

Georgetown University Law Center
International Trade and Investment Law Practicum

**Services Trade under the East
African Community Common Market
Protocol**

May 10, 2015
For: International Trade Center
Submitted by:
Isaac Baker
Carolina Arias Estévez
Karen Bosman

EXECUTIVE SUMMARY	2
INTRODUCTION.....	4
1. AMBIGUITIES IN THE COMMON MARKET PROTOCOL.....	6
1.1 ARTICLES 16(1)&(5).....	6
1.1.1 <i>Positive and Negative List Schedules: what they are, why they are important, and how they are different</i>	<i>7</i>
1.1.2 <i>The EAC Services Schedule: why we assume a positive list approach</i>	<i>8</i>
1.1.3 <i>Where the Ambiguity Lies and how to remove it</i>	<i>9</i>
1.2 THE MARKET ACCESS PROVISION	9
1.2.1 <i>Market Access Provisions: their Purpose and the GATS Approach.....</i>	<i>10</i>
1.2.2 <i>The Problem with the EAC Common Market Protocol</i>	<i>11</i>
1.2.3 <i>Recommendations</i>	<i>11</i>
2. FREE MOVEMENT OF PERSONS AND SERVICES UNDER THE COMMON MARKET PROTOCOL.....	13
2.1 FREE MOVEMENT OF WORKERS	13
2.2 FREE MOVEMENT OF PERSONS.....	14
2.3 FREE MOVEMENT OF SERVICES	15
2.4 APPLICATION OF FREEDOMS IN PRACTICE.....	16
3. MODE 4 REGULATION.....	18
3.1 SCHEDULING MODE 4 SERVICES.....	18
3.1.1 <i>Differences between the Common Market Protocol and the GATS.....</i>	<i>18</i>
3.1.2 <i>Definition of Mode 4.....</i>	<i>18</i>
3.1.3 <i>Occupational Groups rather than Categories of Natural Persons.....</i>	<i>20</i>
3.1.4 <i>Definition of Service Supplier.....</i>	<i>21</i>
3.1.5 <i>Horizontal Commitments.....</i>	<i>23</i>
3.2 CATEGORIES OF NATURAL PERSONS SUBJECT TO COMMITMENTS UNDER MODE 4.....	24
3.2.1 <i>Mode 4 Service Suppliers.....</i>	<i>24</i>
3.2.2 <i>Categories of Service Suppliers in EAC Member States' GATS Schedules.....</i>	<i>25</i>
3.3 COMMON CATEGORIES AND DEFINITIONAL ELEMENTS	27
3.3.1 <i>Intra-corporate transferees (ICTs)</i>	<i>28</i>
3.3.2 <i>Business Visitors (BV).....</i>	<i>31</i>
3.3.3 <i>Contractual Service Suppliers (CSS).....</i>	<i>33</i>
3.3.4 <i>Independent Professionals (IP).....</i>	<i>35</i>
3.3.5 <i>Other</i>	<i>37</i>
3.4 QUALIFICATIONS.....	37
3.5 TRIPARTITE AND CONTINENTAL FREE TRADE AGREEMENT.....	39
4. SERVICES SCHEDULING.....	41
4.1 INTERPRETATION OF SCHEDULED COMMITMENTS	41
4.2 INCONSISTENCIES IN THE EAC COMMON MARKET PROTOCOL SERVICES SCHEDULE OF COMMITMENTS.....	42
4.2.1 <i>Lack of CPC Numbers.....</i>	<i>44</i>
4.2.2 <i>Incorrect Assignment of CPC Numbers.....</i>	<i>47</i>
4.2.3 <i>Discrepancies in the Description of Services</i>	<i>49</i>
4.2.4 <i>Ambiguous Use of Symbols.....</i>	<i>55</i>
4.3 EAC MEMBERS' GATS COMMITMENTS AND THEIR RELATION TO THE CMP SERVICES SCHEDULE.....	58
4.3.1 <i>Burundi's GATS Commitments compared to the CMP Services Schedule.....</i>	<i>59</i>
4.3.2 <i>Rwanda's GATS Commitments compared to the CMP Services Schedule</i>	<i>62</i>
4.3.3 <i>Kenya's GATS Commitments compared to the CMP Services Schedule.....</i>	<i>64</i>
4.3.4 <i>Uganda's GATS Commitments compared to the CMP Services Schedule</i>	<i>66</i>
4.3.5 <i>Tanzania's GATS Commitments compared to the CMP Services Schedule.....</i>	<i>69</i>
4.3.6 <i>Recommendation</i>	<i>71</i>
CONCLUSION.....	71

Executive Summary

The East African Community (EAC) is the regional intergovernmental organization of the Republics of Burundi, Kenya, Rwanda, the United Republic of Tanzania, and the Republic of Uganda. The EAC countries established a Customs Union in 2005 and a Common Market in 2010. The next phase of the integration will see the bloc enter into a Monetary Union, with the ultimate goal being that of a Political Federation.

The Protocol on the Establishment of the EAC Common Market provides for “Four Freedoms”, namely the free movement of goods, labor, services, and capital. This paper is primarily focused on the free movement of services, and touches on the other freedoms only insofar as they overlap with the movement of services.

The goal of the study is to highlight potential obstacles in the Protocol that may hamper the successful liberalization of trade in services within the EAC, and to provide recommendations as well as examples of alternative approaches with respect to regulating the progressive liberalization of services within the common market.

A preliminary investigation into the language and structure of the Protocol finds that there are ambiguities that need to be addressed. First, we show that the Protocol’s language leaves room to be interpreted as a negative, rather than positive, list approach. Second, we explain why the lack of a market access provision in the Protocol creates uncertainty regarding the scope of the commitments found in the EAC services schedule.

A further investigation into the structure of the Protocol shows that three separate instruments guarantee the free movement of persons and services, and that there is significant overlap between these instruments. This creates confusion, which is amplified by the fact that the movement of mode 4 service suppliers is linked to the free movement of workers.

It is suggested that a more clear, concise and transparent way of regulating the movement of mode 4 service suppliers would be by inserting definitions for different categories of service suppliers. Suggestions and guidelines are provided in this regard, taking into account specific principles for mode 4 negotiations that have been adopted by WTO members.

Our final investigation reveals that the liberalization of services trade may be hampered by a number of discrepancies that exist in the Schedule of Commitments on the Progressive Liberalization of Services (Annex V). These discrepancies include missing Central Product Classification (CPC) numbers, incorrect assignment of CPC numbers, and inconsistencies in CPC descriptions. We also compare Annex V and the GATS commitments of Partner States, finding that, although further liberalization has been achieved through regional integration, there are still a number of GATS commitments that are more ambitious than those at the regional level. We suggest, in this regard, that the level of regional liberalization at least match that of multilateral liberalization.

Introduction

This paper is meant to guide policy makers and interested parties regarding certain specific issues hampering the liberalization of trade in services within the East African Community (EAC) via the EAC Common Market Protocol. There exist three primary obstacles to the achievement of free movement of services within the EAC that will be addressed herein: first, ambiguities within the language and structure of the Common Market Protocol; second, the manner in which mode 4 services are regulated; and third, technical errors and discrepancies in the EAC services schedule.

The East African Community Common Market was established to “accelerate economic growth and development.”¹ The Common Market Protocol creates the Common Market, and establishes the free movement of goods, persons, labor, the rights of establishment and residence, the free movement of services and capital, as well as institutions and authority structure (primarily by reference to the Treaty Establishing the East African Community). Furthermore, it mandates the drafting of a services schedule of commitments and various annexes further outlining the five freedoms previously mentioned. These annexes are then referenced later in the Protocol and within the schedule of commitments so as to control the movement of their relevant subjects.²

¹ East African Community. *Protocol on the Establishment of the East African Community Common Market*, 2010. Preamble. 2.

² For a discussion on the purpose, institutions, and structure of the EAC Common Market as set out in the Common Market Protocol, see the “Annex on the East African Community Common Market Protocol.”

With trade in services accounting for nearly 50 percent of the East African Community's GDP, ensuring the free movement of services becomes highly relevant to achieving the Common Market's objective.³ Unfortunately, significant difficulties in implementing the Partner States' negotiated commitments to trade in services liberalization have inhibited the EAC Common Market from realizing many of the gains it hoped to see.⁴ Eliminating the ambiguities and technical errors found in the Protocol and EAC services schedule could help solve those implementation difficulties that arise due to confusion and differences in interpretation between the Partner States. Additionally, increased clarity and practicality in the Protocol and services schedule will allow investors and businesses to feel more comfortable acting within the EAC.

This paper is separated into four parts. Part I, *Ambiguities in the Common Market Protocol*, addresses the ambiguities created by the language in the CMP Articles 16(1)&(5) as well as by the absence of a market access provision in the Protocol. In Part II, *Free movement of persons and services under the Common Market Protocol*, we discuss the different freedoms that are created by the CMP and how they apply to the movement of natural persons within the EAC. Part III, *Mode 4 Regulation*, explains the issues with the EAC's current means of Mode 4 service supply regulation and investigates alternatives, particularly by presenting various means to define service suppliers. Part IV, *Services Scheduling*, explains, and provides examples of, the technical discrepancies found in the EAC Services

³ For a more detailed account of trade in services' importance to the East African Community's growth, see the "Annex on Trade in Services within the East African Community."

⁴ For a breakdown of the EAC's difficulties implementing trade in services commitments, see the "Annex on Implementation Difficulties in the East African Community Common Market."

Schedule and the discrepancies between it and the Partner States' GATS commitments.

1. Ambiguities in the Common Market Protocol

The language of Articles 16(1)&(5) of the East African Community Common Market protocol and the lack of a market access provision in that agreement create ambiguities in the interpretation of the EAC services schedule that could cause the Community problems in the future. As discussed below, in section 4.1, one can generally assume that the Protocol establishes a positive list schedule; however, language in Article 16 is ambiguous enough to open the door for an activist court or tribunal to read a negative list approach into the schedule. This would significantly change the Partner States' commitments, thus we recommend amending the protocol to remove the ambiguity that allows for this possibility.

Furthermore, as explained in section 4.2, the Protocol is missing a market access provision, which creates ambiguity with respect to the scope of the commitments found in the EAC services schedule. Such ambiguity can decrease the Partner States' willingness or ability to commit or implement commitments, and can unnecessarily increase disputes over what each member has committed to. Therefore, we recommend that the EAC draft a GATS modeled market access provision to remove this ambiguity.

1.1 Articles 16(1)&(5)

The East African Community Partner States decided to employ a positive list approach in scheduling commitments to the liberalization of services; however,

language in the Protocol's Articles 16(1)&(5) creates ambiguities that could allow an activist court or tribunal to read a negative list approach into the EAC services schedule. Below is only a general overview of the situation. First, we explain the importance of, and differences between, positive and negative list approaches in services schedules. We then explain why we assume the EAC services schedule uses a positive list approach. Last, we point to the language that gives rise to the ambiguity in this area and provide our recommendation on how to remedy the problem. For the technical analysis of Articles 16(1)&(5), as well as 23(1)&(2), can be found in the *Annex on Articels 16 and 23 Ambiguities*.

1.1.1 Positive and Negative List Schedules: what they are, why they are important, and how they are different

Political, economic, and other reasons can cause countries to exclude certain activities from their commitments to liberalize, or maintain the freedom to implement certain restrictive measures.⁵ The question for these countries, then, is how to maintain these rights. The most common methods are a positive list approach and a negative list approach. A positive list schedule contains those sectors in which the parties are willing the commit to liberalizations. Subject to other provisions in the treaty, the parties are free to maintain and introduce trade restrictions in any sector not listed. In a negative list schedule all sectors are assumed fully liberalized, subject to other provisions in the agreement, except for those restrictions specifically indicated by the schedule.

