



# **Scope for International Commercial Legal Practice in the *Proposed* Grand Free Trade Area**

PALU – ALSF Capacity-building Project on International Commercial Law in  
Africa

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# Presentation Structure

- *Economic Overview*
- *RECs profiles*
- *Obstacles to integration*
- *The Grand TFTA*
- *Relevance to lawyers*
  - *Opportunities*
  - *Obstacles*
- *Recommendations*



# Economic Overview

- COMESA-EAC-SADC Region:
  - 26 Countries, 527 million people, GDP US\$624 bn (2006) or 57% of total AU GDP;
  - BUT 40% of this GDP- South Africa;
  - SMALL FRAGMENTED economies (11 countries less than 1% regional GDP;
  - HUGE INCOME DISPARITIES (e.g. Seychelles US\$24- Burundi 28 CENTS per capita income per day)

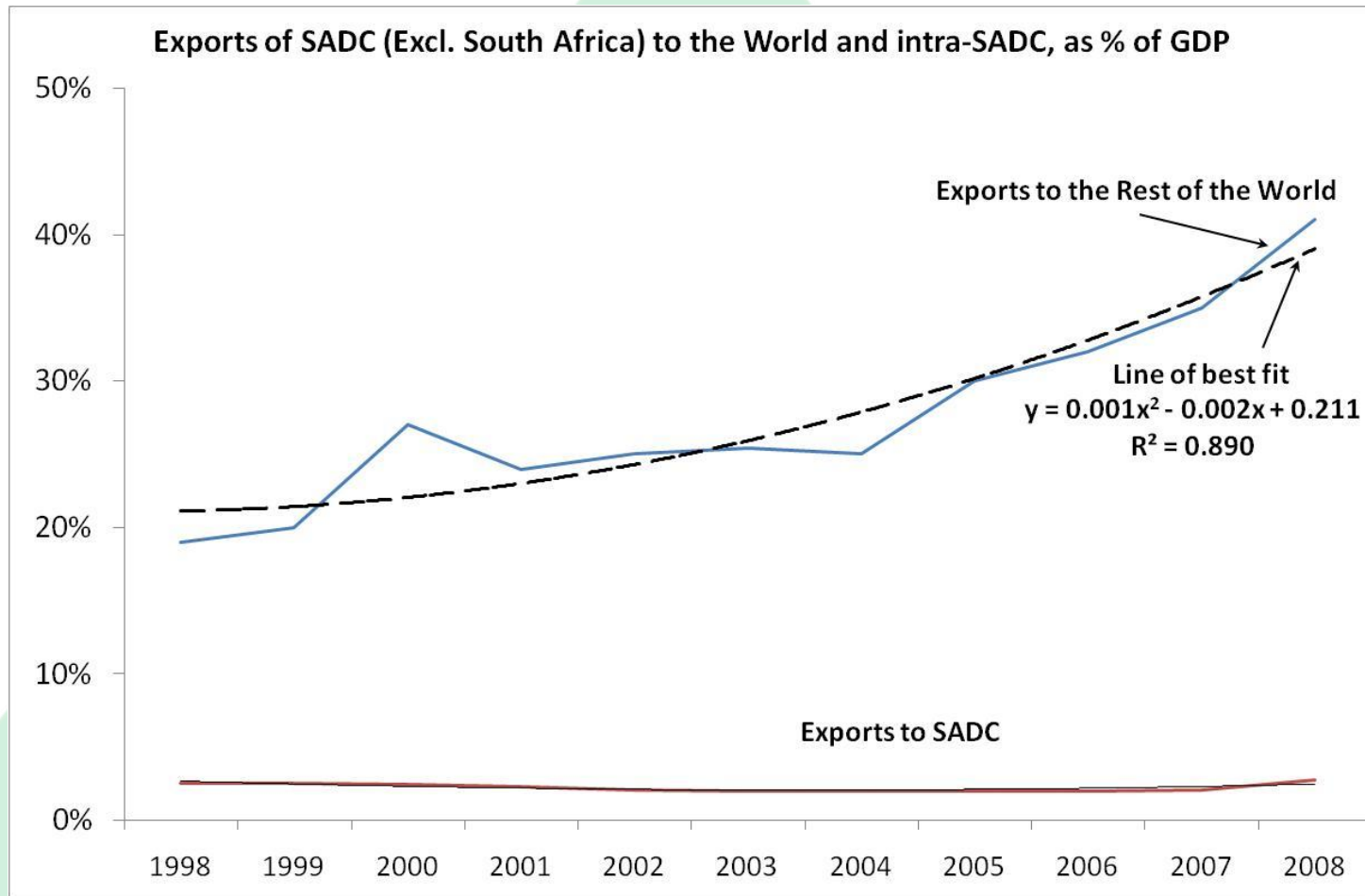


# RECs Profiles

- COMESA- 19 MS, Intra-COMESA trade increased by 30% in 2007 over 2006 to reach US\$8 Billion.
- EAC- 5 MS, In 2007 intra-EAC trade grew by 42% since 2004;
- SADC- 15 MS, As of 2006, intra-SADC trade accounted for about 20% of SADC's total trade.

