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The admission of foreign legal practitioners in South Africa: a GATS perspective

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1. Introduction

In 1995, South Africa made legally binding commitments to liberalise legal services under the World Trade Organisation (WTO) General Agreement on Trade in Services (GATS). The commitments allow foreign legal practitioners to establish a commercial presence in and transfer personnel, including legal practitioners, to South Africa (WTO, 1994). The present paper attempts to analyse South Africa's commitments under GATS in the light of current and proposed legislation governing the admission and enrolment of foreign legal practitioners in South Africa.

2. Background

The legal services sector has experienced several changes as a consequence of the growth in international trade. All over the world lawyers are required to provide services and advice to their clients who do business across borders. Businesses and organisations involved in international transactions need reliable, up-to-date and integrated services covering all aspects of such transactions.

The demand for these legal services is mostly about international law and business law, including corporate restructuring, privatisation, cross-border mergers, acquisitions, intellectual property rights, financial instruments and competition law. The clients are, as a rule, corporations. Occasionally, individuals also require international legal services but it is usually limited to domestic law matters such as real estate, criminal offences, divorces, and so forth.

In order to meet the demands of corporate clients, law firms started to establish international networks of local firms from different countries operating under the same brand name or in integrated international partnerships. International networks range from loose associations of independent local practices to fully integrated multinational companies. Integrated international partnerships tend to specialise in business and international law, whereas networks, due to their decentralised and local character, often also engage in the provision of domestic law legal services.

South Africa's legal services sector has not escaped these changes. The proliferation of South African companies doing business in Africa and an increasing number of foreign businesses using South Africa as a springboard to do business in other parts of the continent necessitated local legal firms to expand their offering to clients to include cross-border legal advice. South Africa's five biggest law firms, Bowman Gilfillan, Cliffe Dekker Hofmeyr (allied with Anglo-American multinational law firm, DLA Piper), Edward Nathan Sonnenbergs, Norton Rose South Africa (incorporated as Deneys Reitz

Inc.) and Webber Wentzel (in alliance with Linklaters), all provide legal services to their clients in different forms throughout Africa. For example, Bowman Gilfillan Africa Group operates offices in Kenya, Tanzania and Uganda and has a working relationship with a Nigerian firm. Edward Nathan Sonnenbergs has established offices in Burundi, Rwanda and Uganda. The Cliffe Dekker Hofmeyr Piper Africa Group consists of affiliated member firms or relationship firms in Botswana, Zambia, Tanzania, Rwanda, Kenya, Uganda, Ethiopia, Mauritius, Egypt and Ghana. Norton Rose operates in Morocco and Tanzania and Webber Wentzel is associated with Africa Legal Network, an independent alliance of twelve African law firms in Botswana, Burundi, Ethiopia, Kenya, Malawi, Mauritius, Mozambique, Kenya, Sudan, Tanzania, Uganda and Zambia.

Another important phenomenon which has influenced changes in the legal services sector is legal process outsourcing. Many law firms increasingly outsource legal support services to other law firms or to legal support services companies, often located in another country. Outsourced legal work includes secretarial functions (e.g. document preparation, storage), billing, legal research and writing, contract drafting and review, litigation support services, and electronic discovery services. Traditionally, most of the outsourced work is done by junior lawyers or paralegals in law firms. South Africa has become one of the most popular international destinations for legal process outsourcing; the local legal profession is able to offer highly trained English-speaking professionals at an attractive price.

It is clear from the aforementioned that South Africa is involved in international trade in legal services; this consists mostly in the transmission of legal documents or advice via the post or telecommunications devices and, to a lesser extent, through the temporary stay of persons travelling abroad as self-employed professionals or as employees/partners of foreign-based law firms. They provide mainly advisory legal services as foreign legal consultants in international law, the law of their home country or the law of a third country for which they possess a qualification. In most cases legal counselling, as opposed to lawyers/advocates whose main role is representation before a court, is limited to matters involving transactions, relationships and disputes that do not involve court proceedings (WTO, 1998).

Domestic law or host-country law plays a limited role in international trade in legal services due to the national character of the law and legal education. As a result, locally established foreign firms are often required to employ locally qualified lawyers if they wish to expand their businesses to provide host-country law services. This happened in 2012, for example, when the global law firm, Baker & McKenzie, took over Dewey & LeBoeuf's Johannesburg offices, and when the Canadian firm, Fasken

Martineau merged with the South African firm, Bell Dewar. One of the world's leading global law firms, White & Case LLP, established offices in South Africa as far back as 1995 and employs a number of locally qualified lawyers. The liberalisation of legal services can therefore lead to increased employment of local lawyers by locally established foreign firms and legal support services companies; attract foreign investment; and, help to create opportunities abroad for local businesses. This demands market access opportunities for foreign legal providers to establish offices and to practise their profession in another country which in turn necessitates mechanisms to verify and recognise their academic and professional qualifications.

