



**UNIVERSITY of the  
WESTERN CAPE**

**FACULTY OF LAW**

**DEPARTMENT OF MERCANTILE AND LABOUR LAW**

**MINI THESIS TITLE**

**THE IMPLEMENTATION OF TRADE IN SERVICES  
LIBERALISATION: CHALLENGES TO ENHANCING THE  
MOVEMENT OF NATURAL PERSONS ACROSS BORDERS  
(MODE IV) AND THE RECOGNITION OF FOREIGN  
QUALIFICATIONS IN SOUTH AFRICA**

A mini- thesis submitted in partial fulfilment of the requirements for the degree  
of Master of Laws (LLM) in the Department of Mercantile & Labour Law

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**November 2015**

## DECLARATION

I declare that this Mini-thesis titled The Implementations of Trade in Services Liberalisation: Challenges to Enhancing the Movement of Natural Persons Across Borders (Mode IV) and the Recognition of foreign Qualifications in South Africa is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

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## **DEDICATION**

This Mini-thesis is dedicated to my parents Mr Gilbert Afulabula and Mary Ngalumbele, to my wife Rachel Ntumba and children Emmanuel-Gilberto, Moses-Johan and Mary-Bethel. You are special for your endurance during the period I had to undertake my studies. May you be inspired to attain greater achievements.



## ACKNOWLEDGEMENTS

This Mini-thesis marks the beginning of a new journey and the end of another. I would like to extend my appreciation to the following persons:

- My first appreciation is for my Almighty God JESUS-CHRIST who strengthened me during trying times and gave me the courage to complete this Mini-thesis.
- My supervisor Professor Patricia Lenaghan, words are not enough to describe my sincere gratitude and appreciation. Thank you for your valuable and insightful comments, as well as guidance throughout the period of research and writing of this Mini- thesis, be blessed.
- I am indebted to my Parents, my uncle Pastor Mbongo, my Brothers and Sisters Germaine, Helen, Guy, Judith and Marin Afulabula. Thank you for your unwavering support and unflagging love in my life and studies. You have all been a pillar of strength.
- I am grateful to Mr Jooste, Mrs Debi, Mr Johan Jooste at Bellevue Manor Stellenbosch for giving me the opportunity to work that has contributed immensely to the completion of this Mini-thesis, thank you very much also for your financial support.
- To Mr Bosco Nantina, Emmanuel Mulombo, Mr.L.Mohamed, Pastor Appo Mutoto, thank you for your unconditional love, support and prayers throughout the period of my studies.

## **KEY WORDS**

Trade in Services

Liberalisation

Movement of Persons

Foreign Qualifications

Natural Persons

General Agreement on Trade in Services

World Trade Organisation

Services

Specific Commitment

National Treatment

Market Access



## ACRONYMS

ASGISA	Accelerated and Shared Growth Initiative for South Africa
CDE	Centre for Development and Enterprise
CEEQ	Centre for the Evaluation of Education Qualifications
CFTA	Continental Free Trade Area
CU	Customs Union
DOL	Department of Labour
DSB	Dispute Settlement Body
DDA	Doha Development Agenda
EC	European Communities
EIA	Economic Integration Agreements
ENT	Economic Needs Tests <i>of the</i>
EMF	Engineers Mobility Forum
FTAs	Free Trade Agreements
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
HSRC	Human Sciences Research Council
IT	Information Technology
IOM	International Organisation for Migration
LDCs	Least Developed Countries
MA	Market Access
MFN	Most Favoured Nations

MRA <sub>s</sub>	Mutual Recognition Agreements
NT	National Treatment
NAMA	Non- Agricultural Market Access
PTA	Preferential Trade Areas
RTA	Regional Trade Agreement
SAIIA	South African Institute of International Affairs
SAQA	South African Qualification Association
TRALAC	Trade Law Centre
UN	United Nations
WTO	World Trade Organisation



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# Chapter I

## Introduction

### 1.1 Introduction and Background to Study

Trade in services is relevant to the development and economic growth, and the liberalisation of trade in services plays a critical role in the national, regional and global economies. The multilateral framework of the World Trade Organisation (WTO) under the General Agreement on Trade in Services (GATS) is principally focused on the elimination of explicit barriers to entry for services providers and the opening of services markets. The purpose of services liberalisation measures is to promote increased trade and competition to enhance earnings by removing the domestic and foreign regulation in the market for foreign services providers.<sup>1</sup>

The GATS provides a predictable and enforceable legal system for trade in services, and can have a potentially positive impact on investment, efficiency and growth. The rules of international trade create a credible and reliable system that ensures fair and equitable treatment of all participants stimulating economic activity, promoting trade and development through progressive liberalisation.<sup>2</sup> The main objective of the GATS is to promote the progressive liberalisation of trade in services as a means to achieve economic growth and development by applying to trade in services the basic rules of the WTO. The necessary modifications take into account the specific characteristics and sensitivities of trade in services.

The GATS include two main parts: the framework agreement containing the general rules and disciplines and national lists. In which is included the specific commitments of each country on access to their domestic markets by foreign suppliers. The trade in services is defined by the GATS as the supply of a service by one of the four modes of supply, and services include activities such as those listed in the WTO/120.<sup>3</sup> The GATS deals with the

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<sup>1</sup> Cattaneo N 'Services Trade Liberalisation and the Role of the Services' available at <https://www.saiia.org.za/.../52-services-trade-liberalisation-and-the-role-of-the-services> (accessed 11 March 2015).

<sup>2</sup> WTO 'GATS Facts and Fiction' available at [http://www.wto.org/english/tratop\\_e/serv\\_e/GATSfacts1004\\_e.pdf](http://www.wto.org/english/tratop_e/serv_e/GATSfacts1004_e.pdf) (accessed 15 March 2015)

<sup>3</sup> WTO 'MTN.GNS/W/120' available at [http://www.wto.org/english/new\\_e/news00\\_e/w/120.doc](http://www.wto.org/english/new_e/news00_e/w/120.doc) (accessed 15 March 2015).

movement of natural persons in two points: First, Article 1 of the main text of the GATS and secondly, in the annex on the movement of natural persons. In which, the natural person is defined as a human being distinct from legal entities such as companies or organisations. The Movement of natural persons refers to the entry and temporary stay of persons for the purpose of providing a service. It does not apply to people seeking citizenship, permanent employment or permanent residence in a country.<sup>4</sup>

The recruitment of foreign services providers is a problem in South Africa mainly because it is subject to the laws of immigration. The implementation of the law on immigration of South Africa hinders the ability of firms to obtain work permits for their foreign workers. The quota system also leads to opportunities for corruption and the law is criticised for its lack of transparency.

The influx of regional immigrants to South Africa is the result of the influence of the South African policy and especially the size of its economy. Certainly, the law of the South African Immigration Amendment October 18 2004, of the principal Act of 2002 (the Aliens Act) recognises that the entry of skilled foreign workers is exceptionally vital for the economic growth of any country. In this respect, the law aims to ensure that if foreign labour is welcome in South Africa, this work should have a negative impact on existing standards not in the labour market but in the rights and the expectations of South African workers.

This apparent change in policy in favour of liberalisation of Mode IV has also been strengthened by the Accelerated and Shared Growth Initiative for South Africa (ASGISA). This aims to increase the average economic growth, so that the country can be able to fight against poverty and unemployment.<sup>5</sup> Therefore, South Africa should join the ranks of other countries to import scarce labour because it is a part of the global economy. South Africa needs to attract foreign expertise and export skills to other countries. Companies should be encouraged both to raise the skill levels of their employees as well as to try to gain more skills through learnerships. If they want to seize the opportunities offered by global and national economies and South Africa must shake the fear for skilled migration.<sup>6</sup>

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<sup>4</sup> 'Trade in services Introduction' available at

[http://www.absoluteastronomy.com/topics/Trade\\_in\\_services](http://www.absoluteastronomy.com/topics/Trade_in_services) (accessed 15 March 2015).

<sup>5</sup> Khumalo N 'Trade in Services: From Controlling to Managing the Movement of Persons in SADC' (2007) South African Institute of International Affairs. (hereafter Khumalo N (2007)).

<sup>6</sup> Khumalo N (2007).

A qualification is the recognition and certification of learning outcomes issued by an accredited formal establishment. This is compatible with international qualifications frameworks to ensure the recognition and comparability of the international standard. While the term qualification cover different aspects which are formal qualifications and job requirements.<sup>7</sup>

The WTO and its agreements constitute one package from which Members cannot pick and choose which agreements to join and implement. However, during the Uruguay Round of multilateral trade negotiations, South Africa has made extensive commitments to trade liberalisation in many sectors and sub-sectors for the reduction or elimination of restrictions on market access and national treatment.

## **1.2 Problem Statement**

The influence and growth of the WTO has led to the application and implementation of the GATS. This calls for the liberalisation of services including the movement of natural persons for the provision of providing services in the Member states of the WTO under Mode IV of the GATS agreement. The fact that South Africa as WTO Member made commitments in services under GATS; South Africa enhances the market access and national treatment commitment for provision of services through the temporary presence of natural persons. However, the recognition of foreign academic and professional qualifications is a major challenge and creates in some cases a barrier to labour mobility. Therefore, an obligation lies on South Africa as WTO Member to respect the agreement in principle to the adoption of agreed international standards for mutual recognition of foreign qualification. Especially in the profession has a high degree of generic skills. Considering that the Temporary workers are subject to immigration laws and labour market conditions that are quite non-transparent and arbitrary<sup>8</sup>. Based on this background, the question to be asked is: whether South Africa after ratification of the GATS agreement is rightly acting in implementing the GATS liberalisation to ensure the ease of temporary movement of natural persons across borders and the recognition of foreign qualification. South Africa made commitments and integrated any services liberalisation under the GATS.

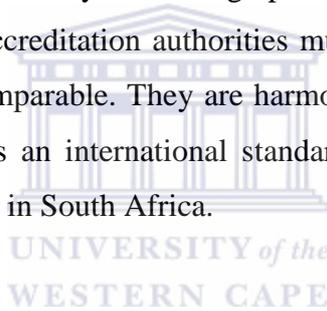
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<sup>7</sup> Desiderio MV, Schuster A & Urso G 'Recognition of Qualifications and Competences of Migrants' (2013) International Organisation of Migration Brussel Belgium 21.

<sup>8</sup> ACCI 'Advancing the liberalisation of the trade in services: Enhancing GATS Mode IV' (2002) the movement of natural persons 14.

### **1.3 Significance of Study**

South Africa as mentioned above is lowly ranked in terms of attracting foreign expertise and skills for export to other countries to seize the opportunities offered by the global economy for skilled migration. South Africa and its economic partners are at various stages of negotiating or implementing agreements that are supposed to facilitate the movement of professionals across borders. However, South Africa will clearly benefit in promoting meaningful liberalisation under Mode IV. Certainly, trade in services under Mode IV is an increasingly important component of services exports as this type of trade would benefit countries lacking in specific skills. In which, temporary migration offers the opportunity to diversify which should allow for competitive advantages.<sup>9</sup> Trade in services are very important to promote inclusive growth, it is a backbone of the economy. Therefore, the recognition of foreign academic and professional qualifications is a major challenge. It creates an obstacle to the labour mobility. For foreign professionals to get their qualifications recognised in another country, accreditation authorities must be convinced that the national and foreign qualifications are comparable. They are harmonised or considered equivalent or responding to external criteria as an international standard to facilitate trade and enhance access to the foreign skills market in South Africa.



