contractual Service Suppliers or Independent Professionals,) but does not cover longer term employees of foreign service suppliers such as Intra-Corporate Transferees.

iii. Resident Visas

Residency is usually is not related to Mode 4. However, in the case of Mozambique, the validity period for the Business and Work Visas is too short to allow viable engagement in an economic activity. This can be made up for by applying for residency (also referred to as the DIRE). There are three types of residency available to foreigners:

- Non-Permanent Residence;
- Temporary Residence; and
- Permanent Residence.

For the purposes of this Study, only the first two categories are relevant.

Non-Permanent Residence is granted to persons intending to remain in Mozambique for periods of 90 days to five years, while Temporary Residence is granted to foreigners who have been in Mozambique for more than five years. Both types of residency are granted in incremental periods of one year⁶² and accord the holder most of the same rights and obligations as a citizen of Mozambique, including economic rights.⁶³ Residency permits can be extended for one year if it is demonstrated that the reasons for granting the residency continue to exist.⁶⁴

Residency is applied for while the applicant is in Mozambique, and the applicant must be the holder of a valid Residency Authorisation,⁶⁵ which is usually a Residency Visa, valid for 30 to 90 days, or a Work Visa. In some cases, the authorisation of a work contract can also suffice.⁶⁶

⁶². Article 21, Immigration Law, and Article 28 of the Immigration Regulation.

⁶³. Article 4, Immigration Law, and Article 31 of the Immigration Regulation.

⁶⁴. Article 21 of the Immigration Law, and Article 28 of the Immigration Regulation.

⁶⁵. Article 20 of the Immigration Law.

⁶⁶. While a work permit is granted to people who are shareholders in a company and who therefore do not need to submit an employment contract, authorization of a work contract is for those foreigners who are employed in Mozambique. The authorization of a work contract cannot be granted for a period exceeding two years, but can be granted for a period equal to the contract period.

Since residency (Non-Permanent or Temporary) accords the holder more or less the same economic rights as citizens, it is then easy for the holder to engage in business, whether as an investor or as an employee, for extended periods of time.

In sum, of all the above permits issued by Mozambique, the one that most fits into the Mode 4 categorisation is the Business Visa which addresses Business Visitors, otherwise other persons who fall under the other categories of WTO Mode 4 categories would require work and residence visa if the intended stay is beyond 30days.

4.7.2. Restrictions on Employment of Foreigners

Foreign employers may apply to the Minister of Labour, or a delegated agency, for authorisation to employ a foreigner.⁶⁷ There is considerable restriction on the numbers of foreign employees that can be employed. The numbers that may be employed are restricted in the following proportions:

- a) in large firms, up to 5% of the total number of workers;
- b) in medium firms, up to 8% of the total number of workers;
- c) in small firms, up to 10% of the total number of workers.

Exception is made in respect to investment projects approved by the Government for which the number of foreign workers can be greater or less than the quota indicated above, in which case no authorisation is required.

In addition, for a foreigner to fall within the above quota, he will only be hired if he has the academic or professional qualifications necessary for the position and there are no Mozambican citizens with such qualifications or their number is insufficient.

To be able to exceed the above quotas, there has to be an authorisation for the same from the Government of Mozambique. This is also true in cases of “specialised technical assistance” including such contexts as employment in NGOs, scientific research and teaching, among others.

Another exception exists for cases where the prospective employee is hired for a short-term assignment that is, for a period up to 30 days, consecutive or interspersed. Under the terms of Decree 55/2008, foreigners may work in Mozambique for up to 30 days (consecutive or interspersed) per calendar year by means of communication from the Mozambican employer (understood here to mean a Mozambican company or the foreign parent of a Mozambican company) to the Minister of Labour. Such 30-day period can be extended, for up to two further 30-day periods, on application to the Minister of Labour. The extension is at the discretion of the Minister of Labour. This exception caters to Contractual Service Suppliers and additionally to a category of natural persons for which only few countries have made commitments, namely short term transfers and visits of employees of a parent company to a local subsidiary or branch.

Neither the Immigration Law nor the Labour Law or Regulations thereunder create the requirement for proficiency tests and there are no legal requirements that foreign employees must mentor or develop the skills of local employees or be replaced by local employees within a specified time period.

⁶⁷Article 26 Para 1 of the Labour Law

4.7.3. Mozambique's Mode 4 GATS Commitments

Mozambique only made sector specific commitments in the Banking sector, as seen in the table 10 below. There are no horizontal commitments.

Table 10: Mozambique's Mode 4 GATS Commitments

Sub sector	Limitations on Market Access	Limitations on National Treatment
FINANCIAL SERVICES		
Banking and other Financial Services (excl. Insurance)	Mode 4- Work Permit required	Mode 4 – None

Source: Mozambique Schedule of Specific Commitments, GATS/SC/58

Mozambique's Mode 4 commitments extend only to the banking sector and are not confined to any skill categories. The Commitments do not take into account the quotas for the employment of foreign natural persons contained in the national laws. The mention of a work permit in itself does not specify any restriction on market access.

4.7.4. Points to Note When Applying for Work Visas

The Ministry of the Interior is the government institution responsible for immigration-related issues. Provincial Immigration Services (Serviços Provinciais de Migração) are addressed by the local representatives of the Ministry with responsibility for immigration-related matters. Visas can be issued by the Ministry of Foreign Affairs (Ministério de Negócios Estrangeiros), the Immigration Service (Serviços de Migração) or by Mozambican Embassies, High Commissions or Consulates.

When applying for a visa the foreigner must be able to demonstrate that he or she has a valid reason for the application, means to guarantee subsistence in Mozambique, and means to ensure their return or outward journey from Mozambique.

By their nature visas are issued outside Mozambique, and in the majority of cases while the Immigration Services in Mozambique are able to renew or extend the time period for which visas apply, they cannot issue visas. Therefore when entering Mozambique it is essential that the entrant does so on the correct type of visa, for it is not possible for example to enter Mozambique on a tourism or border visa and apply for a work or residence visa after entry into the country. In this case the applicant must leave the country, apply for the new type of visa and then re-enter the country.

Whereas visas in general can only be issued outside Mozambique by embassies and consulates, residence authorisation can only be issued within Mozambique.⁶⁸

It is important to note that all application documents submitted are to be in Portuguese, or at least officially translated into Portuguese.

⁶⁸. The Legal Framework for Employment and Immigration in Mozambique, supra.

4.8. NAMIBIA

4.8.1. Context in Which Mode 4 is Permitted

Generally, no one is permitted to provide temporary services in Namibia for the purpose of employment or conducting a business or carrying on a profession or occupation, unless such person is in possession of an employment permit or a business visa. These are discussed below in detail.

i. Business Visa

A business visa is required for a person visiting Namibia in any of the following instances:

- Looking for prospects to set up formal business;
- Exploration for business opportunities
- Business people attending meetings at branches or subsidiaries;
- Official government visits;
- Attending conferences, corporate events (not work) and meetings for which no remuneration is received;
- Attending short training courses (not more than 90 days), sports events, expositions and trade fairs.

It is valid for a period not exceeding 90 days per annum. The 90 days per annum refers to the day of first entry into Namibia. This visa fits squarely into the Mode 4 categorisation for business visitors.

ii. Employment Permits

Any person who intends to enter or reside in Namibia for the purpose of employment is required to have a valid employment permit prior to entering the country, if the duration/period of stay will exceed 3 months. Employment Permits are issued to persons for the purpose of entering or continuing in any employment or conducting any business or carrying on any profession or occupation in Namibia during such period and subject to such conditions as may be imposed and stated in the said permit. The Permit is granted to the individual prior to entering the country.

Whereas employment permits can be obtained by independent professionals, contractual service suppliers, inter alia, the definition accorded to it in the law does not fit squarely into any of the Mode 4 categorizations. The only permit that does so is the business visa, as discussed above.

4.8.2. Restrictions on Employment of Foreigners

There are no stringent restrictions on the employment of foreigners. The Foreign Investment Act stipulates that a foreign national may invest and engage in any business activity in Namibia which any Namibian may undertake and for the purposes of any law governing the establishment and carrying on of any business

activity or the taxation of the income, or any other aspect, of any business activity, a foreign national shall be in no different position than any Namibian.⁶⁹

The Namibian Qualification Authority (NQA) is responsible for evaluation of foreign qualifications and it advises the Ministry of Home Affairs and Immigration in this regard.

4.8.3. Namibia Mode 4 GATS Commitments

Namibia only made commitments in two sectors: Business Services and Tourism and Travel Related Services. Even then, the commitments in these sectors are very limited to only a few sub sectors, as seen below.

Table 11: Namibia's Mode 4 GATS Commitments

HORIZONTAL COMMITMENTS		
The entry and residence of foreign natural persons is to be subject to Namibia's Immigrations Control Act of 1993 and labour laws. The employment of foreign persons for implementation of foreign investment shall be agreed upon by the contracting parties and be subject to approval by the Namibian Government and such personnel shall be employed in management and expert jobs only.		
Sub Sector	Limitations on Market Access	Limitations on National Treatment
BUSINESS SERVICES		
Related scientific and technical consulting services: off-shore oil and gas exploration	Mode 4- None	Mode 4 – None
TOURISM AND TRAVEL RELATED SERVICES		
Hotels and Restaurants	Mode 4 - None	Mode 4 - None
Travel Agencies and Tour Operators		

Source: Namibia Schedule of Specific Commitments, GATS/SC/60

The table shows that Namibia committed to have full market access in the business and tourism services sectors and no restrictions as far as national treatment is concerned. It is interesting to note that Mode 4 here is tied to investment (Mode 3) which implies that if the service provider does not have investments, no entry is guaranteed in the GATS commitment.

The horizontal commitment also extends only to a limited category of higher skilled persons, namely, foreign managers and experts, and applies only to employment in the context of foreign investment, unlike the applied regime. This way, GATS excludes Business Visitors, Contractual Service Suppliers and Independent Professionals, further, contrary to the applied regime.

