The Progressive Liberalization of Trade in Services under the East African Community Common Market Protocol: Reviewing its Trends in the Light of the World Trade Organization General Agreement on Trade in Services

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Abstract

Five years after the coming into force of the East African Community Common Market (CMP), the Partner States of the East African Community (EAC) are now determined to move to the second round of negotiations aimed at achieving a progressively higher level of liberalization of free movement of services, labour, goods and capital. In this context, Partner States wish to address challenges and obstacles observed during the initial operationalization of the CMP moving forward. This article examines the proposals by the EAC Secretariat to amend the CMP and its schedule of commitments on trade in services in view of the Treaty for the Establishment of the East African Community of 1999 (Treaty) and the World Trade Organization General Agreement on Trade in Services (GATS). It specifically examines the effectiveness and relevance of the proposals on market access provisions, delinking the schedules on trade in services and movement of workers, definition and categories of service providers, rectification of technical errors in citation of services sectors, and horizontal commitments as well as on the use of Mutual Recognition Agreements (MRAs) in opening up service sectors.

It also presents the current status on trade in services under the CMP and highlights the major problems facing its full realization as including the limited resources in mainstreaming commitments made into national development policies, lack of an authority to run and manage the CMP, as well as the fact that the commitments were adopted without being fully negotiated. While the suggested proposals to amend the CMP are plausible, this paper submits that they need to be fully negotiated as most of them are borrowed from the GATS whose context may not necessarily fit that of the EAC. This includes the proposed definition and categories of natural persons subject to commitments under Mode Four as well as the adoption of horizontal commitments in delinking the schedule on the movement of services and movement of workers. Moreover, the call for MRAs among the Partner States has been highlighted under this article as a way of facilitating free movement of professionals in accordance with commitments under the CMP with a caution on the growing trend of the tendency to use MRAs in service sectors that are not offered by the CMP. The paper then

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concludes by providing appropriate recommendations also in the context of the proposed amendments to the CMP.

A. Introduction

In 2010, the East African Community (EAC) operationalized its Common Market Protocol (CMP). Partner States to the EAC, namely Burundi, Kenya, Rwanda, Tanzania and Uganda, made clear commitments to progressively remove existing restrictions on the free movements of services, capital, labour, persons as well as the right of establishment and residence to realize the four freedoms. Towards this end, each Partner State made its irrevocable commitments in the schedules indicating the preferred mode of service supply, the extent of commitment and limitations, if any, to each freedom.

Immediately after the operationalization of the CMP, the Partner States observed challenges in implementing trade in services provisions and the schedules of commitments in the CMP. The challenges included technical errors, omissions and legal inconsistencies or discrepancies contained in the schedules of commitments.[1] Subsequently, in June 2013, the Sectoral Council of the EAC Ministers directed the EAC Partner States to introduce proposals for amendment of the CMP on its Articles relating to trade in services and free movement of workers.[2] The deadline for submission of such proposals for amendments was February 2014.

The CMP has just ended its first five years from the date it entered into force. The Partner States are getting ready for a second round of negotiations towards achieving a progressively higher level of liberalization in the spirit of Article XIX of the World Trade Organization General Agreement on Trade in Services (WTO GATS). The proposed amendments will form part of the second round of negotiations. The CMP is modelled along the WTO GATS and nearly all proposals for amendment of the CMP are derived from WTO GATS framework as it will be discussed later.

This paper examines, therefore, the proposals to amend the CMP and its schedule of commitments on trade in services in view of the Treaty for the Establishment of the East African Community of 1999 (Treaty) and in the light of WTO GATS. The discussion is limited to the following EAC Secretariat proposals on market access provisions, specific references to WTO GATS, delinking the Schedules on Trade in Services and Movement of Workers, definition and categories of Service Providers, rectification of technical errors in citation of services sectors, and horizontal commitments, as well as on the use of Mutual Recognition Agreements (MRAs) in opening up service sectors.

1 Report of the 29th Meeting of the Council, 15-20 September, 2014, Arusha, Tanzania, para 44.

2 The procedures to amend the CMP are provided for under Article 53 of the CMP read together with Article 150 of the EAC Treaty.

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B. Legal Framework Governing the Common Market Protocol of the East African Community

Articles 76 and 104 of the Treaty are the main legal basis of the EAC CMP. Article 76 provides for the establishment of the common market through a protocol among the Partner States providing for free movement of labour, goods, services, capital, and the right of establishment of residence. It requires the established common market to be progressive and in accordance with schedules approved by the Council of the Ministers of the EAC. In this regard, the Council is also required to "establish and confer powers and authority upon such institutions as it may deem necessary to administer the Common Market". The intention to establish an authority to run and manage the common market is grounded on the truth that the Council as a policy making organ of the EAC is incapable of managing an effective common market.

Article 104 of the Treaty provides the scope of cooperation among the Partner States. It commits the Partner States to adopt measures that will sustainably achieve the free movement of persons, labour and services and to ensure the enjoyment of the right of establishment of residence of their citizens within the Community.

Part F of the CMP relates specifically on the free movement of services. Article 16(1) and (5) of the CMP enjoins the Partner States to guarantee the free movement of services supplied by nationals of Partner States and service suppliers who are nationals of the Partner States within the Community. It also requires them to progressively remove existing restrictions and not introduce any new restrictions on the provision of services in the Partner States, by nationals of other Partner States except as otherwise provided in the Protocol.

The CMP is about the private sector as opposed to the public sector and no wonder services supplied in the exercise of governmental functions are excluded as services in the context of GATS.[3] It is assumed that services provided by the government are not supplied on commercial basis or in competition with other suppliers.[4] The CMP is essentially guided by the two key principles of non-discrimination on the basis if nationality (the national treatment) and the Most Favoured Nation treatment (the MFN). Under the national treatment, each Partner State must treat service and service suppliers of the other Partner States no less than it treats national services and service suppliers. Under the MFN, all Partner States must treat services and services providers of all other Partner States equally without any discrimination and must be treated no less than services and services suppliers from

3 Article 1(3) of GATS. Also see *Hans Van Houtte*, The Law of International Trade, London 1995, 58. For instance, it is unrealistic for Uganda to include 'judges' (who are normally public servants appointed by the President) under the legal professions category of workers allowed in Uganda within its schedule of commitments. See the East African Community Common Market (Free Movement of Workers) Regulations 2010.

4 *James Harrison*, The Human Rights Impact of the World Trade Organization, Oxford 2007, 130.

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any other third country or a customs territory.[5] The National Treatment and MFN are also key principles of the WTO GATS.[6]

The CMP schedules, like the GATS, adopt positive listing and classification of services. That means, only sectors and subsectors indicated in the schedules of commitments are liberalized and open subject to the indicated limitations, if any. Accordingly, not all service sectors should be assumed fully liberalized.

C. Status of Trade in Services under the Common Market Protocol of the East African Community

So far only seven out of twelve GATS list of services have been liberalized in the first round of the negotiations of the CMP. The liberalized sectors for which Partner States committed to progressive removal of existing restrictions and not to introduce any new restrictions on the provision of services[7] are: business and professional, communication, distribution, education, financial, tourism and travel-related services, and transport. There is significant asymmetry among Partner States in terms of scheduled commitments. The final elimination date for national treatment and market access stipulated in the Schedule of commitments for all Partner States is 2015. However, 2015 should not be seen as the year of full liberalization or implementation of the CMP because liberalization is done progressively and other sectors are yet to be negotiated and liberalized.