### **1.4 Answer to the Question**

This mini-thesis will resolve the problem by looking at the steps taken by the South African government in implementing the GATS liberalisation to enhance the temporary movement of natural person and the recognition of foreign qualification. The South African government is requiring the higher consultation between government and the profession body. However, the permanent cooperation and coordination between relevant government departments such as the Department of Higher Education and Training that is responsible for compiling a critical skills list. In which the Department of Home Affairs can develop its own list of skills and occupations deemed critical for the country in relation to applications for critical skills visas or permanent residence permits. As a Member of the WTO, South Africa must fulfil all the obligations assumed by it under all WTO agreements, including the GATS. The WTO and its agreements constitute one package from which Members cannot pick and choose which

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<sup>9</sup> Cali M, Ellis K & Te Velde WD 'Contribution of Services to Development and The Role of Trade Liberalisation and Regulation' (2008) Global Forum on International Investment Briefing Note 7 OECD 16.

agreements to join and implement. South Africa has made extensive commitments to trade liberalisation in many sectors and sub-sectors for the reduction or elimination of restrictions on access to market and national treatment. South Africa made commitments and integrated services liberalisation under the GATS Mode IV, allowing foreign firms to establish and use the services of such professionals' providers. That they possess the necessary academic and professional qualifications in which have been recognised by the relevant professional association in South Africa.

## **1.5 Methodology**

This research project will build on the materials available from a variety of primary sources, including textbooks, national legislation, international agreements that provide services trade, to secondary sources such as journal articles, reports and newspaper articles. This methodology will include the use of Internet sources that supports the liberalisation of services. Mostly, as an important way to strengthen the temporary movement of persons and ensure increased market access through the recognition of foreign qualifications will be invoked.

## **1.6 Literature Review**

There are literatures on South Africa regarding the need to facilitate the liberalisation of trade in services, to enhance the temporary movement of natural persons. South Africa and its economic partners are at various stages of negotiating or implementing agreements that are supposed to facilitate the movement of professionals across borders.

Australia is a destination for immigration, therefore, absorbs a lot of skilled labour from different parts of the world. It has certainly benefited from the pool of skilled labour Southern Africa and it will be important to monitor their interests in Mode IV of GATS. The Chamber of Commerce and Australian industry contributed in the negotiations on Mode IV to ensure the clarity and consistency of definitions of key concepts and lack of definition in some crucial term used are criticised to the agreement on Mode IV.<sup>10</sup>

The Canadian Centre for Policy Alternatives published a very important document in 2005 entitled The GATS and South Africa's National Health Act. Scott Sinclair analyses the

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<sup>10</sup> ACCI 'Advancing the Liberalisation of Trade in Services: Enhancing GATS Mode IV the Movement of Natural Persons' (2002) The Australian Chamber of Commerce and Industry 2.

implications for the health sector of South Africa's commitments under the GATS and alerts of South African citizens about the dangers. The agreement poses to preserve the right to health care as provided for in the Constitution. It is imperative for this mini-thesis to reveal that while there are strong players calling for the liberalisation of services, including the movement of natural persons, the players against the arguments are also existed.<sup>11</sup>

In South Africa the lack of people who enter legally with the temporary work permit is not attributed to a decrease in demand for skilled workers, but rather to the restrictions of immigration policy that the country has put in place.

In a recent Trade Law Centre (TRALAC) paper, Cronje JB also wrote about whether South Africa will change its GATS commitments. He gives a good explanation that by introducing a domestic measure limiting foreign participation it would constitute a clear violation of South Africa's commitments under the GATS.<sup>12</sup>

Whether South Africa wishes to change its GATS commitments, as Under Article XXI of the GATS, South Africa has the right to modify or withdraw its GATS commitments but it will come at a cost. Certain prescribed procedures must be followed before a Member is legally authorised to implement the intended modification or withdrawal.

This means that the proposed restriction cannot enter into force before the completion of the procedures contained in Article XXI of the GATS. Members cannot withdraw or modify commitments unilaterally and compensatory adjustments to the Member affected must be made on a most-favoured-nation basis. It means that whatever agreement South Africa reach with any affected Member, the benefits thereof must be extended to all WTO Members, so the outcome of the process is uncertain.<sup>13</sup>

Therefore, the general direction of trade negotiations is towards increasing, and not decreasing, market access and national treatment on trade in services. This mini thesis will however broaden the discussion on the need for simplified and harmonised laws on the

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<sup>11</sup> Sinclair S 'The GATS And South Africa's National Health Act: A Cautionary Tale' (2005) The Canadian Centre for Policy Alternatives.

<sup>12</sup> Cronje JB 'Will South Africa Modify its GATS commitments?' Trade Law Centre (TRALAC) working paper March 2015 available at <http://www.tralac.org/discussions/article/7183-will-south-africa-modify-its-gats-commitments.html> (accessed 27 March 2015).

<sup>13</sup> Cronje JB 'Will South Africa Modify its GATS commitments?' Trade Law Centre (TRALAC) working paper March 2015 available at <http://www.tralac.org/discussions/article/7183-will-south-africa-modify-its-gats-commitments.html> (accessed 27 March 2015).

liberalisation of trade in services by enhancing the temporary movement of natural persons and the recognition of foreign professional qualification.<sup>14</sup>

## 1.7 Structure

This Mini-thesis is structured as follows:

Chapter one will be an introductory chapter which will provide an introduction and background to the study, the problem, the significance of the study and the methodology.

Chapter two will examine briefly an overview of the GATS, the first set of legally binding multilateral rules governing international trade in services, a general framework, structure objectives and the contribution of trade in services to development.

Chapter Three will examine the movement of natural persons and the limits to GATS Mode IV supply.

Chapter Four will examine the recognition of foreign qualifications in South Africa.

Chapter five will give the conclusion to the study and summary of the recommendations.



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<sup>14</sup> Cronje JB 'Will South Africa Modify its GATS commitments?' Trade Law Centre (TRALAC) working paper March 2015 available at <http://www.tralac.org/discussions/article/7183-will-south-africa-modify-its-gats-commitments.html> (accessed 27 March 2015).

## Chapter II

### Overview of the General Agreement on Trade in Services and the Movement of Natural Persons

#### 2.1 Introduction

The GATS is the first set of legally binding multilateral rules governing international trade in services that provides for the movement of natural persons. However, since the provision of services often requires the physical presence of the person or company providing the service in the export market, the GATS was formulated in a much more global context. It does not only cover the provision of services across national borders, but also transactions involving cross-border movement of factors of production such as capital and labour or service users.<sup>1</sup>

The contribution of the GATS is based on two main pillars: (a) ensuring the transparency and predictability of increased rules and regulations, and (b) promoting the progressive liberalisation through successive rounds of negotiations.<sup>2</sup> These GATS provisions are necessary to enhance the movement of natural persons because the GATS were formulated to regulate the rules based on the multilateral trading system. The provisions of the GATS Article XIX to XXI framework for progressive liberalisation, the negotiation of specific commitments on market access to be bound in the schedules of individuals Members.<sup>3</sup>

This chapter will not aim to exhaustively discuss all the provisions of the GATS. However it will present the provisions in the GATS that allow for the establishment of the movement of natural persons as a means to promote the implementation of trade in services liberalisation and in particular, the provision of the GATS Article I.2 (d) the principle of non-discrimination under the provision of Most Favoured Nations (MFN) in the treatment of trading partners under the rules of most of WTO agreements.

This chapter will discuss first, the concept and basic purpose of the GATS, scope of application on the provisions that are relevant to Mode IV and the GATS Modes of supply. Secondly, this chapter will discuss the general framework of the GATS in which the focus will be in the provisions of the MFN, domestic regulation, transparency obligations,

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<sup>1</sup> Michael T & Robert H *The Regulation of International Trade* 3 ed (2005) 390. ( hereafter Michael T & Robert H (2005).

<sup>2</sup> Michael T & Robert H (2005).

<sup>3</sup> Michael T & Robert H (2005).

economic integration, national treatment and market access. Thirdly, a look at the specific commitments to be bound in the schedule of South Africa in which will focus on the content of services schedules of commitments, the structure of the schedules of commitments and the withdrawal of the specific commitments. Fourthly, this chapter will look the liberalisation under the GATS.

The choice of these provisions apply due to the movement of natural persons that require respecting the general obligations of the GATS because South Africa has undertaken measures aimed at liberalising its trade in services as a means of improving domestic policy among the provisions of the GATS.

## **2.2 The Concepts and Basic Purpose of the General Agreement on Trade in Services**

The creation of the GATS as the multilateral trade agreement to cover trade in services was one of the landmark achievements of the Uruguay Round, the results of which came into force in January 1995.<sup>4</sup>

As a founding Member of the WTO, South Africa must fulfil all the obligations assumed by it under all WTO agreements, including the GATS agreements. The WTO and its agreements, form a single package from which Members can not pick and choose which agreements to join and implement.<sup>5</sup>

During the Uruguay Round of multilateral GATS negotiations, South Africa has made substantial liberalisation commitments in many sectors and sub-sectors for the reduction or elimination of restrictions on the market access and national treatment. For example, South Africa has made full liberalisation commitments on investigation and security services under the GATS.<sup>6</sup>

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<sup>4</sup> GATS ‘an introduction’ available at [https://www.wto.org/english/tratop\\_e/serv\\_e/gsintr\\_e.doc](https://www.wto.org/english/tratop_e/serv_e/gsintr_e.doc) (accessed 13 April 2015).

<sup>5</sup> Cronje JB ‘Will South Africa Modify its GATS Commitments?’ available at: <http://www.tralac.org/discussions/article/7183-will-south-africa-modify-its-gats-commitments.html> (accessed 12 August 2015).

<sup>6</sup> Cronje JB ‘Will South Africa Modify its GATS Commitments?’ available at: <http://www.tralac.org/discussions/article/7183-will-south-africa-modify-its-gats-commitments.html> (accessed 12 August 2015).

Many countries have governmental responsibilities, reflecting their importance for social integration and regional cohesion, which should be strictly regulated and not be left to the fray of the markets.<sup>7</sup>

The GATS was inspired by essentially the same objectives as its counterpart in merchandise trade, the General Agreement on Tariffs and Trade (GATT): creating a credible and reliable system of international trade rules; ensuring fair and equitable treatment of all participants (principle of non-discrimination); stimulating economic activity through guaranteed policy; and promoting trade and development through progressive liberalisation.<sup>8</sup>

However, the GATS objectives are to promote economic growth of all partners and the development through expansions of trade in services. The South African economic growth can be promoted through the free movement of natural persons providing services, but if there are difficulties, because qualifications are not recognised, then these objectives cannot be reached.<sup>9</sup>

Within the framework of the GATS, the three main pillars on which trade in services are based is: (a) ensuring the transparency and predictability of increased rules and regulations; (b) providing a common framework of disciplines governing international transactions; and (c) promoting the progressive liberalisation through successive rounds of negotiations.<sup>10</sup>

However, this principle comes to accord national treatment to foreign services and service suppliers through a growing number of sectors, and to improving markets access.<sup>11</sup> The scope of application of the GATS will be addressed in the following lines to try to understand and interpret some cases.

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<sup>7</sup> GATS ‘an introduction’ available at [https://www.wto.org/english/tratop\\_e/serv\\_e/gsintr\\_e.doc](https://www.wto.org/english/tratop_e/serv_e/gsintr_e.doc) (accessed 13 April 2015). (hereafter GATS ‘an introduction’).

<sup>8</sup> Demetria HM Promoting Transport Liberalisation under the SADC Trade in Services Protocol: The Zambian Road Transport Operators Experience (unpublished LLM thesis, University of the Western Cape, 2013) 20.

<sup>9</sup> Demetria HM Promoting Transport Liberalisation under the SADC Trade in Services Protocol: The Zambian Road Transport Operators Experience (unpublished LLM thesis, University of the Western Cape, 2013) 20.

<sup>10</sup> GATS ‘an introduction’.

<sup>11</sup> GATS ‘an introduction’.

