

Training Workshop on Trade in Services Negotiations for AU-CFTA Negotiators.

**APPROACHES TO MOVEMENT OF NATURAL PERSONS AND
OPERATIONALIZATION OF THE SERVICES WAIVER**

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BROAD CLUSTERS:

- **Mode 4 approaches to scheduling and negotiations:**
 - **Lessons for the CFTA**
- **Operationalisation of the services waiver:**
 - **Lessons for the CFTA**
- **How to ensure the CFTA has a Mode 4 element.**

Mode 4 APPROACHES TO SCHEDULING AND NEGOTIATIONS

- The Article, the Annex, the Schedules.
- **Art. 1 (2) (d);**
 - ✦ **The supply of a service by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.**
 - ✦ Person can be natural or juridical ;
 - ✦ Natural person can be a service supplier or an employee of a service supplier (Mode 4 Annex)
 - ✦ Categories commonly scheduled: Contractual Service Suppliers, Intra-Corporate Transfers, Independent Professionals, Business Visitors.

Other key aspects of Annex on movement of natural persons:

- **Non-application to persons seeking access to employment market, measures regarding citizenship, residence or employment on a permanent basis.**
- **Members may negotiate specific commitments for all categories of natural persons.**
- **Agreement not to prevent application of measures to regulate entry and stay provided they do not nullify/impair benefits from commitments.**

EXAMPLES OF NATURAL PERSONS IN MEMBERS' SCHEDULES...Background note by the WTO Secretariat

<i>Independent Professionals (IP):</i>	Self-employed persons of B (sender) who are present in A (receiver) to supply a service to a local client pursuant to a service contract. The term 'professionals' should not be misunderstood to mean that these persons are supplying only 'professional services' as defined in the WTO's Services Sectoral Classification List. In principle, they could be supplying many other services.
<i>Contractual Service Suppliers (CSS):</i>	Employees of a service supplier of B without a commercial presence in A, who are present in A to provide a service pursuant to a service contract concluded between their employer and a local client. CSS receive their remuneration from their employer, and not from the client; they are "natural persons of a Member who are employed by a service supplier of a Member.
<i>Intra-Corporate Transferees (ICTs):</i>	Employees of a service supplier of B that has a commercial presence in A, and who are transferred to the affiliate in A.
<i>Business visitors (BV)</i>	Employees of a service supplier of B who are seeking entry into A for the purpose of setting up a commercial presence or of negotiating the sale of a service on behalf of an enterprise. BV do not receive any remuneration from a source located within A and are not engaged in making direct sales to the general public or supplying services themselves. They are just facilitating future trade, which may take place through a variety of modes of supply.

Mode 4: Approaches to scheduling: Lessons from the GATS: Horizontal section

Sector or sub sector	Limitations on market access	Limitations on national treatment	Additional commitments
1. HORIZONTAL COMMITMENTS			
ALL SECTORS INCLUDED IN THIS SCHEDULE	<p><u>Categories of natural persons covered under</u></p> <p><u>Mode 4. Unbound</u> except for measures concerning the entry into and temporary stay of the following categories:</p> <p>(i) Intra-Corporate Transfers (ICTs);</p> <p>(ii) Business visitors:</p> <p>a) Service sellers;</p> <p>b) Establishment of commercial presence;</p> <p>(iii) Contractual Service Suppliers.</p>	<p><u>Categories of natural persons covered under</u></p> <p><u>Mode 4. Unbound</u> except for all categories of natural persons referred to and committed in the market access column.</p>	

Mode 4: Approaches to scheduling: Lessons from the GATS: Sector-specific Section

Example from the EU schedule

Limitations on Market Access	Limitations on National Treatment
II. SECTOR-SPECIFIC COMMITMENTS	
1. BUSINESS SERVICES	
LEGAL SERVICES (CPC 861)	
<p><u>Mode 4: ICT and BV</u></p> <p>All Member States (except Cyprus, Luxembourg and Malta) are unbound for ICTs and BVs except as indicated in the horizontal section. Salient specific limitations include the following:</p> <p>Citizenship and residency (Finland)</p> <p>Nationality (Greece, Latvia and Poland)</p> <p>Language requirements (Latvia)</p> <p><u>CSS</u></p> <p>All Member States with the exception of Germany and UK make no commitment for CSS. Salient specific limitations include the following:</p> <p>University degree and professional qualifications and three years' professional experience in the sector (Germany and UK)</p>	<p><u>Mode 4: ICT and BV</u></p> <p>All Member States (except Cyprus, Finland, Latvia, Malta and Poland) are unbound except as indicated in the horizontal section. Salient specific limitations include the following:</p> <p>Foreign legal advisors required to be members of their national Bar Association (Austria)</p> <p>Limitations on marketing (Denmark)</p> <p>National licence, national exams. (Denmark)</p> <p>Membership to national bar associations. (Sweden)</p> <p>Citizenship and residency. (Sweden)</p> <p>Finland, Latvia and Poland have no national treatment limitation.</p> <p>Cyprus and Malta are unbound.</p> <p><u>CSS</u></p> <p>All Member States (except Cyprus, Czech Republic, Hungary, Malta, Lithuania, Poland, Slovak Republic and Slovenia) limit access to what is contained in horizontal section.</p> <p>Cyprus, Czech Republic, Hungary, Malta, Lithuania, Poland,</p>

What do we learn from this?