3. South Africa's GATS commitments on legal services

South Africa is a member of the WTO and must adhere to and implement the provisions of GATS. Each WTO member state must set out the negotiated commitments it undertakes in a schedule of specific commitments which is annexed to GATS and forms an integral part thereof. Non-compliance with any GATS provision or specific commitment enables any other WTO member state to institute dispute settlement proceedings under its enforcement regime, the Understanding on Rules and Procedures Governing the Settlement of Disputes.

In services sectors where commitments are undertaken, the schedule must specify the terms, limitations and conditions on market access (GATS Article XVI); the conditions and qualifications on national treatment (GATS Article XVII) for each of the four modes of supply; where appropriate the time-frames for implementation of such commitments; and the date of entry into force (GATS Article XX). GATS Article I defines trade in services as the supply of a service:

- from the territory of one Member into the territory of any other Member (Mode 1 / cross-border supply),
- in the territory of one Member to the service consumer of any other Member (Mode 2 / consumption abroad),
- by a service supplier of one Member through commercial presence in the territory of any other Member (Mode 3 / commercial presence),
- by a service supplier of one Member through presence of natural persons in the territory of any other Member (Mode 4 / temporary movement of natural persons).

Once a member state has undertaken liberalisation commitments in a specific services sector, it is under an obligation not to maintain or introduce discriminatory and/or quantitative measures unless it has been listed in the member state's schedule of specific commitments.

In the WTO's Services Sectoral Classification List (WTO, 1991) 'legal services' is classified as 'professional services' under the 'business services' sector. This entry corresponds with the Central Product Classification (CPC) number 861 of the United Nations Provisional CPC and is subdivided and defined in different categories. The classification and definition of legal services in the Provisional CPC has evolved over time. The Provisional CPC has been revised three times with the most recent revision, CPC Version 2, completed in 2008. South Africa's WTO GATS commitments have remained unchanged and are still as classified and defined in the Provisional CPC of 1991 as follows:

Legal advisory and representation services concerning criminal law

Legal advisory and representation services during the litigation process, and drafting services of legal documentation in relation to criminal law. Generally, this implies the defence of a client in front of a judicial body in a case of criminal offence. However, it can also consist of acting as a prosecutor in a case of criminal offence when private legal practitioners are hired on a fee basis by the government. Included are both the pleading of a case in court and out-of-court legal work. The latter comprises research and other work for the preparation of a criminal case (e.g. researching legal documentation, interviewing witnesses, reviewing police and other reports), and the execution of post-litigation work, in relation to criminal law.

Legal advisory and representation services in judicial procedures concerning other fields of law

Legal advisory and representation services during the litigation process, and drafting services of legal documentation in relation to law other than criminal law. Representation services generally consist of either acting as a prosecutor on behalf of the client, or defending the client from a prosecution. Included are both the pleading of a case in court, and out-of-court legal work. The latter comprises research and other work for the preparation of a case (e.g. researching legal documentation, interviewing witnesses,

reviewing police and other reports), and the execution of post-litigation work, in relation to law other than criminal law.

Legal advisory and representation services in statutory procedures of quasi-judicial tribunals, boards, etc.

Legal advisory and representation services during the litigation process, and drafting services of legal documentation in relation to statutory procedures. Generally, this implies the representation of a client in front of a statutory body (e.g. an administrative tribunal). Included are both the pleading of a case in front of authorised bodies other than judicial courts, and the related legal work. The latter comprises research and other work for the preparation of a non-judicial case (e.g. researching legal documentation, interviewing witnesses, reviewing reports), and the execution of post-litigation work.

Legal documentation and certification services

Preparation, drawing up and certification services of legal documents. The services generally comprise the provision of a number of related legal services including the provision of advice and the execution of various tasks necessary for the drawing up or certification of documents. Included are the drawing-up of wills, marriage contracts, commercial contracts, business charters, etc.

Other legal advisory and information services

Advisory services to clients related to their legal rights and obligations and providing information on legal matters not elsewhere classified. Services such as escrow services and estate settlement services are included.

Added to this definition and classification of legal services, countries differentiate between foreign legal practitioners who are allowed to practise domestic law, international law and the law of their home country or of a third country. In each case a further distinction can be made between advisory services or consultancy services and representation services which allow foreign legal practitioners to present a client before a domestic court or arbitral tribunal in the host country. The distinction between advice and representation is derived from English law, where the profession of solicitor (counselling) is separated from that of barrister (court representation). South Africa maintains a

similar distinction although separation between the two professions is nowadays less rigid than in the past (WTO, 1998).

