

**TRADE NEGOTIATING FORUM – SERVICES**

**GUIDELINES FOR DEVELOPING SADC MUTUAL RECOGNITION AGREEMENTS FOR PROFESSIONAL SERVICES**

**Second DEDICATED SESSION, held virtually on 29th may 2023**

**RePORT**

1. **OPENING REMARKS**
   1. The second dedicated session of the Trade Negotiating Forum – Services (TNF-Services) on Guidelines for Developing SADC Mutual Recognition Agreements (MRAs) for Professional Services (“the Guidelines”) was held virtually on 29 May 2023. The objective of the session was to take stock of the results from the first dedicated session, held virtually on 10 May 2023, consider the outstanding issues, and finalise the draft Guidelines.
   2. In the absence of representatives of the SADC Chairperson and Deputy-Chairperson (Democratic Republic of Congo and Angola), the meeting requested Malawi (the outgoing Chairperson member of the SADC Troika of the Summit) to preside over the deliberations. Mr. Ezron Chirambo, Officer for SADC Trade in Services at the Ministry of Trade and Industry, Malawi, presided over the meeting.
   3. Mr. Chirambo reminded the meeting of the importance of discussing the draft Guidelines, given that the African Continental Free Trade Area (AfCFTA) trade in services negotiations were at a point where a similar exercise was being undertaken. When making contributions, participants should therefore bear in mind that the SADC region would have to be more liberal to allow service providers to work within the borders of the SADC region, and the discussions should be treated as preparation for the negotiations to be conducted on MRA issues at the AfCFTA level.
   4. Mr. Reinaldo E. J. Mendiate, Programme Officer – Multilateral Trade at the SADC Secretariat, reminded the meeting that the 45th TNF-Services meeting held in Johannesburg, South Africa, on 27-29 April 2023, had agreed to convene virtually for two dedicated sessions to consider and finalise the draft Guidelines. It had been agreed during this meeting that there was need to fast-track negotiations on the draft Guidelines with a view to presenting the final draft for adoption by the Committee of Ministers of Trade (CMT) at its meeting planned for June/July 2023. This was important given that some professions were already prepared to start negotiating MRAs for their sectors, but the Guidelines were needed to ensure consistency and alignment with the requirements of the SADC Treaty and other Protocols including the Protocol on Trade in Services.
   5. Member States were informed that the first dedicated session had not achieved the required quorum of eleven Member States and that the session had proceeded as a consultative meeting. The Secretariat reiterated that, in line with SADC procedures, Member States may not take decisions in such a meeting and the results thereof would be presented for consideration at a meeting that has a fully constituted quorum.
2. **ATTENDANCE AND QUORUM**
   1. The meeting was attended by ten Member States, namely: Botswana, Eswatini, Lesotho, Malawi, Mauritius, Seychelles, South Africa, Zambia, and Zimbabwe. A representative of the Pan African Federation of Accountants (PAFA) also attended the meeting while the Secretariat was represented by officers from the Directorate of Industrial Development and Trade and Legal Unit. A detailed list of participants is in Appendix I.
   2. A lack of a quorum also applied in respect of this second dedicated session. In light of the Secretariat’s advice on procedure, Member States agreed to continue with the session as a consultative meeting.
3. **CONSIDERATION OF THE DRAFT GUIDELINES FOR DEVELOPING SADC MRAs FOR PROFESSIONAL SERVICES**
   1. The meeting considered the draft Guidelines, paying particular attention to the revisions made by the Secretariat to incorporate Member States’ comments made at the first dedicated session. The key revisions were highlighted in document **SADC/TNF-Serv./45/2023/04/Rev2**.
   2. The meeting considered the draft Guidelines paragraph-by-paragraph. This report summarises the main observations and conclusions from the second dedicated session, as follows:
      1. **Title**

No comments from Member States.

Conclusion 1: Title

No changes proposed.

* + 1. **Opening Paragraph/Chapeau**

Member States recognised that the opening paragraph (chapeau) came from the SADC Protocol on Trade in Services and made no comments or suggestions.

Conclusion 2: Opening Paragraph/Chapeau

No changes proposed.