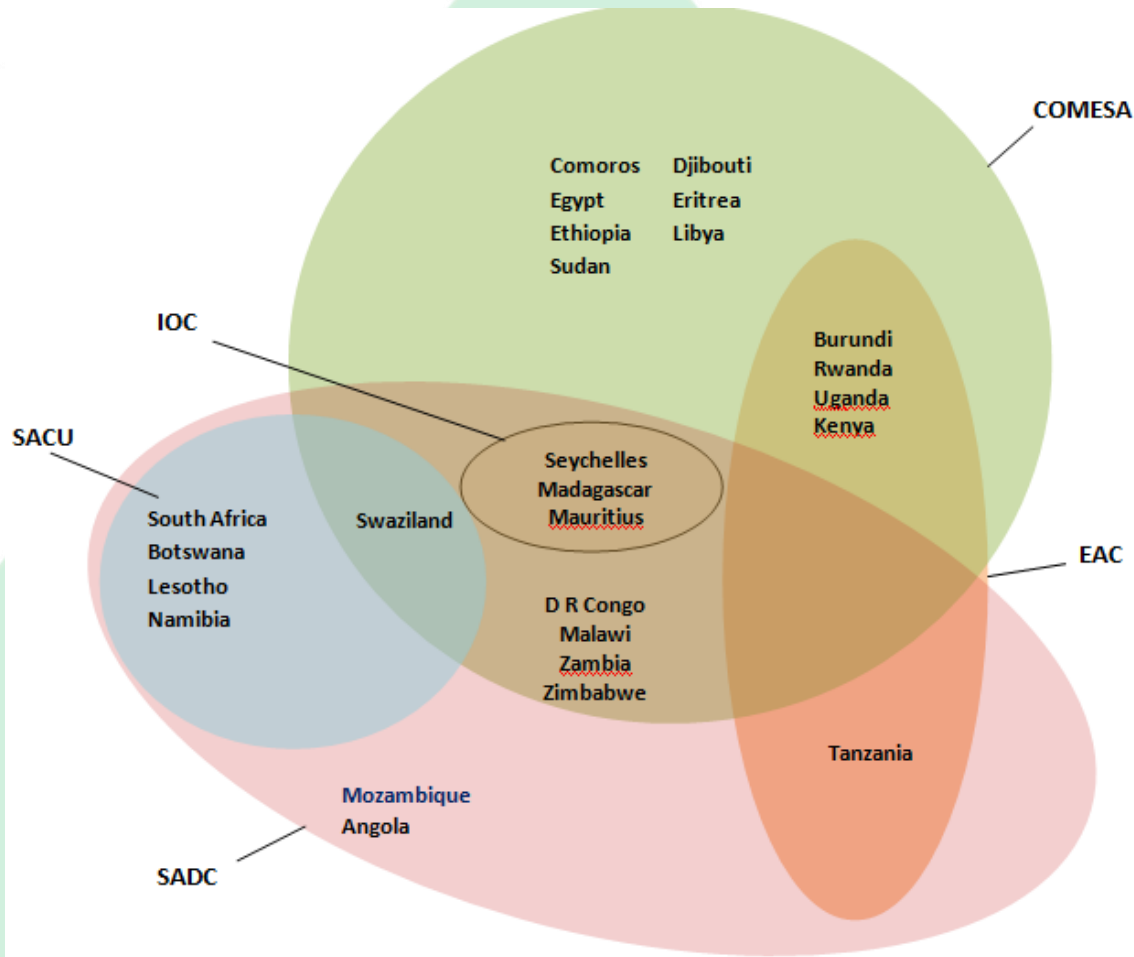


# Low intra-SADC trade





# Overlapping Membership





# Obstacles to Integration

- Multiple memberships (trade deflection, legal, administrative bottlenecks)
- Lack of COMPETITIVENESS
- Restrictions on MOVEMENT of PERSONS
- UNDERDEVELOPED INFRASTRUCTURE
- LOW INDUSTRIAL DEVELOPMENT

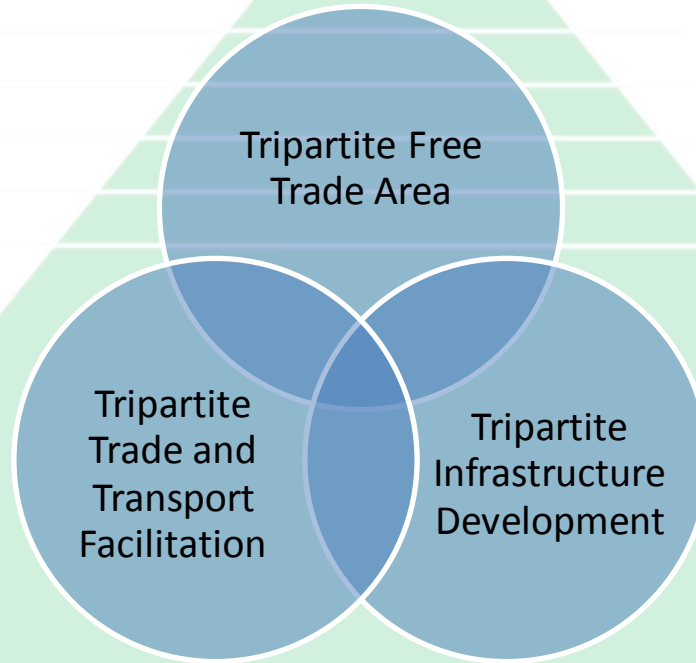


# FTA BENEFITS

- Welfare gains through lower prices, wider choice, and improved quality.
- A Larger market.
- Increased efficiency in production.
- Increased trade and investment in the region.
- Common rules of origin which allow for cumulation and enhances value-addition.



# Grand Tripartite Strategy



# *The Draft Tripartite Free Trade*

TRI AFRICAN



## *Area Agreement*

- Create a large SINGLE MARKET with free movement of goods and services and business persons, and eventually to establish a CUSTOMS UNION:
- Build HARD and SOFT INFRASTRUCTURE:
- COOPERATION in all economic sectors.



# TFTA Specific Objectives

- TARIFF & NTBs elimination;
- Liberalisation of trade in SERVICES
  - Facilitate movement of PERSONS;
  - CAPITAL
  - INVESTMENT.
- INFRASTRUCTURE development.