Based on this definition and classification, South Africa made specific commitments on the establishment of a commercial presence (Mode 3) and the temporary transfer of personnel (Mode 4) to South Africa. The commitments are limited to the supply of legal advisory services in foreign, international and domestic law and legal representation services in domestic law by a locally established legal entity. Such an entity must be owned or controlled by natural or legal persons of any other WTO member state. The specific commitments include undertakings on market access and national treatment on legal services under Modes 3 and 4 (WTO, 1994). GATS commitments on national treatment require the absence of all discriminatory domestic measures that may modify the conditions of competition to the detriment of foreign legal practitioners (GATS Article XVII). The obligation on national treatment prohibits both *de jure* and *de facto* forms of discrimination. Therefore the national treatment obligation requires foreign legal practitioners to be granted equal opportunities to compete with local legal practitioners. With respect to market access South Africa is not allowed to maintain or adopt quantitative restrictions, unless otherwise specified in its schedule of specific commitments (GATS Article XVI). The only trade restrictive market access measure entered into South Africa's schedule of specific commitments is the prohibition on advocates from forming partnerships or companies (WTO, 1994). However, this is not a discriminatory measure because it applies equally to foreign and domestic legal practitioners practising law.

The country made no commitments under Modes 1 and 2 and is therefore not prohibited from limiting or restricting the supply of legal services from across border into the country or consumption of legal services abroad. Cross-border trade typically covers situations where clients receive legal services from abroad via the post or telecommunications devices. No market access or national treatment commitments were undertaken on the cross-border supply and the consumption abroad of legal services. South Africa can therefore maintain or introduce restrictions on cross-border trade in legal services, if they are applied in a non-discriminatory manner to all WTO members.

South Africa's full liberalisation commitment on the establishment of a commercial presence by foreign law firms prohibits it from maintaining or introducing conditions on market access and national treatment. A foreign legal firm has the right to establish a practice in South Africa to provide legal advisory services on domestic, foreign and international law and legal presentation services concerning domestic law. These firms are allowed to transfer professional staff under Mode 4 to South Africa for a limited period of time. South Africa made commitments on the temporary movement of

service suppliers in the horizontal section of its schedule of specific commitments (WTO, 1994). The relevant commitments grant market access and national treatment to the following categories of persons that are engaged in the provision of legal services:

Temporary presence for a period of up to three years, unless otherwise specified, without requiring compliance with an economic needs test, of the following categories of natural persons providing services:

Intra-corporate transferees - 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:

Executives – 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.

Managers – 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.

Specialists – 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.

Professionals – 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 recognised, where appropriate, by the professional association in South Africa.

In other words, foreign legal firms may establish a commercial presence in South Africa and transfer personnel, including professional staff members, to work as legal practitioners for a period of up to three years, provided they possess the necessary academic and professional qualifications which have been recognised by the professional body in South Africa.

Apart from the specific undertakings on legal services and their accompanying obligations on market access (GATS Article XVI) and national treatment (GATS Article XVII) South Africa must comply with the general GATS obligations on most-favoured-nation (MFN) treatment (GATS Article II), recognition of qualifications (GATS Article VII) and domestic regulation (GATS Article VI). These obligations bind all WTO members irrespective of whether scheduled commitments have been undertaken.

The MFN treatment provision in GATS Article II obliges a member state to grant all WTO members treatment that is no less favourable than that it accords to any other member. It prohibits the application of measures that discriminates between WTO member states. The only exceptions to the MFN treatment obligation include measures listed as MFN exemptions in accordance with the GATS Annex on Article II Exemptions (GATS Article II(2)), mutual recognition agreements (GATS Article VII) and economic integration agreements (GATS Article V). To date, South Africa has not made or applied for an exemption on legal services or concluded economic integration agreements on services or mutual recognition agreements. South Africa is party to negotiations for the conclusion of an economic integration agreement, the Southern African Development Community (SADC) Protocol on Trade in Services. The negotiations have not been concluded and may include commitments on the liberalisation of legal services in the SADC region. The same consideration could later apply to the second phase of the COMESA-EAC-SADC¹ Tripartite Free Trade Agreement negotiations. It would be necessary for all the parties involved in these negotiations to consider the implications of GATS Article V.