The pending five sectors scheduled for negotiation on a future date include construction and related services, environmental, health related and social services, recreational, cultural and sporting services, and other services not included elsewhere.

The following table indicates the number of sector and subsectors liberalized for each Partner State.[8]

5 Article 17 And 18 of CMP.

6 Article II and XVII of WTO GATS. Also see *Jan Wouters* and *Bart De Meester*, The World Trade Organization: A Legal and Institutional Analysis, Oxford 2007, 19-29.

7 Article 16(5) of CMP.

8 See *Marie Angelique Umulisa*, Trade in Services in the EAC Region, Paper Presented at the National Workshop to Review the Schedule of Commitments on trade in services under the EAC CMP, September 2015, Dar es Salaam, Tanzania.

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Services Sector	Tanzania	Kenya	Burundi	Uganda	Rwanda
Transport	9	9	17	20	20
Tourism	4	3	4	4	4
Financial	16	12	9	11	15
Education	4	4	4	5	5
Distribution	2	3	3	4	4
Business	7	15	31	33	32
Communication	17	17	6	21	21
Total number of commitments by subsector (out of 160)	**59**	**63**	**74**	**98**	**101**

Hard facts or data on the status of the implementation of the above commitments by the Partner States are hard to get as the EAC has not yet comprehensively reviewed the progress achieved so far under the CMP. However, administrative assessment reports on the progress and studies of independent researchers are many. It is a common knowledge that the progress at the EAC has been slow partly due to limited resources facing the Partner States in mainstreaming their CMP commitments into national development policies and plans. According to Marie Angelique *Umulisa* of the EAC Secretariat, the following is the status of the implementation of CMP commitments by the Partner States:[9]

The Republic of Burundi has: (a) issued an official notice to remove all administrative restrictions on the provision of services, (b) revised the Foreign Exchange Regulations of 10/06/ 2010 in order to facilitate the free movement of capital, (c) finalized the data collection for man power surveys, and (d) initiated plans for full institutional reforms.

The Republic of Kenya has: (a) reviewed the Capital Markets Act, Cap 487, Insurance Amendment Act 2014 and Competition Act No 12 of 2010 to remove restrictions on the East Africans and improve the investment environment, (b) enacted the Capital Markets (Futures Exchanges Licensing Requirements), 2013 to ensure full liberalization of the capital account, (c) enacted the National Social Security Fund Act No 45 of 2013 to provide for portability of social security benefits (the NSSF Kenya is a pension scheme and not provident fund); (d) amended the Advocates Act to allow advocates from EAC Partner States to practice in Kenya; (e) removed restrictions in the Companies Act, Registration of Business Names, and Partnerships Act; (f) finalized and launched the Manpower Survey in October 2014; and (g) established an East African Desk at the Ministry of Interior and Coordination of National Government – Immigration Department.

The United Republic of Tanzania has: (a) amended the Immigration Regulations of 1997 to reflect the provisions of the EAC CMP related to the free movement of persons, workers and right of residence and establishment; (b) amended the Capital Markets and Securities (Foreign Investors) Regulations 2003 in order to allow citizens of East African Partner States to purchase government securities; (c) removed restrictions on secondary

9 *Umulisa*, note 8, 3-4.

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trading of bonds in the capital markets within the EAC; and (d) has agreed to hold quarterly meetings with professional bodies to deliberate on matters on implementation of the EAC CMP.

The Republic of Uganda has: (a) launched a National Policy on EAC integration; (b) developed a National Implementation Strategy – together with National Development Plan and National Trade Policy to guide implementation of CMP; and (c) identified a number of laws for amendment in order to accord National Treatment to services and services suppliers.[10]

The slow realization of the CMP commitments by the Partner States is also reflected in the findings of the East African Common Market Score Card 2014 by the International Finance Corporation of the World Bank working together with the EAC Secretariat. This study reviewed over 500 key sectoral laws and regulations of the EAC Partner States on professional services, road transport, telecommunications and distribution. More than 63 measures were identified as inconsistent to commitments to liberalize services trade within the EAC, with professional services accounting for about 73% of the 63 identified measures. Telecommunications and retail were the only studied sectors with no identified measures inconsistent to the CMP. The measures inconsistent to the CMP were mainly found in Tanzania with 17 measures, Kenya 16, Rwanda 11, Uganda 10, and Burundi 9 measures. According to the study, Burundi's strong performance on the scorecard is partly due to the fact that some of its sectors are not yet regulated through sectoral legislation.[11]

All identified inconsistent measures concerned modes Three (commercial presence) and Four (presence of natural persons) of services supply, and 75% of all measures related to national treatment and discrimination against services or service suppliers of other EAC Partner States. Furthermore, 75% of measures identified were in laws while 15% in administrative measures and 10% in regulations. Also, all Partner States are in default in their obligation to regularly inform the EAC Council of Ministers of any new laws and administrative guidelines that may affect trade in services contrary to the CMP.[12]

It is submitted that part of the root cause of the problems inhibiting the realistic realization and implementation of the CMP is lack of the specific authority to run the CMP envisaged under Article 46 of the CMP. As argued above, the Council as a policy making organ of the EAC is incapable of managing the effective common market. The long awaited review of the EAC institutional framework should create an independent organ or framework to administer the CMP.

10 This includes the Employment Act, Advocates Act, Accountants Act, Veterinary Surgeons Act, Labour Union Act, Workers Compensation Act, Public Procurement and Disposal of Public Assets Authority, Architects Registration Act, Engineering Registration Act, Medical and Dental Practitioners Act, Insurance Act, Allied Health Professionals Act, and Hotels Act.

11 *World Bank and East African Community Secretariat*, EAC Common Market Scorecard 2014: Tracking EAC Compliance in Movement of Capital Services and Goods, Washington D.C and Arusha, 2014, 3-4.

12 *World Bank and East African Community Secretariat*, note 11, 3-4.

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The other compounding problem causing the slow pace in the implementation of the CMP is, arguably, the resentments by Partner States derived from the negotiations of the CMP which culminated into the adoption of the existing commitments without them being negotiated. Following the *cul-de-sac* during the negotiations on CMP schedules of commitments, it was resolved that each Partner States should list its commitments and its attendant market access conditions, if any, and submit the same in a sealed envelope to the negotiation table. All envelopes were then opened at the same time on the condition that commitments made become absolute and irrevocable against the maker. In the absence of reciprocity, it is the common knowledge that some Partner States were disgusted when they found that some Partner States had offered less than anticipated or scheduled their commitments in a manner not anticipated compared to theirs. This explains the absence of horizontal commitments in the CMP as well as fundamental errors in the citation of the commitments as per the United Nations Central Product Classification (CPC) as it shall be discussed later.