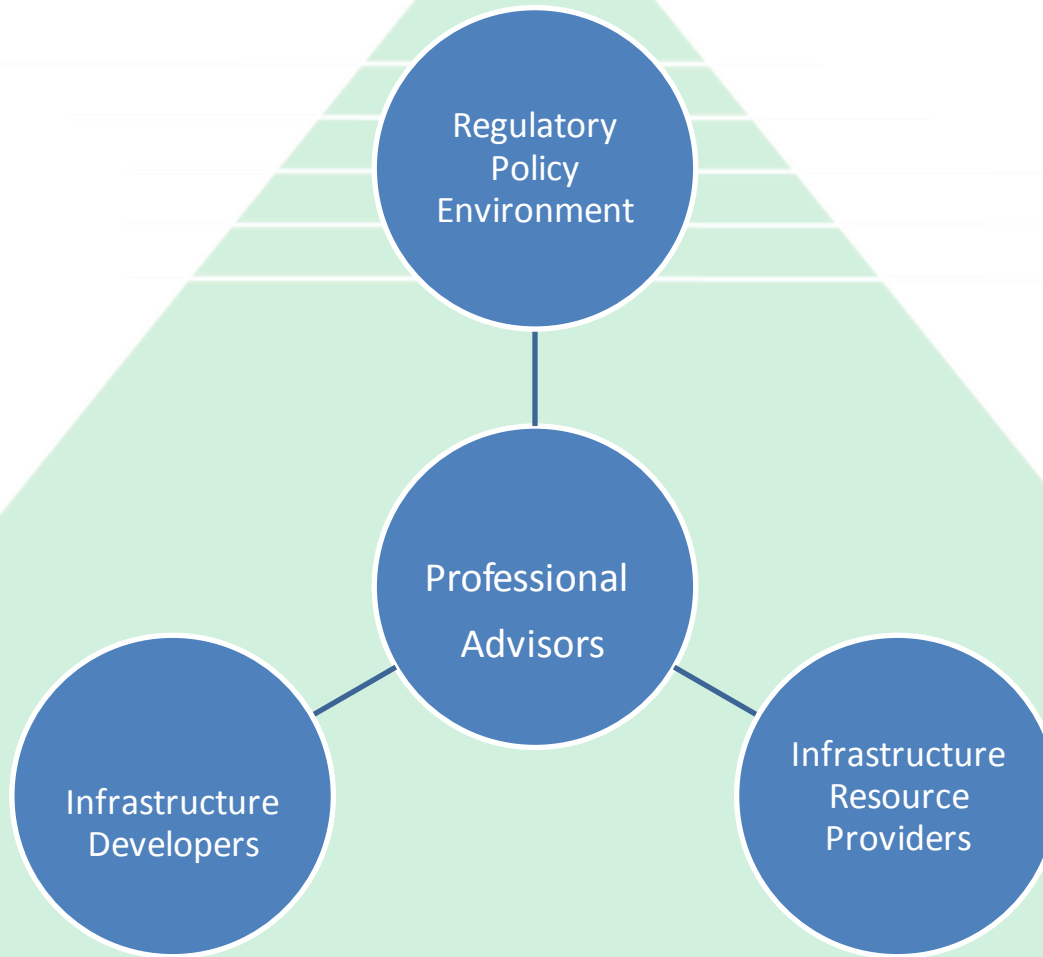


# Progress to date

- The Road Map for Establishing the TFTA (November 2009-January 2015) with an activity matrix;
- A Schedule of activities in preparation for the Second Tripartite Summit; and
- A Road Map for the operationalisation of a Joint Competition Authority.