The provision of market access to foreign legal practitioners to establish law firms and to transfer professional staff members should not be confused with the recognition of their academic and professional qualifications. The recognition of education and other qualifications obtained abroad should be viewed separately from market access commitments. A member state is under no obligation to recognise the education or experience obtained, requirements met, or licences or certifications granted in any other member state. GATS Article VII(1) provides that a member state may recognise

¹ The Common Market for Eastern and Southern Africa, the East African Community and the Southern African Development Community.

foreign qualifications, licences and so on granted in a particular country. Recognition can be achieved through harmonisation or otherwise, be based upon an agreement with any other member or may be accorded unilaterally provided such recognition is not accorded in a manner that would constitute a means of discrimination between countries (GATS Article VII(1) and (3)). This provision is an exception to the MFN treatment obligation. In the case of an agreement between two or more countries, other countries must be afforded the opportunity to negotiate their accession to such agreement (GATS Article VII(2)). These agreements must be notified to the WTO (GATS Article VII(4)). To date, South Africa has not concluded any mutual recognition agreements.

Where WTO members, such as South Africa, accord recognition unilaterally, other member states must be afforded the opportunity to demonstrate that education, experience, licenses or certifications obtained or requirements met in that member state should be recognised (GATS Article VII(2)). Unilateral recognition measures should also be notified to the WTO.

GATS provides, where appropriate, that recognition of qualifications should be based on common international standards and criteria for the recognition and practice of the relevant services trades and professions (GATS Article VII(5)). For example, the International Bar Association developed and adopted guidelines contained in its *General Principles for the Establishment and Regulation of Foreign Lawyers* and *Standards and Criteria for Recognition of the Professional Qualifications of Lawyers*. These standards and criteria should be considered by South Africa when it develops regulations or concludes agreements on the recognition of foreign legal practitioners. South Africa's General Council of the Bar, the Law Society of South Africa, the Law Society of the Cape of Good Hope, the Kwazulu-Natal Law Society, the Law Society of Northern Provinces, and the Corporate Lawyers Association of South Africa are all members of the International Bar Association.

GATS Article VI obliges member states to bring their domestic regulations in line with their WTO obligations. Article VI provides that in sectors where specific commitments are undertaken all domestic measures affecting trade in that service must be administered in a reasonable, objective and impartial manner (GATS Article VI(1)). The motivation for this obligation is to prevent an erosion of the value of commitments through non-discriminatory and non-quantitative impediments concealed in domestic regulation or in the administration thereof. If a member state makes commitments in a professional services sector, such as legal services, it must provide for adequate procedures to verify the competence of professionals of any other member state (GATS Article VI(6)). In cases where authorisation and registration are required, licensing and qualification requirements must be based on objective and transparent criteria and may not be trade-impeding or needlessly burdensome (GATS

Article VI(5)). Local licensing or qualification authorities must inform a foreign applicant of its decision concerning an application and, if requested, provide information concerning the status of the application (GATS Article VI(3)). An affected applicant has the right to challenge any administrative decision affecting trade in services including decisions concerning the verification of professional competences, qualifications and licences and have such decisions reviewed by local courts or tribunals. (GATS Article VI(2)(a)). Where judicial, arbitral or administrative tribunals and procedures are not independent of the agency entrusted with administrative decisions member states must ensure that the applicable procedures in fact provide for an objective and impartial review of administrative decisions (GATS Article VI(2)(a)). It is therefore essential to evaluate existing and proposed legislation regulating the legal profession in the light of South Africa's legal commitments under WTO law. This may then result in the need for incorporating the relevant GATS provisions into the law of the land.

4. The admission and enrolment of foreign legal practitioners in South Africa

The legal profession in South Africa is divided into advocates and attorneys and are regulated by the General Council of the Bar of South Africa and the Law Society of South Africa respectively. No dual practice is allowed, but there are efforts in South Africa to change this dispensation (see *infra* p. 17). Legal practitioners are regulated by different laws and each has its own set of admission requirements. The legislation differentiates between the potential recognition of foreign obtained academic qualifications and foreign obtained professional qualifications for the admission and enrolment of foreign legal practitioners.

South Africa's qualification assessment system

In general, the recognition of foreign qualifications by the South African Qualifications Authority (SAQA) as established by the National Qualifications Framework Act 67 of 2008 entails both an evaluation of a qualification that informs a decision to recognise a foreign qualification and a formal acknowledgement of that qualification allowing the qualification holder to access employment or further studies in South Africa. SAQA's function is to compare foreign qualifications with South African qualifications and to make a recommendation on the recognition of that qualification in South Africa. Its recommendations are intended to be general guidelines and are not binding on other institutions such as professional bodies or education and training institutions. Its recommendations are merely to clarify structural comparability and serve as a point of departure for further context specific assessment.