Namibia's applied regime is more liberal than the GATS commitments, and applies to any sector of the economy, and not only the three subsectors specified in the Schedule. As such, Namibia could easily make well defined commitments on Business Visitors. Independent Professionals and Contractual Service

⁶⁹. S. 3 (2) Foreign Investment Act.

Suppliers would have to apply for an employment permit (even if their stay in Namibia would not constitute formal employment in Namibia, but the supply of a service).

4.8.4. Points to Note When Applying for Work Visas

The Immigration Selection Board is the body responsible for considering applications for permits. On approval, the Board authorises the Chief of Immigration to issue the relevant permit.⁷⁰

The Applicant must satisfy *inter alia* that applicant has the relevant qualifications, education and training or experience as is likely to render him efficient in the employment, business, profession or occupation; and that the employment, business, profession or occupation concerned is not likely to be one in which a sufficient number of persons are already engaged in Namibia to meet the requirements of the inhabitants of Namibia.⁷¹

The Board may require the applicant to deposit with the Chief of Immigration an amount fixed by the Board or to lodge with the Chief of Immigration a guarantee for the amount concerned which shall be refunded or cancelled on the applicant's departure from Namibia.

4.9. SEYCHELLES

4.9.1. Context in Which Mode 4 is Permitted

Mode 4 in Seychelles is governed principally by the Immigration Decree, which at the time of this Study is in the final stages of the amendment process. In this Decree, one specific permit is issued to persons seeking to provide temporary services in Seychelles – the Gainful Occupation Permit. In practice, there is also the ITZ Work Permit. These are discussed subsequently.

i. Gainful Occupation Permit

Foreigners wishing to work either on a self-employed basis and those employed by other firms or companies must obtain a Gainful Occupation Permit, (GOP).⁷² It is also granted to visitors who wish to stay longer than twelve months, and cannot prove that they have enough money to support themselves. Such visitors can only stay on obtaining this Permit which allows a visitor to have a job with pay.⁷³

The application for a GOP must be submitted at least 10 weeks before the person is supposed to begin working by the sponsoring company or employer. The person must not enter the country to start working before the GOP is issued. Self-employed persons may apply for a GOP after arriving in the country if their plan has first been approved by the Seychelles Investment Bureau.

ii. ITZ Work Permit

People who would like to work in the International Trade Zone (ITZ) must get a special work permit for that. This permit allows non-Seychellois to enter and stay in the country for working in an International Trade Zone. The ITZ operator applies for the ITZ work permit through the Seychelles International Business

⁷⁰. S. 25 Immigration Act.

⁷¹. S. 27 (2) Immigration Act.

⁷². S. 17 Immigration Decree.

⁷³. <http://www.seychelles.org>.

Authority (SIBA). Non-Seychellois people are not permitted to enter the country as tourists with the purpose of working in the ITZ.

4.9.2. Restrictions on Employment of Foreigners

S. 17:3 of the Immigration Decree requires that for foreigners to be granted an Occupational Permit, consideration will be given inter alia, to the professional or technical qualifications of the applicant, the availability of the services of persons already in Seychelles, the protection of local interests, and the economic and social benefit that the applicant may bring to Seychelles or enhance by his presence.

4.9.3. Seychelles' GATS Commitments

Seychelles is not a Member of the WTO. It however made its accession application on 31st May 1995. On 10 July 2012, Members reviewed the latest developments of Seychelles' accession to the WTO and commended Seychelles for the considerable progress in its market access negotiations.

4.9.4. Seychelles' Initial Services Offer to SADC

In May 2013, Seychelles submitted its initial offer in the context of the SADC trade in services negotiations. The offer encompasses the key categories of Business Visitors, Intra Corporate Transferees (Managers Executives, and Specialists), as well as Contractual Service Suppliers and Independent Professionals. All categories are clearly defined and contain timeframes for the periods of stay (90 days for Business Visitors and 180 days for Intra Corporate Transferees, Contractual Service Providers and Independent Professionals). The timeframe for Intra Corporate Transferees is comparatively short. The offered commitments are neither subject to a labour market text, nor do they impose any training or mentoring requirements on foreign companies.

4.9.5. Points to Note When Applying for Work Visas

The Gainful Occupation Permit is issued by the Immigration Division, Department of Internal Affairs, with approval from the Department of Employment. Applications are submitted at least ten weeks before the employee is due to start work, and the applicant is not to enter Seychelles before obtaining the GOP. In considering an application for a Gainful Occupation Permit, the following are taken into account:

- a) the character, reputation and health of the prospective employee and where relevant, any member of his/her household to be endorsed on the permit;
- b) the professional or technical qualification of the person to be employed;
- c) the availability of the services of persons already exist in Seychelles;
- d) the protection of local interest;
- e) the economic and social benefit which the applicant/ prospective employee may bring to Seychelles or enhance by his presence.
- f) Proof of Seychelles Investment Bureau approval for the project in the case of a person starting a business.

Once the employer has secured a GOP for prospective employees and the employee has entered the country, there are some requirements that need to be fulfilled within one month of entry:

- A bank guarantee or security bond from a Seychelles bank for an amount that will be determined according to the country of origin of the employee
- A group security bond or bank guarantee, which may be approved upon written request
- A contract for the employee that has been attested by the Employment Department

Self-employed people may apply for a GOP after arriving in the country if their plan has first been approved by the Seychelles Investment Bureau.⁷⁴

4.10. REPUBLIC OF SOUTH AFRICA

4.10.1. Context in Which Mode 4 is Permitted

Mode 4 in South Africa (SA) is governed by the Immigration Act No. 13 of 2011 which permits foreigners to supply services temporarily into SA. From the onset, it is important to note the definition of work by the Act, to include a business, commercial or remunerative activities within SA and to exclude:⁷⁵

- work on the basis of a diplomatic or treaty permit
- work for a foreign employer pursuant to a contract which only partially calls for activities in RSA,
- work as a business or profession mainly based outside RSA but requiring activities within RSA.

The foreign service suppliers permitted to supply services in SA are principally issued temporary residence permits that include; business permits, work permits, corporate permits and exchange permits. These are explained in detail subsequently.

i. Business Permits

These are granted to foreigners and their immediate family members who wish to establish or invest in a business in SA in which the applicant may be employed. They are issued on the following basis:⁷⁶

- i. Where the foreigner invests a prescribed financial or capital contribution in a business as part of the intended book value of the business:
- ii. A chartered accountant certifies the applicant's compliance with the legal provisions.
- iii. The foreigner undertakes to comply with all laws administered by the South African Revenue Service.

A business permit may be issued for more than one entry if multiple entries are needed over a period of time necessary for the applicant to conduct the business in question effectively.⁷⁷

⁷⁴. <http://www.seychelles.org>.

⁷⁵. S.1 of the Immigration Act.

⁷⁶. S. 15 of the Immigration Act.

ii. Temporary Work Permits

Work permits are issued only to foreigners where South African citizens with the relevant skills are not available for appointment. There are several categories of temporary work permits, viz: General Work Permits, Quota Work Permits, Exceptional Skills Permits and Intra-company transfer work permits.

a. General Work Permits

Are issued to foreigners holding general qualifications but who intend to work in SA. The criteria for granting these permits are very stringent, with the guiding factor being that there should be no South Africans available to carry out the work sought.

b. Quota Work Permits

These are issued to a pre-determined number of employees needed in a particular occupational category as determined by the Minister of Home Affairs. The schedule of quotas is released once a year and this information is released through publication of the Government Gazette as well as Departmental website.

The quota work permit remains valid for as long as the permit holder is employed within the area of expertise and permit holders are required to report to the Department of Home Affairs on an annual basis in order to confirm that they are still employed in their designated professions.⁷⁸ Quota work permit documents are issued for a five year period but are automatically renewed.

c. Exceptional Skills Work Permits

These permits are issued to applicants in possession of exceptional skills or qualifications that are scarce in South Africa.⁷⁹ The Minister of Home Affairs consults the Minister of Labour and the Minister of Trade and Industry to identify areas of scarce, critical and special skills required by the South African economy each year. The list of the professional categories and occupational classes is then identified and work permits are made available for application. These positions are available to be filled by formally qualified foreigners who have a minimum of five years practical experience. This permit may be issued for a period not exceeding three years at a time.⁸⁰

d. Intra Company Work Permit

Foreigners being transferred by their own company to an affiliate company in South Africa can apply for Intra-Company Transfer Work Permits. Holders of these permits may only work for the employer referred to therein and in accordance with the job description and other elements contemplated in the permit.⁸¹ This permit is issued for a period not exceeding two years. This category falls squarely within the Mode 4 categorisation of Intra Corporate Transferees.

⁷⁷. S. 15 (5) Immigration Act.

⁷⁸. Reg 16 (3).

⁷⁹. Reg 16 (6) of the Immigration Regulations.

⁸⁰. Reg. 16 (7).

⁸¹. S. 19 (6) of the Immigration Act.

iii. Corporate Permits

Corporate Permits are issued to a corporate applicant to employ foreigners who may wish to conduct work for such a corporate applicant.⁸² A corporate applicant is defined as a juristic person established under the laws of SA or of a foreign country which conducts business that is not-for-gain, in agricultural or commercial activities within the SA.⁸³ The validity period for such permits is determined upon application.⁸⁴

A work permit issued to a person employed by the holder of a corporate permit shall:

- a) In the case of a seasonal worker, be limited to a maximum period of 12 months.
- b) In the case of a worker employed in terms of a bilateral agreement, be subject to the terms and conditions determined by the relevant agreement.⁸⁵

iv. Exchange Permits

Foreigners below 25 years who have received an offer to conduct work for no longer than one year or foreigners wishing to participate in cultural, economic or social exchange programmes administered by an organ of the State or a public higher educational institution in conjunction with an organ of a foreign state may be issued an exchange permit on application.⁸⁶ Holders of an exchange permit can only perform work for which the permit is issued.⁸⁷ The duration of this Permit depends on the length of the programme for which it is issued but does not usually exceed 12 months. Exchange permits cannot be renewed or extended.

v. Crew Permits

Foreigners who are members of the crew of a ship can obtain a Crew Permit for maximum of three months at time to live in SA.⁸⁸ These permits, however, do not permit the holders to work. The permit is granted on condition that the holder accepts to refrain from moving beyond a pre-determined area and that they are not going to work. Applications for the permit can be made from any port of entry in SA.