### 2.2.1 Scope of Application of the General Agreement on Trade in Services

The scope of the GATS was widely interpreted in a number of cases that have gone to the Dispute Settlement Body (DSB) of the WTO.<sup>12</sup> However, suffice it to say that there are two exceptions that are expressly provided to this broad general application under the GATS.<sup>13</sup>

In the case of European Communities (EC), regime for the importation, sale and distribution of bananas which matter was the interpretation of the scope of application of the GATS. The Appellate Body considered the Article I: 3 of the GATS and found that Article I: 3 (b) as read with Article XXVIII (b) should be understood to mean that there is nothing to suggest a limited scope of application of the GATS.<sup>14</sup>

It means that South Africa cannot exclude attracting foreign expertise and skills through the movement of natural persons that allow the competitive advantages offered by temporary migration. There is no legal basis for measures prior exclusion of foreign qualification in South Africa from the scope of the GATS. What this means is that no services are excluded from the application of the GATS with the exception of those services that have been specifically excluded from the general application of the GATS in its text.

Houtte argued that this description of the scope of the GATS is too broad and that it makes little sense to liberalise trade in services in the same manner as trade in goods. What he says is because services are more persons related when compared to goods that can be traded from remote locations without the need for people being close to their trade.<sup>15</sup>

What is important to note however from that debate, is that the Uruguay Round come up with a more comprehensive definition of trade in services. The multilateral trading system was considered essential because of the peculiarity of trade in services that involves the provider and the consumers of the service are close to the time of the transaction of supply.

Services are divided into 12 different sectors that cover all aspects of the economy of a country. These are ranged from business, communication services, construction and

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<sup>12</sup> Demetria HM Promoting Transport Liberalisation under the SADC Trade in Services Protocol: The Zambian Road Transport Operators Experience (unpublished LLM thesis, University of the Western Cape, 2013) 21.

<sup>13</sup> World Trade Organisation 'GATS Fact and Fiction' (1998) 1.

<sup>14</sup> EC-Regime for the Importation, Sale and Distribution of Bananas WTO Doc. WT/DS27/AB/R of 9 September 1997 paras 220.

<sup>15</sup> Houtte H *The Law of International Trade* 2 ed (2002) 128.

engineering, education, the environment, tourism, financial, health, recreation, transportation, distribution services, and other related services.<sup>16</sup> These sectors are subdivided into a total of some 160 sub-sectors. Under this classification system, a service area, or segments thereof, may be included in the list of a Member with specific commitments to market access and national treatment obligations.<sup>17</sup>

Under Article XXI of GATS (1) (b) South Africa shall communicate its intention to amend any commitment in its list of the GATS no later than three months before the expected date of implementation of the modification or withdrawal.

The GATS distinguishes between trade barriers that distort competition and limit market access and rules that are necessary to pursue public policy objectives and to ensure the proper functioning of markets.<sup>18</sup> For example, restrictions on the number of service providers or some discrimination against the recognition of qualification of foreign suppliers are considered barriers to trade in services and can be the subject of negotiation.

Alternatively, require compliance with technical standards or qualification requirements to ensure the quality of service and protection of the public interest that are legitimate forms of domestic regulation of South Africa as WTO Member. Although the main objective of the GATS is the liberalisation of trade in services, this should not be confused with deregulation.<sup>19</sup> South Africa made commitment to regulate the movement of natural persons and this commitment must and will remain carefully regulated in the public interest.<sup>20</sup> The GATS defines trade in services based on the presence of the service supplier and the consumer at the time of the transaction in so-called modes of supply that will be explained next in the lines below.

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<sup>16</sup> Demetria HM Promoting Transport Liberalisation under the SADC Trade in Services Protocol: The Zambian Road Transport Operators Experience (unpublished LLM thesis, University of the Western Cape, 2013) 21.

<sup>17</sup> GATS ‘an introduction’ available at [https://www.wto.org/english/tratop\\_e/serv\\_e/gsintr\\_e.doc](https://www.wto.org/english/tratop_e/serv_e/gsintr_e.doc) (accessed 13 April 2015). (hereafter GATS ‘an introduction’).

<sup>18</sup> GATS ‘an introduction’.

<sup>19</sup> GATS ‘an introduction’.

<sup>20</sup> GATS Article XIV which provides for general exceptions to the GATS obligations, Foot Note 5 gives clarity that the public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society e.g. to protect public morals.

## 2.2.2 The General Agreement on Trade in Services Mode of Supply

The GATS distinguishes four modes of supply of services: cross-border trade, consumption abroad, commercial presence and the presence of natural persons.<sup>21</sup>

Cross-border supply is defined to cover flow of services from the territory of a Member in the territory of another Member. For example the perspective of an importing Member A receives services from abroad through the telecommunications or postal network. Such supplies may include consultancy or market research reports, tele-medical advice, distance training, or architectural drawings (Others e.g. banking or architectural services transmitted via telecommunications or email). (Mode I);

Consumption abroad refers to situations where a service consumer (For example: tourist or patient) moves into the territory of another Member for service. For example when Nationals of A have moved abroad as tourist, student, or patients to consume the respective services (Mode II);

Commercial presence implies that a service supplier of one Member establishes a territorial presence, including through ownership or lease of premises in the territory of another Member to supply a service. For example when the service is provided within A by a locally-established affiliate, subsidiary, or office of a foreign-owned and controlled company (For example: bank, Construction Company, domestic subsidiaries foreign insurance companies or hotel chains) (Mode III);

The attention of this mini-thesis will focus on Mode IV: Presence of natural persons that consists of persons of one Member entering the territory of another Member to supply a service. For example when foreign national provides services within a country as an independent supplier (For example: consultant, health worker) or employee of a Foreign Service firm (For example: Consultancy, Hospital, Construction Company).<sup>22</sup>

The provision of many services is possible only through the simultaneous physical presence of the producer and the consumer. So there are many cases in which, to be commercially meaningful, trade commitments must extend to cross-border movement of consumers, the establishment of a commercial presence in a market, or the temporary movement of the

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<sup>21</sup> GATS Article I.2.

<sup>22</sup> GATS Article I.2(d).

supplier himself.<sup>23</sup> The Annex on Movement of Natural Persons specifies, however, that Members as South Africa remain free to operate measures regarding citizenship, residence or access to the labour market on a permanent basis.<sup>24</sup> Indeed, in the following lines will be discussed the general obligations or framework of the GATS that are the same principles that underlie the movement of natural persons.

### **2.3 The General Agreement on Trade in Services General Framework**

The GATS recognises Members the right to regulate the provision of services to further their political objectives and it does not even seek to influence policy objectives of the Member; as for South Africa acted the prior recognition of foreign qualification to enhance the skilled workers, but the GATS agreement establishes a framework of rules to ensure that services regulations are administered in a reasonable objective and impartial manner; and do not constitute unnecessary barriers to trade.<sup>25</sup>

This mini-thesis will focus on the provisions of general obligations as non-discrimination under the principle of MFN, domestic regulation, transparency, economic integration, national treatment and market access. These provisions are relevant to promote the liberalisation of trade in services through the temporary movement of natural persons across border. The provisions and certain obligations South Africa must respect, that apply regardless on the existence of specific commitments.

#### **2.3.1 Most Favoured Nation Principle**

MFN is among the most important general obligations imposed by the legal framework. Under Article II of the GATS, Members are required to extend immediately and unconditionally to services or service suppliers of any other Members 'treatment no less favourable than that accorded to services and services suppliers of any other country'.<sup>26</sup> If a country allows foreign competition in a sector, equal opportunities in that sector should be

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<sup>23</sup> GATS 'an introduction' available at [https://www.wto.org/english/tratop\\_e/serv\\_e/gsintr\\_e.doc](https://www.wto.org/english/tratop_e/serv_e/gsintr_e.doc) (accessed 13 April 2015). (hereafter GATS an introduction).

<sup>24</sup> GATS 'an introduction'.

<sup>25</sup> Demetria HM Promoting Transport Liberalisation under the SADC Trade in Services Protocol: The Zambian Road Transport Operators Experience (unpublished LLM thesis, University of the Western Cape, 2013) 25.

<sup>26</sup> Demetria HM Promoting Transport Liberalisation under the SADC Trade in Services Protocol: The Zambian Road Transport Operators Experience (unpublished LLM thesis, University of the Western Cape, 2013) 25.

given to service providers Mode IV from all other WTO Members. This applies regardless of whether the country has made no specific commitment to provide foreign companies access to its markets under the WTO.<sup>27</sup>

Therefore, the obligation lies on South Africa as a WTO Member to respect the agreement in principle of MFN because South Africa has made commitments and integrated services liberalisation under Mode IV of the GATS. Which allows foreign companies to establish and use the services of those professionals' providers but prior recognition of foreign academic and professional qualifications create an obstacle to the mobility of the labour.<sup>28</sup>

Therefore, this principle requires that South Africa extends the same treatment to all its partners. However, a Member may sustain a measure incompatible with the MFN obligation, provided that this measure is listed in, and meets the requirements of Annex II of Article MFN exemptions. Similarly, when a Member signs an economic integration agreement in accordance with Article V of the GATS, it is permitted to give preferential treatment to Members of regional economic agreement, not all Members of the WTO.<sup>29</sup>

This amounts to a ban in principle and arrangements between group Members in different sectors or of reciprocity provisions which confine access benefits to trading partners of the GATS Mode IV granting similar treatment.<sup>30</sup>

Exemptions give Members the right to continue giving more favourable treatment to particular countries by listing the MFN exemptions alongside their first sets of commitments. More importantly, the Annex also requires that MFN exemptions be subject to negotiation in a cycle of further trade negotiations. Regarding the current cycle, the Hong Kong Ministerial

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<sup>27</sup> Weiler J & Cho S 'International and Regional Trade Law: The Law of the World Trade Organisation Unit XIII: Trade in Services' (2006) available at [http://jeanmonnetprogram.org/wp-content/uploads/WTO\\_2006\\_UnitXIII\\_Services\\_000.pdf](http://jeanmonnetprogram.org/wp-content/uploads/WTO_2006_UnitXIII_Services_000.pdf) (accessed 20 July 2015).

<sup>28</sup> Weiler J & Cho S 'International and Regional Trade Law: The Law of the World Trade Organisation Unit XIII: Trade in Services' (2006) available at [http://jeanmonnetprogram.org/wp-content/uploads/WTO\\_2006\\_UnitXIII\\_Services\\_000.pdf](http://jeanmonnetprogram.org/wp-content/uploads/WTO_2006_UnitXIII_Services_000.pdf) (accessed 20 July 2015).

<sup>29</sup> Weiler J & Cho S 'International and Regional Trade Law: The Law of the World Trade Organisation Unit XIII: Trade in Services' (2006) available at [http://jeanmonnetprogram.org/wp-content/uploads/WTO\\_2006\\_UnitXIII\\_Services\\_000.pdf](http://jeanmonnetprogram.org/wp-content/uploads/WTO_2006_UnitXIII_Services_000.pdf) (accessed 20 July 2015).

<sup>30</sup> GATS Article II.

Declaration in December 2005 commits Members to eliminate or significantly reduce exemptions and clarify the scope and duration of the remaining measures.<sup>31</sup>

The general explanation of the Annex on MFN exemption is that when the GATS were concluded, some Members had concluded preferential agreements on services either bilaterally or regionally.<sup>32</sup> Members felt that it was necessary to maintain these preferences temporarily as a compromise. A total of 70 Members made their commitments on regular services subject to a new list of exemptions from Article II. In this sense, the framework of the negotiation of GATS liberalisation commitments can be said to have had limited results.

### 2.3.2 Domestic Regulation

Article VI on domestic regulation is one of the most important general provisions with regard to movement of natural persons. Since, Mode IV is mainly constrained by various kinds of domestic regulations, ranging from labour market and immigration policies to tax and government procurement policies.<sup>33</sup>

Although the main objective of the GATS is the liberalisation of trade in services, this should not be confused with deregulation.<sup>34</sup> Many service industries must and will remain carefully regulated in the public interest.<sup>35</sup> The GATS distinguishes between trade barriers that distort competition and limit access to markets on the one hand, and regulations that are necessary to pursue public policy objectives and ensure the proper functioning of markets on other hand. For example, restrictions on the number of service providers or some discrimination against foreign suppliers are considered barriers to trade in services.