In terms of Article 3 of the Admission of Advocates Act 74 of 1964, a person can be admitted to practise and enrol as an advocate if that person is:

- over the age of 21 years and is a fit and proper person to be admitted;
- duly qualified;
- a South African citizen or a permanent resident;

In the case of academic qualification requirements, a person is considered duly qualified if such person has obtained:

- a four-year Legum Baccalaureus (LL.B) undergraduate degree at a South African university; or
- a postgraduate LL.B degree at a South African university after completing a bachelor's degree other than an LL.B degree at a South African university or a degree that has been admitted to the status of a bachelor's degree by a South African university and after completing a period of study for such degrees for not less than five years in the aggregate; or
- a degree of a university in a country which has been designated by the Minister of Justice and Constitutional Development after consultation with the General Council of the Bar of South Africa (Article 3(2)(a)).

In last-mentioned case, it should be noted that it is a country which has to be designated, not a specific degree. In addition, such a degree must also be certified as equivalent to the South African LL.B degree by the law faculty of a South African university. Namibia (GG, 2003a), Zimbabwe (GG, 2003b), Nigeria (GG, 2000a and 2003c) and Lesotho (GG, 2004) are the only countries that have been designated by the Minister for this purpose. Law degrees from universities in these countries could be certified as of the same or higher status than the local equivalent for the purpose of meeting the academic qualification requirement for admission and enrolment.

In other words, unless a person has obtained a degree from a university in a designated country he or she must complete a South African undergraduate LL.B degree or at least a postgraduate LL.B degree if their foreign academic qualification has been admitted to the status of a bachelor's degree by a South African university. Measures providing for the recognition of academic qualifications through the designation of certain countries constitute a violation of the MFN treatment obligation, but could be justified as a form of unilateral recognition under GATS Article VII. Unilateral recognition

measures should be notified to the WTO. However, recognition of foreign academic qualifications does not automatically translate into professional recognition which is, as mentioned, a separate process regulated by the particular professional body.

In the case of professional qualification requirements, any division of the Bar in the country may admit a legal professional practising outside the country to practise in South Africa provided the person has been admitted as an advocate in a designated country, resides and practises as an advocate in that country, is fit and proper to be admitted, and, has no disciplinary proceedings pending or contemplated against him or her (Article 5). Namibia (GG, 2003a), Zimbabwe (GG, 2003b), Nigeria (GG 2000a and 2003c) and Lesotho (GG, 1993a) are the only countries that have been designated countries in terms of this particular provision. Advocates from these countries may be allowed to practise across border in South Africa. This provision constitutes a violation of the MFN treatment obligation because it is not applied in a non-discriminatory manner to all other WTO member states and has not been listed as an exemption in the Annex on Article II Exemptions.

The general requirements for admission and enrolment as an attorney are prescribed by the Attorneys Act 53 of 1979. A person can be admitted and enrolled as an attorney if that person:

- is over the age of 21 years and is a fit and proper person to be admitted and enrolled;
- is a South African citizen or permanent resident;
- has served under articles of clerkship for a period of:
 1. two years after obtaining a four-year LL.B degree from a South African university;
or
 2. two years after obtaining a postgraduate LL.B degree at a South African university after completing a bachelor's degree other than a LL.B degree at a South African university or a degree that has been admitted to the status of a bachelor's degree by a South African university and after completing a period of study for such degrees for not less than five years in the aggregate; or
 3. two years after obtaining a degree at a university outside the country which has been designated by the Minister after consultation with the presidents of the various societies and provided the degree has been certified as equivalent to the South African degree by the law faculty of a South African university together with a supplementary examination, if required; or

4. three years after obtaining any degree other than an honorary degree at a South African or designated country's university; or
 5. three years after he or she has passed the secondary school examination or equivalent and served for a period of two years as a clerk to a judge of the supreme court; or
 6. five years after he or she has passed the secondary school examination or equivalent; and
- has passed the practical examinations.

Any person who has satisfied all the requirements for a degree in 1, 2 and 3 above and has completed an approved four-month training course or has performed community service for a period of one year is exempted from service under articles of clerkship for a period of one year.

The Act provides for three exceptions to the general admission requirements by allowing the Minister to recognise the academic qualifications of certain countries (Article 2(1)(aB)); exempt certain foreign qualified permanent residents from vocational training and practical examinations (Article 13); and allow attorneys practising in certain countries to be admitted to practice in South Africa (Article 17).