⁵ Cronje J.B. "Suitable Mechanisms for Negotiating Trade in Services and Movement of Business Persons in the Continental Free Trade Area." Stellenbosch: *Tralac*. April 2015. 2. <http://www.tralac.org/publications/article/7224-suitable-mechanisms-for-negotiating-trade-in-services-and-movement-of-business-persons-in-the-continental-free-trade-area.html#downloads>

Theoretically, the negative list approach provides for more transparency and policy stability, providing potential service providers and investors more accurate and easily understood information on the relevant restrictions and limitations. However, using a negative list approach, if the schedule does not include every trade restrictive measure found in the country, then businesses are more easily misinformed and unable to accurately picture the business environment. Thus, a negative list schedule often requires long lists of restrictions; unfortunately, such lists are often impractical, difficult to read, and decrease the commercial value of liberalization.⁶ It is, technically, possible to write a schedule that would result in the same outcome whether a positive or negative list approach were used;¹⁰ however, the EAC schedule is not written in such a way, so whether a court interprets the protocol as establishing a positive or negative list approach has significant consequences for the East African Community.

1.1.2 The EAC Services Schedule: why we assume a positive list approach

We assume that the EAC's services schedule uses a positive list approach because its structure and the intent of the member states are not consistent with a negative list approach. Structurally, the EAC schedule is modeled after GATS schedules, which are required to use a positive list approach; if the States wished to use a negative list approach they could have modeled the schedule after one that already does so, thus removing any resulting ambiguity, with its accompanying

⁶ Cronje J.B. "Suitable Mechanisms for Negotiating Trade in Services and Movement of Business Persons in the Continental Free Trade Area." Stellenbosch: *Tralac*. April 2015. 5. <http://www.tralac.org/publications/article/7224-suitable-mechanisms-for-negotiating-trade-in-services-and-movement-of-business-persons-in-the-continental-free-trade-area.html#downloads>

confusion and misinterpretations. Additionally, given the substance of the EAC services schedule, if it used a negative list approach then the member states would be almost entirely committed to liberalization of the services included within, and completely committed to the liberalization of *every other* services sector. We know that the member states do not desire to be so extensively committed, thus they would not have written their schedules as they did with the understanding that those schedules used a negative list approach.

1.1.3 Where the Ambiguity Lies and how to remove it

Unfortunately, despite the reasons above and the fact that Articles 23(1) and (2) of the EAC Common Market Protocol (CMP) would make little sense unless a positive list approach were intended, the language in Article 16 of the CMP gives rise to significant ambiguity in the legal interpretation of the approach used. In particular, Articles 16(1) and (5) are problematic. For a more in depth analysis of the ambiguities created by Articles 16(1), 16(5), 23(1), and 23(2) please see the *Annex on Articles 16 and 23 Ambiguities*. Overall, we recommend that this ambiguity be removed via amendment to the Protocol or some other means by, within article 16(1), specifying the desired positive list approach and referring back to Articles 16(5), 23(1), and 23(2).⁷

1.2 The Market Access Provision

The EAC Common Market Protocol's lack of a market access provision creates ambiguity as to the scope of the commitments found in the EAC services schedule.

⁷ Caution: Some commenters believe that this proposal could create a legal ratcheting effect, disallowing member states from backtracking on commitments that are made.

Below we state the purpose of market access provisions in general and explain the, relatively, common and understood approach used in GATS. We then discuss the problem with the EAC Common Market Protocol's lack of a market access provision. Finally, we recommend that the East African Community draft a market access provision modeled after that found in the GATS.

1.2.1 Market Access Provisions: their Purpose and the GATS Approach

A market access provision in a treaty for the liberalization of trade in services is meant to qualify the market access column in the countries' or entity's services schedule. More specifically, a market access provision sets out the type(s) of restrictions that a country or entity commits to removing when it places a given sector on its services schedule (subject to any specified limitations).

In the General Agreement on Trade in Services (GATS) the member states negotiated to include six specific types of restrictions that a committed State may not use against relevant services sectors. Committed States may place restrictions on (a) the number of service suppliers, (b) the value of service transactions or assets, (c) the number of operations or quantity of output, (d) the number of natural persons supplying a service, (e) the type of legal entity or joint venture, and (f) the participation of foreign capital.⁸ If, for example a country had "none" in the market access column of their GATS schedule for Mode 1 supply of Legal Services, then that country could not place any of the above six restrictions on legal services; however, they would remain free to restrict legal services in any other way. While not including a service sector in one's GATS schedule keeps you free to restrict that

⁸ WTO. *General Agreement on Trade in Services*, Article XVI: (a)-(f).

sector in whatever way one wishes, once a sector is in the GATS schedule one must explicitly limit one's commitment in the desired manner to maintain one's ability to restrict the sector in any of the six ways.

1.2.2 The Problem with the EAC Common Market Protocol

The EAC Common Market Protocol is missing a market access provision, which creates ambiguities in the interpretation of the EAC services schedule. Without a market access provision, the proper interpretation of a country's commitment within the schedule would be that they could not restrict or regulate that sector in *any way* outside of the exceptions in CMP articles 21, 22, and 23. Additionally, even if a member state were to limit their commitment, it would remain unable to regulate the relevant sector in any other way. This would essentially create a positive-list/negative-list hybrid approach that is significantly more ambitious in its attempts to liberalize trade than the member states of the EAC desire at this time. This results in two main problems: first, a member state who would otherwise wish to commit themselves to the liberalization of a given sector may refuse due to the political impossibility of giving up nearly all – limited only by the Articles 21, 22, and 23 exceptions – of one's right to regulate a sector; and second, misinterpretations and different interpretations between member states could give rise to many more disputes than would otherwise be necessary.

1.2.3 Recommendations

We recommend that the East African Community, through whatever means is open to them, draft and enter into force a market access provision modeled after the

GATS Art. XVI(2). This would minimize potential ambiguity due to the higher quantity of jurisprudence and commentary that already exists interpreting the language. With less ambiguity comes increased confidence in both the member states and outside investors as most, if not all, interested parties will understand the services schedule.

Of course, if the EAC intended their services commitments to cover more, fewer, or different restrictions than GATS Art. XVI does, then modeling their market access provision in this way would not make sense; however, in analyzing the EAC services schedule, the member states clearly made commitments with the 6 GATS market access restrictions in mind. The limitations made by the member states in the market access column would each fall within the purview of one of the six GATS restrictions and all six are represented at least once, as shown below.

Rwanda's restricting the total number of mobile service providers, under telecommunication services, to three would fall under GATS Art. XVI(a). Burundi's limiting capital participation to thirty-three percent per shareholder for non-life insurance services limits the value of such services transactions as is restricted in GATS Art. XVI(b). Tanzania limiting their commitment to liberalize hotels and restaurants by maintaining the right to restrict based upon an economic needs test directly references GATS Art. XVI(a)-(d). Uganda's requirement that law firms organize as partnerships in order to gain legal recognition falls within GATS Art. XVI(e). Last, GATS Art. XVI(f) is represented by Kenya's limiting foreign share of capital in telecommunication services to thirty percent.

Furthermore, multiple other commitment limitations within the EAC services schedule would be covered by GATS Articles XVI(a), (e), and (f). While (b)-(d) are only represented in those instances described above, no limitations fall outside the scope of GATS Art. XVI restrictions, making it reasonable to conclude that the EAC member states negotiated their services schedule with the intent to be bound by the GATS market access restrictions. Therefore, modeling a market access provision after GATS Art. XVI will not only increase the gains from trade that the member states hoped to realize when they entered into the common market, but also result in the desired meaning the member states originally intended to create.

2. Free Movement of Persons and Services under the Common Market Protocol

The free movement of persons and services is guaranteed by three separate instruments in the CMP. In this section we will investigate the different freedoms that are created as they apply to the movement of natural persons. We look at the free movement of workers, the free movement of persons, and the free movement of services, and how they would apply in practice. It is important to understand how these freedoms interact because the movement of workers and the movement of persons are closely associated with the temporary movement of service suppliers.

2.1 Free movement of workers

In Article 10 the Partner States guarantee the free movement of workers for each other's citizens within their territories. This includes an agreement not to discriminate against workers of the other Partner States based on nationality as far

as employment, remuneration, and other conditions of work and employment are concerned. Workers in the EAC are entitled to, amongst other things, apply for employment and accept offers made, move freely within the territories of the Partner States for purposes of employment, and stay for purposes of employment in accordance with the national laws and administrative procedures governing the employment of workers of that Partner State. Additional rights also make allowance for accompaniment by children and spouses.⁹

The Schedule on the Free Movement of Workers regulates the implementation of the agreement in the Protocol. At the moment, this Schedule also plays an integral role with regard to the regulation of mode 4¹⁰ service suppliers because the Schedule on the Free Movement of Services incorporates, by reference, the Schedule on the Free Movement of Workers.¹¹

2.2 Free Movement of Persons

In Article 7 Partner States agree to the free movement of citizens of the other Partner States within their territories. They agree not to discriminate against others' nationals on the basis of nationality through, amongst other things:

- visa free entry
- allowing free movement of citizens of the other Partner States
- allowing stay in the other Partner States

⁹ East African Community. *Protocol on the Establishment of the East African Community Common Market*, 2010.

¹⁰ See discussion of the different modes of services supply *infra* at 3.1.1.

¹¹ It is noted however that there are plans to detach the movement of service suppliers from the Schedule on the Free Movement of Workers, see discussion *infra* at 3.1.4.

- allowing exit without restrictions¹²

The Schedule on the Free Movement of Persons contains provisions on entry, stay (up to six months) and exit, stay of students, limitations, border management and registration.

2.3 Free Movement of Services

Keeping the above in mind, we now move to the liberalization of services. In Article 16 the Partner States guarantee the free movement of services supplied by nationals of Partner States and the free movement of service suppliers who are nationals of the Partner States within the Community. The CMP further states in Art 16(2)(d) that the free movement of services shall cover the supply of services by the presence of a service supplier, who is a citizen of a Partner State, in the territory of another Partner State. The CMP provisions on the free movement of service suppliers will be discussed in greater detail below. For this section it is important only to note that service suppliers are guaranteed free movement within the community (depending on commitments made by Partner States in the Services Schedule).

The delivery of many services requires physical or close proximity between service suppliers and consumers. There is a close relationship between the temporary movement of persons across borders and other modes of service supply. The GATS provides a framework of rules for what it classifies as mode 4 trade. This

¹² East African Community. *Protocol on the Establishment of the East African Community Common Market*, 2010.

method of trade always involves the non-permanent presence of a person in the territory of another country through whose presence services are being traded.¹³

2.4 Application of Freedoms in Practice

In the box below we briefly explain how these different freedoms, as contained in the CMP, might apply in practice, and why this can give rise to high levels of uncertainty. Providing solutions to interactions of the different freedoms created under the CMP is not within the immediate scope of our task; however, we believe it necessary to highlight these ambiguities. We also refer readers to a model that was introduced in South Africa to deal with migration control of labor and service suppliers (discussed the *Annex on the South Africa Model*), and point out that MERCOSUR in this regard has developed a community visa for certain categories of natural persons supplying services.¹⁴

Interaction of Freedoms

The different freedoms guaranteed under the EAC Protocol can give rise to different implications with regard to the same situation. For instance, let us follow a Kenyan businessman employed by a company in Kenya. If he travels to Rwanda to supply a service for the Rwandan branch of his Kenyan employer then his movement could

¹³ Cronje J.B. "Suitable Mechanisms for Negotiating Trade in Services and Movement of Business Persons in the Continental Free Trade Area." Stellenbosch: *Tralac*. April 2015. 12.