4.10.2. Restrictions on Employment of Foreigners

The persons that are permitted to supply services in SA are generally skilled foreigners. The unskilled or semi-skilled foreigners are generally not permitted to supply services in SA. There are quota restrictions on the number and type of foreigners that are permitted to supply services for each year. This is seen for example in the Quota Permits, which are issued to a pre-determined number of employees needed in a particular occupational category as determined by the Minister of Home Affairs.

There's no requirement for proficiency tests in the law, but the qualifications of any professional applicant must be subjected to the South African Quality Assurance Agency to assess their weight. Further, in practice, there are skills tests for the mining industry that are conducted by the mining companies.

⁸²S. 21 Immigration Act

⁸³S. 1 of the Immigration Act.

⁸⁴ S. 21 Immigration Act.

⁸⁵Reg. 18(7)

⁸⁶S. 22 of the Immigration Act

⁸⁷S. 22 (b) (ii) Immigration Act

⁸⁸S. 16 (1) Immigration Act.

4.10.3. South Africa's Mode 4 GATS Commitments

The table below shows the sectors and subsectors in which SA made commitments in GATS. The table first shows the horizontal commitments and then lists the different subsectors committed, showing that for each subsector, the Mode 4 commitments on market access and national treatment are to be as stipulated in the horizontal section.

Table 12: South Africa's Mode 4 GATS Commitments

HORIZONTAL COMMITMENTS
<p>Market access is unbound, except for the temporary presence for a period of up to three years, save if specified, for the following categories of persons, without the need for an economic needs test:</p> <p>Services Sales persons</p> <p>Natural persons not based in South Africa and acquiring no remuneration from a source located within South Africa, who are engaged in activities related to representing a services provider for the purpose of negotiating for the sale of the services of that provider, without engaging in making direct sales to the general public or supplying services. Temporary presence for services sales persons is limited to a ninety-day period.</p> <p>Intra-corporate Transferees</p> <p>Natural persons of the following categories who have been employed by a juridical person that provides services within South Africa through a branch, subsidiary, or affiliate established in South Africa and who have been in the prior employ of the juridical person outside South Africa for a period of not less than one year immediately preceding the date of application for admission:</p> <p>Executives</p> <p>Natural persons within the organisation who primarily direct the management of the organisation or establish goals and policies for the organisation or a major component or function of the organisation, exercise wide latitude in decision-making, and receive only general supervision or direction from higher-level executives, the board of directors, or stockholders of the business.</p> <p>Managers</p> <p>Natural persons within an organisation who primarily direct the organisation, or a department or subdivision of the organisation, supervise and control the work of other supervisory, professional or managerial employees, have the authority to hire and fire or recommend hiring, firing, or other personnel actions and exercise discretionary authority over day-to-day operations at a senior level.</p> <p>Specialists</p> <p>Natural persons within an organisation who possess knowledge at an advanced level of continued expertise and who possess proprietary knowledge of the organisation's product, service, research equipment, techniques, or management.</p> <p>Professionals</p> <p>Natural persons who are engaged, as part of a services contract negotiated by a juridical person of another Member in the activity at a professional level in a profession set out in Part II, provided such persons possess the necessary academic credentials and professional qualifications, which have been duly</p>

<p>recognised, where appropriate, by the professional association in South Africa.</p> <p>Personnel Engaged in Establishment</p> <p>Natural persons who have been employed by a juridical person for a period of longer than one year immediately preceding the date of application for admission and who occupy a managerial or executive position and are entering South Africa for the purpose of establishing a commercial presence on behalf of the juridical person.</p>	
<p>SECTOR SPECIFIC COMMITMENTS</p>	
<p>BUSINESS SERVICES - Unbound Save as Stipulated in Horizontal Commitments</p>	
<p>Professional Services</p> <p>Legal Services (Advisory services in foreign and International law only)</p> <p>Legal Services (Domestic Law only)</p> <p>Auditing</p> <p>Taxation services (excluding legal services)</p> <p>Architectural services</p> <p>Engineering services</p>	<p>Integrated Engineering services</p> <p>i. Urban planning services</p> <p>ii. Landscape architectural services</p> <p>Medical and Dental Services</p> <p>Veterinary services</p> <p>Services Provided By: i. Midwives and nurses</p> <p>ii. Physiotherapists and Paramedical Personnel</p>
<p>COMPUTER AND RELATED SERVICES- Unbound Save as Stipulated in Horizontal Commitments</p>	
<p>Consultancy services related to the installation of computer hardware</p> <p>Software implementation services</p> <p>Data Processing Services</p>	<p>Data base services</p> <p>Maintenance and repair services of office machinery and equipment including computers</p>
<p>REAL ESTATE SERVICES - Unbound Save as Stipulated in Horizontal Commitments</p>	
<p>Involving own or leased property</p>	<p>On a fee or contracting basis</p>
<p>RENTAL/ LEASING SERVICES WITHOUT OPERATORS - Unbound Save as Stipulated in Horizontal Commitments</p>	
<p>Relating to ships</p> <p>Relating to aircraft</p>	<p>Relating to other transport equipment</p> <p>Relating to other machinery and equipment</p>
<p>OTHER BUSINESS SERVICES - Unbound Save as Stipulated in Horizontal Commitments</p>	
<p>Market research and public opinion polling services</p> <p>Management consulting services</p>	<p>Services incidental to manufacturing</p> <p>Placement and supply services of personnel</p>

Services related to management consulting	Investigation and security
Technical testing and analysis services	Engineering related scientific and technical consulting services
Services incidental to agriculture, hunting and forestry	Maintenance and repair of equipment
Services incidental to Mining	Building cleaning services
	Photographic services
	Convention services
COMMUNICATION SERVICES - Unbound Save as Stipulated in Horizontal Commitments	
Courier Services	Electronic data interchange
Telecommunication services	Enhanced/value-added facsimile services, including store and forward, store and retrieve
Electronic Mail	Code and protocol conversion
Voice mail	Online information and or data processing (including transaction processing)
On-line information and data base retrieval.	
CONSTRUCTION AND RELATED ENGINEERING SERVICES - Unbound Save as Stipulated in Horizontal Commitments	
General Construction Work for buildings	Installation and assembly work
General construction work for civil engineering	Building completion and finishing work
DISTRIBUTION SERVICES - Unbound Save as Stipulated in Horizontal Commitments	
Wholesale trade services	Franchising
Retailing services	
ENVIRONMENTAL SERVICES - Unbound Save as Stipulated in Horizontal Commitments	
Sewage services	Sanitation and similar services
Refuse disposal services	Other (Cleaning services of exhaust gases, noise abatement services and landscape protection services)
FINANCIAL SERVICES - Unbound Save as Stipulated in Horizontal Commitments	
All Insurance and insurance related services	iv. All payments and money transmission services, including credit charge and debit cards, travellers cheques and bank drafts
i. Direct life insurance	
ii. Direct non-life insurance	v. Guarantees and commitments

<p>iii. Reinsurance</p> <p>Banking and other financial services (Excluding Insurance)</p> <p>i. Acceptance of deposits and other repayable funds from the public</p> <p>ii. Lending of all types including inter alia consumer credit, mortgage credit, factoring and financing of commercial transactions.</p> <p>iii. financial leasing</p>	<p>vi. money broking</p> <p>vii. trading for own account or for account of customers the following:</p> <p>a. money market instruments</p> <p>b. foreign exchange</p> <p>c. derivative products</p> <p>d. exchange rate and interest rate instruments</p> <p>e. Other negotiable instruments but excluding transferable securities</p>
<p>TOURISM AND TRAVEL RELATED SERVICES - Unbound Save as Stipulated in Horizontal Commitments</p>	
<p>Hotels and Restaurants</p> <p>Travel agencies and tour operators services</p>	<p>Tourist guide services</p>
<p>TRANSPORT SERVICES - Unbound Save as Stipulated in Horizontal Commitments</p>	
<p>Road Transport services</p> <p>a. Passenger transportation</p>	<p>b. Freight transportation</p> <p>c. Maintenance and repair of road transport equipment</p>
<p>OTHER SERVICES NOT INCLUDED ELSEWHERE - Unbound Save as Stipulated in Horizontal Commitments</p>	
<p>Washing, cleaning and dyeing services.</p>	<p>Hairdressing and other services</p>
<p>SUPPLEMENT TWO – 11TH APRIL 1997 (Supplements Entries on Communication).</p>	
<p>TELECOMMUNICATIONS - Unbound Save as Stipulated in Horizontal Commitments</p>	
<p>Facilities based and public switched telecommunication services:</p> <p>i. Voice services, except over value-added network.</p> <p>ii. Packet-switched data transmission services</p> <p>iii. Circuit-switched data transmission services</p> <p>iv. Telex services</p> <p>v. Facsimile services</p>	<p>vi. Private leased circuit services</p> <p>vii. Other</p> <p>a. Paging services</p> <p>b. Personal radio communication services</p> <p>c. Trunked radio system services</p> <p>d. Mobile Cellular, including mobile data</p> <p>e. Satellite based services</p>
<p>SUPPLEMENT THREE</p>	
<p>FINANCIAL SERVICES - Unbound Save as Stipulated in Horizontal Commitments</p>	

<ul style="list-style-type: none"> - Insurance and insurance related services <ul style="list-style-type: none"> i. direct life insurance ii. direct non-life insurance iii. renaissance iv. insurance intermediation and auxiliary services - Banking and other financial services <ul style="list-style-type: none"> i. Accepting of deposits and other repayable funds from the public. ii. Lending of all types, including, inter alia, consumer credit, mortgage credit, factoring and financing of commercial transactions iii. Financial Leasing iv. All payments and money transmission services, including credit, charge and debit cards, travellers cheques and bank drafts. v. Guarantees and commitments 	<ul style="list-style-type: none"> vi. Trading for own account or for account of customers of the following: <ul style="list-style-type: none"> a. Money markets instruments b. Foreign exchange c. Derivative products d. Exchange rate and interest rate instruments e. Transferable securities f. Other negotiable instruments vi. Participation in issues of all kinds of securities, including underwriting and placement as an agent vi. Money broking vii. Asset management, such as cash or portfolio management, all forms of collective investment management, custodial depository and trust services. viii. Settlement and clearing services for financial assets, including securities, derivative products and other negotiable instruments ix. Provision and transfer of financial information, and financial data processing and related software by providers of other financial services x. Advisory and other auxiliary financial services on all the activities listed above.
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Source: RSA's Schedule of Specific Commitments, GATS/SC/78, GATS/SC/78/Suppl 2, GATS/SC/78 Suppl 3.