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<sup>31</sup> GATS ‘an introduction’ available at [https://www.wto.org/english/tratop\\_e/serv\\_e/gsintr\\_e.doc](https://www.wto.org/english/tratop_e/serv_e/gsintr_e.doc) (accessed 13 April 2015).

<sup>32</sup> Demetria HM Promoting Transport Liberalisation under the SADC Trade in Services Protocol: The Zambian Road Transport Operators Experience (unpublished LLM thesis, University of the Western Cape, 2013) 23.

<sup>33</sup> GATS Article VI.

<sup>34</sup> Article VI of the GATS allows Members to have national regulations on trade in services. However, since domestic regulations can be used by a country to offer protection to its nationals, there is a requirement that all measures (rules) of general application affecting trade in services are administered in a reasonable manner, objective and impartial.

<sup>35</sup> In accordance with Article XIV provides for exceptions to the general obligations of the GATS, Foot Note 5 provides clarity that the public policy exception can be invoked if a genuine and sufficiently serious threat to one of the interests company fundamentals, for example to protect public morals.

Article VI: 2 stipulate that administrative and / or judicial reviews of decisions affecting trade in services are available. Members are committed to operating domestic mechanisms (judicial, arbitral or administrative tribunals or procedures) where individual service suppliers may seek redress at the request of an affected supplier.<sup>36</sup> The GATS agreement clearly recognises the South African government's right to regulate and to introduce new regulations to achieve the objectives of national policy. These mechanisms must provide for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services.<sup>37</sup>

Considering that domestic regulations constitute the main source of constraints on the movement of natural persons. These provisions are very strong and recognise the need for transparency and objectivity in the criteria, nature, and administration of relevant domestic regulations.<sup>38</sup>

### 2.3.3 Transparency Obligations

Transparency requirements are relevant to the GATS Mode IV which is relevant in services where the role of regulation is like an instrument of trade protection, as a tool of domestic policy which tends to a more prominent place in most other areas of the economy.

The GATS Article III requires Members to publish promptly 'all relevant measures of general application which pertain to or affect the operation of this Agreement' including relevant international agreements to which the country is signatory.<sup>39</sup> This provision require for South Africa to inform the Council for Trade in Services any new laws, regulations and administrative guidelines or relevant amendments to the recognition of foreign qualifications for skilled natural persons across the border.

Some types of general obligations apply only to sectors listed in a Member's schedule of commitments. The schedules are what trade negotiators call 'positive lists'; that is, they set down only those services where a Member wishes to guarantee access for foreign service

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<sup>36</sup> GATS Article VI.2.

<sup>37</sup> GATS 'an introduction' available at [https://www.wto.org/english/tratop\\_e/serv\\_e/gsintr\\_e.doc](https://www.wto.org/english/tratop_e/serv_e/gsintr_e.doc) (accessed 13 April 2015). (hereafter GATS 'an introduction').

<sup>38</sup> Chanda R 'Movement of Natural Persons and Trade in Services: Liberalising Temporary Movement of Labour under the GATS' (1999) working paper No.51 ICRIER 26.

<sup>39</sup> GATS 'an introduction'.

suppliers. Importantly, where a service is not contained in a Member's schedule, there is no guarantee of market access to GATS Mode IV<sup>40</sup>

The provisions of the GATS allow groups of Members to enter into economic integration agreements if certain conditions are met. Furthermore, to exempt countries participating in integration agreements from the MFN obligation are very strong in their formulation while preserving national interests. This is particularly relevant in the case of Mode IV where the administrative and regulatory constraints are the main obstacles. South Africa acting in the implementation of trade in services liberalisation ensures the ease of temporary movement of natural persons across borders; but the obligation related to regional integration initiatives under Article V of GATS called economic integration clause which will be discussed in more detail below.

### **2.3.4 Economic Integration**

Article V allows a WTO Member to enter into agreements to further liberalise trade in services on a bilateral or plurilateral basis, provided the agreement has 'substantial sectoral coverage' and removes substantially all discrimination between the participants.<sup>41</sup> Recognising that these agreements can be part of a wider process of economic integration well beyond trade in services, the Article allows the above conditions to be applied in this perspective.<sup>42</sup> Economic integration usually falls in the field of public international economic law as agreement removing of tariff and non-tariff barriers on imports and factor movements imposed by the States and the pooling of sovereignty on economic affairs.<sup>43</sup>

While the GATS does mention the term economic integration, the current use of the WTO agreement is the term Regional Trade Agreement (RTA). This includes free trade agreements between countries or groups of countries that are not necessarily in the same region. RTA can

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<sup>40</sup> ACCI 'The General Agreement on the Trade in Services' Review No.93 – November 2002 at 1.

<sup>41</sup> Mangeni F *WTO Negotiations on Rules on Regional Trade Agreements: African Perspectives* (2002) 38. (hereafter Mangeni F (2002)).

<sup>42</sup> Demetria HM *Promoting Transport Liberalisation under the SADC Trade in Services Protocol: The Zambian Road Transport Operators Experience* (unpublished LLM thesis, University of the Western Cape, 2013) 28.

<sup>43</sup> Mangeni F (2002) 39.

be broadly divided into Preferential Trade Areas (PTA), the Free Trade Agreements (FTAs), Customs Union (CU), the common market and economic unions.<sup>44</sup>

The Article V: 1 of the GATS provides the term 'Economic Integration Agreements (EIA)' in the title of Article V. It requires the EIA to first have substantial sectoral coverage and also to provide for the absence or elimination of substantially all discrimination. In the sense of Article XVII (which deals with national treatment) between or among the parties in the covered sectors.

While EIA must be designed to facilitate trade among participants, Article V also requires that the overall level of barriers is not increased to the respect of non-participants in the sectors covered. Moreover, if the parties to an agreement intended to withdraw or amend their commitments contained in the GATS, appropriate compensation must be negotiated with the Members concerned.<sup>45</sup> Such situations can arise, for example, if the new common regime in a sector is modelled on the previous regime of a more restrictive participating country. The Article V provides integration of labour markets agreements. The main condition is that citizens of the countries involved are exempt from the residence and work permit.

The WTO General Council created the Regional Trade Agreements Committee. The goal of the Regional Trade Agreements Committee is to examine regional groups and determine if they are compatible with WTO rules.<sup>46</sup> The committee is also examining how regional arrangements might affect the multilateral trading system, and what the relationship between regional and multilateral agreements should be. Differences between Members on how to interpret the criteria for assessing the consistency of RTAs with WTO rules have created a long backlog of overdue reports to the RTA committee.<sup>47</sup> In fact, consensus on WTO consistency has been reached in only one case so far: the customs union between the Czech Republic and the Slovak Republic after the dissolution of Czechoslovakia.<sup>48</sup>

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<sup>44</sup> Pal P 'Regional Trade Agreements in a Multilateral Trade Regime: An Overview' (2004) available at [http://www.networkideas.org/feathm/may2004/survey\\_paper\\_rta.pdf](http://www.networkideas.org/feathm/may2004/survey_paper_rta.pdf) (accessed 14 April 2015) 2.

<sup>45</sup> Mangeni F *WTO Negotiations on Rules on Regional Trade Agreements: African Perspectives* (2002) 38. (hereafter Mangeni F (2002)).

<sup>46</sup> Mangeni F (2002) 43.

<sup>47</sup> Demetria HM *Promoting Transport Liberalisation under the SADC Trade in Services Protocol: The Zambian Road Transport Operators Experience* (unpublished LLM thesis, University of the Western Cape, 2013) 29.

<sup>48</sup> Weiler J, Cho S & Feichtner I 'Globalism V Regionalism' (2011) available at [http://jeanmonnetprogram.org/wp-content/uploads/Unit\\_II-Globalism\\_v\\_Regionalism.pdf](http://jeanmonnetprogram.org/wp-content/uploads/Unit_II-Globalism_v_Regionalism.pdf)

### 2.3.5 National Treatment

A commitment to national treatment implies that the Member concerned does not operate discriminatory measures benefiting domestic services or service suppliers.<sup>49</sup> Therefore, the recognition of foreign academic and professional qualifications creates unequal treatment to facilitate trade and to enhance access to the foreign skills market in South Africa. This principle requires that there be equal treatment for skilled foreigners and nationals to access the South African market under the laws and regulations in the conduct of trade with all WTO Members.<sup>50</sup> Thus, for example if a Member allows foreigners access to its services markets, one cannot discriminate against them in terms of its laws and tax regulations by collecting an amount of tax which is higher than that payable by nationals.<sup>51</sup>

The key is not to modify, in law or in fact, the conditions of competition of the services sector in favour of their own nationals. Again, the extension of national treatment in any particular sector may be subject to conditions and qualifications. In accordance with Article XVII each Member accord to services and service suppliers of any other Member treatment no less favourable than that it accords to its own services and service suppliers.<sup>52</sup>

Unlike the case with market access there is no exhaustive list of national treatment limitations. Every measure has to be tested to see if it affects the conditions of competition in favour of nationals. If the measure meets the test, then it is a restriction of national treatment, and must be provided if the Member wants to keep it. The practice has allowed the identification of typical national processing restrictions as nationality requirement, effective residency requirement, and restrictions on ownership of land, and grants reserved for nationals.<sup>53</sup>

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(accessed 14 April 2015) 8. (hereafter Weiler J, Cho S & Feichtner I Globalism V Regionalism (2011)).

<sup>49</sup> Demetria HM Promoting Transport Liberalisation under the SADC Trade in Services Protocol: The Zambian Road Transport Operators Experience (unpublished LLM thesis, University of the Western Cape, 2013) 31.

<sup>50</sup> Weiler J, Cho S & 'Feichtner I Globalism V Regionalism' (2011) 8.

<sup>51</sup> GATS 'an introduction' available at [https://www.wto.org/english/tratop\\_e/serv\\_e/gsintr\\_e.doc](https://www.wto.org/english/tratop_e/serv_e/gsintr_e.doc) (accessed 13 April 2015). (hereafter GATS 'an introduction').

<sup>52</sup> GATS 'an introduction'.

<sup>53</sup> OECD 'Market Access, Trade in Transport Services and Trade Facilitation' (2007) ECMT Report No. 134 available at <http://www.oecd-ilibrary.org/transport> (accessed 12 April 2015) 22.

### 2.3.6 Market Access

The introduction of a commitment to market access in the GATS reflects the fact that the contestability of services markets is often limited by measures applicable to both domestic and foreign entities.<sup>54</sup> In accordance with Article XVI Members can make specific commitments through the modes of supply identified in Article I allowing services and service suppliers of any other Member to access market. The Article I explicitly, cover a number of measures that are considered of particular importance. The GATS provisions, under Article XVI, cover six types of restrictions that must not be maintained in the absence of limits in sectors where market access commitments are undertaken.<sup>55</sup> The article requires Members not to adopt or maintain restrictions, unless otherwise specified in their schedule.<sup>56</sup>

In accordance with the movement of natural persons that are coming to South Africa, the measures applicable for the recognition of academic and professional qualifications cannot be to restrict foreign access to the South African market. The reason is that South Africa undertook commitment to GATS Mode IV movement of natural persons across the border and discriminatory measures on market access violate the provisions of national treatment.

Market access is a negotiated commitment in specified sectors. It may be subject to various types of limitations enumerated in Article XVI.2 of the GATS.<sup>57</sup>

For example, restrictions may be imposed on the number of authorised service providers, the value of transactions or assets, and the number of operations or quantity of output, the number of natural persons supplying a service. The type of legal entity or joint venture through which a service supplier may supply a service (for example, in banking, branches versus subsidiaries); and participation of foreign capital in terms of maximum percentage limit on foreign ownership or the total value of foreign investment.<sup>58</sup>

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<sup>54</sup> GATS ‘an introduction’ available at [https://www.wto.org/english/tratop\\_e/serv\\_e/gsintr\\_e.doc](https://www.wto.org/english/tratop_e/serv_e/gsintr_e.doc) (accessed 13 April 2015).