<http://www.tralac.org/publications/article/7224-suitable-mechanisms-for-negotiating-trade-in-services-and-movement-of-business-persons-in-the-continental-free-trade-area.html#downloads>

¹⁴ The Agreement for the Creation of a MERCOSUR Visa is aimed at Executives, Managers, Legal Representatives, Scientists, Researchers, Professors, Artists, Sportsmen, Journalists, Specialists and Professionals, who are nationals from a State Party, wishing to supply services for remuneration on a temporary basis in the territory of another State Party. Length of stay granted is subject to a maximum of two years. (Gari, G. *The liberalisation of trade in services in MERCOSUR*. London: Cameron May, 2009).

be regulated in 3 different ways. He could: a) be considered a mode 4 service supplier, which, at the moment, is still regulated by the Schedule on the Free Movement of Workers; b) be considered a visitor¹⁵ and simply move in and out of Rwanda under the visa-free movement guaranteed for up to 6 months in the Schedule on the Free Movement of Persons; or c) if he remains there for a reasonable time, be considered an employee of the Rwandan branch, which allows him to stay in Rwanda up to 6 months and apply for a work permit via the Schedule on the Free Movement of Workers.

Similarly, a Kenyan Independent Professional in Rwanda to supply a service in accordance with a contract could be regulated in 2 ways. As: a) a service supplier currently covered under the Schedule on the Free Movement of Workers; or b) a visitor¹⁶, and thus able cross the border and stay up to 6 months in accordance with the Schedule on the Free Movement of Persons.

Similarly, a Kenyan Independent Professional in Rwanda to supply a service in accordance with a contract could be regulated in 2 ways. As: a) a service supplier currently covered under the Schedule on the Free Movement of Workers; or b) a visitor, and thus able cross the border and stay up to 6 months in accordance with the Schedule on the Free Movement of Persons.

¹⁵ Supposing that he does not disclose that he is traveling to Rwanda for business purposes but rather as a visitor.

¹⁶ *Id.*

3. Mode 4 Regulation

3.1 Scheduling Mode 4 Services

3.1.1 Differences between the Common Market Protocol and the GATS

The CMP is based on the GATS modal approach, there are, however, a number of important differences between the CMP and the GATS. Any interpretation or understanding of the CMP needs to take into account these differences. In this section we will highlight these differences and discuss their implications with regard to regulation of services.

The General Agreement on Trade in Services (GATS) does not define a “service” per se, but rather distinguishes between four modes by which a service can be supplied. These modes correspond to the definition of trade in services in Article I:1 of the GATS. The four modes are: cross-border supply (mode 1), consumption abroad (mode 2), commercial presence (mode 3), and presence of natural persons (mode 4). For purposes of this section we will focus on the presence of natural persons, or “mode 4”.

3.1.2 Definition of Mode 4

Mode 4 is defined in Article 1(2)(d) of the GATS as “the supply of a service by a service supplier of one Member, through the presence of natural persons of a member in the territory of any other Member.” Article XXVIII of the Definitions section of the GATS defines “service supplier” as “any person that supplies a

service.”¹⁷ A “person” is then defined as either a natural person or a juridical person.¹⁸

The GATS Annex on the Movement of Natural Persons Supplying Services under the Agreement identifies two categories of natural persons, namely those that are self-employed and those that are employed by a foreign legal person. The GATS does not cover measures affecting citizenship, residence or employment on a permanent basis. It refers only to employment on a temporary basis, though the period of time that would constitute “temporary” is not defined.¹⁹ The WTO thus makes a distinction between service suppliers as such, and workers or employees in general.²⁰

The CMP, on the other hand, defines the different modes of service supply in Article 2. While the first three modes correspond closely with the definitions in the GATS, the wording for mode 4 is slightly different. Article 16(2)(d) reads: “The free movement of services shall cover the supply of services by the presence of a service supplier, who is a citizen of a Partner State, in the territory of another Partner State.”

Citizen is defined in the CMP as “a national of a Partner State recognized under the laws governing citizenship in the Partner State.”²¹

¹⁷ WTO. *General Agreement on Trade in Services*, Article XXVIII: (g).

¹⁸ WTO. *General Agreement on Trade in Services*, Article XXVIII: (j).

¹⁹ Cronje J.B. “Suitable Mechanisms for Negotiating Trade in Services and Movement of Business Persons in the Continental Free Trade Area.” Stellenbosch: *Tralac*. April 2015. 12.

²⁰ Kategekwa, Joy. *Opening Markets for Foreign Skills: How Can the WTO Help?* Switzerland: Springer International. 2014. 40.

²¹ East African Community. *Protocol on the Establishment of the East African Community Common Market*, 2010, Article 1.

This distinction is important because it may be interpreted to mean that mode 4 includes not only natural persons, but also juridical persons. In practice this would cause confusion because the Partner States have made very different commitments when it comes to mode 3 and mode 4. For instance, Burundi for the most part has scheduled its various mode 3 commitments as “none”, meaning that it is fully committed in this area. However, while it is difficult to say while mode 4 commitments refer to the annex on the movement of workers²², it is assumed that e.g. Burundi would want to keep a much greater level of discretion with regard to regulating the movement of natural persons supplying services. If mode 4 were interpreted to include juridical persons, the establishment of juridical persons would be dictated by two separate and contradictory sets of commitments. It would be particularly problematic if these differences existed in the form of horizontal commitments.²³

3.1.3 Occupational Groups rather than Categories of Natural Persons

One of the greatest deviations of the CMP from the GATS is the incorporation of the Schedule on the Free Movement of Workers in the scheduling of mode 4 commitments.

While the Schedule of Commitments on the Progressive Liberalization of Services is legally distinct from the Schedule on the Free Movement of Workers, the

²² *Infra* at 2.1.3.

²³ See discussion *infra* at 2.1.5.

latter is incorporated by reference into the former by the repeated inscription of “as indicated in the Schedule on the Free Movement of Workers.”²⁴

The provisions in the Schedule on the Free Movement of Workers are not presented in terms of GATS type sectors, but rather in occupational groups. That is to say that there are no categories of natural persons, such as Intra-Corporate Transferees and Business Visitors, but rather occupational groups. The Workers Schedule has no limitations on market access or national treatment, and, as it is incorporated in the services schedule, one interpretation could hold that EAC members have no limits on market access or national treatment at the EAC level in the sectors included in the mode 4 schedule, especially when read in conjunction with Article 17 of the Protocol which obligates members to grant national treatment to each other.²⁵

3.1.4 Definition of Service Supplier

While Article 16(2)(d) refers to a “service supplier,” which is not defined in the CMP, “labour” is defined to include a worker and a self-employed person, and “worker” is defined as “a person who performs services for and under the direction of another person in return for remuneration.”

The scope of application of the Schedule on the Free Movement of Workers is set out in Regulation 4, and includes workers, spouses of workers, and children of workers. This scope does not include self-employed persons or service providers.

²⁴ It is noted however that there are plans to detach the movement of service suppliers from the Schedule on the Free Movement of Workers, see discussion *infra* at 3.1.4.

²⁵ *Id* footnote 12.

Inferring from the above, we appear to have a reasonably clear idea of what a service provider is not, but no definition for what a service provider actually is. Mode 4 service suppliers are regulated in accordance with the Schedule on the Free Movement of Workers, but we know that they do not fall within the definition of “worker” and, thus, must necessarily be something else.

In Article 7, along with Article 21, the CMP defines services in the negative, telling us what does *not* qualify as a service, and setting certain restrictions to the application of the agreement. The second provision of Article 7 purports to detach services from the free movement of goods, capital and persons. While these may be integral to the provision of services in some instances, it clearly indicates that the temporary movement of natural persons providing services is distinct from the movement of persons as envisioned in Articles 7, 8 and 9.

The EAC has recognized that the linkage between the Services Schedule and the Schedule on the Free Movement of Workers, and the subsequent incorporation of “workers” into the regulation of mode 4 needs to be re-looked at.

In the event that the services schedules were no longer to incorporate the Schedule on the Free Movement of Workers, it would be useful to add a distinction between services on the one hand and employment on the other into Article 7. This would indicate that the regulation of the movement of natural persons between member states for purposes involving employment is distinct from that of service providers.²⁶

²⁶ For example, the GATS Annex on the Movement of Natural Persons Supplying Services provides: “The Agreement shall not apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or

A more clear, concise and transparent way of scheduling mode 4 commitments, rather than through the movement of workers, would be by the insertion of definitions for different categories of service suppliers. Limitations and restrictions can then be applied as market access conditions for each type of service supplier and scheduled as horizontal commitments, except where specific commitments are required. There are currently no horizontal commitments in the EAC Services Schedule.

3.1.5 Horizontal Commitments

Though the CMP does not have horizontal commitments, most countries within the GATS model structure their schedules to include a horizontal and a sector-specific section. The horizontal commitments contain market access or national treatment limitations that apply to all sectors covered by the Schedule, unless otherwise specified. Sector-specific commitments must thus be read in conjunction with these horizontal entries.

Horizontal commitments often refer to a particular mode of supply, most notably commercial presence (mode 3) and the presence of natural persons (mode 4). The horizontal entries referring to mode 4 usually indicate the category of natural persons that, subject to specified conditions, are allowed to enter and stay temporarily for the purpose of supplying services in Scheduled sectors. Such

employment on a permanent basis.” Similarly, e.g. the MERCOSUR Annex on Movement of Natural Persons Supplying Services excludes “measures affecting natural persons seeking access to the employment market of a State Party” and “measures regarding citizenship, residence or employment on a permanent basis” from the scope of application.

categories can include e.g. Intra-Corporate Transferees, Business Visitors, Contractual Service Suppliers, and Independent Professionals.

3.2 Categories of Natural Persons Subject to Commitments under Mode 4

3.2.1 Mode 4 Service Suppliers

Mode 4 service suppliers can be organized and scheduled according to categories of service supplier and corresponding definitional elements. This section will discuss different ways in which mode 4 commitments can be scheduled. The discussion will primarily focus on common categories of service suppliers and recommended definitional elements and conditions of market access. We will refer to WTO guidelines in our discussion for three reasons. Firstly, because the CMP is based on the GATS modal approach, secondly, because most countries within the GATS model structure their schedules to include horizontal commitments indicating categories of natural persons, and thirdly, because a common approach toward these categories is being sought internationally, mainly through WTO mechanisms.

There is no clearly defined closed list of categories of natural persons to whom mode 4 applies, and while certain categories of natural persons commonly feature in Members' schedules, there are many divergent ways in which commitments have been scheduled. In an attempt to reach greater comparability and coherence, WTO Members have adopted specific principles for mode 4 negotiations.²⁷

An informal note prepared by the WTO Secretariat describes frequently used categories of natural persons included in the horizontal section of Members'

²⁷ *Id* footnote 5 – see *infra* at 3.3.

schedules of specific commitments and highlights the most common definitional elements in the description of these categories. The advantage of a common approach on these categories and their definitional elements is that it would enable countries to assess the real market access opportunities and assist companies in understanding if and how commitments facilitate temporary entry and reduce the cost of doing business in other countries.²⁸

3.2.2 Categories of Service Suppliers in EAC Member States' GATS Schedules

EAC countries do, to a certain extent, categorize service suppliers in their GATS commitments. Partner States can use these as a starting point to similarly categorize their EAC mode 4 commitments. Below is a description of certain current GATS commitments of the Member States.

Uganda has scheduled the following mode 4 specific commitments: *Unbound except for technical personnel unless 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.*²⁹

Kenya has the following mode 4 horizontal commitment, *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 foreign natural persons for the implementation of foreign investment shall be agreed upon by the contracting parties and approved by Government.*³⁰

²⁸ *Id* at P 14.

²⁹ *Uganda. Schedule of Specific Commitments.* WORLD TRADE ORGANIZATION. GATS/SC/89, 15 April 1994.

³⁰ *Kenya. Schedule of Specific Commitments.* WORLD TRADE ORGANIZATION. GATS/SC/47, 15 April 1994.