First, regulations issued under Article 2(1)(aB) of the Attorneys Act provide that Zimbabwe (GG, 1988), Namibia (GG, 2003d), Swaziland (GG, 2003e) and Nigeria (GG, 2000b) have been designated by the Minister for the recognition of their law degrees, provided a law faculty at a South African university has certified its law degrees as equivalent and provided the applicant has passed a supplementary examination, if required.

Second, regulations issued under Article 13 of the Attorneys Act provide that permanent residents who have been admitted as attorneys in Zimbabwe before 22 May 1981 are exempted from vocational training and practical examinations, provided they have been admitted and enrolled as attorneys in that country and have practised there for at least five years. If they have practised for less than five years, they must practise as a professional assistant of an attorney for a period of three years before they may start practising for their own account in South Africa. Equally, any person that has been admitted as a notary or conveyancer in Zimbabwe before 22 May 1981 is for the purposes of admission exempted from practical examinations in South Africa. Zimbabwe is the only country which has been designated under this particular provision (GG, 1982).

Third, regulations issued under Article 17 of the Attorneys Act provide that practising attorneys residing in Lesotho may be admitted and enrolled as attorneys in South Africa (GG, 1993b). The designation of certain countries in terms of Article 17 of the Act confers cross-border practising rights to foreign legal practitioners provided they reside and continue to practise in their home countries. This is a violation of the MFN treatment obligation since the measure is not applied in a non-discriminatory manner to all other WTO member states and has not been listed as an exemption in the Annex on Article II Exemptions. GATS Article II(3) provides an exception to the MFN provision for locally produced and consumed services between 'contiguous frontier zones' of 'adjacent countries'. A similar provision in favour of frontier traffic is found under WTO General Agreement on Tariffs and Trade (GATT) XXIV(3)(a) allowing freedom of normal economic activity within a restricted zone on each side of the frontier. Certain questions arise as to the extent of the frontier, the locality of production and consumption of the service and whether the exception applies to all modes of supply (Footer, 2005). However, the ability of Lesotho lawyers to practise across border is not limited to a specific geographical area in South Africa even though most, if not all, trade in legal services is in all likelihood confined to the adjacent Free State province of South Africa. Nevertheless, this measure would not justify the violation of the MFN treatment obligation. The special dispensation for (mostly) neighbouring WTO member states predates South Africa's GATS commitments and will have to be reviewed. If South Africa wishes to maintain the status quo in this particular case and in the case of advocates, it will have to apply to the WTO for a waiver from its MFN treatment obligation. The GATS Annex on Article II Exemptions provides that 'any new exemptions applied for after the date of entry into force of the WTO Agreement shall be dealt with under paragraph 3 of Article IX of that Agreement'. This paragraph provides that the WTO members may in 'exceptional circumstances' decide 'to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements' including GATS, provided such decision is 'taken by three-fourths of the members'. Waivers are granted for a limited period of time and extensions have to be justified. If an application for a waiver is rejected and the member state does not withdraw the inconsistent measure it risks the possibility of any member invoking dispute settlement procedures under the WTO's dispute settlement system against it.

The nationality or permanent residency requirement for the admission of legal practitioners is an example of a measure that would qualify as a limitation on national treatment. In practice, a person can overcome the nationality requirement by taking up permanent residency, but this imposes an additional burden on foreign legal practitioners by requiring them to take up residency in South

Africa. This might also lead to the loss of their home country residency. The residency requirement should be entered as a national treatment condition in the country's schedule of specific commitments.

Another national treatment limitation that should be scheduled relates to the local qualification requirement. The requirement that all legal practitioners, excluding those from designated countries, must be graduates from South African universities appears origin neutral but discriminates *de facto* against foreign legal practitioners. The vast majority of locals would be graduates from national universities whereas the vast majority of foreigners would have graduated in other countries, even though nothing prevents them from enrolling at a local university. In practice, this local qualification requirement puts an additional burden on all foreign legal practitioners wanting to practise in South Africa regardless of the nature of the legal services they wish to supply. This places them at a competitive disadvantage vis-à-vis their local counterparts. It also means that unless a foreign legal practitioner also completes a South African law degree, his or her professional competence cannot be verified by the professional body as required by GATS Article VI(6).

5. Academic qualification requirements under the Legal Practice Bill

The Legal Practice Bill B20 of 2012 intends to provide, among other things, for the restructuring of the profession, a single professional body, and the admission, enrolment and registration of foreign legal practitioners in South Africa. In terms of Article 24(1) of the Bill, a person may only practise as a legal practitioner if he or she is admitted and enrolled to practise. The definition of a legal practitioner in the Bill includes a registered advocate or attorney. The separation between the two branches will remain. The only real concession to this is that advocates may, in certain circumstances, take instructions directly from the public. This change will abolish the referral rule of practice that applies to advocates. The current referral rule of practice provides that an advocate may only provide legal services upon receipt of a brief from an attorney. However, such advocates will in future be required to hold fidelity fund certificates and be subject to the same accounting requirements as attorneys. The possible change will not create new implications for South Africa's obligations under GATS.

