



Coverage in Services Agreements

Paul Kruger



trade law
centre for
southern africa

- The GATS system comprises the following twelve (12) core service sectors:
 - Business;
 - Communication;
 - Construction and Engineering;
 - Distribution;
 - Education;
 - Environment;
 - Financial;
 - Health and social;
 - Tourism and Travel;
 - Recreation, Cultural, and Sporting;
 - Transport; and
 - Other services not included elsewhere.

	Bus.	Com	Cons + Eng.	Dist.	Edu.	Envir	Fin.	Health + Social	Tourism	Culture + Sport	Trans.	Other
Angola							X		X	X		
Botswana	X	X							X			
Lesotho	X	X	X	X	X	X	X		X		X	X
Mozambique							X					
Namibia	X								X			
South Africa	X	X	X	X	X	X	X		X		X	X
Swaziland	X							X	X			
TOTAL	5	3	2	2	2	2	4	1	6	1	2	2

Sectoral Coverage

<u>Countries</u>	<u>12 Core Sectors</u>	<u>160 Sub-sectors</u>	<u>Percentage</u>
Angola	3	6	3.75%
Botswana	3	19	11.88%
Lesotho	10	79	49.38%
Mozambique	1	7	4.38%
Namibia	2	3	1.88%
South Africa	9	85	53.13%
Swaziland	3	9	5.63%

Schedule Example

1. Business Services	Limitations on Market Access	Limitations on National Treatment	Additional Commitments
<p>A. Professional Services:</p> <p>a) Legal Services – domestic law only (CPC 861+)</p>	<p>1) Unbound</p> <p>2) Unbound</p> <p>3) An advocate is not allowed to form a partnership / company</p> <p>4) Unbound except as indicated in the horizontal section</p>	<p>1) Unbound</p> <p>2) <i>Unbound*</i></p> <p>3) None</p> <p>4) Unbound except as indicated in the horizontal section</p>	

Horizontal commitments: Horizontal commitments: Professionals - natural persons who are engaged, as part of a services contract negotiated by a juridical person of another Member in the activity at a professional level in a profession set out in Part II, provided such persons possess the necessary academic credentials and professional qualifications, which have been duly recognised, where appropriate, by the professional association in South Africa.

- The four modes of supply are the following:
- Cross border supply (**Mode 1**): foreign suppliers supply services across the borders into the territory of another Member State.
- Consumption abroad (**Mode 2**): residents purchase services in the territory of another Member State.
- Commercial presence (**Mode 3**): foreign suppliers establish an operation in the territory of another Member State.
- Movement of natural persons (**Mode 4**): entry and temporary stay of residents of one Member State into another.

*services supplier not present within the territory of the country

**services supplier present within the territory of the country

- Service supplied from the territory of one Member into the territory of any other Member. Usually done using electronic or other forms of delivery.
- **Sectors where Mode 1 is important:** Professional Services, Computer related services, Telecoms, Postal and Courier Services and any other sectors conducive to consultancy services
- **Types of measures affecting Mode 1:** Commercial Presence requirements, Residency Requirements, Citizenship requirements, Authorization or Licensing requirements
- Future importance of this sector: Seacom

- Angola – Lending of all types:
“(1) Residents may request loans abroad after the National Bank of Angola has authorized them to do so”
- Botswana – Maintenance and repair services of office machinery, Maintenance and repair of equipment (not including maritime vessels, aircraft or other transport equipment, Real Estate Services,
“(1) The service should be supplied through commercial presence”
- Botswana – Travel agencies and tour operators
“(1) Permanent residents should not purchase tickets to enable non-residents to visit Botswana and accept payment outside of Botswana

Mode 2 – Consumption abroad

- Movement of the consumer: Essential feature is that the service is delivered outside of the territory of the Party making the commitment.
- Doesn't necessarily need to be consumer – can also be the property of the consumer
- Example: Patient traveling abroad for medical treatment.
- **Sectors where Mode 2 is important:** Tourism, Healthcare, Education
- **Measure affecting Mode 2:** Obstacles relating to payment, foreign currency
- Case of the CARIFORUM EPA