Tanzania, in the hotel industry only, makes the following mode 4 commitments: *Unbound except for measures concerning senior managers that possess skills not available in Tanzania.*³¹

Rwanda's mode 4 commitments include the following three specific commitments: Medical and Dental Services remain *Unbound except for specialist physicians*; Hotels remain *Unbound, except for measures affecting senior executives and specialists who possess knowledge that is essential to the provision of the service*; and Restaurants remain *Unbound, except for measures affecting natural persons in the following categories: directors, senior executives and specialists who possess knowledge that is essential to the provision of the service.*³²

Burundi has the following mode 4 horizontal commitments: *Unbound, except for medical specialists, specialized senior management and managers.*

"Medical specialists", "managers" or "specialized senior management" may be taken to include persons who meet the following requirements:

- *they have specialized, and not general, knowledge, of the profession;*
- *they engage in it regularly and exclusively;*
- *they have studied beyond a general level, as evidenced by diplomas.*³³

Categories included in the different commitments of the EAC countries include "technical personnel," "management," "expert jobs," "senior managers that possess skills not available," "directors," "specialists," and "senior executives."

³¹ Tanzania. *Schedule of Specific Commitments*. WORLD TRADE ORGANIZATION. GATS/SC/84, 15 April 1994.

³² *Communication from Rwanda. Schedule of Specific Commitments under the General Agreement on Trade in Services*. WORLD TRADE ORGANIZATION. GATS/SC/107, 30 August 1995.

³³ *Communication from the Republic of Burundi. General Agreement on Trade in Services-Schedule of Specific Commitments*. WORLD TRADE ORGANIZATION. GATS/SC/116, 30 August 1995.

In certain instances a schedule elaborates with regard to the definition of the category. E.g. Burundi states that “*managers may be taken to include...*” In other cases no further explanation is given.

Each country allows access to certain categories of mode 4 service supplier, and in other cases limits such access by providing similar, but not identical, definitions for the stated categories.

3.3 Common Categories and Definitional Elements

Taking into account the different categories already used by EAC Partner States, we now lay out common categories, definitional elements, and conditions for market access. These are examples that have been provided in the WTO Secretariat’s informal note on the Categories of Natural Persons Subject to Commitments under mode 4, but which also take into account the way in which all the most recently acceded members have made their commitments, as well as the definitions used in the Doha Development Agenda.³⁴

Member States can create limitations to their commitments by means of scheduling market access conditions for each separate category. The examples of market access conditions are based on existing commitments, initial offers, proposals made by Members and experience in bilateral negotiations.^{35, 36}

³⁴ WTO, Council for Trade in Services - Special Session - Categories of Natural Persons Subject to Commitments under Mode 4 - Informal Note by the Secretariat, 2003, and Communication From Bulgaria, Canada, The European Communities And Romania: Mode 4 – A Common Approach to Scheduling.

³⁵ Communication from Argentina, Bolivia, Brazil, Chile, Colombia, India, Mexico, Pakistan, Peru, Philippines, Thailand, and Uruguay on Categories of Natural Persons for Commitments under Mode 4 of GATS (Document TN/S/W/31).

³⁶ These examples have been used by other countries, e.g. in the fifth round of MERCOSUR services negotiations: the parties “also improved the clarity, precision and comparability of their horizontal

3.3.1 Intra-corporate transferees (ICTs)

All countries facilitate the movement of intra-corporate transfers of certain personnel either in countries' law or in practice to some degree. This is because countries recognize that –if they wish to attract and retain investment – they must respond to investor's needs. And in an increasingly inter-connected and inter-independent work, companies – particularly those in the services sector – need to be able to move their personnel internationally if they are to implement and to provide services effectively and efficiently.

The relevant sub-categories here include -

- executives
- senior managers
- specialists
- persons entering for career development purposes
- other

In some instances “executives” and “senior managers” have been merged into one sub-category.

commitments on mode 4 by accommodating them to a common classification of types of natural persons supplying services used in the GATS context”, with reference to Document TN/S/W/31 (Gari, G. *The liberalisation of trade in services in MERCOSUR*. London: Cameron May, 2009); as well as “Taking into account the communication from Bulgaria, Canada, the European Communities and Romania (TN/S/W/32) and the communication from Argentina, Bolivia, Brazil, Chile, Colombia, India, Mexico, Pakistan, Peru, Philippines, Thailand and Uruguay (TN/S/W/31), “Japan improved comparability and clarity in the scheduled commitments on the entry and temporary stay of a natural person by using common categories such as “intra-corporate transferees,” “independent professionals,” “business visitors” and “contractual service suppliers” and common sub-categories such as “executives,” “senior managers” and “specialists.” – Statement by Ministry of Foreign Affairs of Japan (17 June 2005). (<http://www.mofa.go.jp/policy/economy/wto/offer0507.html>)

ICTs include work within a juridical person established in the territory of another WTO Member that are temporarily transferred in the context of the provision of a service through commercial presence (mode 3) to the territory of the WTO Member taking the commitment.

3.3.1.1 Definitional elements

1. Executives

- Primarily direct the management of the organization, exercising wide latitude in decision making;
- Do not perform tasks directly related to the provision of services by the commercial presence

2. Senior Managers

- Primarily direct the organization, or a department or sub-division thereof;
- Have discretionary control over day-to-day activities, including personnel actions;
- Supervise and control other supervisory, professional or managerial staff;
- Do not include first-line managers, unless those supervised are professionals

3. Specialists

- Possesses knowledge at an advanced level of expertise;
- Possesses proprietary knowledge of the organization
- Includes members of licensed / regulated professions

4. Persons entering for career development purposes
 - Are being transferred for career development purposes or to obtain training in business techniques or methods

5. Other sub-categories
 - Any type of person which does not fall into one of the sub-categories listed above, for example persons entering to provide services in-house, or persons who do not fall within one of the sub-categories listed above and who enter to enable the commercial presence in the host Member to provide a specific service to a specific client

3.3.1.2 Market Access Conditions

- Employees will be restricted to personnel with requisite qualifications to fill positions responsible either for management of operations, or provision of services at a level of complexity and specialty that require, at a minimum, a diploma or a university degree, or demonstrated experience.
- Period of prior employment with home country juridical person will be clearly specified and will not exceed a particular time period.
- Duration of stay for one year with provision for renewal.
- Economic Needs Tests (ENT) will not be applied except under exceptional circumstances which should be specifically stated. If they are required to be applied under exceptional circumstances, they should be applied on a non-discriminatory basis. In such a case, details concerning the following should be specifically mentioned:

- The service sectors and occupations to which the ENT shall be applied,
- The definition, criteria and conditions to be used in applying the ENT,
- The duration of application of the ENT.

ICTs enable gains for local economies from exposure to foreign expertise in terms of knowledge transmission, productivity growth and flow-on benefits for the development of domestic entrepreneurship.

3.3.2 Business Visitors (BV)

All countries allow business visitors to enter their country, either under a specific regime, or through general short stay visas which are also used by tourists, or in the case of the EAC possibly through the free movement of natural persons.

Sub-categories can include

- service sellers
- persons responsible for setting up a commercial presence

Business visitors are representatives of a service supplier of another WTO Member, do not engage in making direct sales to the general public or in supplying services themselves and do not receive remuneration from a source located within the host member.

3.3.2.1 Definitional elements

1. Service sellers

- Enter to negotiate or conclude agreements on the sale of services for that service supplier in the host Member
- The service supplier has no commercial presence in that Member

- Work in a senior position within the service supplier
2. Persons responsible for setting up a commercial presence
- Are responsible for setting up a commercial presence of the service supplier in the host Member;
 - The service supplier has no commercial presence in that Member;
 - Work in a senior position within the service supplier.

3.3.2.1 Market Access Conditions

- Duration of stay for six months with provision for renewal.

Further to the above, Annex C to the Hong Kong Ministerial Declaration in 2005, provides that Members should be guided by the following objectives with regard to mode 4 in making new or improved commitments:

- i. on the categories of Intra-corporate Transferees and Business Visitors, to reflect inter alia:*
- *removal or substantial reduction of economic needs tests*
 - *indication of prescribed duration of stay and possibility of renewal, if any*

The Annex also encourages Members to ensure clarity, certainty, comparability and coherence in the scheduling and classification of commitments and that economic needs tests adhere to the *Guidelines on the Scheduling of Specific Commitments under the GATS*.

3.3.3 Contractual Service Suppliers (CSS)

This category is also sometimes referred to in schedules as "Professionals" or "persons (of an enterprise) engaged in substantive business activities". It covers those cases where a foreign-based service supplier has won a contract to provide services to a client in the Member taking the commitment, that requires the presence of employees of the service supplier in that Member in order to deliver the service. Because there does not have to be a commercial presence in the Member taking the commitment, the contractual service supplier category is of particular interest to developing countries and to small and medium sized enterprises in any country.

3.3.3.1 Definitional Elements

- Enter as employees of a commercial presence based in another Member which has obtained a bona fide contract to provide services in the WTO Member taking the commitment, where the person entering will not be in a dependent working relationship with the client;
- Person entering has appropriate educational and professional qualifications relevant to the service to be provided;
- The person entering can only provide services directly related to the service activity which is the subject of the contract;
- Receives remuneration from his/her employer and not from the client.

3.3.3.1 Market Access Conditions

- Employees of foreign based enterprises will be restricted to personnel with requisite qualifications to fill positions responsible either for management of

operations, or provision of services at a level of complexity and specialty that require, at a minimum, a diploma or a university degree, or demonstrated experience.

- Wage parity will not be a pre-condition of entry.
- List of sectors/occupations to which this category will apply will be clearly specified through a positive listing of all such sectors or possibly indicating those sectors where it would not apply.
- Economic Needs Tests will not be applied except under exceptional circumstances which should be specifically stated. If they are required to be applied under exceptional circumstances, they should be applied on a non-discriminatory basis. In such a case, details concerning the following should be specifically mentioned:
 - The service sectors and occupations to which the ENT shall be applied,
 - The definition, criteria and conditions to be used in applying the ENT,
 - The duration of application of the ENT.
- Duration of stay for one year or for duration of contract (if longer) with provision for renewal.
- Employees can perform services related only to the service activity which is the subject of the contract.

Annex C to the Hong Kong Ministerial Declaration in 2005, provides that Members should be guided by the following objectives:

ii. *on the categories of Contractual Services Suppliers, Independent Professionals and Others, de-linked from commercial presence, to reflect inter alia:*

- *removal or substantial reduction of economic needs tests*
- *indication of prescribed duration of stay and possibility of renewal, if any*

3.3.4 Independent Professionals (IP)

In this case, the service supplier is a natural person, who has won a contract to provide services to a client in the Member taking the commitment, which requires his/her presence in that Member in order to deliver the service.

3.3.4.1 Definitional Elements

- Are self-employed persons primarily based in the territory of another WTO Member
- Have obtained a bona fide contract to provide services in the WTO Member taking the commitment, where the IP will not be in a dependent working relationship with the client;
- The IP has appropriate educational and professional qualifications relevant to the service to be provided;
- The IP can only provide services directly related to the service activity which is the subject of the contract.

3.3.4.1 Market Access Conditions

- Natural persons will be restricted for provision of services at a level of complexity and specialty that require, at a minimum, a diploma or a university degree, or demonstrated experience.
- Wage parity will not be a pre- condition of entry.
- List of sectors/occupations to which this category will apply will be clearly specified through a positive listing of all such sectors or possibly indicating those sectors where it would not apply.
- Economic Needs Tests will not be applied except under exceptional circumstances which should be specifically stated. If they are required to be applied under exceptional circumstances, they should be applied on a non-discriminatory basis. In such a case, details concerning the following should be specifically mentioned:
 - The service sectors and occupations to which the ENT shall be applied,
 - The definition, criteria and conditions to be used in applying the ENT,
 - The duration of application of the ENT.
- Natural person can perform services related only to the service activity which is the subject of the contract.
- Duration of stay for one year or for duration of contract (if longer) with provision for renewal.

3.3.5 Other

Mode 4 service suppliers which do not fit into one of the categories enumerated above, for example ships crews, an internationally known musical or theatre troupe on tour, foreign correspondents, or athletes and their entourage (coach, physiotherapist etc) participating in a sporting event.