- **Very narrow scope- initial unbound, only for certain categories with additional conditions- both horizontal and sector specific;**
- **Limited categories covered;**
- **Some non-clarity in scope of access granted: H.S says: *Unbound, except for the categories of natural persons included* ; S.S says: *Unbound, except as indicated in the horizontal section*;**
- **Limitations such as citizenship, residence, nationality, examinations, ENTs;**
- **Seemingly only covers highly-skilled service suppliers;**
- **Comparably more limitations on CSS: link to commercial presence, pre-obtained contract, contract obtained by open tendering process, no more than 3 months, Access is solely for contract not to practice the profession, high minimum qualifications (degree and 3-5 years experience depending on MS)**
- **Utilization subject to compliance with national laws including on period of stay;**
- **Uncertainty in depth of NT concession; i.e. unbound except as indicated in horizontal section: H.S: unbound except for MA categories;**
- **Cases of disconnect between MA and NT;**
- **Overall assessment? Need for improvements of H.S and more liberal commitments in sectors as well as overall improvements of a scheduling clarity nature.**

Subsector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments
Telecommunications services			Uganda undertakes the obligations contained in the reference paper attached here
<p>Value-added services except over value-added networks like Internet</p> <p>Packet-switched data</p> <p>Circuit-switched data</p> <p>Mobile services</p> <p>Leased circuit services</p>	<p><u>Mode 4:</u></p> <p>Unbound except for technical personnel except where Ugandans are or become available. Entry and temporary stay of foreign service suppliers subject to compliance with laws, regulations and guidelines in force in Uganda.</p>	<p><u>Mode 4:</u></p> <p>Unbound except for technical personnel stipulated under market access.</p> <p>11</p>	
Voice & data for closed user groups (group of users with stable common and long-term interest)	<p><u>Mode 4:</u></p> <p>Unbound except for technical personnel except where Ugandans are or become available. Entry and temporary stay of foreign service suppliers subject to compliance with laws, regulations and guidelines in force in Uganda.</p>	<p><u>Mode 4:</u></p> <p>Unbound except for technical personnel stipulated under market access.</p>	
Cellular voice and data	<p><u>Mode 4:</u></p> <p>Unbound except for technical personnel except where Ugandans are or become available. Entry and temporary stay of foreign service suppliers subject to compliance with laws, regulations and guidelines in force in Uganda.</p>	<p><u>Mode 4:</u> Unbound except for technical personnel stipulated under market access.</p>	
Internet services TCP/IP (Internet)	<p><u>Mode 4:</u></p> <p>Unbound</p>	<p><u>Mode 4:</u></p> <p>Unbound.</p>	

What do we learn from this?

General trends

- No horizontal section;
- No specific categories-only technical personnel;
- No detail on qualifications, experience, etc;
- Entry and stay subject to compliance with laws, regulations and guidelines in force in Uganda.

Sector specific trends

- Very narrow sectoral commitments;
- No commitment if there are Ugandans; “Unbound except for technical personnel except where Ugandans are or become available”
- Unclear scope of NT commitment “Unbound except for technical persons stipulated under market access”
- General assessment?

Are there any advancements in RTAs? evidence from Mode 4-like commitments in the EAC Common Market Protocol

- **Relevant Schedules: Free Movement of Workers (as contained in Schedule on Free Movt of Workers) and Schedule of Commitments on Progressive Liberalization of Services.**

Free Movement of Workers: Entitlements...

- Apply for employment and accept offers made;
- Free movement within the territories of the PS for employment;
- Conclude contracts, take up employment;
- Stay for purposes of employment;
- Freedom of association and collective bargaining;
- Rights and benefits of social security as accorded to the workers of the host Partner State;
- Rights for children and spouses;
- Implementation is in accordance with EAC CM Free Movement of Workers Regulations.