- Angola – Lending of all types

“(2) Residents may request loans abroad after having received prior authorization of the National Bank of Angola”

- Botswana – Hotels and restaurants

“(2) The amount of local and foreign currency entitled to permanent residents is limited for each trip and for the whole year by the Bank of Botswana”

Mode 3 – Commercial Presence

- One Party supply services in the territory of another party by opening up a local office. This could be done through a local established affiliate, subsidiary, or representative office of a foreign owned and controlled company
- Example: Barclays bank and Virgin Mobile
- **Sectors where Mode 3 is important:** Financial Services, Oil, Gas and Mining companies, Telecommunications Services, Construction companies
- **Types of measures affecting Mode 3 trade:** Restrictions on the type of legal entity, number of suppliers, participation of foreign capital, discriminatory taxation, remittances, capital transfers and currency conversions

- Botswana – various Professional services categories

“(3) The foreign company should be a registered institution and allowed to practice in its country of origin”

- Mozambique – Banking and other financial services

“(3) Any foreign bank or financial institution can operate in Mozambique as long as they abide by the domestic rules and regulations governing investments and operations of such institutions”

- **3)** *All juridical persons must be registered with the Registrar of Companies.*
- *All juridical persons are required to have a license issued by the relevant authorities.*
- **3)** *The Government does not have a fixed ratio of equity between foreign and local companies. But foreign investors are encouraged to enter into joint ventures with local investors.*
- *Juridical persons who specialize in providing services should be registered in their countries of origin.*
- *The Ministry of Commerce and Industry should be notified of all sale of business interests, mergers and take-overs.*
- *When foreign investors sell their interests in resident companies, locals should be given priority to purchase such interests.*

- Service supplied through the **temporary** presence of a natural person in the territory of another party
- Mode covers persons who themselves are services suppliers as well as natural persons who are employees of services suppliers. (Temporary contract specific employees and temporary entry associated with commercial presence).
- **Sectors where Mode 4 is important:** IT, Professional Services, Services where the movement of support personnel is crucial
- **Types of measures affecting Mode 4 trade:** Immigration related regulations; recognition of qualifications, work experience, training; differential treatment of domestic and foreign personnel, regulations on other modes of supply.

- Swaziland – Professional services

“(4) Unbound except for senior qualified chartered engineers / specialist doctors / professional personnel with a higher university degree or professional training who are not available in Swaziland

- Botswana – General

“(4) Unbound except as indicated in the Horizontal commitments

- *4) Entry and residence in Botswana of foreign natural persons is subject to immigration laws, regulations, guidelines and procedures.*
- *Employment in Botswana of foreign natural persons is subject to labour laws, regulations and procedures. For a foreign natural person to work in Botswana a residence and work permit is required.*
- *Foreign natural persons shall be employed by companies that provide services within Botswana only as managers, executives, special technicians and highly qualified professionals.*
- *Investors are required to conform to the requirements of the localization policy. Investors are required to train citizens in order to enable them to assume senior management positions over time.*
- *Professionals are required to register with the appropriate professional body.*
- *4) Professional foreign natural persons should be recognized as such and they should have rights to practice in their countries of origin.*
- *Professional natural persons should be recognized and be registered by the appropriate committee or council.*

Coverage including modes of supply

<u>Countries</u>	<u>Percentage</u>	<u>1280 Modal possibilities</u>	<u>Percentage</u>
Angola	3.75%	32	2.50%
Botswana	11.88%	54	4.22%
Lesotho	49.39%	326	25.47%
Mozambique	4.38%	42	3.28%
Namibia	1.88%	24	1.88%
South Africa	53.13%	342	26.72%
Swaziland	5.63%	56	4.38%

- Limitations on market access: GATS Art. XVI
- *“(1) With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule”.*
- Restrictions on market access: 1) Number of services suppliers, 2) Value of services transactions, 3) Number of operations or quantity of output, 4) Number of natural persons supplying a services, 5) Type of legal entity, 6) Participation of foreign capital.