3.4 Qualifications

The recognition of qualifications can be done via mutual recognition agreements, but can also, to a certain extent, be included by means of scheduling.

The EU-CARIFORUM agreement for example clarifies the concept of qualifications, making it easier for a service supplier to know what documentation would satisfy the qualification requirements to supply a service. The agreement defines qualifications as “Diplomas, certificates and other evidence (of formal qualification) issued by an authority designated pursuant to legislative, regulatory or administrative provisions and certifying successful completion of professional training.”

The CARICOM recognizes qualifications based on a Skills Certificate and a system called the free movement of skills, which grants eligible categories of CARICOM nationals the right to seek employment, or render services, in other Member States.³⁷ Nationals apply for a Certificate of Recognition of CARICOM Skills Qualification, or a “Skills Certificate”, by completing the application form and submitting relevant documents to the Competent Authority on Free Movement of

³⁷ Article 46.1 of the Revised Treaty provides for the Movement of Skilled Community Nationals, better known as the Free Movement of Skills.

Skills. The Skills Certificate ensures six months definite entry into another Member State. If the receiving Member State is satisfied that the National belongs to one of the eligible categories, the person will be granted indefinite stay as a CARICOM Skilled National.³⁸ Applications for Skills Certificates include a requirement for documentary proof of qualifications. The Skills Certificate applies to ten wage-earning categories, as well as self-employed service providers and persons who are establishing commercial presence. CARICOM nationals have however opened up their markets widely in terms of services, and thus all non-wage earners (service providers) have been granted the right to free movement and thus do not require a Skills Certificate. It is nonetheless a workable example of how to regulate the verification of qualifications in an economic integration area.

The EAC Treaty, in order to achieve mutual recognition of academic qualifications, places an obligation on Partner States to “harmonize curricula, examination, certification and accreditation of education and training institutions in the Partner States through the joint action of their relevant national bodies charged with the preparation of such curricula.”³⁹ The Inter-University Council for East Africa Act incorporated the Inter-University Council for East Africa (IUCEA) into the EAC legal and institutional framework. The IUCEA consists of public and private

³⁸ The system allows CARICOM citizens to apply online as skilled nationals, service providers or entrepreneurs and for administrators to process these applications, all in a virtual environment. It will harmonize and standardize these administrative processes across Member States as well as capture useful data on the use of the CSME regimes by nationals and commercial entities. A manual of these practices, now in the review stage, has been produced by the consultants and will be presented for the endorsement of the 40th Regular Meeting of the Council for Trade and Economic Development (COTED) scheduled for late April.

http://www.caricom.org/jsp/pressreleases/press_releases_2015/pres43_15.jsp

³⁹ *East African Community Treaty*, 1999, Article 102(2)(e), and *Protocol on the Establishment of the East African Community Common Market*, 2010, Article 11.

universities, university colleges and other degree awarding institutions in the EAC region. The IUCEA currently has 100 members and is responsible for maintaining high and comparable academic standards in higher education regionally as well as coordinating and developing systems for the harmonization of higher education qualifications in the EAC. Eventually, the regional qualifications framework will assist national statutory and professional bodies to relate their qualification requirements with those of their counterparts in other Partner States and internationally in order to ensure professional recognition of foreign qualifications and continued professional development.

Such a system could be incorporated with and used to facilitate a type of free movement of skills as in the CARICOM.

3.5 Tripartite and Continental Free Trade Agreement

An important factor underlining any changes and renegotiations to the CMP is the imminent conclusion of not only the Tripartite Free Trade Agreement (TFTA), but also ultimately the Continental Free Trade Agreement (CFTA).

According to the roadmap for establishing the TFTA which was adopted in 2011, the COMESA, the EAC, and the SADC are expected to launch a single FTA by 2016, building on the FTA's that are already in place.

The Annex on Movement of Business Persons to the draft TFTA looks very similar to the North American Free Trade Agreement (NAFTA). Chapter Sixteen of the NAFTA deals with Temporary Entry for Business Persons and provides an

example of how the movement of business persons can be dealt with in a negative list preferential trade agreement.⁴⁰

All the Regional Economic Communities (RECs) comprising the Tripartite FTA have developed legal instruments to deal with the liberalization of trade in services and the movement of persons or labor, and have all adopted a GATS-style positive list approach.⁴¹

The SADC Members have adopted the Protocol on Trade in Services and are currently negotiating market access and national treatment commitments in priority sectors, as well as specific commitments on the temporary movement of persons supplying services.⁴²

The COMESA Council adopted Regulations on Trade in Services with the aim of enhancing the establishment of a common market. The Regulations cover measures affecting trade in services through all four modes of supply. Members are currently negotiating specific commitments on four priority sectors. Annex 1 to the Regulations deals specifically with the temporary movement of natural persons and has the same scope and coverage as the GATS Annex on Movement of Natural Persons Supplying Services under the Agreement. The COMESA members adopted a Protocol on the Free Movement of Persons, Labour, Services Right of Establishment and Residence in 1998, though it has not yet entered into force.⁴³

⁴⁰ Cronje J.B. "Suitable Mechanisms for Negotiating Trade in Services and Movement of Business Persons in the Continental Free Trade Area." Stellenbosch: *Tralac*. April 2015. 30.
<http://www.tralac.org/publications/article/7224-suitable-mechanisms-for-negotiating-trade-in-services-and-movement-of-business-persons-in-the-continental-free-trade-area.html#downloads>

⁴¹ *Id* at P 22.

⁴² *Id*.

⁴³ *Id* at P 23.

The fourth meeting of the Tripartite Technical Committee on Movement of Business Persons took place in January 2015. From the start Members of the committee have had different views on the methodology and approach to the negotiations on movement of business persons. Some are of the opinion that negotiations should be based on the draft TFTA and draft Annex on Movement of Business Persons. Others believe that the outcome of negotiations on the movement of business persons should not result in an Annex to the TFTA but a separate stand-alone agreement.⁴⁴

All RECs have selected certain sectors such as financial, telecommunications, transport and tourism services as priority sectors that could be consolidated.

The development of a framework for the negotiation of trade in services should address the core architectural elements of a trade in services protocol including market access, most favored nation treatment, national treatment and domestic regulation.⁴⁵ It would make sense for the negotiation outcomes for mode 4 regulation within the EAC to incorporate TFTA (and ultimately the CFTA) objectives in this regard.

4. Services Scheduling

4.1 Interpretation of Scheduled Commitments

It is important to ensure that the EAC's schedule of commitments is specific, clear, and unambiguous. While doing so helps both to avoid discouraging service providers and investors from doing business in the EAC or between Partner States

⁴⁴ *Id* at P 24.

⁴⁵ *Id* at P 29.

and to make implementation by officials easier, the primary reason is to avoid courts and tribunals from reading unintended and desired commitments into or out of the treaty, respectively. The WTO jurisprudence, especially *US – Gambling*,⁴⁶ *Mexico – Telecoms*,⁴⁷ and *China Audiovisuals*,⁴⁸ establishes that schedules and their annexes must be interpreted as treaties, meaning evidence of negotiators' intent is only relevant for such interpretation if ambiguity remains following an analysis of the relevant term's ordinary meaning, context, object and purpose. This means that general or ambiguous language can lead interpretations far removed from a Member State's understanding if a dispute were to arise. For a more in depth discussion of the WTO jurisprudence on this matter, please see the *Annex on Schedule Interpretation*.

4.2 Inconsistencies in the EAC Common Market Protocol Services Schedule of Commitments

As discussed above, it is very important for negotiators to be careful when writing a schedule of commitments. Particularly significant is the manner in which they describe the service or economic activity that will be subjected to liberalization under Market Access or National Treatment provisions. If the description is too broad or isn't clear enough, the party may unknowingly accept opening a sector of its economy that it had intended to keep protected.

⁴⁶ Appellate Body Report, *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*. WORLD TRADE ORGANIZATION. WT/DS285/AB/R (7 April 2005).

⁴⁷ Panel Report, *Mexico-Measures Affecting Telecommunication Services*, WORLD TRADE ORGANIZATION. WT/DS204/R (2 April 2004).

⁴⁸ Appellate Body Report, *China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WORLD TRADE ORGANIZATION. WT/DS363/AB/R (21 December 2009).

Although it is not mandatory, when parties to a trade agreement are scheduling services they can guide themselves by the classification of the economic activities contained in the United Nations' Central Product Classification (CPC).⁴⁹ The provisional version of this classification (the Provisional CPC),⁵⁰ dated 1991, was used for negotiating services schedules in GATS as well as in the EAC Common Market Protocol. In this respect, we were tasked with reviewing Annex V of the Common Market Protocol (hereafter, the CMP Services Schedule) with the purpose of identifying any inconsistencies between this document and the CPC. Even though the CPC has been updated several times, we used the Provisional CPC as the basis of our comparison, in the name of consistency.⁵¹

In this sense, after careful review of the CMP Services Schedule, we found several technical inconsistencies with the Provisional CPC. We have divided these inconsistencies in four groups: 1) Lack of use of CPC numbers; 2) Incorrect assignment of CPC numbers; 3) Discrepancies in the description of services; and 4) Ambiguous use of symbols. We provide several examples of inconsistencies found in the scheduled service commitments of the EAC Partner States, although an exhaustive commentary on each country's scheduling issues can be found in the annexes. Finally, we provide recommendations on how to solve the inconsistencies.

⁴⁹ The CPC classification divides an extensive list of economic activities covering products and services into divisions, groups, classes and subclasses.

⁵⁰ *United Nations Statistics Division-Classification Registry*. UNITED NATIONS. <http://unstats.un.org/unsd/cr/registry/regcst.asp?Cl=9&Lg=1> (last visited May 9th, 2015).

⁵¹ The latest version of the CPC was completed on December 31st, 2008 (better know as CPC Ver. 2), making all previous versions obsolete. However, it would be difficult to understand the scope of the commitments made by the EAC Partner States in the Common Market Protocol by using the latest version of the classification if the commitments were made under a different document, as changes could inadvertently narrow or broaden the scope of the negotiated obligations.

4.2.1 Lack of CPC Numbers

The Provisional CPC assigns each classified service with a number. Although it is difficult to document every single economic activity known to man, the CPC provides a very extensive list and most of the time a trade negotiator will be able to find a number that matches the service in which commitments are being made. However, some activities in the CMP Services Schedule are not accompanied by the pertinent CPC number, even though such number exists in the classification and it covers the exact service that is being scheduled. Below, we identify several of these cases and suggest the appropriate CPC number to be used.

1. In Rwanda's commitments in the Business Services' sector under subsector A (Professional Services), the CPC code for "Legal Services" is missing.⁵²

(SUB) SECTOR CPC CODE	MARKET ACCESS	ELIMINATION DATE	NATIONAL TREATMENT	ELIMINATION DATE
(a) Legal Services	(1) None (2) None (3) None (4) In accordance with the Schedule on the Free Movement of Workers.	2010	(1) None (2) None (3) None (4) In accordance with the Schedule on the Free Movement of Workers.	2010

The CPC number for Legal Services is 861, in accordance to the Provisional CPC.

⁵² East African Community. *The East African Community Common Market Schedule of Commitments on the Progressive Liberalisation of Services (Annex V)*. EAC Secretariat, November 2009, p. 13.

2. In Tanzania's commitments in the Communication Services' sector, under subsector B (Telecommunications Services), the CPC number for Telecommunication Services is missing.⁵³

(SUB) SECTOR CPC CODE	MARKET ACCESS	ELIMINATION DATE	NATIONAL TREATMENT	ELIMINATION DATE
Telecommunication Services	(1) None (2) None (3) None, except 35% local shareholder (2015) (4) In accordance with the Schedule on the Free Movement of Workers.	2015 subject to harmonized local shareholding requirement among EAC Partner State.	(1) None (2) None (3) None (4) In accordance with the Schedule on the Free Movement of Workers.	2015 subject to harmonized local shareholding requirement among EAC Partner State.