<sup>55</sup> Demetria HM Promoting Transport Liberalisation under the SADC Trade in Services Protocol: The Zambian Road Transport Operators Experience (unpublished LLM thesis, University of the Western Cape, 2013) 32.

<sup>56</sup> GATS Article XVI.

<sup>57</sup> GATS Article XVI.2.

<sup>58</sup> Demetria HM Promoting Transport Liberalisation under the SADC Trade in Services Protocol: The Zambian Road Transport Operators Experience (unpublished LLM thesis, University of the Western Cape, 2013) 32.

These measures covered by Article XVI take the form of quantitative restrictions with the exception of Article XVI (e) and (f), are not necessarily discriminatory, taking into account that they can have a national impact as well as foreign services or service suppliers. However, in practice the requirement of market access covers national treatment obligation, measures restricting market access may also be forbidden to violate national treatment.<sup>59</sup>

The choice of these provisions applies in spite of the movement of natural persons that required respecting the GATS general framework. The reason why South Africa has undertaken measures aimed at liberalising its trade in services as a means of improving domestic policy among the provisions of the GATS. The specific commitments that GATS Member countries' including South Africa takes the contents and conditions of the modification or withdrawal will be examined in the following lines.

## 2.4 Specific Commitments

The GATS is a very flexible agreement that allows each Member to adjust the conditions of entry to the market and participation in its specific objectives and constraints of the sector.<sup>60</sup> According to South Africa's specific commitments, for example, South Africa has made full liberalisation commitments on investigation and security services. In addition, South Africa has made commitments in engineering services and integrated engineering framework under GATS. These provisions allow foreign companies to establish and use the services of these professionals' providers if they possess the necessary academic and professional qualifications. South Africa has made certain commitments which offer, among other services sellers, intra-corporate transfers, including executives, managers, specialists and professionals. However, these personnel assigned to the establishment of commercial presence, temporary access to the South African market to engage in trade in services and the supply of it. This includes a market access commitment not to maintain or introduce measures that would limit for example, the participation of foreign capital in terms of maximum percentage or the total value of foreign investment.<sup>61</sup> Therefore, the introduction of national measure restricting foreign participation, for example in the private security industry

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<sup>59</sup> Hoekman B & Kostecki M *The Political Economy of the World Trading System; the WTO and Beyond* (2001) at 253.

<sup>60</sup> GATS 'an introduction' available at [https://www.wto.org/english/tratop\\_e/serv\\_e/gsintr\\_e.doc](https://www.wto.org/english/tratop_e/serv_e/gsintr_e.doc) (accessed 13 April 2015).

<sup>61</sup> GATS Article XVI (f).

and others commitments would constitute a clear violation of South Africa's commitments under the GATS.<sup>62</sup>

South Africa as WTO Member made commitments in services under GATS and South Africa enhances the market access and national treatment commitment for provision of services through the temporary presence of natural persons. The Article XVI Market Access (MA) and XVII National Treatment (NT) require Members such as South Africa to assume specific commitments relating to market access and national treatment in designated sectors and does not put restriction to the foreigners that entering the country.<sup>63</sup>

Two sets of legal obligations governing respectively, market access and national treatment are relevant in this context. As already indicated, Members are free to designate the sectors, and list them in their schedules in which they assume such obligations regarding to the four modes of supply.<sup>64</sup> In addition, limitations may be attached to commitments in order to reserve the right to operate measures inconsistent with full market access and / or national treatment.<sup>65</sup>

South Africa has made extensive commitments to trade liberalisation in many sectors and sub-sectors for the reduction or elimination of restrictions on access to market and national treatment.

The commitments tend to reflect the objectives and constraints of national policy in general and in different sectors. While some Members have scheduled less than a handful services, others have taken market access and national treatment disciplines in over 120 out of 160 services. The existence of specific commitments triggers further obligations concerning, the notification of new measures that have a significant impact on trade and the use of restrictions on international payments and transfers.

It's difficult to estimate the extent to which liberalisation has actually been achieved by the specific commitments in the Uruguay Round. Hoekman attempted to measure these outcomes

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<sup>62</sup> GATS / SC / 78.

<sup>63</sup> Michael T & Robert H *The Regulation of International Trade* 3 ed (2005) 399.

<sup>64</sup> Demetria HM Promoting Transport Liberalisation under the SADC Trade in Services Protocol: The Zambian Road Transport Operators Experience (unpublished LLM thesis, University of the Western Cape, 2013) 34.

<sup>65</sup> Demetria HM Promoting Transport Liberalisation under the SADC Trade in Services Protocol: The Zambian Road Transport Operators Experience (unpublished LLM thesis, University of the Western Cape, 2013) 34.

in terms of number of commitments consolidated, the number of sectors covered by each Member, and the extent to which restrictions were placed on market access and national treatment.<sup>66</sup> Hoekman noticed the figure for high-income, low-income and middle-income countries. These figures clearly show how far the GATS Members are to achieve free trade in services and the magnitude of the task that remains.<sup>67</sup>

#### **2.4.1 Contents of Services Schedules of Specific Commitments**

According to GATS Article XX, each WTO Member is required to have a schedule of specific commitments that identify the services for which the Member guarantees market access and national treatment and any limitations that may be attached. However, do not specify the scope or level of liberalisation. Furthermore, the article states some basic elements to be covered in the list of each Member.<sup>68</sup>

It also provides that the annexes are an integral part of the GATS itself. The list can also be used to make additional commitments regarding, for example, the implementation of specified standards or regulatory principles. Commitments are made with respect to each of the four modes of supply of various services.<sup>69</sup>

Most lists consist of both sectoral and horizontal sections. The horizontal section contains entries that apply across all sectors subsequently listed in the schedule. Horizontal limitations often refer to a particular mode of supply, notably commercial presence and the presence of natural persons. Specific sectoral sections contain entries that apply only to the particular service. Commitment can be introduced or improved outside the context of multilateral negotiations. That means, any Member is free to expand or upgrade its existing commitments at any time. Thus, national treatment and market access obligations can only be understood in terms of national schedules of specific commitments of a country. A list of commitments is essentially a table with four columns and four rows; and in the following lines will look how these specific commitments are structured in GATS Members.

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<sup>66</sup> Hoekman B *Assessing the General Agreement on Trade in Services* (1996) 88. (hereafter Hoekman B (1996)).

<sup>67</sup> Hoekman B (1996) 89.

<sup>68</sup> GATS Article XX.

<sup>69</sup> Hoekman B (1996) 90.

## 2.4.2 Structures of the Schedules of Specific Commitments

As indicated above, the obligations of WTO Members under the GATS consist of the provisions of the Agreement and its annexes and the specific commitments in the national schedule. The schedule is a relatively complex document, more difficult to read than a tariff schedule under General Agreement on Tariffs and Trade (GATT).<sup>70</sup>

The schedule is divided into two parts. While Part one lists horizontal commitments, applicable to all sectors that have been scheduled, Part two sets out commitments on a sector by sector basis. For example, horizontal commitments of South Africa under Mode III, national treatment, reserve the right to deny foreign land ownership. In Mode IV, South Africa would be able to prevent any foreigner from entering its territory to supply services, except for specific groups of people. In the distribution sector, the scope of the definition is further clarified by reference to the United Nations (UN) Provisional Product Classification commitments vary widely across modes.

More liberal are those for Mode II (consumption abroad) where a Member is required not to take action under either Article XVI or XVII that would prevent or discourage its residents from shopping abroad. While the latter, in its simplest form, lists one tariff rate per product, a schedule of commitments contains at least eight entries per sector: the commitments on market access and national treatment with regard to the four modes of supply. While the first column indicates the sector or sub-sector concerned, the second column sets out restrictions or limitations on market access that fall within the six types of restrictions mentioned in Article XVI: 2.<sup>71</sup> The third column contains restrictions one may want to place, in accordance with Article XVII, on national treatment. A final column provides the opportunity to make additional commitments as envisaged in Article XVIII.

The first column contains the description of the sector. Members are free to describe and delineate sectors as they wish. In practice, they resort to in almost all cases a combination of

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<sup>70</sup> Demetria HM Promoting Transport Liberalisation under the SADC Trade in Services Protocol: The Zambian Road Transport Operators Experience (unpublished LLM thesis, University of the Western Cape, 2013) 34.

<sup>71</sup> GATS 'an introduction' available at [https://www.wto.org/english/tratop\\_e/serv\\_e/gsintr\\_e.doc](https://www.wto.org/english/tratop_e/serv_e/gsintr_e.doc) (accessed 13 April 2015).

both classifications, the W120 of the WTO and the UN Provisional Product Classification that were previously discussed.<sup>72</sup>

The second column of the Schedule contains limitations that a Member wish to maintain to the principle of market access for example the prior recognition of academic and professional qualifications that South Africa made to the movement of natural persons across border.<sup>73</sup> By undertaking a market access commitment, a WTO Member accords no less favourable treatment than that provided in the terms, limitations and conditions agreed and specified in its list of services and service suppliers of any other Member of the WTO. These conditions and restrictions may be either discriminatory or only apply to foreigners and non-discriminatory.

The third column is devoted to national treatment restrictions. Under the GATS, national treatment means that in any sector included in its list of specific commitments, a Member must accord to foreign services and service provider's treatment no less favourable that accorded to its own like services and service providers. The main requirement is to refrain from measures that are likely to modify, in law or in fact, the conditions of competition in favour of their own Member.

The fourth column is devoted to additional commitments that Members may wish to undertake. Furthermore, the schedule does not necessarily list all the restrictions applicable to the sector. To avoid repetition, the Members agreed that common restrictions to legislation on the movement of natural persons and capital subsidy legislation must be put forward in the section. Therefore, in practice, a commitment should always be read in the light of the horizontal commitments section.<sup>74</sup> Finally, a schedule of commitment has four rows. Each line is for a mode of supply, which are the ways in which services can be provided. A key feature of GATS is that it covers all the ways in which services can be traded.<sup>75</sup>

Thus the scope of obligations for a country under the GATS depends on the scope of the specific commitment made in the schedule of Members. One of the entries under market

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<sup>72</sup> GATS 'an introduction' available at [https://www.wto.org/english/tratop\\_e/serv\\_e/gsintr\\_e.doc](https://www.wto.org/english/tratop_e/serv_e/gsintr_e.doc) (accessed 13 April 2015). ( hereafter GATS 'an introduction').

<sup>73</sup> GATS 'an introduction'.

<sup>74</sup> OECD 'Market Access, Trade in Transport Services and Trade Facilitation' (2007) ECMT Report No. 134 available at <http://www.oecd-ilibrary.org/transport> (accessed 12 April 2015) 23.

<sup>75</sup> GATS 'an introduction' available at [https://www.wto.org/english/tratop\\_e/serv\\_e/gsintr\\_e.doc](https://www.wto.org/english/tratop_e/serv_e/gsintr_e.doc) (accessed 13 April 2015).

access or national treatment may vary within a spectrum whose opposing ends are full commitments without limitation 'none' and full discretion to apply any measure under the relevant section 'unbound'.<sup>76</sup> For example, a Member could provide the Mode I in the market access column 'None'. What this means is that such a Member has committed to provide full market access within the meaning of Article XVI, regarding the services included as part of its commitment to the sector. In doing so, the Member committed not to maintain any of the types of measures listed in the six sub-paragraphs of Article XVI: 2. At the other extreme, the Member may list 'unbound', which means it retains complete freedom of regulation; if it has no restrictions, it may introduce some restrictions, it can aggravate or mitigate as they wish. The entries in the lists should be restricted to measures incompatible with either the market access or national treatment provisions of the GATS and to additional commitments a Member may want to undertake under Article XVIII.<sup>77</sup>

Schedules would not provide legal cover for measures inconsistent with other provisions of the Agreement, including the MFN obligation under Article II or the obligation under Article VI: 1 to reasonable administration, objective and unbiased measures of general application. An MFN inconsistent measure, which was not included in the relevant list, must be cancelled and the same applies to any inconsistencies with Article VI. As the Agreement clearly distinguishes between, on the one hand, trade liberalisation under specific commitments and on the other hand, national regulations for quality and other legitimate policy purposes.