- Exhaustive list of measures under market access
- If the measures discriminates in favour of a domestic supplier / service – national treatment issue
- GATS Art. XVII : *“each Member shall accord to services and services suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than it accords to its own like services and services suppliers”*
- GATS Art. XVIII: *“Members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII...”*

- Angola – Acceptance of deposits

“(3) None. Banks and foreign financial institutions in Angola may operate as long as they abide by the regulations of the country concerning the activities of such bodies”

“(4) At least half of the personnel of subsidiaries, branch offices and agencies of foreign financial institutions must be Angolan citizens”

- Botswana – Specialized medical services

“(3) Only natural persons can supply specialized medical services

- Botswana – Medical and Dental Service

“(3) Foreign-owned hospitals are encourage to enter into joint ventures with local hospitals and clinics.

- Lesotho – Reinsurance

“(3) To transact business in Lesotho, insurers (foreign and domestic) must be incorporated as a public company in terms of the Companies Act.

- Mozambique – Banking and other Financial Services
“(4) Work permit required”
- South Africa – Various Telecommunications
“(3) Foreign investment in suppliers permitted up to a cumulative maximum of 30 percent”
- South Africa – Lending of all types
“(3) Foreign non-bank organizations wishing to obtain a controlling interest in a local bank are required to establish a domestic public company”
- Swaziland – Consultancy relating computer hardware
*“(4) Unbound except for senior computer engineers and personnel that possess specialized training and skill and **who are not available in Swaziland***

- Title II - Chapter 2: **Art. 6(2) of the CARIFORUM EPA**
- In sectors where market access commitments are undertaken, the measures which the EC Party and the Signatory CARIFORUM States 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 Annex [...] (commitments on investment and trade in services) are defined as:
 - (a) limitations on the number of commercial presences whether in the form of numerical quotas, monopolies, exclusive rights or other commercial presence requirements such as economic needs tests;
 - (b) limitations on the total value of transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
 - (c) limitations on the total number of operations or on the total quantity of 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 participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment; and
 - (e) measures which restrict or require specific types of establishment (subsidiary, branch, representative office) or joint ventures through which an investor of the other Party may perform an economic activity.

- Angola – Tourism and travel
“(4) Unbound, except for measures affecting senior managers and specialists with knowledge essential for the provision of services”

- Botswana – Medical and dental services
“(3) The hospitals and clinics should employ Botswana nationals as doctors, medical personnel and supporting staff”

- South Africa – Professional services: Auditing
“(3) Citizenship requirement for accreditation”

- South Africa – Lending of all types
“(3) Branches of non-resident banks in South Africa must maintain a minimum balance of R 1 million on the deposit accounts of natural persons”

- Title II - Chapter 2: Art 6(4) of the CARIFORUM EPA

(1) In the sectors where market access commitments are inscribed in Annex [...] (commitments on investment and trade in services) and subject to any conditions and qualifications set out therein, with respect to all measures affecting commercial presence, the EC Party and the Signatory CARIFORUM States shall grant to commercial presences and investors of each other treatment no less favourable than that they accord to their own like commercial presences and investors.

2. The EC Party and the Signatory CARIFORUM States may meet the requirement of paragraph 1 by according to commercial presences and investors of each other, either formally identical treatment or formally different treatment to that they accord to their own like commercial presences and investors.

3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of commercial presences and investors of the EC Party or of the Signatory CARIFORUM States compared to like commercial presences and investors of the other Party.

4. Specific commitments assumed under this Article shall not be construed to require the EC Party or the Signatory CARIFORUM States to compensate for inherent competitive disadvantages which result from the foreign character of the relevant commercial presences and investors.

- Know the sectors and the applicable legislation and regulations
- The schedule should correctly reflect the restrictions
- Transparency is also an objective
- Gather all the support