One example of the attempt to withdraw the commitment made on the account of lack of reciprocity from Tanzania, despite the clear principle of the Treaty that reciprocity is not applicable, is the petition by the Law Society of Kenya (LSK) to sabotage and pre-empt what the Kenyan government had offered. Tanzania is the only Partner State that did not make definite commitments on legal services in its schedule of commitments. Instead of resorting to the principle of variable geometry, the LSK attempted to nullify the Kenyan schedule of commitments on legal services as unconstitutional by filing a constitutional petition dated 25th July 2012 in the name of the *Law Society of Kenya v. Attorney General & 2 others.*[13] The LSK challenged the constitutionality of various sections of the Statute Law Miscellaneous (Amendments) Act, 2012, No. 12 of 2012 of Kenya which amended certain sections of the Advocates Act, (Chapter 16 of the Laws of Kenya) with some consequential amendments being made to the Law Society of Kenya Act to, *inter alia*, open market access for foreign advocates.[14]

The LSK argued that the Amendment was impugned on the ground that opening Kenya's market for trade in legal services in favour of advocates and judges to non-Kenyans without reciprocal market access for Kenyan lawyers and judges in the countries is an abuse of the legislative authority. It was contended that the provision was in violation of the public good expressed in the Constitution of Kenya and the relevant WTO Agreements and other trade agreements applicable to Kenya which call for market access for trade in services on the basis of reciprocity. The petitioner further argued that these agreements are part of the law of Kenya by virtue of Article 2(6) of the Kenyan Constitution of

13 [2013] eKLR (High Court at Nairobi (Nairobi Law Courts) (Petition 318 of 2012). The petition was supported by an affidavit of Mr. Apollo Mboya, as the Secretary of the Law Society of Kenya, of 25th July 2012.

14 This case is discussed in *Kennedy Gastorn*, Cross Border Legal Practice in the East African Community: Prospects and Challenges from the Tanzanian Position, Journal of African and International Law, 3:2:2013: 29-76.

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2010 which provides that "Any Treaty or Convention ratified by Kenya shall form part of the law of Kenya under this Constitution."

It was also argued that young Kenyan lawyers are aggrieved by the amendment permitting foreign lawyers to practice in Kenya as they will be limited in terms of their opportunities which could lead to brain drain in Kenya. Counsel emphasized the fact opening the market for legal services must be accompanied by reciprocity from the other countries whose lawyers are entitled to practice in Kenya. The LSK clarified that the government of Kenya has an obligation under Article 55 of the Constitution of Kenya to take measures including affirmative action to ensure that the youth access employment, relevant education and training and that they are protected from exploitation. According to LSK, the amendment undermines this objective as the majority of young advocates are currently below the age of 35 years and opening the legal practice to foreign advocates will only diminish the opportunities for young advocates.

Furthermore, it was contended that different countries have different legal standards for legal education, training, and practice of the law and those standards are different from those required from Kenyan Advocates. Thus opening an avenue for foreign advocates to practice in Kenya will institutionalize discrimination as otherwise unqualified persons will be admitted to practice in Kenya and create an untenable situation as it will diminish the opportunities for young lawyers.

In response, the Attorney General argued that the amendments in relation to foreign advocates were only in relation to advocates who are citizens of Rwanda, Burundi, Uganda and Tanzania and are consistent with Kenya's obligations under the Treaty. Otherwise, the requisite qualifications for foreign advocates are still regulated by the Council for Legal Education of Kenya as set out in section 13 of the Advocates Act.

Justice D. S. *Majanja* was not convinced by the arguments of the LSK as the court was not shown what constitutional provision had been infringed by this provision or how the treaties which are applicable in Kenya limit legislative authority to provide for the practice of non-citizen advocates. The Court upheld the Attorney General's submission on the practice and regulation of foreign advocates in Kenya. The court held that the amendment was a consequence of the Treaty and the amendment is clear that the citizens of the Partner States of the EAC must be duly qualified as advocates in accordance with section 13 thus the issue of different standards and entrenching discrimination against Kenyan advocates does not arise.

It was also held that Article 23 of the CMP commits the Partner States to implement free movement of services in a progressive manner. According to the schedule of Commitments on the Progressive Liberalisation of Services contained in Annex V to the CMP, Kenya had committed to provide market access to Legal Advisory and Representation Services in Judicial Procedures concerning other fields of law and national treatment to other citizens of the community by the year 2010. In conclusion therefore, the court found that

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the amendments to sections 12 and 13 of the *Advocates Act* were consistent with Kenya's treaty obligations and were not unconstitutional in the manner alluded to by the petitioner.[15]

D. Background to the East African Community Secretariat Proposals

Immediately after the operationalization of the CMP, the Partner States observed challenges in implementing trade in services provisions in the CMP and the schedules of commitments. The challenges included, among others, the presence of technical errors in citation of sector services, omissions and legal inconsistencies/discrepancies contained in the schedules of commitments.[16] In June 2013, the Sectoral Council of the EAC Ministers directed the EAC Partner States to introduce proposals for amendment of the CMP on its Articles relating to the trade in services and free movement of workers.[17] The deadline for submission of such amendments was set to February 2014.

Various recommendations and proposals for the amendment were made, and the Sectoral Council adopted the proposals to include and provide for:

(a) a definition of a 'Service Supplier' as 'a natural person or a juridical person of the Partner State that seeks to supply or supplies a service on a temporary basis',
(b) categories of natural persons subject to commitments under Mode Four in the CMP;
(c) a Market Access provision in the trade in services provisions in the CMP;
(d) horizontal commitments in the Partner States Schedules of commitments on movement of services;
(e) clear reference to WTO GATS as regards Free Movement of Services in the EAC CMP since the CMP provisions on services and the Partner States" schedules of commitments are based on the WTO GATS;
(f) review Annex V and provide for specific commitments under Mode Four;
(g) a clear elimination dates, correct classification of services sectors and subsectors, and correct reference of the CPC numbers; and deletion of repeated subsectors in the Partner States Schedules of commitments on movement of services; and
(h) regulations to implement the free movement of services under the EAC CMP.

The Sectoral Council also directed Partner States to review their commitments on Mode Four under Annex V of the CMP.

In the premise of the above progress, the 29th Meeting of the Council of Ministers held in September 2014, directed the Secretariat of the EAC to prepare specific amendments to the CMP and submit the same to the Sectoral Council of Trade, Industry, Finance and Invest-

15 Judgment delivered on 19th day of March 2013.
16 Report of the 29th Meeting of the Council, 15-20 September, 2014, Arusha, Tanzania, page 44.
17 Article 53 of the CMP and Article 150 of the EAC Treaty.

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ment[18] and further directed Partner States to review their commitments on Mode Four under Annex V of the CMP.[19] Selected notable proposals by the EAC Secretariat in view of the directive of the above Meeting of the Council of Ministers are discussed below.

E. The Market Access Provisions

Under the WTO GATS framework, the market access is a negotiated commitment provision which refers to sections or provisions which prohibit limitations on the number of service suppliers, total value of service transactions, total number of service operations, number of natural persons employed in the particular service industry, type of legal entity through which a service may be supplied, and the extent of participation of foreign capital in a service sector.[20] Market access provision is different from the national treatment provision. The latter refers to requirement that services by the foreign suppliers as domestic suppliers must be subjected to the same laws and regulations.[21] In principle, market access for services is not granted automatically. It depends on specific sector commitments which Partner States undertakes.[22]

The articles on trade in services of the CMP do not contain the market access provisions. The mere absence of the market access provision is interpreted by some scholars as a key omission in the Regulations on Trade in Services. It has been argued that this omission 'creates ambiguities in the interpretation of the EAC services schedule as Partner States may not restrict or regulate any sector in any way outside the exceptions in Articles 21, 22, and 23 of CMP.[23] Accordingly "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… misinterpretations and different interpretations between member states could give rise to many more disputes than would otherwise be necessary".[24] To this end, it has therefore been suggested that the CMP should contains the market access

18 EAC/CM 29/Directive 28.

19 EAC/CM 29/Directive 29.

20 Article XVI of GATS.

21 Article XVII of GATS. Also see *S.R. Myneni*, World Trade Organisation (WTO), Hyderabad 2003, 76.

22 *Wouters* and *Meester*, note 6, 23.