The CPC number for Telecommunication Services is 752, in accordance to the Provisional CPC.

3. In Tanzania's commitments in the Tourism and Travel Related Services' sector, under subsector B (Travel Agencies and Tour Operator Services) there is no CPC number to identify the activity "Tourist Hunting".⁵⁴

(SUB) SECTOR CPC CODE	MARKET ACCESS	ELIMINATION DATE	NATIONAL TREATMENT	ELIMINATION DATE
(b) Tourist Hunting	(1) None (2) None (3) None (4) In accordance with the Schedule on the Free Movement of Workers.	2010	(1) None (2) None (3) Licensing charges for foreigner is higher (4) Higher licensing fee, charges for foreigners	2013 Subject to harmonization of EAC Licensing Procedures and Fees.

⁵³ *Id.*, 40-41.

⁵⁴ *Id.*, p. 70.

After review of the Provisional CPC, no matching activity was found; however, Tourist Hunting could be classified under CPC 74720 (“Tourist Guide Services”), CPC 96419 (“Other sporting services”) or under CPC 91131 (“Administrative agriculture, forestry, fishing and hunting related services”).

4. In Tanzania’s commitments in the Transport Services’ sector, under subsector C (Maritime Transport), no CPC is provided to identify the activity “Cargo Stations/Depot Services”.⁵⁵

(SUB) SECTOR CPC CODE	MARKET ACCESS	ELIMINATION DATE	NATIONAL TREATMENT	ELIMINATION DATE
(c) Cargo Stations/Depot Services	(1) None (2) None (3) None (4) In accordance with the Schedule on the Free Movement of Workers.	2010	(1) None (2) None (3) None (4) In accordance with the Schedule on the Free Movement of Workers.	2010

A possible fit for this activity is CPC 741 (“Cargo handling services”). CPC 742 is also an option (Storage and warehousing services).

As we can see above, sometimes the Provisional CPC provides an exact match and sometimes it doesn’t. In the first two examples, exact matches were found- However, we still recommend that negotiators analyze further whether the CPC numbers that have been provided are adequate. For example, the Telecommunications Services sector is one of the most protected. Assigning CPC group number 752 means you are committing all activities covered by that group. If that isn’t the intention of the negotiators, it is recommended that specific services

⁵⁵ *Id.*, p. 78.

under the sector be scheduled and that the appropriate CPC class or subclass number be linked to those services, instead of the group number. That way the pertinent party will avoid committing further than desired.

4.2.2 Incorrect Assignment of CPC Numbers

Another inconsistency found in the CMP Services Schedule is the assignment of incorrect CPC numbers to certain activities. Below are some examples, accompanied by the suggested CPC number to be used.

1. In Rwanda’s commitments in the Business Services’ sector, under subsector A (Professional Services), the activity “Integrated Engineering Services” is identified with CPC 863, when the correct number is CPC 8673, as CPC 863 corresponds to Taxation Services.⁵⁶

(SUB) SECTOR CPC CODE	MARKET ACCESS	ELIMINATION DATE	NATIONAL TREATMENT	ELIMINATION DATE
(f) Integrated Engineering Services (CPC 863)	(1) None (2) None (3) None (4) In accordance with the Schedule on the Free Movement of Workers.	2010	(1) None (2) None (3) None (4) In accordance with the Schedule on the Free Movement of Workers. (Residency requirements exist for accountants and architects).	2010

2. In Kenya’s commitments in the Financial Services’ sector, under subsector B (All Insurance and Insurance-Related Services), the activity “Life Insurance Services”

⁵⁶ *Id.*, p. 15.

was linked to CPC 8120, which does not exist. The correct CPC number would be 81211, with covers “Life insurance services”.⁵⁷

(SUB) SECTOR CPC CODE	MARKET ACCESS	ELIMINATION DATE	NATIONAL TREATMENT	ELIMINATION DATE
Life Insurance Services (CPC 8120)	(1) Unbound (2) Unbound (3) 1/3 of paid up capital must be owned by Kenyans. (4) In accordance with the Schedule on the Free Movement of Workers.	2015	(1) Unbound (2) Unbound (3) Unbound (4) In accordance with the Schedule on the Free Movement of Workers.	2015

3. In Tanzania’s commitments in the Transport Services’ sector, under subsector C (Maritime Transport), the activity “Cargo Handling Services” is identified incorrectly with the CPC number 754, which covers “Telecommunication related services.”⁵⁸ The appropriate number would be CPC 741. In addition, there is no need to repeat this activity under subsector C, as the commitments for Cargo Handling Services were already stated under subsector B (Services Auxiliary to all Modes of Transport).

(SUB) SECTOR CPC CODE	MARKET ACCESS	ELIMINATION DATE	NATIONAL TREATMENT	ELIMINATION DATE
(a) Cargo Handling Services (CPC 754**)	(1) None (2) None (3) Concessions (4) In accordance with the Schedule on the Free Movement of Workers.	2015	(1) None (2) None (3) Unbound (4) In accordance with the Schedule on the Free Movement of Workers.	2015

⁵⁷ *Id.*, p. 59.

⁵⁸ *Id.*, p. 78.

4.2.3 Discrepancies in the Description of Services

In the CMP Services Schedule, some sectors are correctly numbered in reference to the Provisional CPC; however, the descriptions of the services differ from those established in the classification. Although use of the CPC is not mandatory and members are free to schedule services in the manner they deem fit, it is important to remember that the sectors and subsectors should be clearly defined. In that sense, discrepancies from the CPC, although not considered errors, tend to make understanding the commitments difficult. Below, we provide a sample of these discrepancies and make suggestions as to what language to use to better narrow the scope of the commitments.

1. In Uganda’s commitments in the Business Services’ sector, under subsector A (Professional Services), CPC 93191 identifies “Services provided by Midwives, Nurses, Physiotherapists and Para-medical Personnel.”⁵⁹ However, in the provisional CPC the category is called “Deliveries and related services, nursing services, physiotherapeutic and para-medical services.”

(SUB) SECTOR CPC CODE	MARKET ACCESS	ELIMINATION DATE	NATIONAL TREATMENT	ELIMINATION DATE
(j) Services provided by Midwives, Nurses, Physiotherapists and Para-Medical personnel (CPC 93191)	(1) None (2) None (3) None (4) In accordance with the Schedule on the Free Movement of Workers.	2010	(1) None (2) None (3) Unbound (4) In accordance with the Schedule on the Free Movement of Workers.	2010

⁵⁹ *Id.*, p. 27.

Although the language is similar, there is a difference to be noted between the phrase “Deliveries and related services”, and the narrower term “Midwives” used in the CMP Services Schedule. In this sense, we suggest using the following language: “Delivery services exclusively provided by Midwives, nursing services, physiotherapeutic and paramedical services.”

2. In Burundi’s commitments in the Business Services’ sector, under subsector C (Research and Development Services), we find an entry identified with CPC number 851, another with 852, and another using 853, referring to Research and Development Services on Natural Sciences, Research and Development Services on Social Sciences and Humanities and Interdisciplinary Research and Development Services, respectively.⁶⁰

(SUB) SECTOR CPC CODE	MARKET ACCESS	ELIMINATION DATE	NATIONAL TREATMENT	ELIMINATION DATE
(a) Research and Development Services on Natural Sciences (CPC 851)	(1) None (2) None (3) None (4) In accordance with the Schedule on the Free Movement of Workers.	2010	(1) None (2) None (3) None (4) In accordance with the Schedule on the Free Movement of Workers.	2015
(b) Research and Development Services on Social Sciences and Humanities (CPC 852)	(1) None (2) None (3) None (4) In accordance with the Schedule on the Free Movement	2010	(1) None (2) None (3) None (4) In accordance with the Schedule on the Free Movement of Workers.	2015

⁶⁰ *Id.*, pp. 4-5.

	of Workers.			
(c) Interdisciplinary Research and Development Services (CPC 852)	(1) None (2) None (3) None (4) In accordanc e with the Schedule on the Free Movement of Workers.	2010	(1) None (2) None (3) None (4) In accordance with the Schedule on the Free Movement of Workers.	2015

Even though the numbers are correctly assigned, the language used by the CPC is not identical. In each of the activities, the word “development” is qualified by the adjective “experimental.” In addition, CPC 851 includes engineering in its description, meaning the correct names of the activities are:

- a) CPC 851: Research and experimental development services on natural sciences and engineering.
- b) CPC 852: Research and experimental development services on social sciences and humanities.
- c) CPC 853: Interdisciplinary Research and Development Services.

If the exclusion of the words “experimental” and “engineering” was intentional, we suggest scheduling each of the commitments in the following manner:

- a) CPC 851: Research and non-experimental development services to be performed exclusively on natural sciences.
- b) CPC 852: Research and non-experimental development services on social sciences and humanities.

c) CPC 853: Interdisciplinary Research and non-experimental Development Services.

However, we doubt that the intention of Burundi was to intentionally exclude “experimental” from the description of tasks such as research and development, as the very nature of those activities requires forward thinking and experimentation.

3. In Burundi’s and Rwanda’s commitments in the Business Services’ sector, under subsectors D (for Burundi) and E (for Rwanda) covering Other Business Services, CPC 8675 is identified with “Related Scientific and Technical Consulting Services,” but this is an incomplete description of the activity. The correct description according to CPC 8675 is “Engineering related scientific and technical consulting services.”

Burundi:⁶¹

(SUB) SECTOR CPC CODE	MARKET ACCESS	ELIMINATION DATE	NATIONAL TREATMENT	ELIMINATION DATE
(i) Related Scientific and Technical Consulting Services (CPC 8675)	(1) None (2) None (3) None (4) In accordance with the Schedule on the Free Movement of Workers.	2010	(1) None (2) None (3) None (4) In accordance with the Schedule on the Free Movement of Workers.	2010

Rwanda:⁶²

(SUB) SECTOR CPC CODE	MARKET ACCESS	ELIMINATION DATE	NATIONAL TREATMENT	ELIMINATION DATE
(g) Related Scientific and	(1) None (2) None	2010	(1) None (2) None	2010

⁶¹ *Id.*, p. 7.

⁶² *Id.*, p. 21.

Technical Consulting Services (CPC 8675)	(3) None (4) In accordance with the Schedule on the Free Movement of Workers.		(3) None (4) In accordance with the Schedule on the Free Movement of Workers.	
--	--	--	--	--

4. In Rwanda's and Uganda's commitments in the Business Services' sector, under subsector E (Other Business Services), CPC 88442 is used to describe the activity "Printing, Publishing" but the complete description is "Publishing and printing, on a fee or contract basis."

Rwanda:⁶³

(SUB) SECTOR CPC CODE	MARKET ACCESS	ELIMINATION DATE	NATIONAL TREATMENT	ELIMINATION DATE
(l) Printing, Publishing (CPC 88442)	(1) None (2) None (3) None (4) In accordance with the Schedule on the Free Movement of Workers.	2010	(1) None (2) None (3) None (4) In accordance with the Schedule on the Free Movement of Workers.	2010

Uganda:⁶⁴

(SUB) SECTOR CPC CODE	MARKET ACCESS	ELIMINATION DATE	NATIONAL TREATMENT	ELIMINATION DATE
(n) Printing, Publishing (CPC 88442)	(1) None (2) None (3) None (4) In accordance with the Schedule on the Free Movement of Workers.	2010	(1) None (2) None (3) None (4) In accordance with the Schedule on the Free Movement of Workers.	2010

⁶³ *Id.*, p. 23.

⁶⁴ *Id.*, p. 32.

5. In Burundi’s commitments in the Financial Services’ sector, under subsector A (All Insurance and Insurance-Related Services) the activity linked to CPC 8121 is “Life, Accident and Health Insurance Services;”⁶⁵ however, CPC 8121 covers “Life insurance and pension fund services.” Accident and health insurance services are covered by a different CPC group. We suggest writing the commitment as “Life insurance services” covered by CPC 81211.