# RELEVANCE TO LAWYERS



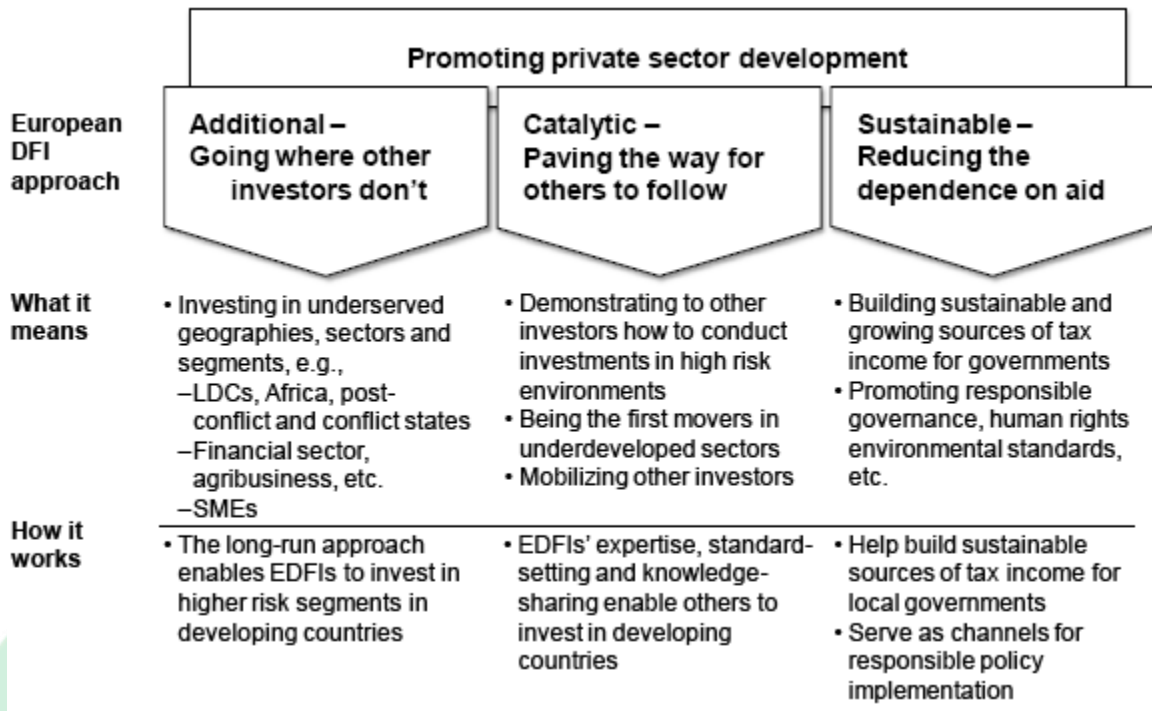


# Opportunities

- Stage 1- Negotiations:
  - Support to country delegations, Technical support to RECs, Formulation of positions
- Stage 2- Implementation:
  - Drafting compliant legislation, Advisory (Gvt, Pvt sector), Disputes (negotiations, arbitration, litigation at REC level & Domestic level)
  - M&A, Trade Remedies, Competition, Investment.



# The DFI Model





# Example: Maputo Toll Road

- Maputo – Gauteng Rd mooted in 1980 (Mitterrand); initial cost US\$75m
- Bids invited 1994, 5 consortia (SA, French, Middle East), bid costs ZAR 50-100 million
- 28 member evaluation panel (engineers, environmentalists, lawyers, financial); 3 Gvts (SA, Mozambique, Swaziland- for alternative route)
- 12 months to evaluate bids. Preferred bidder wanted REVENUE GUARANTEES, Gvts wanted to pass ALL RISK to Concessionaire.
- 1997: Contract signed, price ZAR 1.44 billion. Project refinanced 2005.
- Toll road design depends on traffic volume for revenue
- Questions: Do we grant REVENUE GUARANTEES to Concessionaire?
- Can concessionaire take all the financial risk?



# Maputo Toll Road

- How long should the concession run? 20-30 years? What is the best period for return on investment? What happens when the concession ends? Do the Gvts take full ownership or run another concession?
- How do we calculate the actual initial road charges? (tariffs)
- What financial model can we adopt for this project?
- Multiple financiers involved (14 different capital markets players)
- How do equity investors get surety?
- How does the rate of inflation in Mozambique, Swaziland, SA affect the financial model?
- What load limits can be designed for trucks given that this concerns 3 countries?
- What would be effect of different load limits?
- What contracts do we use, fixed price?



# Obstacles

- Scope of services liberalisation under TFTA
- Structure of Legal Services Market
- Quantity and Quality Issues
- Skills Gap



# Liberalisation limited

- Art. 30 Draft TFTA
  - No compulsory substantive services liberalisation;
  - Limited to PRIORITY SECTORS
    - Up to MS to define
    - Hence no common approach in TFTA Countries
- Legal profession historically PROTECTED and PROTECTIVE. (Global problem, see too INDIA, CHINA, BRAZIL.....)
- Attitudes difficult to shift.