The basic requirements for the admission of attorneys and advocates will remain in place. The admission requirements in the Bill include that a person is duly qualified, is a South African citizen or permanent resident, and is fit and proper to be admitted. In addition, the applicant must undertake all

the practical vocational training requirements and pass a competency-based examination or assessment for candidate legal practitioners.

A person will be considered duly qualified to be admitted and enrolled as a legal practitioner if that person has obtained the four-year LL.B degree at any university in the country or a law degree in a foreign country which is equivalent to the LL.B degree and recognised by SAQA. It means that the evaluation of all foreign academic qualifications will in future be done by SAQA and not by the law faculties of local universities as is currently the case with law degrees obtained in designated countries. The Minister will also not be required to designate countries to make their legal qualifications receptive to recognition. The legal academic qualifications of any country could in principle meet the minimum qualification requirements. The requirement that the Minister must designate such a country will then fall away.

6. Admission and enrolment requirements of foreign legal practitioners under the Legal Practice Bill

Apart from obtaining recognition for foreign-obtained academic qualifications, foreign legal practitioners will in future have to meet all other qualification requirements including the citizenship or permanent residency requirement. Obtaining a permanent residency permit could take up to five years if a foreigner has been residing in the country on the basis of a work permit. According to the Immigration Act 13 of 2002, permanent residency permits may also be issued to foreigners who, amongst other things, have received a permanent work offer, possess extraordinary skills or qualifications or intend to establish a business in South Africa. This application process can take up to eight months (Department Home Affairs, 2013).

In addition, foreign legal practitioners are required to undergo practical vocational training in South Africa. This can take up to two years. In addition, they have to pass a competency-based practical examination before they will be admitted and enrolled as a legal practitioner in South Africa.

Article 24(3) of the Bill makes provision for certain exceptions to the general admission and enrolment requirements. Subsection 3 provides that the Minister may, after consultation with the yet-to-be-established professional body (the South African Legal Practice Council) draw up regulations in respect of admission and enrolment in order to:

- (a) determine the right of foreign legal practitioners to appear in South African courts and to practise as legal practitioners in South Africa;
- (b) give effect to any reciprocal international agreement to which the Republic is a party, regulating –
 - (i) The provision of legal services by foreign legal practitioners; or
 - (ii) The admission and enrolment of foreign legal practitioners; or
- (c) if it is in the public interest, permit a person or category of persons concerned, to expeditiously commence practising as a legal practitioner by virtue of his or her academic qualifications or professional experience.

The Bill confers powers on the Minister to regulate market access of foreign legal practitioners into the country after consultation with the professional body. Regulations adopted in terms of subsection 3 will have to comply with GATS obligations, including South Africa's specific commitments on legal services.

The proposed Article 24(3)(a) provides for the regulation of cross-border supply of legal services. These regulations may impose conditions and limitations on the scope of legal advisory and representation services supplied across border by foreign legal practitioners not established in South Africa without necessarily violating SA's GATS commitments. Foreign legal practitioners practising across border may, for example, be prohibited from appearing in local courts or from rendering advice on foreign, international or domestic law if they are not fully qualified and admitted in South Africa. They may also, for example, be required to use a certain title and make disclosure reasonably designed to inform the public of their status.

Article 24(3)(b) of the Bill provides for the preferential liberalisation of legal services. It also provides for the conclusion of mutual recognition agreements. However, preferential trade agreements and mutual recognition agreements must meet the conditions of GATS Articles V and VII respectively. They must be notified to the WTO and are subject to scrutiny. The one thing the provision does not offer is the unilateral recognition of other WTO members' academic and professional qualifications. Existing unilateral recognition arrangements will remain in force under the new Act. However, their continuation should be reviewed in light of the Bill's call for reciprocity in the recognition of foreign legal practitioners.

According to Article 24(3)(c) of the Bill, the Minister may permit any individual or category of persons to commence practising by ‘*virtue of his or her academic qualifications **or** professional experience*’ [own emphasis] if it is in the public interest. This might be problematic – academic qualifications alone can surely not suffice? It is unclear what circumstances would allow the Minister to deviate from the general admission and enrolment requirements to permit a person or category of persons to commence practising in South Africa. The rationale for the inclusion of the provision is unclear because it could pave the way for certain persons or category of persons to gain the right to practise without having to comply with normal admission requirements and procedures.