The horizontal section makes reference to services sales persons, who through interpretation of the provision, are actually business visitors if going by the Mode 4 categorisation. The applied regime also makes provision for business visitors although its criteria is different from that ascribed by GATS. In GATS, their presence is limited to a ninety day period, just like in the applied regime, where the Business Permits are valid for three months but not exceeding three years.

The Intra corporate transferees referred to in the horizontal section are also expressly provided for in the applied regime. In GATS however, unlike the applied regime, they are required to have been in prior employment of the juridical person for a period of not less than one year from the date of application for admission. Further, in the applied regime, the permits are granted for maximum two years, and yet in GATS, temporary presence is to be for a period of up to three years.

The horizontal section also makes reference to professionals, a sub category of Intra Corporate Transferees. The commitments do not extend to Contract Service Suppliers and Independent Professionals, for which the applied regime provides facilities, to the extent that persons falling under these categories could be eligible for permits for exceptionally skilled persons in professions and occupations.

It is noteworthy that South Africa's GATS commitments do not contain quotas and explicitly exclude the administration of an economic needs test, whereas the general work permit category uses a labour market test as a safety valve and the quota permits and exceptionally skilled permits have quota restrictions.

Further, the categories of persons permitted to supply services in SA according to the applied regime are the highly skilled persons. This is also reflected generally in the Horizontal Commitments where categories permitted include executives, managers, specialists, intra corporate transferees and professionals, inter alia. To this end, it can be said that the GATS regime is relatively in sync with the applied regime, where the persons that are permitted to supply services are the highly skilled foreigners. The unskilled or semi-skilled foreigners are generally not permitted to supply services in SA.

SA is one of the only two SADC States that has updated its GATS commitments, to tally with the changing times in the State. One of the Supplements, Supplement One, which was originally an addition to the original commitments, was later replaced by Supplement Three. Also noteworthy is the fact that SA's GATS Mode 4 commitments are as detailed as the law that governs its work permits and the sectors committed in GATS are the same sectors that SA is to make offers on, in the SADC services negotiations, save for the Energy related sector.

4.10.4. Points to Note When Applying for Work Visas

The Department of Home Affairs (DHA) is the body that regulates the entry and exit of foreigners into SA.⁸⁹

4.11. SWAZILAND

4.11.1. Context in Which Mode 4 is Permitted

Movement of persons to supply services in Swaziland is permitted on the basis of the following Permit Classes.⁹⁰

i. Class A

This Permit is granted to persons who have been offered specific employment by a specific employer, who is qualified to undertake that employment, and whose engagement in that employment is of benefit to Swaziland.

ii. Class B

This is granted to a holder of a dependant's pass, who is offered specific employment by a specific employer, and whose engagement in that employment will be of benefit to Swaziland.

iii. Class D:

This class is given to persons who intend to engage, whether alone or in partnership, in business, agriculture or animal husbandry in Swaziland, and who have acquired, or received all permissions that may be necessary in order to acquire an interest in land of sufficient size and suitability of the purpose and whose engagement in that business will be of benefit to Swaziland.

⁸⁹. S. 36 (1) and 44 Immigration Act.

⁹⁰. S. 5 Immigration Act.

iv. Class E

This permit is given to a person who intends to engage, whether alone or in partnership, in prospecting for minerals or mining in Swaziland, and who has obtained, or is assured of obtaining, any prospecting or mining right or licence that may be necessary for the purpose; and has in his own right and at his full and free disposition sufficient capital and other resources for the purpose and whose engagement in that prospecting or mining will be of benefit to Swaziland.

v. Class F

This is given to persons who intend to engage, whether alone or in partnership in a specific trade, business, or profession (other than a prescribed profession which is dealt with by Class H in Swaziland, and who has obtained, or is assured of obtaining, any licence, registration or other authority or permission that may be necessary for the purpose; and has in his own right and at his full and free disposition sufficient capital and other resources for the purpose and whose engagement in that trade, business or profession will be to the benefit of Swaziland.

vi. Class G

Granted to a person who intends to engage, whether alone or in partnership, in a specific manufacture in Swaziland, and has obtained, or is assured of obtaining, any licence, registration or other authority or permission that may be necessary for the purpose; and has in his own right and at his full and free disposition sufficient capital and other resources for the purpose, and whose engagement in that manufacture will be of benefit to Swaziland.

vii. Class H

A member of a prescribed profession who intends to practise that profession, whether alone or in partnership, in Swaziland, and who possesses the prescribed qualifications; and has in his own right and at his full and free disposition sufficient capital and other resources for the purpose, and whose practice of that profession will be of benefit to Swaziland.

The key determining aspect in all these permits, according to the Act is that the permit is granted for the purpose of engaging in a business that will be of benefit to Swaziland. In practice however, the situation is the same as in the other SADC States where the common/ constant factor in all the permits is the fact that the permit is granted where there are no nationals to do the job sought by the foreigner. In Swaziland, proof that there are no available nationals must be provided through provision of a copy of advertisement in the local print media for the vacancy.

The period of validity of any entry permit shall be at the discretion of the Chief Immigration Officer but may be renewed for further periods provided that an entry permit shall not be issued or renewed for a period exceeding five years from the date of issue.⁹¹

4.11.2. Restrictions on Employment of Foreigners

The only professionals currently permitted to supply services in Swaziland are medical professionals, dentists, legal professionals, surveyors (land, estate agents, valuers and land agents), architects,

⁹¹ Reg 11.

pharmacists, veterinary surgeons, engineers, nursing professionals, physiotherapists, accountants, chartered secretaries.⁹²

4.11.3. Swaziland's Mode 4 GATS Commitments

All the commitments made by Swaziland in GATS are made in the sector specific commitments. There are no horizontal commitments. The following are the Mode 4 commitments made in the different sectors.

Table 13: Swaziland's Mode 4 GATS Commitments

Sub Sector	Limitations on Market Access	Limitations on National Treatment
BUSINESS SERVICES – Professional Services		
Engineering	Unbound except for senior qualified chartered engineers	None
Integrated Engineering services	Unbound except for professional personnel with a higher university degree or professional training and who are not available in Swaziland	None
Medical and Dental services	Unbound except for specialist doctors	None
COMPUTER AND RELATED SERVICES		
Consultancy services related to the installation of computer hardware	Unbound except for senior computer engineers and personnel that possess specialized training and who are not available in Swaziland	None
RESEARCH AND DEVELOPMENT SERVICES		
Research and experimental development services on natural sciences and engineering	None	None
OTHER BUSINESS SERVICES		
Management consulting services	Unbound except for personnel with a senior university degree or professional training who are not available in Swaziland	None
Technical testing and analysis services	None	None

⁹². Class H: Permitted professionals – 5th schedule to Regulations.

HEALTH RELATED AND SOCIAL SERVICES		
Hospital Services	Unbound except for specialist doctors	None
TOURISM AND TRAVEL RELATED SERVICES		
Hotel and Restaurant Services	Unbound except for chief executives, senior managers and chef cooks in the case of hotels and chef cooks in the case of restaurants.	None

Source: Swaziland's Schedule of Specific Commitments, GATS/SC/81.

The above table shows that there are market access restrictions in the committed sectors, with access principally granted to specialists, senior qualified personnel and professionals who are not available in Swaziland. In applied regime, for professionals, only particular categories of professionals are permitted access.

The GATS commitments, like the applied regime emphasize that access is granted where there is no qualified personnel in Swaziland.

4.11.3. Swaziland's Initial Services Offer to SADC

In May 2013, Swaziland submitted an initial services offer in the context of the SADC Trade in Services Negotiations. The offer contains horizontal Mode 4 commitments applicable to the newly offered sectors. The horizontal commitments encompass Business Visitors (defined as participating in business meetings or engaged in establishment of a commercial presence) for a period of up to 90 days per calendar year, and intra corporate transferees (defined as personnel sent from the headquarters in the home country to temporarily work in a subsidiary in Swaziland) which allows for 10 intra corporate transferees for a period of 5 years, extendable.

4.11.4. Points to Note When Applying for Work Visas

Regulation 19 (1) stipulates that work permits are handled by the Chief Immigration Officer. S. 5(5) of the Act states that the Chief Immigration Officer may vary the terms and conditions of any permit issued under the Act and may with the written consent of the Minister cancel such permit.

4.12. TANZANIA

4.12.1. Context in Which Mode 4 is Permitted

The temporary movement of foreigners into Tanzania to supply services is principally governed by the Immigration Act of 1995 and the Business Activities Registration Act of 2007. Section 13(f) of the Business Registration Act requires every application for the registration of any business to declare the nationality of the owner, and Section 16(e) requires compliance with immigration laws where the applicant is a foreigner.

Under Section 16 of the Immigration Act, paid employment under a resident employer⁹³ as well as engagement in trade, business or a profession⁹⁴ can only be done upon issuance of an appropriate Permit.

The underlying principle behind the permission of foreigners to supply services in Tanzania is to promote economic growth and encourage the training of citizens and residents by the employers through engaging in trade, business, profession, agriculture, animal husbandry, prospecting of minerals or manufacture.⁹⁵

The Immigration Act creates three types of permits – Class A, Class B, and Class C – that can have a validity of two (2) years with the possibility of replacement for a further two (2) years. These permits are described here below.

i. Class A Permits

These are issued to foreign nationals who intend to enter or remain in Tanzania to engage in trade, business, profession, agriculture, animal husbandry, prospecting of minerals or manufacture.⁹⁶

ii. Class B Permits

A person who has been offered specified employment in Tanzania and of whom the Principal Commissioner is satisfied that he possesses the qualification or necessary skill for the employment which will be of benefit to Tanzania, may, will be granted a Class B permit.