# Restrictions to Modes of Trade

- Mode 1: Cross-border Trade (A to B to provides legal service via e.g. E-mail)
- Mode 2: Consumption Abroad (Client frm A to B for legal advice.)
- **Mode 3: Commercial Presence (A to B sets up firm)**
- **Mode 4: Movement of Natural Persons (A to B to give advice, temporary stay)**

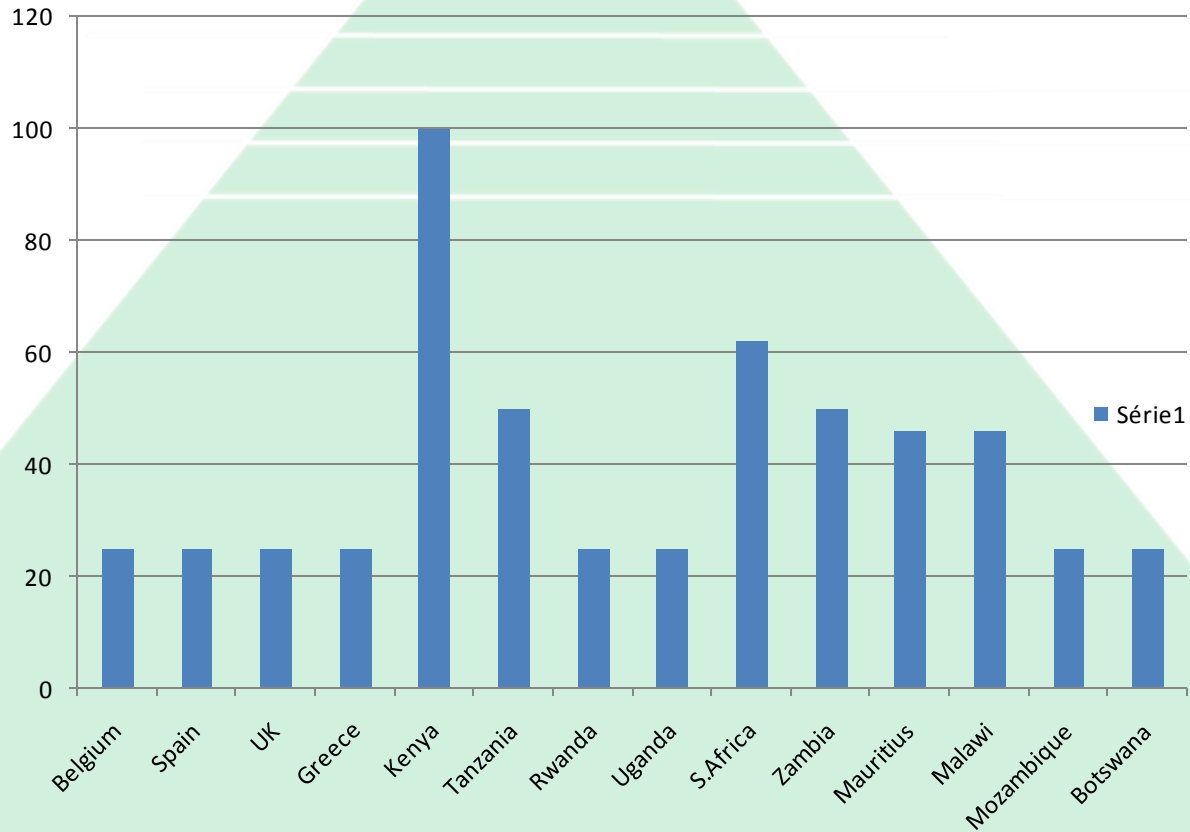


# Restrictiveness Index

The analysis is based on the World Bank (2011) study which uses an index of services trade restrictiveness (STRI). For Mode 3 and 4 the openness of policy towards foreign legal services suppliers is mapped on a 5-point scale ranging from 0 (for no restrictions) to 100 (closed), with three intermediate levels of restrictiveness (25, 50 and 75). Country comparisons are made using selected COMESA-EAC-SADC member states, and to facilitate global comparisons an indication is also made of the STRI in the legal services of some EU member states.