* + 1. **Introduction [Section 1]**

**Paragraph 1.2 on “*training facilities*”**

1. Some Member States proposed the deletion of “*training facilities*” from the scope of the definition of “educational system”, due to the complexity of harmonising training facilities across the region, notwithstanding that in some specific sectoral professions (medical or health-related professions, veterinary, engineering) training facilities were paramount to the achievement of learning outcomes. It was argued that “*facility*” referred to the amenities, the building, equipment, etc., and that given the high costs of improving premises where training is offered, this made it difficult for such issues to be dealt with under the Protocol on Trade in Services.
2. A question was raised as to whether “*internship*” fell under the scope of “training facilities”. It was explained that internship was part of the course content and may not therefore fall under “training facilities.”
3. Conclusion 3: Introduction [Section 1]
   1. Delete “*training facilities*” from paragraph 1.2 of the draft Guidelines;
   2. Include a definition section, at the beginning of the draft Guidelines, explaining or interpreting technical words and terminologies used in the draft Guidelines e.g., “*educational* *system*” and “*MRA*”;
   3. Zimbabwe to propose a text to rephrase paragraph 6 [*Required Qualifications]* in Appendix I of the draft Guidelines to provide flexibility for sector/profession-specific MRAs to include any additional elements necessary and specific in that sector including such issues relating to “training facilities”.
      1. **Objective [Section 2]**
4. The meeting observed that the 45th TNF-Services meeting had agreed on the need to separate the objectives of the draft Guidelines from the objective of the MRAs. In addition, the meeting noted that the paragraph provided for a *“common approach*” and “*minimum content and standards”* for the structures of MRAs. It was suggested the “elements” to be considered in developing the sectoral MRAs would be the same, although the actual content and standards may differ across professions. Hence, there was need to consider replacing the words “*minimum content and* *standards*” with “*minimum* *elements and features*.”
5. Conclusion 4: Objective [Section 2]

Replace the words “*minimum* *content and standards*” in paragraph 2.1 with *“minimum* *elements and features”*.

* + 1. **Negotiating Approach [Section 3]**

1. **Paragraph 3.1 on “*develop sectoral/professional-specific MRAs*”.**

Member States sought clarifications on what constituted “professional fields covered by the Protocol” for which sectoral or professional-specific MRAs were envisaged in this paragraph compared to the sub-sector groups organised during the workshop on MRAs in April 2023. It was explained that this referred to professional services specified in the Services Sectoral Classification List [document World Trade Organisation (WTO) MTN.GNS/W/120], namely (a) Legal Services, (b) Accounting, auditing and bookkeeping services, (c) Taxation Services, (d) Architectural services, (e) Engineering services, (f) Integrated engineering services, (g) Urban planning and landscape, architectural services, (h) Medical and dental services, (i) Veterinary services, (j) Services provided by midwives, nurses, physiotherapists and para-medical personnel and (k) Others.

1. **Paragraph 3.3 on “*technical assistance and capacity building to the least-developed countries (LDCs) in accessing MRAs*”.**

It was noted that the Article 7 of the Protocol indicated the need for Member States to provide technical assistance and capacity building to the LDCs in accessing MRAs. However, it was not clear which Member States were considered to be LDCs in the SADC context, and whether it was the Member States or the Secretariat that would provide such assistance.

It was explained that:

* + 1. **LDC Member Sates** – SADC had no definition of LDCs in any of its legal instruments, but Article 1.2 of the Protocol on Trade in Services read “a*ll other terms relating to any matter directly regulated by this Protocol not defined herewith are deemed to have the same meaning as in the WTO General Agreement on Trade in Services (GATS)”.* This implied that the term LDC used in the Protocol shall be interpreted within its meaning under the GATS, and hence a Member State considered to be an LDC under the WTO would have the same status under the Protocol.
    2. **Entities responsible for providing technical assistance** – Article 7.3 of the Protocol stated that “*Members shall strive to  
       provide such assistance*”, hence the responsibility rested with the Member States. However, it was noted that it was possible that the professional bodies of State Parties would support each other in line with any technical cooperation agreed under the sectoral or profession-specific MRAs in supporting LDCs to access to the MRAs. Support could also be provided by the private sector and regional as well as international professional bodies to assist national professional associations. This would not prejudice the role of the Secretariat including resource mobilisation, depending on type of assistance needed.