### **2.4.3 Specific Commitments can be Withdrawn or Modified**

Pursuant to Article XXI provides a framework of rules for modifying or withdrawing specific commitments under certain procedures. The relevant provisions may be invoked at any time after three years have elapsed since the effective date of a commitment.

Pursuant to Article XXI of the GATS, the South African Minister of Police said that the South African government intends to withdraw from its commitments under the GATS. On March 19, 2015, the minister addressed a conference of the private security industry and said that the private security industry poses a potential threat to national security because this industry has gathered more intelligence that can sometimes compromise national security.

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<sup>76</sup> Michael T & Robert H *The Regulation of International Trade* 3 ed (2005) 404.

<sup>77</sup> Michael T & Robert H *The Regulation of International Trade* 3 ed (2005) 404.

Some of these companies have strong links outside the country and it would be really impossible not to guard against these potential dangers.<sup>78</sup>

According to Article XXI (1) (b) of the GATS, a Member must communicate this intention to change any commitment in its list of the WTO no later than three months before the expected date of implementation of the modification or withdrawal. Subsequently, certain prescribed procedures must be followed before a Member is legally authorised to implement the intended modification or withdrawal.<sup>79</sup>

This means that the proposed limitation on foreigners cannot enter into force before the completion of the procedures contained in Article XXI of GATS. All Members whose interests may be affected by the planned modification or withdrawal must communicate its claim within 45 days. If no one applies, a claim for a modification or withdrawal may be implemented. However, the modifying Member is obliged to negotiate with each affected Member to reach agreement on any necessary compensation within three months. The compensation must be negotiated in the form of other commitments in other service sectors. The negotiation period may be extended by mutual agreement.<sup>80</sup>

This means that South Africa cannot unilaterally withdraw or modify commitments. Compensatory adjustments must be made on a most favoured nation basis. This means that regardless South Africa reach agreement with any affected Member, the benefits of this must be extended to all WTO Members.<sup>81</sup>

If South Africa cannot reach agreement within the prescribed period of negotiations, an affected Member can apply for arbitration request. In such cases, the modifying Member cannot implement any modification or withdrawal before receiving the findings of the arbitration body and is in conformity with these conclusions. The arbitration body must examine the compensatory adjustments offered by the modifying Member or requested by an

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<sup>78</sup> Cronjé JB 'Will South Africa modify its GATS commitments' available at <http://www.tralac.org/discussions/article/7183-will-south-africa-modify-its-gats-commitments.html> (accessed 20 August 2015).

<sup>79</sup> GATS 'an introduction' available at [https://www.wto.org/english/tratop\\_e/serv\\_e/gsintr\\_e.doc](https://www.wto.org/english/tratop_e/serv_e/gsintr_e.doc) (accessed 13 April 2015).

<sup>80</sup> GATS 'an introduction' available at [https://www.wto.org/english/tratop\\_e/serv\\_e/gsintr\\_e.doc](https://www.wto.org/english/tratop_e/serv_e/gsintr_e.doc) (accessed 13 April 2015).

<sup>81</sup> Cronjé JB 'Will South Africa modify its GATS commitments?' available at <http://www.tralac.org/discussions/article/7183-will-south-africa-modify-its-gats-commitments.html> (accessed 20 August 2015).

affected Member to find a balance of rights and obligations which maintains a general level of mutually advantageous commitments not less favourable to trade than that provided for in schedules of specific commitments prior to such negotiations.<sup>82</sup>

GATS Article XXI further provides that if South Africa as the modifying Member implements the proposed modification or withdrawal and does not comply with the findings of the arbitration.<sup>83</sup> In addition, any affected Member that participated in the arbitration may modify or withdraw benefits substantially equivalent in accordance with these conclusions. In other words, the Members concerned shall have the right to retaliate or cross-retaliate by suspension of concessions arising under the GATS or other obligations under another WTO agreement not in disputes such those relating to trade in goods or intellectual property.<sup>84</sup>

South Africa has the right to modify or withdraw GATS commitments but it will come at a cost. If it was relatively easy to change commitments it suggests that the GATS framework is flexible to changes in national regulatory regimes. Such a situation could only lead to uncertainty and unpredictability of doing business across borders. The overall objective of the GATS is the progressive liberalisation of international trade in services.

In 1999, the Council for Trade in Services enacted detailed procedures for the modification of schedules pursuant to Article XXI. Improvements to schedules, for example inscription of new sectors or removal of existing limitations, are subject to more streamlined procedures, outlined in the document.<sup>85</sup>

The schedules are complex documents in which each country identifies the service sectors to which it will apply the market access and national treatment obligations of the GATS and exceptions to those obligations it wishes to maintain. The commitments and limitations are in

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<sup>82</sup> Cronjé JB 'Will South Africa modify its GATS commitments?' available at <http://www.tralac.org/discussions/article/7183-will-south-africa-modify-its-gats-commitments.html> (accessed 20 August 2015). ( hereafter Cronjé JB 'Will South Africa modify its GATS commitments').

<sup>83</sup> Cronjé JB 'Will South Africa modify its GATS commitments'.

<sup>84</sup> Cronjé JB 'Will South Africa modify its GATS commitments'.

<sup>85</sup> Demetria HM Promoting Transport Liberalisation under the SADC Trade in Services Protocol: The Zambian Road Transport Operators Experience (unpublished LLM thesis, University of the Western Cape, 2013) 34.

every case entered with respect to each of the four modes of supply which constitute the definition of trade in services in Article I of the GATS.<sup>86</sup>

## 2.5 Trade in Services Liberalisation

Regarding services, the Uruguay Round marked a breakthrough in that it led to the creation of the multilateral rules and trade liberalisation as a new agreement. However, it also means that the Members' attention was entirely absorbed by issues of definition, structural and institutional, and a little time was left to the newly created framework to negotiate the liberalisation commitments.<sup>87</sup>

Thus, this prompted the founding fathers of the Agreement to include a mandate to liberalise trade directly in the GATS. Observers agree that the effects of liberalisation have been relatively modest in that schedules have remained confined to confirm the market conditions in a relatively limited number of sectors.<sup>88</sup> This is due in part to the novelty of the agreement and the Members would also gain experience before considering wider and deeper commitments. However, many countries need time to develop the necessary regulations, including quality standards, licensing and qualification requirements that ensure the compatibility of liberalisation with the fundamental policy objectives. Since the establishment of the GATS, the economic importance of services in terms of production, income, employment and trade continue to increase. So it seems ample opportunity for new and improved commitments for further negotiations.

According to Article XIX: 1, WTO Members have committed to enter into successive rounds of negotiations, the first of which was to begin no later than five years after the effective date of entry into force of the Agreement on WTO.<sup>89</sup>

The Hong Kong Ministerial Declaration of December 2005 reaffirms key principles of services negotiations and called on Members to intensify the objectives, approaches and timelines set out in annex C. It contained a more detailed and ambitious set of objectives than

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<sup>86</sup> Weiler J and Cho S 'International and Regional Trade Law: The Law of the World Trade Organisation Unit XIII: Trade in Services' (2006) available at [http://jeanmonnetprogram.org/wp-content/uploads/WTO\\_2006\\_UnitXIII\\_Services\\_000.pdf](http://jeanmonnetprogram.org/wp-content/uploads/WTO_2006_UnitXIII_Services_000.pdf) (accessed 20 July 2015).

<sup>87</sup> GATS 'an introduction' available at [https://www.wto.org/english/tratop\\_e/serv\\_e/gsintr\\_e.doc](https://www.wto.org/english/tratop_e/serv_e/gsintr_e.doc) (accessed 13 April 2015). (hereafter GATS 'an introduction').

<sup>88</sup> GATS 'an introduction'.

<sup>89</sup> GATS Article XIX: 1.

any previous document and expected that the negotiations so far, should be pursued on a plurilateral basis.<sup>90</sup>

In July 2008, interested Members gathered for an informal meeting 'Signalling Conference' in Geneva to prefigure what they might be able to come up with in the future course of negotiations on services. Based on previous statements and press reports, it appears that participants were generally satisfied with the information provided. The market access negotiations in services then continued at a slow pace in 2011 before they actually came to a halt. Although the mandate of Article XIX was unchanged, the impasse in other areas of the Doha Development Agenda (DDA), particularly agriculture and Non- Agricultural Market Access (NAMA), had taken its toll. The most recent discussions in services were mostly conceptual in nature and definition in subsidiary organs to explore and add clarity on issues related to the application of the GATS and the classification of sectors in conditions of rapid technical, reglementary and exchange.<sup>91</sup>

The eighth Ministerial Conference in December 2011 adopts a waiver to permit WTO Members to grant preferential treatment to services and service suppliers from the Least Developed Countries (LDCs). Thus, to facilitate rapid progress, Members were asked to explore in greater detail the different approaches to negotiation, while respecting the principles of transparency and inclusion. At least one group of Members has since sought to explore new avenues, regularly reporting back to meetings of the Council for Trade in Services. The discussions within the group were still ongoing at the time of writing of the final declaration.<sup>92</sup>

The actual African configuration through the Negotiations to establish a free trade area among Member states of the African Union will begin in 2016.<sup>93</sup> The Continental Free Trade Area (CFTA) aims to establish a comprehensive and mutually beneficial trade agreement. According to the agreed objectives and guidelines principles for the negotiation of the CFTA, the scope of the negotiations shall also covers trade in services. However, an agreement on

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<sup>90</sup> Hong Kong WTO Ministerial 2005: 'Briefing Notes, Rules: Regional Agreements-Building blocks or stumbling blocks' available at <http://www.wto.org> (accessed 11 April 2015).

<sup>91</sup> GATS 'an introduction' available at [https://www.wto.org/english/tratop\\_e/serv\\_e/gsintr\\_e.doc](https://www.wto.org/english/tratop_e/serv_e/gsintr_e.doc) (accessed 13 April 2015). (hereafter GATS 'an introduction').

<sup>92</sup> GATS 'an introduction'.

<sup>93</sup> Cronje JB 'Preparing for Trade in Services Negotiations in the Context of a Comprehensive CFTA' available at <http://www.tralac.org/discussions/article/8045-preparing-for-trade-in-services-negotiations-in-the-context-of-a-comprehensive-cfta.html> (accessed 14 September 2015).

trade in services with a set of horizontal disciplines applicable across all services must be complemented by several sectoral annexes.

## **2.6 Conclusion**

South Africa as a WTO Member has made commitments in services under the GATS allowing temporary movement of natural persons across borders. The important interaction between commitments made under international law and their implementation in terms of domestic law to facilitate the new regulations. The greater liberalisation of services under Mode IV of the GATS would provide better access to potential markets in South Africa.

This would result in greater benefit of trade in services, as it has a comparative advantage in labour services. South Africa acting to implement the GATS liberalisation to ensure the ease of temporary movement of natural persons across borders but the liberalisation of trade in services under Mode IV is not achievable by the general multilateral rules. The diverse nature of multilateral agreements, obligations to trade in services and interconnection of several barriers with a wide range of complex national policies and regulations such as the recognition of foreign academic and professional qualifications.

The market access and national treatment are two negotiable parameters determinant conditions of entry on the market. The participation of natural persons remains a challenge to the GATS Mode IV and many obstacles can be resolved by a commitment which requires the elimination or modification of discriminatory internal regulations. The WTO must promote the promise of becoming a real supranational organisation capable of facilitating negotiations in the light of technological and other changes that affect the sectors covered by the GATS under Mode IV and to present new regulatory challenges or renewal.

Chapter Three will examine the challenges surrounding the liberalisation of the temporary movement of natural persons across borders and progress made by South Africa in facilitating trade in services through the liberalisation of movement of natural persons as service providers and the limits of the GATS under Mode IV.