(SUB) SECTOR CPC CODE	MARKET ACCESS	ELIMINATION DATE	NATIONAL TREATMENT	ELIMINATION DATE
(a) Life, Accident and Health Insurance Services (CPC 8121)	(1) None (2) None (3) Unbound (4) In accordance with the Schedule on the Annex on Free Movement of Workers.	2015	(1) None (2) None (3) None (4) In accordance with the Schedule on the Annex on Free Movement of Workers.	2010

6. In Rwanda’s commitments in the Banking and Other Financial Services’ sector, under subsector B (All Insurance and Insurance-Related Services), the activity “Services Auxiliary to Insurance” is identified with CPC 8140, but the complete name of the activity in the CPC is “Services Auxiliary to Insurance and Pension Funding.”⁶⁶ We suggest scheduling the commitment as “Services Auxiliary to Insurance, excluding those related to pension funding”.

(SUB) SECTOR CPC CODE	MARKET ACCESS	ELIMINATION DATE	NATIONAL TREATMENT	ELIMINATION DATE
(d) Services Auxiliary to Insurance (CPC 8140)	(1) None (2) Limitation on off- shore purchase of insurance services unless unavailable in Rwanda and with prior	2015	(1) None (2) None (3) None (4) In accordance with the Schedule on the Free	2010

⁶⁵ *Id.*, p. 54.

⁶⁶ *Id.*, p. 62.

	authorization (3) None (4) In accordance with the Schedule on the Free Movement of Workers.		Movement of Workers.	
--	---	--	-------------------------	--

4.2.4 Ambiguous Use of Symbols

In several sections of the CMP Services Schedule symbols like asterisks and dashes are used in an unclear or inconsistent way. For example, we find asterisks next to CPC numbers, but nowhere in the annex is their meaning provided. In consequence, when reading the commitments that have asterisks attached, it is difficult to determine the scope of the obligations expressed by the schedule, as it is obvious that the symbols are there to make a clarification. The most obvious guide as to what could be the meaning of these asterisks can be found in the Services Sectoral Classification List prepared by the WTO.⁶⁷ Here, the use of asterisk is described as follows:

**The (*) indicates that the service specified is a component of a more aggregated CPC item specified elsewhere in this classification list.*

***The (**) indicates that the service specified constitutes only a part of the total range of activities covered by the CPC concordance (e.g. voice mail is only a component of CPC item 7523).*

Despite the above, the CMP Services Schedule does not contain any reference to the Services Sectoral Classification List, so until the EAC Partner States expressly clarify the meaning of the asterisks in relation to their regional agreement, there is a

⁶⁷ Services Sectoral Classification List. WORLD TRADE ORGANIZATION. MTN.GNS/W/120, 10 July 1991.

lack of information that affects the reading and understanding of the commitments.

An example of this issue is below:

1. In Tanzania’s commitments in the Business Services’ sector, under subsector A (Professional Services), the economic activity “Accounting and Auditing” is identified with CPC 862, followed by two asterisks.⁶⁸

A. PROFESSIONAL SERVICES.				
(SUB) SECTOR CPC CODE	MARKET ACCESS	ELIMINATION DATE	NATIONAL TREATMENT	ELIMINATION DATE
(a) Accounting and Auditing (CPC 862**)	(1) Unbound (2) None (3) None (4) In accordance with the annex on free movement of workers.	2010	(1) None (2) None (3) None (4) In accordance with the Schedule on the Free Movement of Workers.	2010

As mentioned, the schedule does not provide the meaning of the asterisks. It must be noted, however, that CPC 862 actually stands for “Accounting, auditing and book-keeping services” and that the description of the economic activity in Tanzania’s commitments excludes “book-keeping”, making the meaning applied by the Services Sectoral List applicable in this case.

Another symbol that is used inconsistently in the CMP Services schedule is the dash (-). When a dash is placed between two numbers it usually means that a range is being covered. However, the schedule does not do this consistently as the examples below will show:

⁶⁸ East African Community. *The East African Community Common Market Schedule of Commitments on the Progressive Liberalisation of Services (Annex V)*. EAC Secretariat, November 2009, p. 33

2. In Uganda’s commitments in the Transport Services’ sector, under subsector A (Internal Waterways Transport), the economic activity described as “Internal Waterways Transport” is linked to several CPC numbers, including “CPC 7221-7224”.⁶⁹ When reading this, we logically assume that CPC numbers 7222 and 7223 are included in the commitment, even though they are not expressly mentioned, because that would be the customary interpretation of the dash.

A. INTERNAL WATERWAYS TRANSPORT				
(SUB) SECTOR CPC CODE	MARKET ACCESS	ELIMINATION DATE	NATIONAL TREATMENT	ELIMINATION DATE
Internal Waterways Transport (CPC 7221 – 7224, 8868** and 745)	(1) None (2) None (3) None, except in areas where Government has granted concessions (4) In accordance with the Schedule on the Free Movement of Workers.	2012	(1) None (2) None (3) None (4) In accordance with the Schedule on the Free Movement of Workers.	2010

Despite the above, when we look at another commitment made by Uganda in the CMP Services Schedule, we wonder if our interpretation of the dash is correct:

3. In the Communication Services’ sector, subsector B (Telecommunications Services) is covered by “CPC 7521-843”.⁷⁰ The use of dash would indicate that there is a spectrum of CPC numbers between 7521 and 843. But these two numbers belong to different CPC groups, so there cannot be any continuity between them. Therefore, the customary use of the dash cannot be applied here.

⁶⁹ *Supra* note 52, pp. 75-76.

⁷⁰ *Id.*, p. 39.

(SUB) SECTOR CPC CODE	MARKET ACCESS	ELIMINATION DATE	NATIONAL TREATMENT	ELIMINATION DATE
Telecommunication Services (CPC 7521-843)	(1) None (2) None (3) Mobile Operators entry is allowed only through acquisition of existing local entities owing to a moratorium on new licenses for the next 10 years. (4) In accordance with the Schedule on the Free Movement of Workers.	2010	(1) None (2) None (3) None (4) In accordance with the Schedule on the Free Movement of Workers.	2010

In summary, it is important the the EAC Partner States review the CMP Services Schedule and identify those instances where symbols are used in ambiguous and inconsistent ways. In this sense, we recommend that an express reference to the meaning of the asterisks be included in the schedule and that dashes be used only when CPC numbers belong to the same group, class or subclass.

4.3 EAC Members' GATS Commitments and their Relation to the CMP Services Schedule.

As Members of the WTO,⁷¹ the Partner States of the EAC made specific commitments to liberalize trade in services under GATS, benefiting all WTO Members on a MFN basis, in accordance with the principle of non-discrimination

⁷¹ Kenya, Uganda and Tanzania joined the WTO in January 1, 1995, Burundi joined July 23, 1995 and Rwanda joined May 22, 1996. *Understanding the WTO-Members*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited February 28, 2015).

established in Article II of GATS. In contrast, under the CMP and its services schedule, the commitments agreed upon only benefit EAC Partner States, a discriminatory result justified on the exception for economic integration contemplated in Article V of GATS.⁷² Despite this distinction, the EAC Partner States want to make sure that the commitments they have undertaken inside the Common Market are as ambitious as those negotiated at the WTO.

In following this mandate, we proceeded to review the services commitments made by each of the EAC Partner States under GATS and compared them to the commitments they made under the CMP. First, we determined the sectors in which commitments were made under each agreement and identified the ones that were common to both the GATS and the CMP. Then, we sorted out the subsectors that were also common between agreements and went through the specific commitments made for each service.

After following this process we identified several instances in which the CMP services schedule fails to meet the level of trade liberalization achieved at the WTO and have pointed them out below for each EAC Partner State. Finally, we have recommended the renegotiation of these commitments in the Common Market context as a solution to these discrepancies.

4.3.1 Burundi's GATS Commitments compared to the CMP Services Schedule

⁷² Evaluating the compatibility of the EAC Common Market with Article V is beyond the scope of this memo. However, it is important to mention that for a preferential trade agreement to be compatible with GATS, it must include “substantial sectoral coverage” and “provide for the absence or elimination of substantially all discrimination” (Article V, paragraph 1), subject to several considerations.

Burundi's GATS negotiations resulted in commitments in five sectors: Business Services, Construction and Related Engineering Services, Distribution Services, Health Related and Social Services (other than those listed under 1.A.h.-j.), and Tourism and Travel Related Services.⁷³ Burundi also scheduled horizontal commitments affecting mode 4 (presence of natural persons) Market Access and National Treatment, remaining unbound except with respect to market access for "medical specialists, specialized senior management and managers" and national treatment for "specialists, specialized senior management and managers."

In contrast, at the CMP level Burundi committed to seven sectors, two more than at the WTO. However, only three of the five sectors in which commitments were made at the WTO were scheduled at the CMP (Business Services, Distribution Services and Tourism and Travel Related Services). No commitments were made in relation to Construction and Related Engineering Services or Health Related and Social Services, which means Burundi should include similar commitments in its CMP service schedules to maintain an equal level of liberalization in the regional context.

BURUNDI'S SECTORAL SERVICES COVERAGE	
WTO	EAC CMP
Business Services	Business Services
Construction and Related Engineering Services	X
Distribution Services	Distribution Services
Health Related and Social Services (other than those listed under 1.A.h-j)	X
X	Education Services
X	Financial Services
Tourism and Travel Related Services	Tourism and Travel Related Services
X	Transportation Services

⁷³ *Supra* note 33.

The services in which Burundi committed under GATS for the sectors common to both agreements (Business Services, Distribution Services and Tourism and Travel Related Services), were also subject to liberalization in the CMP context. For example, under the Distribution Services' sector, Burundi made commitments in both agreements covering Commission Agents' Services, Wholesale Trade Services and Retailing Services. However, Burundi's GATS schedule suffers from some notable inconsistencies in the way it links CPC numbers to economic activities, so it is difficult to make a final determination as to the scope of these commitments and the proper comparison to the CMP Services Schedule.⁷⁴ Nevertheless, our perception is that once the GATS schedule is clarified the scope of those commitments will turn out to be the same in both agreements, except in relation to mode 4.

In effect, Burundi didn't schedule any horizontal commitments in the CMP that would affect mode 4 Market Access or National Treatment, as it did under GATS. Instead, mode 4 is subject to the regulations established on the Schedule on the Free Movement of Workers. As has been previously mentioned on this paper, the EAC Partner States are interested in moving away from this approach and want to schedule specific provisions under mode 4. However, as it stands right now, it can be said that the CMP services schedule is much more ambitious than the schedule

⁷⁴ In Burundi's GATS schedule, the Commission Agents Services, Wholesale Trade Services and Retailing Services sectors are identified as "CPC 621 to 6121," which is incorrect as CPC 621 belongs to one division of the services classification and CPC 6121 to another. First, it is impossible to determine what is included between each classification number. Second, CPC 621 only covers Commission Agents Services. Wholesale Trade Services is supposed to be covered by CPC 622, as is correctly done in the CMP services schedule. As for Retailing Services, this economic activity should be identified using CPC 631 (Food retailing services) and/or CPC 632 (Non-food retailing services).

negotiated at GATS on this particular point. We have reached this conclusion because there is no clear cut definition of “worker” in the CMP. The Schedule on the Free Movement of Workers applies to “a citizen of a Partner State who seeks to enter or exit the territory of another Partner State as a worker...”⁷⁵ There are no specific qualifications regarding level of education or expertise, so the commitments under mode 4 would apply to a much broader working population than the ones established horizontally in GATS.

In conclusion, when it comes to Burundi’s CMP schedule the main discrepancy with the level of liberalization achieved under GATS is the absence of commitments in the Construction and Related Engineering Services and Health Related and Social Services sectors. In this sense, our main recommendation for Burundi is to negotiate the inclusion of those commitments in the CMP.