23 Article 21 provides for the general exceptions to trade in service and Article 23 deals with security exceptions on trade in Services. Article 23 is on implementation of the free movement of services.

24 *Isaac Baker, Carolina Arias Estévez* and *Karen Bosman*, Services Trade under the East African Community Common Market Protocol, Georgetown University Law Center, International Trade and Investment Law Practicum (submitted for International Trade Center), 10 May, 2015, p. 11, https://www.tradelab.org/documents/clinics/georgetown/EAC/Services_Trade_under_the_East_African_Community_Common_Market_Protocol.pdf (accessed on 8 January 2016).

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provisions to facilitate the free movements of services for the growth and development of the EAC.

According to the EAC Secretariat, lack of market access provision has created difficulties in the implementation of Partner States' services commitments under the EAC CMP. It is further argued that a market access article will shed light on whether some restrictions are permissible, the kinds of restrictions or domestic regulations that are not to be tolerated and/or even whether a particular type of measure or regulation is a restriction. This is relevant particularly because the EAC CMP approach to services liberalization entails progressive removal of existing restrictions and with no new restrictions to be introduced.[25]

The following text on the market access is proposed by the EAC Secretariat to be included in the CMP:

> *"For the purposes of Article 16.5 and Article 23.1 of the Protocol on the Establishment of the East African Common Market, in sectors where market-access commitments are undertaken, the measures which a Partner State shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule on the Progressive Liberalization of Services, are defined as:*
>
> *(a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;*
>
> *(b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;*
>
> *(c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;*
>
> *(d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;*
>
> *(e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and*
>
> *(f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment."*

It is submitted that the usefulness of the above suggested provision is limited for various reasons. First, the suggested provision is a replica of Article XVI(2) of WTO GATS for which all existing EAC Partner States are members.[26] This mere duplication of similar pro-

25 Annex XX to the 29th Meeting of the Council, 15-20 September, 2014, Arusha, Tanzania.

26 *Wouters* and *Meester*, note 6, 115.

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visions from two related trade regimes adhered to by the same parties might not add more value in promoting the free movement of services. Secondly, the EAC wished to have more flexibility on restrictions beyond what is provided for under the WTO GATS.[27] That is why the EAC CMP schedule of commitments has practically a market access column which indicates limitations, if any, for each mode of supply and for each sector or subsector offered by each EAC Partner States.[28] Arguably, the market access is indirectly provided for under the CMP as schedules. Unlike preambles, they are part of the operative provisions of the CMP. Market access provisions are usually part of the specific commitments and are therefore not included in hard provisions of all trade regimes but in sectors where market-access commitments are deliberately undertaken by the participating states.

According to Isaac *Baker*, Carolina Arias *Estévez* and Karen *Bosman*, all limitations under the market access column of the CMP fall within existing parameters of limitations under Article XVI(2) of WTO GATS by the EAC Partner States.[29] This include: the limitation by Rwanda on the total number of mobile service providers under telecommunication services,[30] limitation by Burundi on capital participation to thirty-three per cent per shareholder for non-life insurance services,[31] limitation by Uganda that foreign law firms must organize as partnerships with locals to be allowed to practice in Uganda,[32] limitation by Kenya that foreign share of capital in telecommunication services should not exceed thirty per cent,[33] and the limitation by Tanzania to subject liberalization of hotels and restaurants subject to economic needs test.[34] In the premise, the market access column is modelled on the permissible WTO GATS limitations and is able to promote free movement of services in the context of the Treaty.

F. The World Trade Organization General Agreement on Trade in Services and the East African Community Common Market Protocol

The EAC Secretariat has recommended the Partner States to correct the legal discrepancy between the WTO GATS regime and the CMP on the account that some Partner States have committed less in the CMP than in the WTO. At the same time, the EAC Secretariat has observed with concern what it has referred to as the omission of reference of WTO GATS in the EAC CMP provisions on trade in services. It has accordingly recommended the inclusion in the CMP of a clear reference to WTO GATS as regards free movement of ser-

27 See the drafting documents to the Treaty.

28 The indication in the column of the market access of 'none' means no restriction in the market access of the sector, and 'unbound' means no commitment to liberalize the sector is made.

29 *Baker,* note 24*,* 12.

30 Article XVI(a) of GATS.

31 Article XVI(b) of GATS.

32 Article XVI(e) of GATS.

33 Article XVI(f) of GATS.

34 Article XVI (a-d) of GATS.

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vices so as to acknowledge that Annex V of the CMP follows the WTO GATS classification.

As earlier indicated, under the status of trade in services under the EAC CMP, a total of 160 commitments by subsectors have been committed by the EAC Partner States within their schedules of commitments. Counting by numbers, Tanzania has liberalized less subsectors (59), followed by Kenya (63), Burundi (74) and Uganda (98) while Rwanda is the most liberalized Partner State with 101 subsectors. However, counting by sectors, each Partner State has committed more sectors to the EAC CMP within its first round of negotiations than GATS, as shown in the table below.

EAC Partner States' Commitments to CMP and GATS by Sectors

S/N	Services Sector/Country	Tanzania		Uganda		Kenya		Rwanda		Burundi	
		CMP	GATS	CMP	GATS	CMP	GATS	CMP	GATS	CMP	GATS
1	Business Services	✓	X	✓	X	✓	X	✓	✓	✓	✓
2	Construction and Related Engineering	X	X	X	X	X	X	X	X	X	✓
3	Distribution Services	✓	X	✓	X	✓	X	✓	X	✓	✓
4	Health Related and Social Services	X	X	X	X	X	X	X	X	X	✓
5	Educational Services	✓	X	✓	X	✓	X	✓	✓	✓	X
6	Financial Services	✓	X	✓	X	✓	✓	✓	X	✓	X
7	Tourism and Travel Related Services	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
8	Transport Services	✓	X	✓	X	✓	✓	✓	X	✓	X
9	Recreational, Cultural and Sporting Services	X	X	X	X	X	X	X	✓	X	X
10	Environmental Services	X	X	X	X	X	X	X	✓	X	X
11	Communication Services	✓	X	✓	✓	✓	✓	✓	X	X	X

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TOTAL (liberalized sectors)	**7**	**1**	**7**	**2**	**7**	**4**	**7**	**5**	**6**	**5**

Source: Derived from Annex V to the CMP on Schedule of Commitments on the Progressive Liberalization of Services & *Baker*, note 24, 60-66.