This class permits are dependent on the holding of employment according to Section 20(2) of the Immigration Act. The failure to get employment and the loss of employment invalidates the Permit. Similarly, the employment must conform to the terms of the permit, and the pursuance of any employment other than the employment specified in the Permit will lead to the Permit being withdrawn.

iii. Class C Permits

Where a foreigner is not granted a Class A or Class B Permit, he will be granted a Class C Permit.⁹⁷ There are no specifications in the law concerning the grant of this category of permit. Its award is entirely at the discretion of the Principal Commissioner. In practice, Class C permits are issued to persons such as students, retired officers and volunteers, inter alia.

The above permits are issued for any period not exceeding two years and may be replaced for any period not exceeding two years.⁹⁸ The total period of the validity of the original permit and its replacements cannot exceed five years.

4.12.2. Restrictions on Employment of Foreigners

Foreign investors can hire up to five foreign personnel to work in their companies during the start-up period of the investment.⁹⁹ It is not specified what the duration of the 'start-up period' is. There is no

⁹³. Section 16(1), of the Immigration Act.

⁹⁴. Section 16 (2), *ibid*.

⁹⁵. Section 19(1), *ibid*.

⁹⁶. S. 18 Immigration Act.

⁹⁷. S. 21 of the Act.

⁹⁸. S. 18 (2) of the Act.

⁹⁹. Section 24(1), the Investment Act, 1997.

prescription of the skill level as long as it can be proved that there are no Tanzanians ably qualified to do the same job and that it is for the benefit of Tanzania.¹⁰⁰

Generally, an investor can hire foreign employees at any skill or education level as long as there are no Tanzanians qualified to do the same job.¹⁰¹ There is no requirement that the foreign employee must have worked for the investor beforehand. There is also no legal restriction on the type of foreign employees allowed.

In the event that the need arises for more foreign employees, then an application must be made to the Tanzania Investment Centre (TIC), which will, in consultation with the Immigration Department, determine the merits of the application, and the availability of qualified local personnel. If the TIC is satisfied that there is a need that cannot be locally met, it will then authorise the employment of extra foreigners beyond the quota of 5 persons.

The Immigration Act does not create any requirement for proficiency tests. But Section 20(1) creates room for a kind of 'needs assessment' criteria to be followed in the award of Class B Permits. They are only issued subject to the satisfaction of the Principal Commissioner of Immigration Services that:

- a) the applicant possesses the qualification or skill necessary for that employment, and
- b) the applicant's employment will be of benefit to Tanzania.

4.12.3. Tanzania's Commitments in the EAC

In the seven sectors that were being liberalized at the EAC level, Tanzania stipulated that its Mode 4 commitments would be in accordance with the Schedule on the Annex on Free Movement of Workers. The following are some of the key provisions in the Annex on the Free Movement of Workers that Tanzania is bound to respect with regard to other EAC Partner States (PS), and which should therefore be bore in mind, as Tanzania concludes its SADC services negotiations.

- Other PS workers are to be issued a pass to enable them enter and stay in Tanzania for a period of up to 6 months for purposes of completing the formalities of obtaining a work permit.¹⁰²
- A worker who has a contract of employment for a period of more than 90 days is to apply for a work permit within 15 days from the date of entry into Tanzania.¹⁰³ If the contract for employment is obtained while the worker is already in Tanzania, they can still apply for a pass within 15 days from date of concluding contract.¹⁰⁴
- If the employment obtained is for less than 90 days, the worker will be issued a special pass which shall entitle them to enter and work in Tanzania.¹⁰⁵
- If the worker's employment is for more than 90 days, they will be issued a special pass before getting the work permit.¹⁰⁶ They will then be issued a work permit within 30 days of application,

¹⁰⁰. Section 20(1), Immigration Act.

¹⁰¹. Section 24(2), Investment Act, 1997.

¹⁰². Reg 5:4.

¹⁰³. Reg 6:9.

¹⁰⁴. Reg 6:3.

¹⁰⁵. Reg 6: 4 & 5.

which will be valid for an initial period of 2 years which may be renewed on application.¹⁰⁷ The actual duration of the work permit shall be the duration of the contract of employment.

- Workers of other PS in Tanzania will be given the same treatment as Tanzanian nationals with regard to terms and conditions of employment, equal opportunities for men and women, occupational health and safety, access to vocational training, contribution to a social security scheme, freedom of association and the right to collective bargaining, access to dispute resolution mechanisms, inter alia.¹⁰⁸

For the actual categories of persons who are permitted to enter into Tanzania to work, the following commitments were made.

Table 14: Categories of Workers Permitted to Work in Tanzania From Other EAC Partner States

Major Group	Sub Group	Minor Group	Occupational Titles	Commencement Date of Liberalisation
Professionals	Teaching	University and higher education teachers	PhD Holder	2010
		Secondary school teachers	Teacher(Mathematics, Biology, Physics, and foreign languages)	2015
		Primary school and early childhood teachers	Teacher (English medium primary school). Degree holder. (Not applicable in the islands)	2010
		Other Teaching Professionals	Tutor (Agricultural colleges) Master's Degree holder	
			Teacher (Vocational Education Training) in any field provided the teacher is a holder of a Master's Degree	
		Cultural Heritage	Tutor/ Teacher,	2010
	Engineering	Engineering Professionals (excluding Electro- Technology)	Mining Engineer	2011
			Geomorphologist	2011
			Civil Engineer	2010

¹⁰⁶. Reg 6:6.

¹⁰⁷. Reg 6:7.

¹⁰⁸. Reg 13.

			Engineer, Railways Construction	2012
			Engineer:- sewerage and sanitary, civil irrigation, soil mechanic, dock construction	
	Science	Life Science	Agricultural Field Officer (at least a Diploma holder)	2015
	Health	Medical Doctors and Practitioners	Medical officer	2015
			Specialists in another field	2010
			Nurse and Midwife	2010
	Land Surveying	Surveyors	Cadastral Surveyor and Cartographer	2015
Technicians and Associate Professionals	Air Traffic	Air traffic controllers	Air traffic controllers	2012

Source: Annex II: The EAC Common Market (Free Movement of Workers Regulations).

The categories of persons permitted to enter Tanzania as seen above are restricted to professionals and technicians and associate professionals only, and even so, to very few select professionals, out of all the 7 sectors that were committed to in the EAC Common Market negotiations. (Educational services, Tourism and Travel Related services, Communication, Business and Professional Services, Financial, Transport and Distribution services.)

Of the seven EAC service sectors above, Tanzania is to make commitments in five of the same sectors, (Communication, Construction, Financial services, Tourism and Transport), in its SADC services Negotiations. It is probable that Tanzania's decision is going to be influenced greatly by what commitments it made at the EAC, where Mode 4 entry was restricted to professionals, technicians and associate professionals, as discussed above.

4.12.4. Tanzania's Mode 4 Commitments

Tanzania only made commitments in the tourism and travel related sector as follows:

Table 15: Tanzania's Mode 4 GATS Commitments

Sub sector	Limitations on Market Access	Limitations on National Treatment
TOURISM AND TRAVEL RELATED SERVICES		
Hotels of four stars and above (as defined by Tanzania legislation)	Unbound except for measures concerning senior managers that possess skills not available in Tanzania	Unbound

Source: Tanzania's schedule of specific commitments, GATS/SC/84

The table above shows that in the only sector in which Tanzania made commitments at the WTO, access will only be for senior managers with skills that are not available in Tanzania. This commitment does not reflect the 5 person quota contained in the Investment Act.

4.12.4. Points to Note When Applying for Work Permits

The institution concerned with the administration of permits for foreigners wishing to work in Tanzania is the Immigration Services Department led by the Principal Commissioner of Immigration Services.

Permits are issued for any period up to two years, though they can be replaced for a further two years. The usual maximum period of validity of a Permit depends on the importance of the investment or the employee. In exceptional cases, the Principal Commissioner of Immigration Services may allow extensions beyond ten years. In all cases, the Permit specifies the period for which it is valid.

An application for the Class A permit may be lodged at Immigration Department's Headquarters, or the Tanzania Investment Centre (TIC) or Zanzibar Investment Promotion Authority-ZIPA for Zanzibar (in case the business or project has been registered with TIC and ZIPA respectively). Application for a Class B Residence Permit are lodged at the Office of the Director of Employment in the Ministry of Labour and Employment or The Tanzania Investment Centre (TIC) – if the business or project of the employer is registered with the Tanzania Investment Centre – or the Zanzibar Investment Promotion Authority-ZIPA where the prospective employee will be based in Zanzibar. The Director of Employment will forward his recommendations to the Principal Commissioner of Immigration Service for approval.

4.13. ZAMBIA

4.13.1. Context in Which Mode 4 is Permitted.

Mode 4 in Zambia is principally governed by the Immigration and Deportation Act No. 18 of 2010 and the Investment Act of 2006. S. 17 of the Trade Licensing Act stipulates that a trading licence will not be issued to anyone who is not a Zambian unless; (a) the applicant has obtained an investment certificate from the Zambia Development Agency; and (b) where the applicant is an individual, he has satisfied the requirements of the Immigration Act.