## Chapter III

### Challenges Surrounding the Temporary Movement of Natural Persons and the Limits of the General Agreement on Trade in Services Mode IV

#### 3.1 Introduction

The movement of natural persons under the GATS is processed firstly, in the main text of the GATS Article 1.2(d) and secondly in the Annex dedicated to movement of natural persons.<sup>1</sup> The service sectors under GATS Mode IV are currently the least liberalised. Not all WTO countries have opened a significant market access in their sectoral commitments on Mode IV. As for horizontal commitments, they do not refer to the movement of natural persons in all categories and professions. However, from an economic point of view it turns difficult to separate trade and investment from the migration. It is important to realise that trade and migration have been institutionalised through the signing of Mode IV of GATS, so, the movement of natural persons constitutes the human side of globalisation.<sup>2</sup>

The movement of goods, services and capital necessarily involves the movement of workers and peoples. However in the short term, historical and empirical studies show that free trade can lead to increased migration, especially when disparities in wages and incomes are very high among countries.<sup>3</sup>

Article XIX sets the rules of engagement for further liberalisation in services based on the concepts of progressive liberalisation and the balance of benefits in exchange for concessions. In terms of the concept of progressive liberalisation in GATS Article XIX, each subsequent round of negotiations should provide a high level of liberalisation. Which would mean the phasing out of restrictions and limitations to market access and national treatment in existing lists and adding new sectors and sub-sectors.<sup>4</sup>

The GATS Mode IV covers two main categories of natural persons: first, intra-corporate transferees regarded as essential personnel, such as management, professional and skilled

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<sup>1</sup> GATS Article 1.2(d).

<sup>2</sup> GATS Mode IV 'How Trade in Services Can Help Developing Countries' available at [http://www.migrationdrc.org/publications/briefing\\_papers/BP4.pdf](http://www.migrationdrc.org/publications/briefing_papers/BP4.pdf) (accessed 29 June 2015).

<sup>3</sup> Paula L & Pedro M 'Post-2015: Can we talk about migration' available at <http://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/8233.pdf> (accessed 25 September 2015).

<sup>4</sup> GATS Article XIX.

technical staff linked to commercial presence in the host country. Then secondly, business visitors with a short-term presence, but generally not employed in the host country.<sup>5</sup>

The challenges surrounding the liberalisation of the GATS Mode IV (movement of natural persons) in South Africa will be explored in this chapter. This will be structured in the following three main ways: first by providing the definition and basic information on how the WTO Members including South Africa have generally responded to the need for liberalisation of temporary movement of service providers. In which will look at the limitations on the scope and definition of GATS Mode IV, the categorisation of movement under Mode IV liberalisation for low and semi-skilled workers and the implications of temporary movement of labour in home and host countries.

Secondly, give a general overview of obstacles on the movement of natural persons as service providers. In which, it will look at the current Mode IV commitments, limitations on the current Mode IV commitments, horizontal sectoral commitments, structural limitation with Mode IV commitments and the restrictions on the temporary movement of natural persons. Thirdly, evaluate particularly the progress made by South Africa in facilitating trade in services through the liberalisation of movement of natural persons as service providers. In which, it will look at the South Africa's commitments and GATS Mode IV, South Africa's Mode IV commitments, South Africa's Mode IV liberalisation, the factors limiting the implementation of Mode IV in South Africa, the possibility of increased illegal migrations, and some measures to enhance the temporary movement of natural persons.

### **3.2 Definition and Scope of Mode IV**

Natural persons are defined as persons who are different to legal entities such as companies and organisations. A natural person of a Member is defined in Article XXVIII (*k*) of the GATS as a national of that Member or an individual who has a permanent right of residence in that Member.<sup>6</sup> The presence of natural persons has been identified as the fourth mode. In which services are provided by a service supplier of one Member, through presence of natural

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<sup>5</sup> ACCI 'Advancing the Liberalisation of the Trade in Services: Enhancing GATS Mode IV the Movement of Natural Persons' (2002) The Australian Chamber of Commerce and Industry available at [http://tradeinservices.mofcom.gov.cn/upload/2008/08/18/1219021812000\\_175622.pdf](http://tradeinservices.mofcom.gov.cn/upload/2008/08/18/1219021812000_175622.pdf) (accessed 29 June 2015).

<sup>6</sup> A natural person can be presented as opposed to a juridical person, GATS refers to any legal entity or corporation that is engaged in substantive business operations.

persons of a Member in the territory of any other Member and is referred to as Mode IV of the GATS.<sup>7</sup>

The essential characteristic of Mode IV is that it only covers the entry and temporary stay of natural persons for the purpose of providing a service. Thus, GATS Mode IV covers only peoples moving temporary, although there is no definition of temporary. Mode IV is unique and different from other channels because it is the only one that directly regulates people. In addition, it is the only one that is parallel to an existing structure outside the GATS, namely the regulation on immigration.<sup>8</sup>

The length of stay authorised by the GATS Mode IV is identified by the offers and an agreement made in the countries negotiating positions and varies from a few months to a few years renewable depending on the type of work and general skill level. Business travellers can usually stay up to three months, while intra-corporate transfers are usually for two to five years. It can cover the self-employed moving to offer a service or those employed by others on whose behalf they travel to offer a service. Mode IV does not cover people seeking access to a labour market in general but they must have a specific sectoral role or those looking for citizenship, asylum or permanent residence.<sup>9</sup>

There is no specific definition of the types of movements that Mode IV may apply to. It covers all international temporary movement to provide services, whether they are between developing to developed countries, developed to developing including highly skilled, less skilled or unskilled. Mode IV does not cover all aspects of temporary mobility, but the boundaries are sometimes vague.<sup>10</sup>

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<sup>7</sup> Rajan R & Sen R 'Liberalisation of Market Access in GATS Mode IV and its Importance for Developing Countries' (2005) available at [http://ramkishenrajan.gmu.edu/pdfs/publications/Published\\_Academic\\_Papers/2005](http://ramkishenrajan.gmu.edu/pdfs/publications/Published_Academic_Papers/2005) (accessed 22 June 2015).

<sup>8</sup> Ostrovsky A 'Liberalisation of the Temporary movement of Natural Persons and the Gulf between Unskilled and Skilled Service Suppliers; Suggestions for further Liberalisation of GATS Mode IV' (2006) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=59398](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=59398) (accessed 29 June 2015).

<sup>9</sup> UN 'Background Note on GATS Mode IV World Trade Organisation Meeting of the United Nations Technical Subgroup on Movement of Persons Mode IV' (2006) New York available at <http://unstats.un.org/UNSD/tradeserv/TSG3-Feb06/tsg0602-16.pdf> (accessed 29 June 2015).

<sup>10</sup> Edna KM Liberalisation of Trade in Services: Enhancing the Temporary Movement of Natural Persons (Mode IV), A Least Developed Countries' Perspective (unpublished LLM thesis, University of the Western Cape, 2009) 41.

The definition of a service makes it difficult to know, for example, if a temporary agricultural worker provides agricultural services (covered) or seeking temporary employment in agriculture (not covered) by the GATS Mode IV. Similar interpretation is necessary for companies that produce goods for their own account or as a customer of another company. There is a list of 'sectoral classification' supplied by the WTO, but is itself subject to interpretation. The above definition limits the scope of Mode IV by limiting its coverage only to the temporary movement of natural persons.<sup>11</sup>

However, Mode IV offers a degree of transparency and is superior to the previous situation, which was no rule.<sup>12</sup> In addition, the scope of the GATS Mode IV does not exclude the skill level. Consequently, low-skilled service providers, such as construction workers, and domestic, semi-skilled service providers, such as, repairers and technicians, skilled professional service providers such as doctors and engineers, and manufacturing services. In addition, from agricultural activities such as, distribution, transportation, and technical are all covered by the GATS Mode IV.<sup>13</sup>

### **3.2.1 Limitations on the Scope and Definition of General Agreement on Trade in Services Mode IV.**

There are limits to how Mode IV is defined in the GATS and some ambiguities regarding the scope and definition of this mode. The first is that the distinction between temporary foreign workers whose services are contracted by a firm or company of host countries and temporary foreign workers who are employees of the company in the host country may not be applicable.<sup>14</sup> The second source of ambiguity is that it is difficult to define the supply of a service because Mode IV of the GATS covers only the services and service suppliers.<sup>15</sup> It

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<sup>11</sup> GATS Mode IV 'How Trade in Services Can Help Developing Countries' available at [http://www.migrationdrc.org/publications/briefing\\_papers/BP4.pdf](http://www.migrationdrc.org/publications/briefing_papers/BP4.pdf) (accessed 25 June 2015).

<sup>12</sup> ACCI 'Advancing the Liberalisation of the Trade in Services: Enhancing GATS Mode IV the Movement of Natural Persons' (2002) The Australian Chamber of Commerce and Industry available at [http://tradeinservices.mofcom.gov.cn/upload/2008/08/18/1219021812000\\_175622.pdf](http://tradeinservices.mofcom.gov.cn/upload/2008/08/18/1219021812000_175622.pdf) (accessed 29 June 2015).

<sup>13</sup> Chanda R 'Movement and Presence of Natural Persons and Developing Countries: Issues and Proposals For The GATS Negotiations' (2004) Working Papers 19 South Centres at 15.

<sup>14</sup> Edna KM Liberalisation of Trade in Services: Enhancing the Temporary Movement of Natural Persons (Mode IV), A Least Developed Countries' Perspective (unpublished LLM thesis, University of the Western Cape, 2009) 41.

<sup>15</sup> Edna KM Liberalisation of Trade in Services: Enhancing the Temporary Movement of Natural Persons (Mode IV), A Least Developed Countries' Perspective (unpublished LLM thesis, University of the Western Cape, 2009) 42.

turns difficult to say what constitutes the provision of a service. Thus, there is a lack of clarity about who is covered under Mode IV from a sectoral perspective.

Progress in the GATS negotiations is made by requests and offers in response to these requests. This is made in existing commercial commitments for a minimum treatment of WTO Members, but they are also open to suppliers from all WTO Members under the terms of the MFN. Accordingly, countries can negotiate direct offers to them and without making demands themselves but offers are made obligatory on a horizontal basis in all sectors.<sup>16</sup>

The commitments are not made public and it is therefore not easy to assess progress, but most commentators believe that the initial offerings are limited. Few countries have made offers on Mode IV. Promotional offers are limited to upper and competent intragroup detachment.<sup>17</sup>

Moreover, very few targeted applications to the movement of low-skilled workers and economic needs tests have been specified; certain quantitative limits on the foreign jobs are in place, some other requirements such as the training of local workers, there are even geographical restrictions between companies and they do not define the qualification levels required.

### **3.2.2 Categorisation of Movement under Mode IV**

Internal measures affecting the temporary movement of natural persons can be divided into three main categories that will retain the attention of this mini-thesis.

First, the laws on overall movement of the recipient country Secondly, regulation of the labour market for the issuance of work permits; and thirdly, the regulations regarding the ability of foreigners to work in individual or specific areas.<sup>18</sup>

The first category of general movement laws of the recipient countries are clearly outside of the coverage of the GATS, including Article 2 of the Annex on Movement of Natural Persons which expressly excludes permanent movement, including the residence and citizenship. The

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<sup>16</sup> Chanda R 'Movement and Presence of Natural Persons and Developing Countries: Issues and Proposals For The GATS Negotiations' (2004) Working Papers 19 South Centres at 15. (hereafter Chanda R (2004)).

<sup>17</sup> Chanda R (2004) 16.

<sup>18</sup> ACCI 'Advancing the Liberalisation of the Trade in Services: Enhancing GATS Mode IV the Movement of Natural Persons' (2002) The Australian Chamber of Commerce and Industry available at [http://tradeinservices.mofcom.gov.cn/upload/2008/08/18/1219021812000\\_175622.pdf](http://tradeinservices.mofcom.gov.cn/upload/2008/08/18/1219021812000_175622.pdf) (accessed 29 June 2015).

second and third categories of domestic labour and other regulations covering entry and temporary work arrangements are fixed by foreign general obligations and by specific commitments in scheduled sectors under GATS Article XVI, XVII and XVIII (4).<sup>19</sup> What follows is the liberalisation of Mode IV for the low and semi-skilled workers.