Key:

✓ = liberalized

X = not liberalized

Accordingly, Tanzania leads the other Partner States by offering more to the CMP against the GATS at the ratio of 7:1, followed by Uganda 7:2, Kenya 7:4, Rwanda 7:5 and Burundi 6:5. It can therefore be argued that, the call to offer more to the CMP goes to Burundi with six sectors while the rest have offered seven sectors each, unless the call relates to sub sectors.[35] The most GATS supporting regimes, by sectors, is Burundi and Rwanda with five sectors each followed by Kenya with four sectors. However, the second round negotiations of the CMP for the pending sectors may change the equilibrium by having more sectors committed to the CMP.

These recommendations to rectify the legal discrepancy and acknowledge the GATS are commendable. However, they may carry with them a serious contradiction in content. First, GATS allows its members to conclude regional integration agreements on trade in services as long as they have substantial sectorial coverage and eliminate discrimination between the parties.[36] Second, GATS and CMP are separate and distinct trade regimes which complement each other. To argue otherwise would defeat the very purposes of having the CMP to offer the same that is offered by GATS. The GATS is not part of the *acquis communautaire* of the EAC. Thirdly, the Treaty and CMP do not operate on the principle of reciprocity or parity and so the question of legal discrepancy is a baseless claim. Fourth, what is offered by GATS but not offered by the CMP may still be accessed by nationals of any of the EAC Partner States because all Partner States are also members to the GATS.

G. Delinking the Free Movement of Services and the Free Movement of Workers

Article 1 of WTO GATS defines services as the supply of a service in the following modes (a) from the territory of one member into the territory of any other member, also known as a cross-border supply, e.g. telecommunications, (b) in the territory of one member to the service consumer of any other member also known as consumption abroad, e.g. tourists, (c) by a service supplier of one member, through commercial presence in the territory of any other member, e.g. incorporating a company or a school abroad, or (d) by a service supplier of one member, through presence of natural persons of a member in the territory of any oth-

35 It must be emphasized that the principle of reciprocity is not applicable under the EAC CMP regime.

36 Article V of GATS. Also see *Myneni,* note 21, 75.

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er member. These types of supply of services constitute the key WTO modes of the supply of services and the same are reproduced by Article 16(2) of the CMP as its modes of supply of services.

The supply of services under Mode Four in the context of CMP has been subjected to the following criticisms. First, a service supplier has not been defined, and secondly, categories of service suppliers have not been provided for. The nature of temporary entry and duration of natural persons supplying services under mode four need also to be clearly provided for.[37] Currently, the Mode Four is pursued in accordance with the Schedule on the Free Movement of Workers. That means, conditions attached to the free movement of labour or workers apply also to the free movement of natural persons supplying services. It is this link between the free movement of services and the free movement of workers which is considered problematic.[38]

The decision to de-link the two schedules is construed from the decision of the 29th Meeting of the Council of Ministers held in September 2014, which directed Partner States to review their commitments on Mode Four under Annex V of the CMP on Schedule of Commitments on the Progressive Liberalization of Services.[39] Practically, this directive requires limitations, if any, to the free movement of natural persons supplying services to be expressly provided for under the respective schedule instead of making a reference to another schedule dealing with workers. In other words, natural persons under services should not tread as same as those moving for employment or labour. This does not mean that a separate or different set of rules should be enacted for each category of natural persons but each schedule for each category should be self-sufficient in content, even when it may end up reproducing the same limitations.

To this end, this directive imposes no obligation to the Partner States to depart from their hitherto position on the free movement of natural persons. The further justification to delink the two comes from the fact that Schedule V of CMP on Commitments on the Progressive Liberalization of Services is based on the CPC while the Annex II on Schedule on Free Movements of Workers is derived from the International Labour Organization (ILO) Standard Classifications of Occupations (ISCO).

However, the decision to de-link the free movement of services and the free movement of workers is likely to generate implications if the definition of service suppliers under Mode Four is enlarged to include juridical persons. Then the establishment of legal person or commercial enterprises would be regulated by two separate and contradictory sets of commitments.[40]

37 *Ramesh Chaitoo*, Technical Issues in the CMP Regarding Provisions on the Supply of Services, Paper Presented at the National Workshop to Review the Schedule of Commitments on trade in services under the EAC CMP, September 2015, Dar es Salaam, Tanzania, p. 1.

38 Annex V on Schedule of Commitments on the Progressive Liberalization of Services and Annex II on Schedule on Free Movements of Workers.

39 EAC/CM 29/Directive 29.

40 *Baker*, note 24, 20.

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Essentially Mode Four is about professional natural persons (e.g. individual lawyers) as opposed to commercial enterprises (e.g. law firms) that are focused under Mode Three. This distinction between professional natural persons for Mode Four and the commercial enterprises for Mode Three is what was negotiated under the CMP.[41] Under Article 1(2)(d) of GATS, 'service suppliers' under Mode Four is limited to natural persons (citizens and permanent residents), and not juridical persons. Article 1(2)(d) clearly defines Mode Four as a supply of services by "a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member". It will be idiosyncratic and unprecedented if the CMP is amended to include 'juridical persons' under its Mode Four.

It is submitted that the absence of concrete evidence and reliable data on how problematic the linking of the two schedules inhibits realization of the CMP is critical because usually conditions attached to the free movement of workers could also apply to the persons supplying services in connection with the commercial presence. This is also important because the CMP does not provide categories or classification of natural persons for the purposes of undertaking commitments under Mode Three. From the WTO experience, one would but agree with Richard *Self* and B. K. *Zutshi* that Mode Four commitments barely touches the level of activity taking place in the provision of services by persons traveling to other countries, and most mode four entries had value only if Members had inscribed commitments under the commercial presence mode, since the value of such an obligation depended on the ability of a services provider to establish a commercial presence in the host country market".[42] Therefore the same set of measures can apply to both modes as both deal with natural persons entering the territory either privately as a service supplier, self-employed or under a contract of employment. For example, "a service delivered by a foreign worker under an employment contract to a local provider may be treated differently from precisely the same service provided by precisely the same person acting as an unattached service provider or under a contract to a foreign company".[43]

H. Definition and Categories of Service Providers

The EAC Secretariat is recommending the CMP to include definitions of 'services supplier' and categories of natural persons subject to commitments under Mode Four in the EAC CMP. The rationale is to bring clarity as to who is a service supplier and a service provider and to distinctively specify the temporary nature of the service supplier that will be allowed

41 See Article 1 and 16(2)(d) of CMP. Service supplier is referred to as a natural person citizen of any EAC Partner States.

42 *Richard Self* and *B. K. Zutshi*, 'Temporary Entry of Natural Persons as service Providers: Issues and Challenges in Further liberalization under the Current GATS Negotiations', Joint WTO-World Bank Symposium on Movement of Natural Persons (Mode 4) Under the GATS, https://www.google.com/search?q=Richard+Self+and+B.+K.+Zutshi&ie=utf-8&oe=utf-8 (accessed on 8 January 2016).

43 *Self* and *Zutshi*, note 42, 8.