The underlying principle behind the application of Mode 4 in Zambia is to promote economic growth and encourage the training of citizens and residents by the employers on the basis that:

- (i) Businesses in Zambia employ skilled foreigners who are needed in sectors that are reliant on international exchanges of people and personnel,
- (ii) Exceptionally skilled or qualified people are enabled to sojourn in Zambia;
- (iii) The movement of students and academic staff, within SADC and COMESA for study, teaching and research is facilitated.¹⁰⁹

The foregoing is an explanation of the circumstances under which the foreigners are permitted to work in Zambia.

i. Business Visitors

A business visitor in Zambia refers a person entering to transact business during the person's stay in Zambia, such as attending meetings, conferences, arranging of deals and the signing of contracts. They include:

- overseas workers, who are paid by an employer abroad, who seek entry into Zambia for a short period, to work, install, erect, repair or service foreign-made machinery or equipment;
- persons who come to Zambia to advise on the development of new computer systems or information technology; or the provision of any service consisting of advice, training or learning by observation or in a classroom;

S. 24 of the Immigration Act makes provision for a Business Permit to be granted to such persons as stipulated above, but in practice, this Permit has been suspended subject to legislative review and is thus no longer being issued. At present, the practice is that Business Visitors are entitled to a free thirty (30) days visit in any period of twelve (12) months. These days are endorsed in the business visitors' passport at any immigration port of entry on meeting the visa requirement applicable to his/her nationality. It should be noted however that the business permit under S. 24 that was suspended was fitting squarely into the Mode 4 category of business visitors.

ii. Temporary Employment Permits

In case a business visitor desires to stay in Zambia for longer than the 30 free days in any period of 12 months, the applicant must apply for a temporary Employment permit¹¹⁰ which permit would however not exceed 6 months in any period of 12 months.

iii. Employment Permits

Where foreigners are desirous of obtaining jobs in Zambia, they must obtain an employment permit.¹¹¹ The immigration department requires that applicants secure their employment permits while outside the country. However, government employees, volunteers, and missionaries may apply for their permits whilst in the country.¹¹² The employment permit specifies the conditions to be observed by the holder,

¹⁰⁹. S. 5 (2) (c) of the Immigration and Deportation Act.

¹¹⁰. S. 28 (10) of the Immigration Act.

¹¹¹. S. 28 (3) of the Immigration Act.

¹¹². <http://www.zambiaimmigration.gov.zm>.

such as the area within which the holder may engage in employment and the nature of the employment in which the holder may engage.¹¹³

The category of persons who apply for this employment permit must be persons who seek to be employed by a resident Zambian employer. As evidenced from S. 28 (6) of the Immigration Act, the employment permit authorises the holder to engage in paid work under an employer resident in Zambia and to enter and re-enter into and to remain within Zambia until the permit expires.

According to the Immigration Act, the initial maximum period that is granted for an employment permit is 2 years from the date of issue and is capable of extension for a further maximum period of 5 years from issue.¹¹⁴ In practice however, it is extended for a maximum period of 10 years from the date of issue.

iv. Investor Permits

S. 29 of the Immigration Act stipulates that a foreigner who wishes to establish or invest in a business in Zambia will be given an investor's permit if he has invested a prescribed financial or capital contribution in the business and shows proof of the same or holds an investment licence issued by the Zambia Development Agency; if he is joining an existing business entity and has a clearance letter from the Zambia Development Agency. The granted Investment licence is to be valid for a period of ten years from the date of issue, during which period the investor shall implement the proposed investment. An investor may, apply for a renewal of the licence, before its expiry, for a period not exceeding ten years at a time.¹¹⁵

S. 29 (4) of the Immigration Act lays out the terms in respect of which the investor holds the permit to include inter alia, the possibility of employing such number of qualified expatriate employees as may be authorised by Immigration, and on condition that the holder employs a prescribed minimum number of citizens.

v. Holders of Employment Permits for 10 Years and Investor Permits for More Than 10 Years

S. 20 of the Immigration Act provides for a resident permit for:

- i) Foreigners holding investor permits for a period exceeding three years and
- ii) Holders of Employment Permits for an unbroken period of 10 years

who intend to engage in any trade, business, profession, employment or other occupation for gain;

(a) for which the person is fitted by virtue of the person's academic or professional qualifications, standard of education, skill and financial resources;

(b) in which, having regard to the productivity and efficiency of the persons already engaged therein, there is not already a sufficient number of persons engaged or available in Zambia to meet the requirements of the inhabitants of Zambia; or

(c) which is likely to be of benefit to the inhabitants of Zambia generally.

The investor's permit is valid for the period stated therein by the immigration department.

¹¹³. S. 28 (4) of the Immigration Act.

¹¹⁴. S. 28(5) of the Immigration Act.

¹¹⁵. S. 71 and 72 Investment Act.

4.13.2. Restrictions on Employment of Foreigners

Foreign investors can hire foreign personnel to work in their companies. These can either be family members who would be given investor permits or any other persons, such as intra-corporate transferees as long as it can be proved that there are no Zambians ably qualified to do the same job and that it is for the benefit of Zambia. Further, the foreign investor should mentor or develop the skills of Zambian understudies to be able to take on the job when the foreigner's permit expires.

The investor can hire foreign employees at any skill or education level as long as there are no local Zambians to do the equivalent job. There is no requirement that the foreign employee must have worked for the investor beforehand.

Generally, there is no particular legal restriction on the type and number of persons that can be employed by the foreign investor. This discretion is still left to the immigration department and it is supposed to be exercised in consultation with the Ministry of labour and social services. The law however notes that a holder of an investor's permit may employ such number of qualified expatriate employees as may be authorised by Immigration, on condition that the holder employs a prescribed minimum number of citizens,¹¹⁶ and there are no locals available to do the job.

Further, whereas not expressly stated in the law, according to practice, the only types of jobs that cannot be given to foreigners in Zambia are Human Resource and Marketing positions.

The Immigration Act stipulates that an immigration officer may require any foreigner to undertake a proficiency test.¹¹⁷ There are no further legal specifications on the particulars of these tests.

S. 5 (2) (C) of the Immigration Act tasks the immigration department with the need to regulate the migration of persons in to Zambia while promoting economic growth and encouraging the training of citizens and residents by the employers.

4.13.3. Zambia's Mode 4 GATS Commitments

Zambia made both horizontal and sector specific commitments as seen below:

Table 16: Zambia's Mode 4 GATS Commitments

HORIZONTAL COMMITMENTS
Unbound except for measures concerning the entry and temporary stay of natural persons employed in management and expert jobs for the implementation of foreign investment. The employment of such persons shall be agreed upon by the contracting parties and approved by the Ministry of Home Affairs. Enterprises must also provide for training in higher skills for Zambians to enable them to assume specialized roles.
SECTOR SPECIFIC COMMITMENTS
PROFESSIONAL SERVICES - Unbound Save as Indicated in Horizontal Section

¹¹⁶. S. 29 (4) of the Immigration Act.

¹¹⁷. S. 20 (3) of the Immigration Act.

Accountancy
Medical and dental services
Services provided by Midwives, nurses, physiotherapists and para medical personnel
OTHER BUSINESS SERVICES- Unbound Save as Indicated in Horizontal Section
Technical testing and analysis services
Services incidental to mining, exploration
CONSTRUCTION AND RELATED ENGINEERING SERVICES- Unbound Save as Indicated in Horizontal Section
Construction and related engineering services
HEALTH RELATED AND SOCIAL SERVICES- Unbound Save as Indicated in Horizontal Section
Hospital services
Other human health services
TOURISM AND TRAVEL RELATED SERVICES- Unbound Save as Indicated in Horizontal Section
Tourism and Travel related services

Source: Zambia's Schedule of Specific Commitments, GATS/SC/93

Zambia's commitments relate only to management and expert jobs for the implementation of foreign investment, unlike in the applied regime. This should specifically be noted for Construction and Tourism, which form part of the SADC services negotiations.

A further condition for foreign employment in Zambia according to GATS is that the employment of the foreigners shall be agreed upon between the employer and the Ministry of home affairs. This unspecific approval requirement does not indicate that a labour market test will be applied, as foreseen in the applied regime.

Under the GATS commitment, training for Zambians must be provided to enable them to obtain the specialized skills that the foreigner is holding. The applied regime merely foresees that training be encouraged.

4.13.4. Points to Note When Applying for Employment Permits

The employment permit is issued by Immigration, on consultation with the Ministry responsible for labour, and may be applied for by any foreigner from within or outside Zambia as long as the applicant meets any of the following criteria:¹¹⁸

- (i) is not a prohibited immigrant; (prostitute, persons dealing in human trafficking, etc.)
- (ii) is employed by the Zambian Government or a statutory body;

¹¹⁸. S. 28 (1) and (2) of the Immigration Act.

(iii) is a volunteer or missionary

(iv) intends for gain to engage in any trade, business, profession, employment or other occupation:

(a) for which the applicant is fitted by virtue of the person's academic or professional qualifications, standard of education, skill and financial resources;

(b) in which, having regard to the productivity and efficiency of the persons already engaged therein, there is not already a sufficient number of persons engaged or available in Zambia to meet the requirements of the inhabitants of Zambia;

(c) which is likely to be of benefit to the inhabitants of Zambia generally.

On submission of the relevant documents, the Immigration Permits Committee (IPC) in the Department of Immigration then scrutinizes the applications presented before it and determines whether the applicants are deserving of the permits sought. In scrutinizing the different permits, the committee analyses whether the applicant meets the requirements stipulated by the Immigration Department. The Ministry of Labour and Social Security is involved to ensure that jobs which should be given to Zambians are not given to foreigners.

According to the new service charter, the period of application is supposed to take a maximum of 10 days depending on whether the committee is availed with all relevant information and documentation.¹¹⁹

For renewal, the employer writes to the Director General of Immigration giving reasons why the employment permit must be extended. However, if there was a condition attached to the granting of that work permit, it is very unlikely that it will be extended. By attaching a condition, it means that if the employer was advised that the expatriate should work with an understudy for the purpose of transferring skills, so that at the end of the period, the expatriate should leave the country and the understudy should take over.

4.14. ZIMBABWE

4.14.2. Context in Which Mode 4 is Permitted

Movement of persons for the temporary supply of services in Zimbabwe is generally possible through the use of the following permits.

i. Temporary Employment Permits

A foreign employee seeking to work for a company based in Zimbabwe requires a Temporary Employment Permit.¹²⁰ Work herein means any activity (paid or unpaid) but in the interest of any business undertaking operational in Zimbabwe. The following are the categories of persons who may apply for a temporary employment permit: professionals offering scarce skills which are not easily available in Zimbabwe, journalists on assignments, personnel on short contracts and foreign researchers who must in the first instance be cleared by the Research Council of Zimbabwe.

¹¹⁹. <http://www.mlss.gov.zm>.