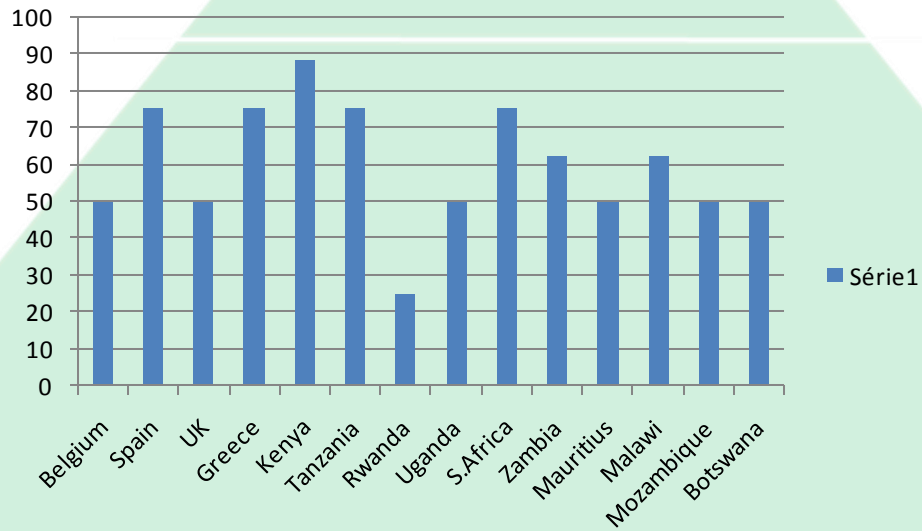


# Mode 3





# Mode 4





# No Progress in SADC

- Services liberalisation still **NEGOTIATIONS ABOUT HOW TO NEGOTIATE**
- 10 Years no progress
- Legal Services not a priority
- Resistance to Free Movement of People
- VISA restrictions



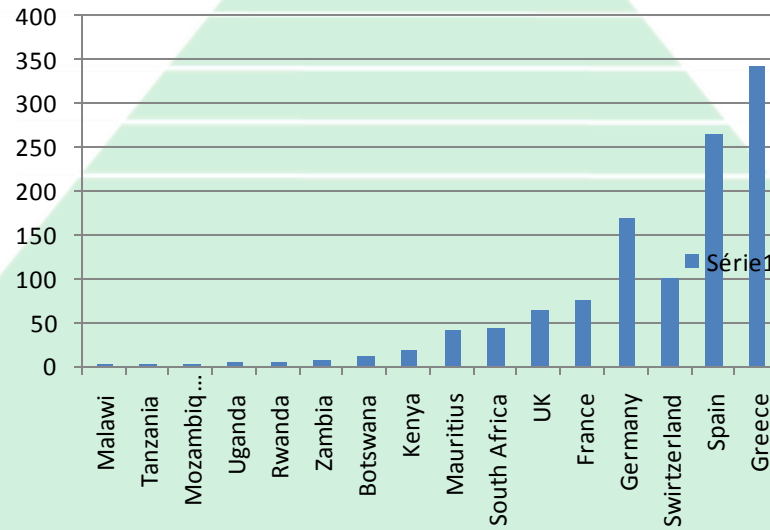
# GOOD PROGRESS IN EAC

- EAC Schedule of Commitments on Services Liberalisation (2009)
- Burundi (Modes 1-2; none, Mode 3 Unbound, Mode 4 as per Mvmt of Workers Schedule.
- Kenya (Modes 1-3; none)
- Rwanda (Modes 1-3; none)
- Uganda (Modes 1-2; none, **Mode 3 common law**)
- **BUT Tanzania no commitment**



# Skills Gap

Lawyer density (100,000 popn)





# Gap an opportunity for others

*“In view of the magnitude, scope and complexity of the projects, as well as the amounts involved, the Government determined that in order to minimise its exposure, it required highly specialised services offered by a legal services firm with experience in the areas relevant to the project.”*

*See, The Sunday Standard, May 22 2011.*



# Recommendations

- Perceptions & Attitudes
- Needs assessments
- Reforming the curricula (economic thinking)
- Regulatory Cost-Benefit Analysis
- Moving SADC agenda to speed with the rest
- Rationalising EAC positions (legal services, Tanzania...)

**/THANK YOU. ASANTE/SIYABONGA/TATENDA.....**