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to move to supply the services under the commitments made under Mode Four. Specifically, it is proposed that 'service supplier should mean 'a natural or juridical person of the Partner State that seeks to supply or supplies a service'. And, the categories of natural persons subject to commitments under Mode Four in the EAC CMP should include: (a) independent service suppliers or independent professionals, (b) contractual service suppliers, (c) graduate trainees, (d) intra-corporate transferees and (e) business visitors. To this effect the following text is suggested to be included in the CMP:

> *"For the purposes of Article 16.2(d) of the Protocol on the Establishment of the East African Common Market, free movement of service suppliers includes the following categories of natural persons: (a) contractual services supplier; (b) independent professionals.*
>
> *"Contractual services supplier" means a natural person of a Partner State employed by a juridical person of that Partner State which has no commercial presence in the territory of another Partner State and which has concluded a bona fide contract to supply services with a final consumer in the latter [that] Partner State requiring the presence on a temporary basis of its employees in that Partner State in order to fulfil the contract to provide services. The natural person should have at least [two] years of experience in the particular field that is the subject of the service contract.*
>
> *"Independent service supplier" means a natural person of a Partner State engaged in the supply of a service and established as self-employed in the territory of that Partner State who has no commercial presence in the territory of any other Partner State and who has concluded a bona fide contract to supply services with a final consumer in another Partner State requiring his/her presence on a temporary basis in that Partner State in order to fulfil the contract to provide services. The natural person should have at least [five] years of experience in the particular field that is the subject of the service contract.*
>
> *The temporary entry and stay of natural persons considered as contractual service suppliers or independent service suppliers within any Partner State shall be for a cumulative period of not more than [six] months in any twelve-month period or for the duration of the contract, whichever is less."*

Furthermore, the Partner States are undertaking national consultations on the (a) number of years of experience for 'Contractual services supplier' and 'Independent service supplier', (b) period of stay of 'Contractual services supplier' and 'Independent service supplier', (c) whether to include Business visitors, Intra-corporate transferees and Graduate trainees in the categories of services supplier.[44] The following further categories of service supplier are suggested:

44 Annex XX to the 29th Meeting of the Council, 15-20 September, 2014, Arusha, Tanzania.

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Business Visitors: These are persons who visit another Partner State temporarily for the purposes of sale of services or to conclude agreements for sale of services. It also include (a) employees of a legal person who visits another Partner States for purposes of setting up a commercial presence of that particular juridical person in another Partner State; (b) a person participating in business meetings, and (c) persons engaged in after-sale services such as installing machinery under the conditions of the purchase of that machinery.

Intra-Corporate Transferees: these usually includes expatriates in the categories of executives, managers, and specialists who are sent from the headquarters of a service supplier in a particular country but with a commercial presence in another Partner State in order to implement and provide services efficiently and effectively. The EAC Secretariat is proposing that each company should be allowed to bring or send in another partner state a maximum of five expatriates for an agreed period of time. It has been argued that expatriates are necessary for serious investors and any country wishing to attract and retain investments must respond to the investors' needs.[45]

Graduate Trainees: These are natural persons employed by a legal person of a Partner State for at least one year, who possess a university degree and who are temporarily transferred to an establishment in the territory of the other Partner State for career development purposes or to obtain training in business techniques or methods.

The above proposals on business visitors, intra-corporate transferees and graduate trainees are possibly derived from the existing commitments of individual EAC Partner States under the WTO GATS.[46] There is no exhaustive list of categories of natural persons that may be regulated under Mode Four, although for greater comparability and coherence, WTO GATS members are said to have adopted guiding principles for Mode Four as suggested above for the CMP.[47]

All the EAC Partner States are members of the WTO GATS and their commitments under Mode Four reveals the same categories of service suppliers that is being proposed for the CMP. Isaac *Baker*, Carolina Arias *Estévez* and Karen *Bosman* have extracted the categories of 'technical personnel, management, expert jobs, senior managers that poses skills not available, directors, specialists, and senior executives' as service suppliers in the EAC Partner States' WTO GATS Schedules of commitments on Mode Four, which could as well be used as a point of reference to them in categorizing the CMP Mode Four commitments.[48]

Uganda is 'Unbound except for technical personnel unless Ugandans are or become available', Kenya is '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', Tanzania in the hotel industry is 'Unbound except for measures con-

45 *Baker*, note 24, 28.

46 See *Baker*, note 24, 25-26.

47 *Baker*, note 24, 24.

48 *Baker*, note 24, 25-27.

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cerning senior managers that possess skills not available in Tanzania', Rwanda in the hotel industry is 'Unbound, except for measures affecting senior executives and specialists who possess knowledge that is essential to the provision of the service' and Burundi has horizontal commitments 'Unbound, except for medical specialists, specialized senior management and managers'.[49] In the scheduling of commitments 'unbound' means that the country has no commitment to fully liberalize the mentioned sector until the contrary further notice is given or until the mentioned date, if any.

The context of the suggestion to expand the categories of natural persons subject to commitments under Mode Four in the EAC CMP to include independent or contractual service suppliers, intra-corporate transferees, business visitors and graduate trainees is that such categories will be part of the horizontal commitments to apply across all service sectors and all Partner States. The discussion on horizontal commitments is elsewhere in this paper.

It is submitted that the inclusion of juridical persons under Mode Four of service supplies is not a harmless anomaly as argued above. Also, the expansion of the categories of natural persons under Mode Four to include independent or contractual service suppliers, intra-corporate transferees, business visitors and graduate trainees should be negotiated basically as a new commitments in the light of Article XIX(2) of GATS. This Article provides that the process of liberalization must take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors. And that, the process must contain appropriate flexibility for individual developing country Members, like the EAC Partner States, for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching to such access the necessary conditions aimed at achieving the set objectives.

So far the CMP, under the schedule of free movement of persons and workers, provides a stay visa to all EAC Partner States' nationals of up to six months. This visa is not even limited in terms of how many entries may be made in a year, and it is common knowledge that most individuals would simply cross the border and turn back with a new visa once the earlier six months' visa is about to expire. Practically one may stay indefinitely in a country with this visa provided the person leaves the country after six months and returns back. Since intra-corporate transferees, business visitors and graduate trainees are not expected to work for gain or remuneration in the country or engage directly in provision of actual services as employees, practically, the need to have new visa category for them is limited unless a need assessment is done, as they use the same general stay visa of up to six months in a country. In this context, the CMP is more generous than the WTO GATS which does not have such a gratis visa to nationals of its members' states.

Furthermore, there is also no categories or classification of natural persons for the purposes of undertaking commitments under Mode Three within the CMP. If the categories are

49 *Baker*, note 24, 25-27.

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to be made for the Mode Four, it is critical important also to develop categories of persons and their qualifications necessary in managing the flow of natural persons under Mode Three.

It is also submitted that the proposed categories of natural persons subject to commitments under Mode Four in the EAC CMP should be negotiated and committed specifically and not form horizontal commitments that would apply across all service sectors and all Partner States because the EAC CMP has not horizontal commitments.