¹²⁰. Reg 21.

These permits are normally issued for an initial period up to a maximum period of three years and may be renewed up to five (5) years.¹²¹

ii. Business Visas

No visitor is to engage in any employment unless he/she has been issued with a business permit. The business visitors would be required to be in possession of all requirements for ordinary visitors and in addition to that, would have a restricted period of stay not exceeding thirty days. If there is need to continue as a business visitor at the expiry of this initial period, then a Temporary Employment Permit covering the desired period would have to be applied for from the Principal Director Immigration. The applicant would however first have to leave Zimbabwe to be able to do so, according to Section 16 (2) of the Immigration Regulations.

Business permits are granted to personnel coming on business for the following:

- (i) consultancy work
- (ii) installation and back up service for machinery purchased outside Zimbabwe by local companies.
- (iii) attending Board meetings
- (iv) assessing investment opportunities

This visa fits into the Mode 4 categorisation for supply of services by Business Visitors.

iii. Investor Residence Permits

A person who wishes to establish a business in Zimbabwe by investing offshore capital and equipment to the sum of US\$ 100,000 in a joint venture with a local partner would be granted a Residence Permit. A technical expert or professional who would have resided in Zimbabwe on a valid work permit for a period of not less than three years and has invested US\$ 100,000 or more is illegible for a permanent residence permit as an investor. He however must apply for such permit six months prior to the expiry of the permit held by him at the time of application.

A non-technical person would have to invest US\$ 300,000 or more to be eligible for an Investor Residence Permit and would need to have been resident in Zimbabwe for not less than three years and must apply for the permit six months before expiry of current permit.

An initial investor residence permit application can be processed within seven formal working days after submission of the application.

4.14.2. Restrictions on Employment of Foreigners

There are restrictions on the type of persons who can apply for temporary employment permits, to the following:

- (i) Professionals offering scarce skills, which are not easily available in Zimbabwe.
- (ii) Journalists on assignments

¹²¹. Reg 22 (2).

- (iii) Personnel on short contracts.
- (iv) Foreign Researchers - who must in the first instance, be cleared by the Research Council of Zimbabwe.
- (v) Foreign company representatives.

There are also specific restrictions on the persons to whom Business Visas can be granted. Business permits are granted to personnel coming on business for the following:

- (i) consultancy work
- (ii) installation and back up service for machinery purchased outside Zimbabwe by local companies.
- (iii) attending Board meetings
- (iv) assessing investment opportunities

The law also makes special provisions for certain categories of service suppliers:

a. Journalists

(i) Journalists should be placed on a journalistic Notice to Visitor (IF3) and are required to report within 24 hours to the Ministry of Information for accreditation, should they be on a working visit. They should also comply with the normal entry requirements.

(ii) If the journalist is coming as a holiday maker, he is to be facilitated on a "Notice to Visitor" and in this case, marking for his attention that working without the relevant permit is prohibited.

b. Investors

On showing proof of intended investment and the necessary documentation of approval from the Zimbabwe Investment Authority, an intending investor will be admitted on a business visa, but where they chose to apply for their investor residence permits, applications are made whilst they are outside Zimbabwe.

Further, the Foreign Recruitment Guidelines state that where applicable, expatriates shall transfer skills to identifiable local understudies during the course of the term of their first contract. Companies shall identify suitably qualified understudies and draw up a training programme which should be submitted not later than three months after engaging the expatriate. Training of local understudies shall start not later than three months after engaging the expatriate and both the employer and the employee must submit half yearly progress reports to the Manpower Planning Committee on Foreign Recruitment starting from the commencement of the training programme. The understudy should take the leading roles during the last year of training to allow for smooth takeover.

4.14.3. Zimbabwe's GATS Commitments

The table below shows the sectors and subsectors in which Zimbabwe made various commitments in GATS. The table firstly shows the horizontal commitments and then lists the different subsectors committed, showing that for each subsector, the Mode 4 commitments on market access and national treatment are to be as stipulated in the horizontal section.

Table 17: Zimbabwe's Mode 4 GATS Commitments

HORIZONTAL COMMITMENTS	
Market Access: Unbound, except for measures concerning the entry and temporary stay of intra-corporate transfer of executive and senior managerial personnel and except for specialists, subject to lack of availability in the local labour market.	
National Treatment: None, with respect to categories of natural persons referred to in the market access column. Unbound, with respect to measures concerning any other categories of natural persons.	
SECTOR SPECIFIC COMMITMENTS	
TELECOMMUNICATIONS SERVICES – Unbound save as in horizontal section	
Public Telecommunications Transport Networks and services. Private automatic branch exchange contained within a single building. Facsimile Data transmission services (through leasing point to point transmission facilities from the PTC) Radio communication services (not including mobile communications services) Value added/ enhanced services Electronic mail	Voice Mail Online information and data base retrieval Electronic data interchange Enhanced/value added facsimile services incl. Store and forward, store and retrieve Code and protocol conversion Online information and or data processing (incl. Transaction processing)
FINANCIAL SERVICES – - Unbound Save as Indicated in Horizontal Section	
Banking services: a. acceptance of deposits and other repayable funds from the public b. Lending of all types, including consumer credit, mortgage, credit, factoring and financing of commercial transaction c. Financial leasing	d. All payment and money transmission services, including credit, charge and debit cards, travelers cheques and bankers drafts e. Guarantees and commitments Merchants banks are also authorized to: underwrite new issues, manage portfolios, raise development capital, and arrange financing for mergers and takeovers.
TOURISM AND TRAFFIC RELATED SERVICES- Unbound Save as Indicated in Horizontal Section	
Hotels and restaurants Travel agencies and tour operators	Tourist guide services

Source: Zimbabwe's Schedule of Specific Commitments, GATS/SC/94

The above table shows that Zimbabwe committed that there will be no access except for the intra corporate transfer of executive and senior managerial personnel and save for specialists, subject to the lack of availability in the local labour market.

The applied regime permits access to professionals with scarce skills that are not easily available in Zimbabwe. This is also reflected in the GATS horizontal commitments above, where the intra corporate transfer of executives and senior management is subject to lack of availability in the local labour market.

Whereas GATS subjects entry to lack of availability in the local market, the applied regime also focuses on the need to train an understudy for the period of validity of the foreign employee's contract.

4.1.4. Points to Note When Applying for Work Visas

Immigration matters are handled by the Chief Immigration Officer with his relevant immigration officers and the Relevant Minister who can delegate his power to the Chief Immigration Officer.¹²²

The applicant is required to remain outside Zimbabwe until the successful outcome of the application is communicated to applicant after which, arrangements can be made to enter Zimbabwe.

¹²². S. 5 and 6 Immigration Act.

5. CONCLUSIONS AND RECOMMENDATIONS

5.1. Conclusions

This Study takes stock of the existing restrictions in the SADC States' laws and regulations relevant for regulating the movement of natural persons (Mode 4) for the purpose of supplying services in the SADC region, and compares the applied regimes in these countries with their existing GATS commitments.

It has been shown that Mode 4 in the SADC States is governed by the existing laws, which on the whole, are not very restrictive. Mode 4 is generally permitted, as long as there are no qualified locals for the position, and as long as it is for the benefit of the recipient State. In DRC, South Africa, Malawi, Swaziland, Zambia, and Zimbabwe, there are restrictions in the applied regime either on the type and or number of persons that can be hired. In most of these States, these are restricted to specialists, highly qualified professionals, and top management persons and to certain jobs/professions.

Generally, there are no requirements in most of the SADC States that the foreign employee must have worked for the investor beforehand, save where the intra corporate transferees have been expressly provided for, as is the position in South Africa.

Work and residence permits are generally awarded for different time periods, but in most cases range from seven days to ten years, subject to renewal. There are no market labour tests in most States. In most of the States, there is a requirement that professionals register with the local professional bodies, which usually ensure that the required competencies are checked.

Generally, there are no requirements that foreign service providers mentor the skills of local employees. In almost all States, there is a requirement that the locals be trained to take on the position of the foreign employee at the end of the permit period.

With respect to GATS vis a vis the applied regime, in some States, the commitments made in the GATS regime principally tally with the applied regime. This is so for South Africa. In other States, the GATS regime is less specific and or less restrictive than the applied regime. This is seen in Angola, Botswana, Mauritius, Tanzania, Zambia and Zimbabwe. In other States such as Lesotho, the GATS regime is stricter than the applied regime.

In their applied regime and the GATS commitments, no SADC State has made commitments that are targeted at semi or low skilled services. The majority of permissions relate to highly skilled service supply, which is even in most cases linked to Mode 3 establishment. This means that the meaningful achievement of Mode 4 is not realised as most LDCs do not even have the financial ability to make the Mode 3 investments and also because they principally can only supply low and semi-skilled service suppliers.

On the Mode 4 categorization, the majority of the States do not use the Mode 4 categorization that is widely used by WTO Members in particular, in the schedules of recently acceded countries and in the positive list Economic Integration Agreements.

Some States such as Mozambique, Namibia and Zimbabwe grant business visas for business visitors, and in so doing accommodate the categorization for business visitors as is recognized in the Mode 4 categorization. South Africa also recognises the intra corporate transferees, as is defined in the Mode 4 categorisation.

Other States however use their own terminology in reference to the Mode 4 categories. For example, Mauritius uses occupational permits which fall within the Mode 4 categorization for independent professionals and contractual service suppliers. Angola grants the ordinary visa, which fits into the Mode 4 category for a Business Visitor. The Business Permit that was issued by Zambia, which fell squarely within the Mode 4 definition was suspended and is no longer applicable until after its review. Seychelles and Mauritius further grant a visa for visitors entering for business, but the nature of the visa, even though so named, does not fit into the Mode 4 categorisation criterion.

On the other hand, none of the Mode 4 categories of service supply fit squarely into the types of permits issued by DRC, Lesotho, Botswana, Seychelles, Swaziland and Tanzania.

5.2. Recommendations

The overall objective of the SADC Protocol on the Facilitation of Movement of Persons according to Article 2 therein, is the development of policies that are aimed at the progressive elimination of obstacles to Mode 4 in the SADC region. Specifically, as stated in Article 3 (c), the Protocol aims at facilitating the establishment of one's self and work in the territory of another State. The SADC services negotiations will achieve these aspirations if several issues are addressed. This Study only highlights a few of them, here below.