One possible reason for the inclusion of the provision could in part be explained by a historical perspective in the context of a similar provision in the Attorneys Act. Article 81(1) of this Act provides for the admission of a certain class or classes of persons to practise in South Africa. In the 1980s, under the previous political dispensation, attorneys practising in the South African homelands of Transkei (GR, 1987a), Bophuthatswana (GR, 1987b), Venda (GR 1989) and Ciskei (GR, 1988) were allowed to practise in the rest of the country. It was the only time when a certain class of persons considered as ‘foreign legal practitioners’ were recognised to be admitted to practise in the country. The statehood of the South Africa homelands was always contested. However, this particular regulation was later amended to include practising attorneys from Lesotho (GG, 1993b).

Another historical fact could explain the inclusion of this provision in the Bill. With the arrival of a new political dispensation in South Africa the Recognition of Foreign Legal Qualifications and Practice Act 114 of 1993 was enacted to provide for the exemption of certain qualification requirements for South Africans who obtained foreign legal qualifications or practised outside the country while living in exile. It allowed certain citizens to gain access to the legal profession without having to requalify in South Africa. This Act has since ceased to have effect after its original purpose had been fulfilled and is scheduled to be repealed in the new Bill.

These two acts addressed specific policy objectives at the time and were transitional in nature. Their rationale has fallen away and the same reasoning cannot justify the inclusion of this particular provision in the new Bill.

7. Conclusion

The current qualification requirements for the admission and enrolment of attorneys and advocates present an insurmountable barrier to foreign legal practitioners wanting to practise in South Africa. South Africa will not reap the potential benefits of liberalisation, such as increased employment opportunities for local lawyers created by locally established foreign firms and legal support services companies; attracting foreign investment; and helping to create opportunities abroad for local businesses, if it fails to adapt to the reality created by international trade, to conform to standing obligations and to commit to further liberalisation of legal services. The existing legislation governing the admission of foreign legal practitioners in South Africa appears to be in conflict with specific aspects of its commitments and obligations under the WTO GATS.

- Under certain circumstances qualified foreign legal practitioners from designated countries are exempted from vocational training and practical examinations. In the case of foreign lawyers, cross-border practising rights are granted in respect of certain designated countries. Although South Africa has not made any GATS commitments on cross-border supply of legal services, the special treatment provided to certain foreign lawyers appears to constitute a violation of the MFN treatment obligation under GATS Article II. South Africa will need to obtain a waiver from the WTO to maintain the measure for a limited period of time. If not, any WTO member may invoke dispute settlement proceedings against it to seek the withdrawal of the inconsistent measure.
- South Africa unilaterally recognises the academic and professional qualifications of some (mainly) neighbouring WTO members. Most of these arrangements predate South Africa's GATS commitments and should be reviewed. Nonetheless, recognition can be justified as an exception to the MFN obligation. Where recognition occurs, it should as far as possible be based on common international standards and criteria, such as those of the International Bar Association. The unilateral recognition of some WTO members' qualifications places an obligation on South Africa to afford any other WTO member adequate opportunity to demonstrate that education, experience, licences and certifications obtained or requirements met in that other member state should also be recognised. In addition, GATS Article VII(4) places an obligation on South Africa to notify the Council for Trade Services of such measures. South Africa is yet to notify the Council of its existing unilateral recognition measures.

- The permanent resident and local qualification requirements constitute national treatment limitations under GATS Article XVII and should, if maintained, be entered into the country's GATS schedule of specific commitments. This would require the modification of the country's schedule of specific commitments and, if requested by an affected member, negotiation of compensatory adjustments. However, it is envisaged that the academic qualification requirement for the admission and enrolment of foreign legal practitioners is set to be brought in line with South Africa's GATS commitments under the Legal Practice Bill.
- It is envisaged under the Legal Practice Bill that recognition of other countries' qualifications will no longer occur unilaterally but in terms of reciprocal international agreements only. These agreements will have to be notified to the WTO. Moreover, once the new legislation enters into force, South Africa will be under an obligation to inform the WTO of the new law.

The taking up of specific commitments under GATS creates certain policy implications for a country. Nothing in GATS prevents a country from maintaining or introducing technical or commercial regulation to meet national policy objectives. However, it does determine to a certain extent how a country can regulate its scheduled services sectors. GATS provisions and specific commitments are binding international obligations and noncompliance will have legal consequences for South Africa. It is therefore under an obligation to ensure that any regulation on the admission and enrolment of foreign legal practitioners made under existing and future legislation fully complies with the country's GATS obligations and commitments.

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