EAC Schedule Contained in Free Movement of Workers Regulations

Burundi	Kenya	Tanzania
<ul style="list-style-type: none"> Physical mathematical and engineering science professionals. Life science and health professionals. Teaching professionals. Other professionals (such as business, archivists, librarians, social science, writers and creative or performing artists). 	<ul style="list-style-type: none"> Directors and Chief Executives (of corporations, universities, other school/institutions principals, company secretaries. Specialized departmental managers such as account and finance controllers, administration managers, export-import managers, public relation managers, information technology managers etc. Professionals in areas of physical science, mathematicians, statisticians and computing engineering, health life and science, teaching, legal, social science and related, and business. Associated professionals in the areas of Technicians, medical health science, physical and life science, business and social services. Ship and Aircraft controllers. Primary and pre-primary education teachers. Athletics, sports and related workers. Craft and related trades workers. 	<ul style="list-style-type: none"> Professionals in teaching, engineering, science, health, land surveying and air traffic.

EAC Schedule contained in Free Movement of Workers Regulations (Cont'd)

Rwanda	Uganda
<ul style="list-style-type: none"> • Professionals <p>Such as physical science, mathematicians, engineering science, health and life science, teaching, Technicians and associated professionals such as in engineering, optical and electronic equipment operators.</p>	<ul style="list-style-type: none"> • Administrators and managers such as managing directors of companies, universities, other school/ Institutional principals, company Secretaries. • Specialized departmental managers such as accounts and finance controllers, administration managers, export-import managers, public relation managers, information technology managers etc. • Professionals in the areas of science and engineering, health, teaching, business and administration, computing and legal. • Writers and creative or performing artists. • Craft and related trade workers such as Air traffic and ship controllers and technicians; • extraction and building trade workers.

Free Movement of Services in the EAC: Art.16, Part F CMP

- **Guarantees free movement of services and service suppliers of nationals of EAC partners within the EAC;**
- **GATS approaches; Modal definitions, prog.lib, NT (Art.17), MFN (Art.18).**

Sector-specific assessment of potential links between services schedule and workers schedule; An example

Sector:	Conditions of access for market access and national treatment on mode 4 for all sectors are "In accordance with the ¹¹ schedule on the Free movement of Workers"	Potentially corresponding categories of workers in the Schedule for the Free Movement of Workers
<u>Professional services:</u>	<ul style="list-style-type: none"> Legal services (CPC 88442) 	<ul style="list-style-type: none"> Lawyers and Judges.
	<ul style="list-style-type: none"> Accounting, Auditing and Book Keeping services (CPC 862) 	<ul style="list-style-type: none"> Accountants, Financial and Investment Advisers, Financial analysts.
	<ul style="list-style-type: none"> Taxation services (CPC 863) 	<ul style="list-style-type: none"> Accountants, Financial and Financial analysts.
	<ul style="list-style-type: none"> Architectural services (CPC 8671) 	<ul style="list-style-type: none"> Architects.
	<ul style="list-style-type: none"> Engineering services (CPC 8672) 	<ul style="list-style-type: none"> Civil engineers, Industrial and Production engineers, Mechanical engineers, Chemical, Mining engineers, Electronic engineers.
	<ul style="list-style-type: none"> Integrated Engineering services (CPC 863) 	<ul style="list-style-type: none"> Same as above.
	<ul style="list-style-type: none"> Urban Planning and Land scape Architectural services (CPC 8674) 	<ul style="list-style-type: none"> Architects, Surveyors and Planners.

What do we learn from this?

- Developing countries, LDCs included, can go much further than the GATS within their own EIA processes;
 - Uganda makes commitments in 27 sectors and 53 subsectors in the EAC CM process;
- Hybrid approaches are possible- Mode 4 plus other types of labour mobility-but need to be sure it was intention;
- Various layers of skill levels can be accommodated- it includes lower skilled workers;
- Scope of beneficiaries can be wider: covering workers, children and spouses;
- Access is for employment- a break from the GATS Mode 4 Annex exclusions of domestic labour market;

What to take from this for the CFTA

- **It is possible to liberalize Mode 4 access within the African continent- examples abound in east and west Africa;**
- **Think through depth issues-is it workers? Mode 4? Skill levels? Intended levels of access?**
- **Importance of scheduling clarity (Some have argued unintended depth)**
- **But underpinning all of this is what the framework looks like as it is to that treatment that Mode 4 services and services suppliers will have access.**

Approaches to negotiations: Lessons from the multilateral level

- **The Bilateral Request/Offer modality?**
 - **The Practice?**
 - **Pros: Allow for country specific input, sector and market specific dialogue, forces countries to engage internally on how their interests should be portrayed?**
 - **Cons:**
 - **Cumbersome, requires large resources per country to devote to preparations, bilaterals and follow up,**
 - **Difficult to see overall content on the table,**
 - **Difficult to anticipate what all of the offers mean for an individual country (assessments are typically in overall terms),**
 - **Difficult to see if your own requests are taken into account? Unless you assess each individually,**
 - **Those with weaker resources and technical grasp, as well as less political weight likely to be left behind in terms of their interests or ability to influence process (but recall results are MFN)**
 - **Relies on heavily resourced secretariat to do this assessment,**
 - **Potential for free riders?**