1. Agree on Common Terminology

One of the first steps that ought to be taken in the SADC negotiations would be to define a political target that States will be aiming at, in the provision of access in the mode 4 categories of service supply (Intra corporate transferees, Business Visitors, Contract Service Suppliers, and Independent Professionals). That target should be to agree to adopt and use the Mode 4 categorisations used by WTO Members, in the negotiations, with an eye to easing the harmonisation of the immigration documents among the States in the future. Since the SADC States agreed to conduct their services negotiations on the basis of the GATS Negotiations, as a practical matter, as is also being done today by WTO Member States that are acceding, they should agree to adopt the Mode 4 categorization, as the terminology to be used with respect to scheduling of commitments, where applicable. So far, as shown in this Study, some of the SADC offers that have been made have adopted this Mode 4 categorization terminology.

This will facilitate clarity in interpretation and will make the future harmonisation process envisaged in Article 7 of the SADC Protocol on the Facilitation of Movement of Persons easier. Once there is common terminology used, this will in the future also ease on the process of obtaining standardised immigration forms for travelling citizens, as is required by Article 13: b of the Protocol on the Facilitation of Movement of Person, as there will be common legal terms adopted in the negotiations, especially with respect to Mode 4 categories.

2. Negotiate Clearly Defined Time Lines for Stay of Persons

Once the States have agreed on the Mode 4 terminology to be used by all Members, there should then be agreement on the time lines that are to be granted for each category. At present, permits in most States do not have clear time frames, which to some extent creates considerable uncertainty. Agreement on time for periods of stay will further ease the process of harmonisation in the future.

3. Enhance Technical Clarity of GATS Mode 4 Commitments

The country analysis shows that the scope of GATS Mode 4 commitments, as well as the terminology used, differs widely between the SADC States. Legally speaking, some States' GATS commitments would not allow them to operate quotas, labour market tests or the like in the committed sectors for any person accessing their territory with respect of the supply of a service. Further, some of the limitations in GATS are not in the applied regime. They are therefore redundant and are seemingly not required, hence should be removed. The negotiations hence offer a unique opportunity to clarify, update and rectify the scope of the GATS Mode 4 commitments for Member States.

Without prejudice to the content of their offered access in Mode 4, the initial offers received by the Seychelles, Swaziland and Mauritius are excellent examples of how such adjusted Mode 4 commitments could look like from a technical standpoint.

4. Consider Relaxation of High Skill Requirements

Most of the access granted by the SADC States is limited to high skill and highly specialised persons, as opposed to semi and low skilled persons. The SADC negotiations therefore provide an opportunity to inquire into the extent to which movement of semi-skilled and low skilled persons is desirable.

5. Increase Exceptions to Labour Market Tests

In the applied regime, authorities have relatively wide discretion on the various labour market tests that are prevalent in the different SADC States. This creates some degree of uncertainty in certain instances for applicants. SADC negotiations therefore offer a platform for revision on how a balance can be obtained.

6. Define a Realistic Transparency and Facilitation Agenda

The SADC Protocol on the Facilitation of Movement of Persons foresees movement for work related reasons only towards the end of a gradual integration process. Discussions on Movement of business persons are meant to proceed within the Tripartite configuration, but have been delayed to date. Hence, negotiations under the SADC Protocol on Trade in Services are at present the only forum within SADC where progress can be made with regard to enhancing transparency and facilitating the movement of persons. The SADC negotiations should therefore specifically aim at improving aspects of transparency and effective transparent legislation by establishing Mode 4 specific targets in this regard.

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Annex Table 1: Summary of GATS Mode 4 Commitments Compared to the Applied Regime

State	GATS	Existing Laws
Angola	Banking – GATS requires 50% minimum employment of locals.	70% in enterprise of more than 5 employees.
	Tourism – hotels limited to senior managers & specialists. Restaurants – Directors in addition.	No restrictions on categories of persons and skills in Angola laws.
Botswana	Restricts skills to managers, executives, specialists, highly qualified professionals.	No restriction to managers, executive & specialists in laws.
	Localization policy stated.	Localization required.
DRC	Only permits senior executives & specialists for one year.	Excludes almost all top executive level jobs.
Lesotho	4 expatriate senior executives and specialists – given automatic entry.	Requires work permits for all.
Malawi	Only permits management and expert jobs.	Permit key positions in investments.
Mauritius	Highly qualified persons.	No such restriction in law.
Mozambique	No quotas in GATS	Quotas (5%, 8%, 19%) in firms.
South Africa	No quotas	Quotas in exceptionally skilled permits.
	Mainly highly skilled persons	Mainly highly skilled persons.
	Excludes economic needs test	Labour market test used.
Swaziland	Specialists, senior qualified persons and professionals	On professionals - only select professionals are permitted.
Tanzania	No quota	5 person quota existing
	Senior managers with skills not available in Tanzania	No mention of skills
Zambia	Management and expert jobs for foreign investment	No such requirement
	Must train locals	Must train locals too.
Zimbabwe	Intra corporate transfer of executive, senior management and specialists subject to no skills in local market.	Professionals with scarce skills subject to absence of skills in local labour market.

- Note: The underlined regime is more liberal than the compared regime.
- Source: Author's Analysis

Annex Table 2: Summary of States that Specify Particular Categories of Skills Needed in Law

State	Categories Permitted in State Laws
DRC	Excludes almost all top executive jobs.
S.A	Exceptional skills permits for pre-determined select skills.
Malawi	Permits key positions in investment.
Swaziland	Only permit medical, dental, legal, surveyors, architects, pharmacists, veterinary surgeons, engineers, nurses, physiotherapists, accountants and chartered secretaries.
Zambia	- Exceptionally skilled persons. Human resource jobs only for Zambians. - Business Permits – Consultants, installers and servicers, attending meetings.
Zimbabwe	Professionals offering scarce skills, journalists on assignment, short contract personnel, foreign researchers.
<u>No specified categories noted in:</u> Angola, Botswana, Lesotho, Mauritius, Mozambique, Namibia, Seychelles & Tanzania.	

Source: Author's Analysis

Annex Table 3: Summary of Labour Market Tests in the Different States.

State	Labour Market Test in Laws
Botswana	<ul style="list-style-type: none"> - Whether opportunities of nationals are affected by foreign employment. - Must show arrangements to train nationals to replace foreigner.
DRC	<ul style="list-style-type: none"> - Foreign job must be advertised in placement office. If unsatisfied after 30 days, can submit application to employ foreigners. - Exemption from employment of Congolese given on proof that foreign jobs will be done by locals within 2 years.
Lesotho	<ul style="list-style-type: none"> - There should be no locals to take on position. - Practice - foreigner must mentor local employees and must submit a localization plan for period of permit held.
Malawi	Position must be advertised and localization policy existing. There must be a Malawian understudy.
Mauritius	None noted.
Namibia	Position should not be one in which several persons are already engaged in Namibia to meet the requirements of the locals.
Seychelles	Consider availability of persons already in Seychelles, protection of local interests and social economic benefit to Seychelles.
South Africa	<ul style="list-style-type: none"> - No SA citizens with relevant skills. - Unskilled and semi-skilled generally not permitted.
Zambia	<ul style="list-style-type: none"> - No Zambians to do the job. Should mentor locals. - Proficiency tests on discretion of immigration.
Tanzania	There should be no locals ably qualified to do the same job.
Mozambique	There should be no locals ably qualified to do the same job.
Angola	There should be no locals ably qualified to do the same job.

Source: Author's Analysis

Annex Table 4: Overview of Period of Stay for the Different States

State	Short Business Visit	Standard Work Visa	Longer Work Visa
Angola	7 days & 30 days	12 months	Depends on investment
Botswana	- No permit for less than 2 weeks. - 4 weeks - 6 months	6 months	10 years
DRC	1 year max	1 – 3 years	5 - 10 years
Lesotho	Depends on Visit	2 years	Left to Discretion
Malawi	30 days extendable to 90 days	6 months – 2 years	5 years
Mauritius	120 days max in calendar year and stay in each trip not to exceed 90 days.	2 - 3 years at rate of 120 days in a calendar year, each stay not exceeding 90 days.	Depends on permit
Mozambique	30 days	90 days – 5 years	Longer than 5 years
Namibia	90 days max pa	Depends on permit	Left to Discretion
Seychelles	Practice - 12 months	Left to Discretion	Left to Discretion
South Africa	Left to Discretion	1year, 2 years, 3 years, 5 years	Based on Application
Swaziland	Left to Discretion	Depends on immigration. Max 5 years	Depends on Immigration. Max 5 years
Tanzania	Left to Discretion	2 years	10 years and more
Zambia	- 30 days free in any 12 months -Temporary employment permit - max 6 months	2 - 5 years	10 years
Zimbabwe	30 days	3 years	5 years

Source: Author's Analysis

Annex Table 5: Summary of States that Have Quota Restrictions in Their Applied Regimes

State	Types of Quotas in State Laws
Angola	In enterprise of more than 5 employees, 70% should be nationals unless there are no local employees for position.
Mozambique	Large firms – up to 5% of total workers. Medium – 8%. Small – 10%.
DRC	<ul style="list-style-type: none"> - Max foreigners of total work force in DRC should be 15%. - Max % of foreigners that can work in given sectors existing. - Majority of top management jobs reserved for locals.
Lesotho	<ul style="list-style-type: none"> - Practice – Textile & Garment – 1 expatriate per 20 locals. Retail – one expatriate per 5 locals.
South Africa	<ul style="list-style-type: none"> - Quota permits for pre-determined quota in an occupation. - Exceptional skills permits for pre-determined select skills.
Tanzania	<ul style="list-style-type: none"> - Foreign investors to hire 5 foreigners in startup period. - Can seek exemption from Tanzania Investment Centre
<u>No Quotas noted in:</u> Botswana, Malawi, Mauritius, Namibia, Seychelles & Zambia.	

Source: Author's Analysis