Mode Four is the most controversial and sensitive mode of service unlike other modes both under the CMP and the GATS. Richard *Self* and B. K. *Zutshi* confirm this and recall even how controversial the acceptability of the tradability of services or 'invisible trade' was under the WTO multilateral trade negotiations in 1986-1993 at Uruguay Round Negotiations after the Punta Del Este Ministerial Declaration that culminated into the GATS.[50] And that, even by the modest standards of liberalization, little has been achieved under Mode Four for the temporary entry of natural persons under the GATS framework.[51]

Mode Four involves persons entering a territory of another country. Nations like to have absolute discretion in terms of allowing non-nationals entering the territory for labour market protection, national security or simply avoiding abuse that may be associated with multiple visa systems by individuals purportedly enjoying rights provided for under CMP. For instance, if juridical person is included as a person in the context of Mode Four, every person associated with that legal person (including non-citizens of the EAC Partner States), would be allowed to enter the territory. This is a choice that needs to be made on the basis of value addition and merits, if any, of allowing commercial enterprises (legal persons) to be regulated under Mode Three and Four at the same time. No wonder, as observed Christopher *Findlay*, the commitments in the GATS to the fourth mode of supply on the movement people are few, and the multilateral norms on the important regulatory issues that affect the movement of natural persons are valuable, while the questions of movement of people are always more complicated to discuss because of the greater weight on national security in policy agendas.[52]

The tension between the national interest and laws to control any person entering the territory and community laws wishing to facilitate free movements of persons in the context of the EAC is best illustrated by the recent decisions of the Republic of Uganda to deny entry of some Kenyan nationals irrespective of its commitments made under the CMP regarding the free movements of persons. In principle, a decision to allow a non-national to enter a territory is a sovereign decision.

50 *Houtte*, note 3, 58.

51 *Self* and *Zutshi*, note 42. Also see *Harrison*, note 4, 139.

52 *Christopher Findlay*, Multilateral Liberalisation of Services Trade and Investment in a Globalising World: Scope and Limitations, p. 13, https://digitalcollections.anu.edu.au/bitstream/1885/40279/3/findlay.pdf (accessed on 8 January 2016).

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In April 2011, Uganda denied four Kenyan human rights activists led by Mr. Hassan Omar *Hassan*, a member of the Kenya National Commission on Human Rights, access into Uganda, forcing them to remain at the airport in Uganda upon their arrival till the next available return flight to Kenya. The Kenyan human rights activists went to Uganda intending to meet the Ugandan Chief Justice in relation to detention of Al-Amin *Kimathi*, Coordinator of the Muslim Human Rights Forum, who was also one of the Kenyans arrested over the Kampala July 11, 2010 bombings. According to the Ugandan authorities, the said Kenyans were denied access to Uganda for lack of genuine travel documents.[53]

In the same year, Uganda also denied the entry into Uganda a Kenyan and an Advocate of the High Court of Kenya, one Mr. Samwel Mukira *Mohochi* as a prohibited immigrant. He was part of a delegation of the International Commission of Jurists-Kenya Chapter scheduled to meet Justice Benjamin *Odoki*, the Chief Justice of Uganda on 14 April 2011. He was confined at the airport without being given any reasons as to why he was denied to enter Uganda contrary to the CMP. Reference on this incidence was subsequently filed by Mr. *Mohochi* before the East African Court of Justice contending that the actions of Uganda were in violation of his legal rights and Uganda's obligations under Article 104 of the Treaty and Article 7 of the CMP, among others. The Applicant, among others, prayed specifically for the following orders in the form of declarations:

(a) that the denial of the Applicant, a citizen of one of the Member States of the East African Community, of entry into Uganda without according him a hearing, due process of law or any legal or administrative process is illegal, unlawful and a breach of Uganda's obligations under Articles 6(d) and 7(2) of the Treaty;
(b) that the denial of the Applicant, a citizen of one of the Member States of the East African Community, of entry into Uganda, without Treaty based reasons, is illegal, unlawful and a breach of Uganda's obligations under Articles 104 of the Treaty and 7 of the Protocol; and
(c) that the provisions of Section 52 (a), (b), (c), (d) and (g) of the Citizenship and Immigration Control, Chapter 66 of the Laws of Uganda, bestowing unchecked and overarching discretionary powers on the Minister and the Director of Immigration to unilaterally declare persons who are citizens of Member States of the East African Community, such as the Applicant, the status of prohibited immigrants, are inconsistent with and in violation of Uganda's obligations of observance of the imperatives of the rule of law, transparency, accountability and human rights under Articles 6(d), 7(2), and the guarantee of free movement and residence within the East African Community under Article 104 of the Treaty and Article 7 of the Protocol.

In response to the applicant's case, Uganda as the Respondent, among other arguments, averred that 'section 52 of the Uganda's Citizenship and Immigration Control Act is not in

53 *Martin Ssebuyira*, Kenyan activists denied entry into Uganda, Daily Monitor (Uganda), http://www.monitor.co.ug/News/National/-/688334/1144344/-/c2q71dz/-/index.html (accessed on 8 January 2016). Also see *Lucas Barasa*, Kenya activists denied Uganda entry, http://www.nation.co.ke/News/-/1056/1143624/-/10yf37dz/-/index.html (accessed on 8 January 2016).

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contravention of the Treaty or the Protocol, that neither the Treaty nor the Protocol takes away the sovereignty of the member states to make decisions in the best interest of their national security and, in response to allegations that Section 52 of Uganda's Immigration Act bestows unchecked and overarching discretionary power to declare people, including East African Citizens, prohibited immigrants, it further averred that under Article 76(2) of the Protocol, implementation of the Common Market shall be progressive'.

In its judgement, the court found Uganda in violation of the EAC laws and held that (a) sovereignty cannot act as a defence or justification for non-compliance, and neither can it be a restraint or impediment to compliance of the Treaty and CMP, (b) actions of denial of entry, detention, removal and return of the Applicant, a citizen of a Partner State, to the Republic of Kenya, a Partner State, were illegal, unlawful and in violation of his rights under Articles 104 of the Treaty and 7 of the Common Market Protocol, and (c) on matters pertaining to citizens of the Partner States, any provisions of Section 52 of Uganda's Citizenship and Immigration Control Act formerly inconsistent with provisions of the Treaty and the Protocol were rendered inoperative and having no force of law, as from the respective dates of entry into force of the Treaty and the Protocol as law applicable in the Republic of Uganda.[54]

In its reasoning, the court argued that "...The Republic of Uganda is bound by the precedence of community laws over national ones in matters pertaining to the implementation of the Treaty. We think, therefore, that the obligations voluntarily entered into by the Republic of Uganda, and the rights acquired by the citizens of the Partner States, under the Treaty and Protocol, in respect of the movement of citizens of the Partner States, within Uganda, carried with them a permanent limitation against which a provision of existing or subsequent national law incompatible with the Treaty and Protocol, by the Republic of Uganda, cannot stand".[55]

I. Rectification of Technical Errors in Citation of Service Sectors

The CMP contains several errors in terms of classification of services sectors and subsectors as well the correct reference of the CPC. It is a common global practice of the common market regimes to use CPC in listing their schedules, and CMP uses CPC as well. It is therefore proposed that such errors be rectified by, among others, providing correct classification of services sectors and subsectors, correct reference of the CPC numbers and deletion of repeated subsectors as well as clear elimination of dates, where appropriate. The er-

54 *Samuel Mukira Mohochi (Applicant)* v *The Attorney General of the Republic of Uganda (Respondent),* Reference No. 5 of 2011, First Instance Division, The East African Court of Justice at Arusha (Johnston Busingye, PJ, John Mkwawa, J and Isaac Lenaola, J.).

55 Paragraph 121 of the judgement in *Samuel Mukira Mohochi (Applicant)* v *The Attorney General of the Republic of Uganda (Respondent),* Reference No. 5 of 2011, First Instance Division, The East African Court of Justice at Arusha.