Approaches to negotiations at the multilateral level

- **The plurilateral request/offer modality?**
 - **The Practice?** Groups of friends of specific sectors form critical mass in sector x, agree to content of group request, submit to a group of or all of Members. Sponsors deemed to be recipients in some cases.
 - **Pros:** Allows for tapping on strength in numbers, helps identify a critical mass of interests in specific sectors, heightens ambition as sponsors are recipients, We have not seen results of the plurilateral modality yet at the WTO.
 - **Cons:**
 - **Also resource intensive in initial preparations, ensuring your interest is captured in the group, follow up.**
 - **Issues with so-called critical mass- which might be in sectors where certain countries do not have export interest/capacity (how to ensure sector negotiated are beneficial for all)**
 - **Some questions raised on implications for GATS in-built flexibilities. Large ones may tend to dominate.**

What to take from this for the CFTA

- **It is possible to negotiate and schedule GATS mode 4 commitments in the African context...and it makes business sense:**
 - **Might make sense to start with least controversial categories, for which movement is legally accepted and in place- and lock those in...REC levels as the floor?**
- **It is possible to consider wider, broader categories of persons- but caution on clarity.**
- **Issues of the framework agreement on the basis of which such modal details would be underpinned need to come first:**
 - **These will be key in delineating what access is really about i.e quality of treatment to be offered to services and service suppliers. If built on GATS acquis, which is basis for most RECS, that will be mileage.**
- **Scheduling approaches (will determine levels of ambition), classification, will need to be got right to reflect intentions:**
- **Negotiating approaches (modalities) may need to build on lessons not only from the multilateral but also the regional experiences.**
- **Think through whether S&D, including for specific groups such as LDCs, is appropriate in this context and learn from multilateral approaches on which types work best.**
- **Think through issues of sequencing liberalization- Need to fast track the (remaining) sectoral capacity assessments and regulatory and institutional audits?**

OPERATIONALIZATION OF THE SERVICES WAIVER

- **What does the waiver do?**
 - **Create legal room for those interested to provide LDCs preferential market access for 15 years from 2011.**
 - **Recall import of MFN and difficulty to use the MFN exemption track.**
- **Scope:**
 - **Market access**
 - **NT when approved by the services council.**
- **ROOs.**
- **Why is it important?**
 - **Ideally provides guaranteed market access in sectors and modes of supply of LDC export interest.**
 - **Provides incentive to develop targeted capacity in specific areas**

OPERATIONALIZATION OF THE SERVICES WAIVER

- **Where are we on operationalization of the waiver?**
 - **February 2015-High Level meeting**
 - **July 31 soft deadline for notifications**
 - **By July TNC, 9 Members had submitted their notifications pursuant to the operationalization of the services waiver as per the Bali Decision. These members include (in the order of submission): Canada, Australia, Norway; Korea; China; Hong Kong, China; Chinese Taipei; Singapore; New Zealand.**
 - **LDC assessment of some of the notifications?**
 - **Overall, there are questions as to whether these notifications provide any preferential treatment to LDCs.**
 - **Other notifications seem to have maintained horizontal restrictions.**
 - **LDCs to assess notifications and in tandem have bilateral meetings to have better clarity on definition of "Preferential Treatment".**

What to take from this for the CFTA

- **It remains a challenge to operationalize preferential market access;**
- **If services are a priority then CFTA needs to move much quicker to create market access opportunities for LDCs in Africa**
- **Experience of LDC collective request could be useful, as a base, in informing export priorities in services.**
- **Developing countries in Africa are expected to table offers in the DDA- can these be frontloaded in CFTA?**
- **Developing countries declaring themselves in a position to do so are encouraged to give LDCs preferential access- can their plans be frontloaded in the CFTA?**
- **Would the flexibility offered by waiver schedules give comfort to African countries in a CFTA context? Can this be adapted? But what about concerns with certainty and predictability, how to ensure this in CFTA?**

How to ensure the CFTA has a Mode 4 element;

- **Mapping access regimes and conditions on the continent;**
 - **Is it an option to lock in the base as a start?**
- **Understanding the various layers/distinctions between Mode 4 and labour mobility in general.**
- **Ensuring the framework Agreement is got right; Is GATS a basis going forward?**
 - **Issues like guidelines, modalities, definitional issues need careful thought.**
- **Learning from the GATS- Do you want a GATS mode 4 approach i.e mode 4 Annex scope? Is it realistic in the CFTA context? Are we talking access to labour market?**
 - **Is it an option to borrow the acquis, negotiating guidelines and move straight to scheduling?**
- **Regulatory capacity development;**
- **Regulatory cooperation on all of the complex layers and steps in the mode 4 chain.**

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