1. Conclusion 5: Negotiating Approach [Section 3]
2. Paragraph 3.1 to be rephased to include a list of professional services as provided for in the W/120 Services List, and
3. Delete the word “*strive to*” appearing between “… *Parties shall*” and “*provide technical assistance* …” in paragraph 3.3.
   * 1. **Priority Professional Fields for MRAs [Section 4]**
4. **Paragraphs 4.1(a) and 4.1(b)**

It was noted that paragraph 4 included the need to obtain input from stakeholders including the SADC Business Council. However, Member States had divergent views on whether the Council had the capacity to articulate, champion and take the lead in identifying priorities for MRAs rather than professional bodies, and to identify possible barriers to professional services. Member States also noted that paragraph 4 was drafted recognising that State Parties may not have the capacity to negotiate all sectoral or profession-specific MRAs in parallel. There was therefore a need for State Parties to prioritise the MRA negotiations. The selection of priority professional sectors needed to be based on agreed criteria, with input from all key stakeholders.

In this regard, Member States stated that TNF-Services should decide on the prioritised professional services sectors and suggested rephrasing the paragraph to reflect the criteria to be applied and need for such criteria to be informed by the interests of all stakeholders.

1. Conclusion 6: Priority Professional Fields for MRAs [Section 4]
2. Add the words “*by considering*” at the end of the chapeau of paragraph 4;
3. rephrase the entire paragraph 4.1(a) to read: “*liberalisation commitments by State Parties under the Part IV of the Protocol*”; and
4. rephrase paragraph 4.1(b) to read: “*inputs received from national and regional professional stakeholders, including the SADC Business Council*.”
   * 1. **Starting Point [Section 5]**
5. **Paragraph 5.1** – Member States corrected a minor typographical error.
6. **Paragraph 5.2** – The meeting was informed that the Secretariat had rephrased this paragraph taking into account Member States’ comments in the first dedicated session relating to the progress made at the WTO in developing the Joint Initiative on Services Domestic Regulation. Member States supported the proposed text by the Secretariat and made some improvements to reflect the need for MRAs to be underpinned by technical competencies relating to technical standards, licensing requirements and procedures, and qualifications requirements, in line with Article 6 of the Protocol.
7. Conclusion 7: Starting Point [Section 5]
8. Rephase paragraph 5.2 to read: *To the extent that MRAs developed under these Guidelines deal with matters relating to qualification requirements and procedures, technical standards, and licensing requirements and procedures, falling within the scope of Article 6 [domestic regulation] of the Protocol, State Parties shall ensure that such provisions in MRAs for professional services are consistent with [a] [each] State Party’s commitments under the World Trade Organisation (WTO), including the Joint Initiative on Services Domestic Regulation where applicable”, and*
9. The Secretariat, after legal input, to advise on a suitable word, either *“a”* or *“each*, to be used in paragraph 5.2, for consideration by Member States at the next TNF-Services meeting.
   * 1. **Stakeholders Engagements [Section 6]**

No comments from Member States.