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rors are, possibly, attributed to the fact that the CMP commitments were adopted without them being negotiated.

Four clusters of errors in the CMP Services Schedule, as pointed out by Isaac *Baker*, Carolina Arias *Estévez* and Karen *Bosman*, may be mentioned as examples.[56] First, several activities are listed without requisite CPC number. For example there is no CPC code to Rwanda's commitments for 'Legal Services' in the Professional Services. The CPC code for 'Legal Services' is 861. Also, the CPC Code of 752 for 'Telecommunication Services' is missing in the Tanzania's commitments in the 'Communication Services' sector.

Second, various activities are assigned incorrect CPC numbers. For instance, 'Integrated Engineering Services' within Professional Services in Business Services' sector in Rwanda is assigned CPC number 863 instead of 8673. Usually, CPC 863 is used to describe 'Taxation Services'. Also, Kenya's commitments in "Life Insurance Services" are assigned the CPC 8120, which does not exist, instead of 81211.

Third, various sectors and subsectors are assigned correct CPC numbers but wrong description of services in the classification. For instance, in Uganda's commitments, CPC 93191 is used for "Services provided by Midwives, Nurses, Physiotherapists and Para-medical Personnel" instead of "Deliveries and related services, nursing services, physiotherapeutic and para-medical services." Also, in Burundi's commitments in the Financial Services' sector, CPC 8121 describes "Life, Accident and Health Insurance Services" instead of "Life insurance and pension fund services."

Fourth, the CMP uses symbols such as asterisks (* or **) and dashes (-) inconsistently. Usually, a dash is used to show a range covered between two numbers while a single asterisk indicates that the service specified is a component of a more aggregated CPC item specified elsewhere in the classification list. Double asterisks indicate that the service specified constitutes only a part of the total range of activities covered by the CPC concordance. For instance, Telecommunications Services in the Uganda's commitments is assigned "CPC 7521-843", and the use of dash would ordinarily indicate that there is a spectrum of CPC numbers between 7521 and 843 but in reality, there cannot be any continuity between these two numbers. After all, these two numbers represent different CPC groups.

J. Horizontal Commitments

Ideally, movement of natural persons requires clear, consistent and transparent rules across the region. The CMP does not have horizontal commitments in the schedules on Free Movement of Services. The CMP has specific-sector commitments. Horizontal commitments are useful in addressing issues of a cross cutting nature, such as the market access or national treatment limitations, that apply to all the scheduled sectors. As alluded to above, one example of horizontal commitment in the services sectors may include the proposed categories of natural persons (such as business visitors, intra-corporate transferees and

56 See *Baker*, note 24, 49-58.

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graduate trainees) subject to commitments under Mode Four across all service sectors and all Partner States.

It is therefore proposed that CMP should be amended to provide for horizontal commitments in the Partner States schedules of commitments on movement of services. Horizontal commitments are a common feature under GATS regime. Horizontal and specific commitments are not always mutually exclusive. A country may choose to have specific-sector commitments and the horizontal commitments simultaneously where the latter prevails in case of conflict.

K. Mutual Recognition Agreements

Article 11 of the CMP calls for Partner States to mutually recognise the academic and professional qualifications granted, experience obtained, requirements met, and licences or certificates granted in other Partner States. In view of this, several initiatives are underway especially among the professional bodies to conclude Mutual Recognition Agreements (MRAs) to facilitate free movements of labour and services. Furthermore, the EAC has the draft "East African Community Common Market (Mutual Recognition of Academic and Professional Qualifications) Regulations 2011. The draft regulations seek to codify academic and professional qualifications rather than offering mutual reciprocal recognitions. It however enjoins Partner States to designate competent authorities to enter into MRAs to facilitate free movement of professionals in accordance with commitments made under Protocol.

There is a growing trend of using MRAs in service sectors and in sectors that are not offered by the CMP. This is anomaly. First, the MRAs in the context of the CMP are facilitating instruments for free movements of labour and not services. Second, MRAs cannot offer sectors not opened up by the Protocol and its Schedules. It is only the Protocol that can open up the sector and the MRAs in the sector must be consistent with the respective schedules of commitments made by the Partner States. Article 11 of the Common Market Protocol states clearly that:

> *"For the purpose of ensuring the free movement of labour, the Partner States undertake to: (a) mutually recognise the academic and professional qualifications granted, experience obtained, requirements met, licences or certifications granted, in other Partner States; and (b) harmonise their curricula, examinations, standards, certification and accreditation of educational and training institutions".*

The good example of MRAs seeking to open up sectors not committed under the CMP is the pending draft MRAs in legal profession, supported by the *Deutsche Gesellschaft für Internationale Zusammenarbeit, GmbH* (GIZ) and the East African Law Society (EALS), which seek to promote free movement of legal services in the region. This is argued in the context of Tanzania on the account that the country did not make any commitment as to the

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legal profession in the CMP.[57] This draft MRAs is allegedly anchored under Article 11 of the CMP and the East African Legislative Assembly Bill on the Cross Border Legal Practice. It is submitted that Article 11 of CMP cannot be used as a basis for the MRAs in services as it deals with labour matters.

L. Conclusions

The relevance of WTO GATS in reforming and influencing the CMP second round of negotiations in achieving a progressively higher level of liberalization is clear. The CMP is modelled along the WTO GATS and no wonder nearly all proposals for amendment of the CMP are derived from WTO GATS. It is absolutely important that such proposals are locally owned, negotiated and tested in the local context of the EAC.

Five years after the operationalization of any common market regime, is a good opportunity to the Partner States for second round negotiations to appropriately remove further barriers on the movement of services in the context of their national policies and laws and for the benefit of the EAC. The CMP faces many challenges including: the limited resources in mainstreaming their CMP commitments into national development policies and plans, lack of comprehensive reliable audit on its achievements and obstacles in all its sectors.

This article has reviewed the selected proposals to amend the CMP and its schedule of commitments on trade in services in view of the Treaty. It has also discussed the on-going strategies of using MRAs to expand horizons of the CMP in areas not provided for by the Partner States in their schedules of commitments.

In the context of the proposed amendment to the CMP to progressively liberalize services sectors as per the obligation for each Partner State, it is recommended, at the minimum, that:

- the EAC should develop a robust investment policy in supporting service sectors which would also be consistent with Partner States' overall trade policy. This should complement the CMP.
- Categories of natural persons subject to commitments under Mode Four in the CMP should be negotiated and committed specifically per sectors and not form horizontal commitments. So far the CMP contains sectors-specific commitments.
- For better management, the categories of natural persons under Mode Three should be developed. Currently, the CMP is silent on individuals that may enter a territory under Mode Three in the name of commercial enterprise.
- Service suppliers under Mode Four of CMP should not be defined to include juridical persons. Legal persons should be confined to Mode Three.
- The EAC Council of Ministers should establish and confer powers and authority upon such institutions as it may deem necessary to administer the Common Market. It is satis-

57 *Gastorn*, note 14, 41.

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fying to note the existence of a proposal by the EAC Secretariat to the Council to establish a Sectoral Committee on Trade in Services to negotiate; monitor and review the implementation of the trade in services and make appropriate recommendations. It is hoped that the Secretariat will soon develop a draft Concept Note and Terms of Reference to justify the establishment of the Sectoral Committee on Trade in Services.

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