4.3.2 Rwanda’s GATS Commitments compared to the CMP Services Schedule

Rwanda committed to five services sectors in GATS: Business Services, Educational Services, Environmental Services, Tourism and Travel Related Services and Recreational, Cultural and Sporting Services (other than audiovisual services).⁷⁶

In turn, it committed to seven sectors in the CMP schedule:

RWANDA’S SECTORAL SERVICES COVERAGE	
WTO	EAC CMP
Business Services	Business Services
X	Communication Services
X	Distribution Services
Educational Services	Educational Services
Environmental Services	X

⁷⁵ Regulations 4 and 5 of the East African Community Common Market Protocol (Free Movement of Workers) Regulations. The provisions also include the workers’ spouse and children.

⁷⁶ *Supra* note 32.

X	Financial Services
Tourism and Travel Related Services	Tourism and Travel Related Services
Recreational, Cultural and Sporting Services	X
X	Transportation Services

As we can see from the above table, only three sectors are covered by both agreements. Moreover, two sectors that were covered in GATS negotiations (Environmental Services and Recreational, Cultural and Sporting Services) are missing from the CMP schedule of commitments. In that respect, there is a gap between GATS and the CMP schedule that must be filled in order to achieve the same level of sectoral coverage at both the multilateral and the regional context.

In relation to the commitments made in the sectors covered by both agreements, there are some differences that are worth pointing out. First, in the Business Services and Educational Services sectors, Rwanda fully committed to liberalize Legal Services and Adult Education Services, respectively, with no limitations on Market Access or National Treatment under any of the modes, including mode 4. In contrast, the CMP schedule subordinates mode 4 commitments to the provisions of the Schedule on the Free Movement of Workers. Given that no limitations were scheduled in GATS under mode 4, the commitments made at the regional level are more restrictive than the ones made at the multilateral level.

Second, in the Tourism and Travel Related Services sector, Rwanda committed in the Hotels (CPC 641) and Restaurants (CPC 642) subsectors at the WTO. No limitations on Market Access or National Treatment were scheduled for modes 1 through 3, however, mode 4 remained unbound, except for specific

conditions.⁷⁷ At the regional level, it is unclear whether Rwanda committed to CPC 642, and CPC 641's mode 4 commitments are delegated to the Schedule on the Free Movement of Workers. As has been mentioned, the CMP does not establish specific qualifications for workers, so Rwanda's commitments on CPC 641 are broader at the regional level.

In order to achieve the same sectoral coverage as in the WTO, we recommend that Rwanda include similar commitments in the CMP schedule to the ones made on the Environmental Services and Recreational, Cultural and Sporting Services' sectors in GATS. The commitments made for Legal Services and Adult Education Services present a different challenge, as these were completely liberalized at the multilateral level. In order to meet that standard, Rwanda would have to do the same in its CMP schedule, foregoing the references to the Schedule on the Free Movement of Workers on mode 4 Market Access and National Treatment on both commitments.

4.3.3 Kenya's GATS Commitments compared to the CMP Services Schedule

Kenya made commitments in four sectors at the multilateral level (Communication Services, Financial Services, Tourism and Travel Related Services

⁷⁷ For Hotels, mode 4 Market Access and National Treatment is unbound, except for "measures affecting senior executives and specialists who possess knowledge that is essential to the provision of the service". For Restaurants, mode 4 Market Access and National Treatment is also unbound, except for "measures affecting natural persons in the following categories: directors, senior executives and specialist who possess knowledge that is essential to the provision of the service".

and Transport Services).⁷⁸ In the CMP, it made commitments in those same sectors, and also in the Business, Distribution and Education Services sectors:

KENYA'S SECTORAL SERVICES COVERAGE	
WTO	EAC CMP
X	Business Services
Communication Services	Communication Services
X	Distribution Services
X	Educational Services
Financial Services	Financial Services
Tourism and Travel Related Services	Tourism and Travel Related Services
Transportation Services	Transportation Services

After reviewing all of the sectors common to both agreements in order to establish if the CMP services schedule is as ambitious as the GATS schedule, we found at least three instances where the former fails to attain the same level of liberalization as the latter.

First, in the Communication Services sector, Kenya made commitments at the WTO for “On-line information and/or data processing (including transaction processing)”, which is covered in part by CPC 843 (Data processing services). There is no similar commitment in the CMP schedule.

Second, in the Financial Services sector, Kenya negotiated commitments for “Participation in issues of all kinds of securities and provision of services relates to such issues except underwriting”. Again, Kenya did not schedule commitments on this service in the CMP schedule.

⁷⁸ *Supra* note 30; Kenya. *Schedule of Specific Commitments. Supplement 1*. WORLD TRADE ORGANIZATION. GATS/SC/47/Suppl.1, 26 February, 1998; Kenya. *Schedule of Specific Commitments. Supplement 2*. WORLD TRADE ORGANIZATION. GATS/SC/47/Suppl.2, 18 November, 1999.

Finally, in the Transport Services sector, Kenya included commitments at the multilateral level for “Rental of commercial vehicles with operator,” but no compromises were struck for this service at the regional level.

In this sense, although Kenya’s CMP services schedule represents a step further in the liberalization process as many of the commitments made at the regional level eliminate barriers, we recommend that Kenya review the three examples herein provided in order to attain greater compatibility between commitments at the multilateral and regional level.

4.3.4 Uganda’s GATS Commitments compared to the CMP Services Schedule

Uganda made commitments in only two sectors at the WTO (Communication Services and Tourism and Travel Related Services).⁷⁹ On the contrary, it committed to five more sectors in the EAC Common Market, totaling commitments in seven sectors:

UGANDA’S SECTORAL SERVICES COVERAGE	
WTO	EAC CMP
X	Business Services
Communication Services	Communication Services
X	Distribution Services
X	Educational Services
X	Financial Services
Tourism and Travel Related Services	Tourism and Travel Related Services
X	Transportation Services

⁷⁹ *Supra* note 29; Uganda. *Schedule of Specific Commitments. Supplement 1*. WORLD TRADE ORGANIZATION. GATS/SC/89/Suppl.1/Rev.1, 29 November, 1999.

Commitments in the Communication Services and Tourism and Travel Related Services sectors were scheduled in both agreements. We will begin analyzing the commitments in the Communication Services sector, where we found that some of the commitments made at the multilateral level were more ambitious than those at regional level.

It's true that in GATS, Uganda only scheduled commitments in the Telecommunication Services subsector, while in the EAC CMP it made additional commitments in the Courier and Audiovisual Services subsectors, making the sectoral coverage greater at the regional level. However, there is a notable gap between the obligations adopted in the Telecommunication Services subsector in each agreement, with the more liberalizing outcome being found in GATS. In effect, while Uganda only made commitments for Public Telephone Services (CPC 7521) and Data Processing Services (CPC 843) in the CMP, it committed to private services (like private voice and data for closed user groups and private mobile radio) and to paging services at the WTO. Furthermore, Tanzania scheduled additional commitments in the Telecommunications subsector by undertaking the obligations found in the Telecommunications' Reference Paper, which established "definitions and principles on the regulatory framework for the basic telecommunication services."⁸⁰ For the above reasons, we believe GATS is more ambitious than the EAC Common Market in respect to the Telecommunication Services subsector.

⁸⁰ *Uganda. Schedule of Specific Commitments. Supplement 1.* WORLD TRADE ORGANIZATION. GATS/SC/89/Suppl.1/Rev.1, 29 November, 1999; *WTO/Services: Telecommunications-Negotiating Group on Basic Telecommunications*, WORLD TRADE ORGANIZATION, 24 April 1996, https://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm (last visited May 9th, 2015).

In relation to the next sector, Tourism and Travel Related Services, Uganda scheduled commitments in two subsectors (Hotels and Restaurants Services and Travel Agencies and Tour Operator services), both at the WTO and in the EAC CMP. However, it scheduled commitments in one additional subsector in the EAC CMP (Tourist Guide Services).

Again, in the two scheduled subsectors common to the agreements, there are some gaps on the level of liberalization achieved. For example, for Hotels and Restaurants, Uganda did not schedule restrictions on mode 3 (commercial presence) on the National Treatment column of the GATS schedule, however, it did so on the CMP services schedule. Another example is Travel Agencies and Tour Operator Services: there is only one limitation in the GATS schedule on Market Access for mode 3, but zero commitments were made on the same mode in the CMP (unbound). Also, National Treatment for mode 3 is completely liberalized in GATS, while there is one limitation scheduled in the CMP.

Given the previous observations, we recommend that Uganda carefully review its commitments, especially on the Telecommunications Services subsector, in order to include any subsectors that were left out of the CMP, and also to match the level of liberalization negotiated for several of the modes of delivery.

4.3.5 Tanzania’s GATS Commitments compared to the CMP Services Schedule

At the multilateral level, Tanzania only made commitments in the Tourism and Travel Related Services sector,⁸¹ while at the regional level it covered seven sectors:

TANZANIA’S SECTORAL SERVICES COVERAGE	
WTO	EAC CMP
X	Business Services
X	Communication Services
X	Distribution Services
X	Educational Services
X	Financial Services
Tourism and Travel Related Services	Tourism and Travel Related Services
X	Transportation Services

Clearly, Tanzania opened up its market to a greater level of liberalization in trade in services at the EAC Common Market. Nonetheless, we will still proceed to analyze the commitments made in the Tourism and Travel Related Services sector and compare them to the ones made in the CMP Services Schedule in order to establish their compatibility.

Tanzania made commitments in both GATS and the EAC Common Market for “Hotels and restaurants (including catering).” In GATS, these commitments only applied to hotels of four stars and above, while in the CMP services schedule the commitments apply to hotels of three stars and above (with some exceptions).⁸² This means that the commitments are more ambitious in the CMP schedule because they apply to a larger group of service suppliers.

⁸¹ *Supra* note 31.

⁸² *Supra* note 52, p. 69-70.

In relation to Market Access in the GATS, Tanzania established limitations under mode 3 (commercial presence) related to the foreign character of the service suppliers,⁸³ while in the CMP schedule there is also a mode 3 limitation establishing that commercial presence is subject to an economic needs test. Given that both limitations are different in nature, the latter being more ambiguous than the former, it is difficult to compare them.

Under mode 4, Tanzania made no market access commitments in GATS (unbound), except for “measures concerning senior managers that possess skills not available in Tanzania.” In the CMP, mode 4 is linked to the Schedule on the Free Movement of Workers and, as has been previously stated, we consider the latter to be more liberal than the former.

In relation to National Treatment, Tanzania made no commitments in GATS under mode 3 (unbound), while in the CMP it included just one limitation (a higher licensing fee for foreigners). Mode 4 is also unbound, while in the CMP is supposed to be regulated by the Schedule on the Free Movement of Workers.

Furthermore, Tanzania scheduled additional commitments for this sub-sector in GATS. Balancing this with the fact that there are less unbound modes of service delivery in the CMP schedule than in GATS, we conclude that as a whole, the commitments undertaken by Tanzania for Hotels and restaurants (including catering) in the CMP schedule are just as ambitious as the ones made under GATS.

⁸³ Acquisition of domestic firms and mergers by foreigners are subject to approval, and the acquisition of land by foreigners or domestic companies which are deemed foreign due to foreign equity ownership is subject to approval.

4.3.6 Recommendation

After reviewing the EAC Partner States' GATS commitments against those scheduled in the CMP, our main recommendation for the parties to achieve the same level of liberalization attained at the WTO, would be to schedule commitments in the sectors that were included at the multilateral level but not at the regional level. This is the main discrepancy between the GATS schedule and the CMP schedule, specifically for Burundi and Rwanda. After solving that issue, the parties can start reviewing the specific examples under each sector that we have provided.

Conclusion

The EAC has immense potential to unleash tremendous economic growth should it properly harness the services trade in the region. This paper highlights that the EAC has committed to, and is in fact at the verge of, accomplishing such a goal. We hope that by highlighting certain of the obstacles that stand in the way of full implementation of the liberalization of services in the area and by providing analysis of alternative approaches, our goal, and that of the EAC, will be achieved.