* + 1. **Negotiating Structures and Steps [Section 7]**

1. **Paragraph 7.1** – The meeting noted that TNF-Services did not have mandate to create subcommittees as Article 24 assigned such a role to the Committee of Ministers of Trade (CMT). It was further noted that as TNF-Services had benefited from the advice of Sector Focus Groups (SFGs), it was prudent for the Guidelines to provide for such a structure and, upon their approval by the CMT, the structure would be deemed a formal structure. Some Member States suggested use of the designation “technical working group (TWG)” instead of SFG, but the meeting agreed to maintain the use of SFG for consistency as TNF-Services had been using this designation during the first round of negotiations. In addition, Member States proposed replacing the words “… *to express interest* …” with the words “… *to provide inputs …*” in paragraph 7.1(a).
2. **Paragraph 7.3** – Member States had divergent views on whether to include this paragraph as some wanted to exclude the issue of how the final text of the MRAs would be adopted by the CMT. This implied deferring the decision to the time of finalising an MRA, at which point TNF-Services could decide to recommend to the CMT whether the final MRAs would constitute an additional commitment in a Member State’s List/schedule of commitments or an annex under Article 26 of the Protocol, depending on the content of the MRA. Some Member States were of the view that the Guidelines would be incomplete if they did not include the final steps including legal scrubbing or clearance and whether the final MRAs would be adopted by CMT and be annexed to the Protocol. In addition, some Member States were unsure whether the MRAs are to be developed under Article 7 only or both Article 7 and Article 24 of the Protocol.
3. It was noted that the legal scrubbing or clearance of the final MRAs by the Ministers of Justice and Attorney Generals would come after the CMT had approved the MRAs and thus conclude technical negotiations. Hence, the CMT would recommend the final text to the Committee of Ministers of Justice and Attorney Generals for legal clearance, who may refer the text back to CMT for final adoption highlighting any issues that require CMT’s attention.
4. Conclusion 9: Negotiating Structures and Steps [Section 7]
5. Replace the words “… *to express interest* …” with the words “… *to provide inputs* …” in paragraph 71(a),
6. Consider further two proposals for paragraph 7.3, which read as follows:
7. “*The MRAs for professional services adopted by the CMT shall be annexed to, and form an integral part of, the Protocol in line with provisions of Article 26 of the Protocol/ as may be recommended/ decided by the TNF-Services”*; or
8. *“The adoption of MRAs will be decided on by the TNF-Services, through a recommendation to the CMT*”.
9. Add a new paragraph 7.4, reading as follows:

*“The final text of MRAs adopted by the CMT will be recommended for legal scrubbing/clearance by the Committee of Ministers of Justices and Attorney Generals, who shall refer it back the CMT for final adoption’.*

1. Bracket the proposed texts for paragraph 7.3 and 7.4 for consideration by Member States at the next TNF-Services meeting.
   * 1. **Parties to the MRAs [Section 8]**
2. One Member State, i.e., Zambia, proposed an additional paragraph to clarify the interface between existing bilateral MRAs and the envisaged SADC regional MRAs.
3. Conclusion 10: Parties to the MRAs [Section 8]

Zambia to provide text proposal on the interface between the existing bilateral MRAs and the SADC regional MRAs for consideration by Member States at the next TNF-Services meeting.

* + 1. **Structure of AN MRA [section 9]**

1. **Paragraph 9.3** – Some Member States highlighted the need to ensure that the application of the national treatment principle in recognising professional qualifications would not disadvantage professionals of another State Party, e.g., a junior professional of one State Party supervised by a professional registered in another State Party. In addition, Member States had divergent views on whether the MRAs should be linked to State Parties’ lists of commitments or not. Some Member States were of the view that the MRAs would facilitate recognition of qualifications in line with the most favoured nation (MFN) treatment principle even in cases where a State Party had no liberalisation commitments under the Protocol, as well as in cases of unilateral liberalisation efforts. It was also noted that the MRAs would contribute to development of the profession.
2. In addition, some Member States proposed that the last part of paragraph 9.3, which read “*nothing in a final MRA shall imply or be construed to grant market access or national treatment in professional services …*” be placed into an appropriate section dealing with the application of the MRAs rather than the structure of an MRA.
3. Conclusion 11: Structure of an MRAs [Section 9]

Bracket the entire paragraph 9.3 for consideration by Member States at the next TNF-Services meeting.

* + 1. **Appendix I**

1. Preamble –The meeting considered amendments introduced by the Secretariat to incorporate inputs from the first dedicated session. Member States could not discuss the entire section and agreed to defer discussion to the next TNF-Services meeting.
2. Conclusions 12: Appendix

Member States to consider Appendix I during the next TNF-Services meeting.

1. **WAY FORWARD AND NEXT MEETING** 
   1. Given the lack of a quorum, Member States were advised that the Secretariat would prepare and circulate to all Member States a report of the discussions and conclusions, together with a version of the draft Guidelines containing annotations of Member States’ comments, now as document **SADC/TNF-Serv./45/2023/04/Rev3**, to guide national and regional consultations.
   2. The meeting noted that it was not feasible to finalise the draft Guidelines for submission to CMT in June/July 2023. It was therefore agreed to continue negotiations on the draft Guidelines at the next meeting of the TNF-Services planned for September 2023 at a date to be advised by the Secretariat.

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