### **3.2.3 Mode IV Liberalisation for Low and Semi-Skilled Workers**

The demand for temporary foreign workers has increased in developed countries. Foreign workers, including skilled, unskilled and seasonal, are allowed to enter and stay under temporary and seasonal work permits for periods ranging from three months to four years.<sup>20</sup> Developed countries are facing changing demographic and economic trends that project a strong need to increase the low participation of qualified workers. However, reducing labour supply is the main factor contributing to the shortage of unskilled workers in most major developed countries. In the United States, Canada and Australia there are special programmes for temporary workers to meet labour market needs.<sup>21</sup>

Demographic and economic trends contributing to the decline in labour supply include: the low birth rates in developed countries, the developed countries face an aging population. That's means; population with a high percentage of elderly people which reduces the number of people working or labour supply. The early retirement policies that remove the older labour, pool the young men to penetrate the labour market at a later stage. Thus, reducing the amount of new people into the labour market at a given time, this is mainly due to the fact that young people spend long periods in higher education before entering the labour market.<sup>22</sup>

Consequently, the need for low and semi-skilled workers is increasing in the developed world due to increase technological advances in services based on knowledge and

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<sup>19</sup> ACCI 'Advancing the Liberalisation of the Trade in Services: Enhancing GATS Mode IV the Movement of Natural Persons' (2002) The Australian Chamber of Commerce and Industry available at [http://tradeinservices.mofcom.gov.cn/upload/2008/08/18/1219021812000\\_175622.pdf](http://tradeinservices.mofcom.gov.cn/upload/2008/08/18/1219021812000_175622.pdf) (accessed 29 June 2015).

<sup>20</sup> Chanda R Movement and Presence of Natural Persons and Developing Countries: Issues and Proposals For The GATS Negotiations (2004) Working Papers 19 South Centre at 11. (hereafter Chanda R (2004)).

<sup>21</sup> Chanda R (2004) 13.

<sup>22</sup> UN 'Background Note on GATS Mode IV World Trade Organisation Meeting of the United Nations Technical Subgroup on Movement of Persons Mode IV' (2006) New York available at <http://unstats.un.org/UNSD/tradeserv/TSG3-Feb06/tsg0602-16.pdf> (accessed 29 June 2015).

infrastructure improvements.<sup>23</sup> South Africa is ranked to attract foreign expertise and skills for export to other countries to seize the opportunities offered by the global economy for skilled migration. Thus, some demographers and economists see Mode IV as a means of increasing need to fill this gap in the sector where there is little alternative to the use of people rather than technology. The demand for low and semi-skilled workers such as nurses, midwives, cleaners, gardeners, taxi drivers, farm workers, domestic services such as cleaning and childcare increases to serve the aging population, early retirement policies and low birth rate.<sup>24</sup>

Therefore, foreign workers are needed to prevent decline in the labour supply to the developed countries that are facing a decline in the supply of low and semi-skilled workers. They will not be able to reverse this trend projected without reversing their aging populations. Reversing these current trends can be very difficult, impossible or not feasible.<sup>25</sup>

The increase of foreign workers in the South African population seems a more realistic option than rising rates of wealth. According to labour policies in developed countries, the entry provisions by low or semi-skilled workers mainly through bilateral agreements on employment programs usually are concluded between representatives of governments, employers and industry.<sup>26</sup> The bilateral agreements offer a higher level of market access commitment. These agreements generally tend to cover highly skilled labour and it is only in the context of typical seasonal labour market arrangements as the least skilled occupational groups and non-professionals tend to be covered.<sup>27</sup> The developed countries want to maintain flexibility and discretion in granting market access to lower and semi-skilled service providers. The implementation of conditions by developed countries which can be done more easily bilaterally than multilateral level. The movement of the highest skilled workers will explain how the developed countries such as Australia and the United States are increasing the demand for higher skills in the lines below.

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<sup>23</sup> Gent S & Skeldon R 'Globalisation & Poverty: GATS Mode IV How Trade in Services Can Help Developing Countries' (2005) briefing No. 4, Development Research Centre on Migration 2.

<sup>24</sup> Gent S & Skeldon R 'Globalisation & Poverty: GATS Mode IV How Trade in Services Can Help Developing Countries' (2005) briefing No. 4, Development Research Centre on Migration 2.

<sup>25</sup> McDonald P & Kippen R 'Labour Supply Prospects in 16 Developed Countries, 2000–2050' (2001) Population and Development Review at 5.

<sup>26</sup> Chanda R 'Movement and Presence of Natural Persons and Developing Countries: Issues and Proposals for the GATS Negotiations' (2004) Working Papers 19 South Centre at 8.

<sup>27</sup> Edna KM Liberalisation of Trade in Services: Enhancing the Temporary Movement of Natural Persons (Mode IV), A Least Developed Countries' Perspective (unpublished LLM thesis, University of the Western Cape, 2009) 55.

### 3.2.4 Movement of the Highest Skilled Workers

The increase of entries in Australia in the category of temporary businesses falls under the two highest groups of skills of managers and administrators or professionals. In addition, Australia's visa regimes respond to those who have recognised expertise in specific areas, or those associated with the investment.<sup>28</sup> The temporary business visas residences have been issued in large numbers to meet the shortage of Information Technology (IT) professionals. There was priority treatment for nurses, another key area in high demand. These are signs of a growing demand for skilled movement, especially in the knowledge economies of the world which offer higher incentives for skilled migrants.<sup>29</sup>

The United States indicate the relative importance of immigration even higher skilled workers in the global temporary admissions in the United States.<sup>30</sup> The temporary business visitors make up the largest class of admissions followed by specialised occupations across industries as wide ranging as IT, engineering, consulting, accounting, and architecture. In addition to partiality towards professional and managerial groups, the United States also has special visa regimes to address shortages in skilled workers such as nursing.<sup>31</sup> The flows of workers can be increased by the implication of developed and developing countries which follows next.

### 3.2.5 Implications of Temporary Movement of Labour on Home and Host Countries

The impact of the temporary migration of labour on the home and host countries is difficult to measure because the impact is specific to the type of work involved, receiving or sending the labour, the regulations in force and many other factors that can vary across countries. It also depends on whether it complements or facilitates trade in other modes such as commercial presence, and if it can be replaced by other modes of supply.

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<sup>28</sup> Chanda R 'Movement and Presence of Natural Persons and Developing Countries: Issues and Proposals for the GATS Negotiations' (2004) Working Papers 19 South Centre at 8. (hereafter Chanda R (2004)).

<sup>29</sup> Edna KM Liberalisation of Trade in Services: Enhancing the Temporary Movement of Natural Persons (Mode IV), A Least Developed Countries' Perspective (unpublished LLM thesis, University of the Western Cape, 2009) 67.

<sup>30</sup> Chanda R (2004) 14.

<sup>31</sup> Chanda R (2004) 15.

Developed and developing countries have much to gain from the temporary movement of labour which increases flows of workers.<sup>32</sup> The developed countries benefit because they obtain workers whose skills are in short supply as the movement of natural persons allows an influx of young workers contributing to pension systems that would otherwise be unsustainable.<sup>33</sup>

### **3.2.5.1 Home Countries**

The temporary movement of natural persons is seen as a benefit for developing countries allowing them to exploit a relative abundance of low and semi-skilled workers. This brings economic benefits in terms of direct payments for workers. In addition, having temporary workers abroad can enhance the productivity, facilitate market access, transfer of ideas, technology and networking. The economic benefits of Mode IV should flow from the temporary nature of movement and extent that liberalisation could provide.<sup>34</sup>

The contribution of transfer of funds to development and poverty reduction has also been well documented by temporary workers, who also tend to send the larger part of their income home. The transfer of funds not only improves the ability of a country to finance development, but also for the livelihoods of recipients, allowing them to engage in economic activity.<sup>35</sup> The fact that developed countries prefer work quality, there is the possibility of a brain drain and loss of human capital, with a negative impact on developing countries, particularly affecting the service sectors such as education, medical and health care.

### **3.2.5.2 Host Countries**

From the perspective of the host countries, the temporary movement of workers including service providers can help alleviate the problems caused by specific demographic challenges, such as the aging population phenomenon. The temporary movement of young foreign workers to developed countries can rebalance the share of the workers. Finally, the

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<sup>32</sup> Chanda R 'Movement and Presence of Natural Persons and Developing Countries: Issues and Proposals for the GATS Negotiations' (2004) Working Papers 19 South Centre at 14. (hereafter Chanda R (2004)).

<sup>33</sup> Sherry S & Gary H 'Labour Mobility' available at <http://siteresources.worldbank.org/INTRANETTRADE/Resources/C13.pdf> (accessed 04 July 2015).

<sup>34</sup> Gent S & Skeldon R 'Globalisation and Poverty: GATS Mode IV How Trade in Services Can Help Developing Countries' (2005) briefing No. 4, Development Research Centre on Migration November 2005 at 2.

<sup>35</sup> Chanda R (2004) 14.

temporary movement of labour can represent an alternative to illegal immigration. However, the liberalisation of the GATS Mode IV can reduce the size of the illegal labour market.<sup>36</sup>

The impact of foreign labour for host countries depends on the impact of productivity, costs, production intensity factor and the extent of complementarities between foreign and local workers. The gains are likely due to the transfer of skills and knowledge contained in the foreign workers and lower labour costs.<sup>37</sup>

However, the balance of costs and benefits also depends on the regulatory framework of the host country. The regulations in host countries are essential to determine the scope and implications of trade in services through the temporary movement of workers.<sup>38</sup> Thus, foreign suppliers may be forced to comply with local regulations on wages, prices and taxes that could erode their economic advantage and reduce the scope for trade or transfer of skills and knowledge.

### **3.3 Obstacles to Mode IV Commitments**

The liberalisation of the movement of service providers under Mode IV has known little progress. Even in the Uruguay Round the result was that countries tend to be conservative for the liberalisation on trade in services.

#### **3.3.1 Commitments on the Current Mode IV**

The number of workers, occupations and sectors committed under Mode IV is left to each country's discretion and some countries have complained that the current commitments are limited to highly skilled occupations, such as doctors, lawyers and business leaders. In

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<sup>36</sup> WTO 'World Trade Report 2004 Exploring the Linkage between the Domestic Policy Environment and International Trade' available at [https://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/world\\_trade\\_report04\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report04_e.pdf) (accessed 28 June 2015).

<sup>37</sup> Edna KM Liberalisation of Trade in Services: Enhancing the Temporary Movement of Natural Persons (Mode IV), A Least Developed Countries' Perspective (unpublished LLM thesis, University of the Western Cape, 2009) 71.

<sup>38</sup> Edna KM Liberalisation of Trade in Services: Enhancing the Temporary Movement of Natural Persons (Mode IV), A Least Developed Countries' Perspective (unpublished LLM thesis, University of the Western Cape, 2009) 71.

addition, Mode IV currently grants to the rich countries an advantage because they have many skilled persons and are favoured by these systems.<sup>39</sup>

Furthermore, the GATS Members have made very limited commitments in this Mode IV compared to other modes of supply. The horizontal commitments and sectoral, those that have been filed in the case of movement of natural persons were very limited. These commitments are different from all other modes from the point of view of structure and substance, in fact, no Member has provided for full market access in Mode IV in all sectors.<sup>40</sup>

There are three main problems with the nature of the liberalisation that has taken place in the Mode IV. First, the limited sectoral coverage of commitments, such commitments are subject to restrictions on market access and national treatment. In addition, high-income countries provide 50 percent of the service sectors while developing countries have provided only 11 per cent of all service sectors.<sup>41</sup>

Secondly, the commitments filed in Mode IV, in most cases, do not provide unconditional liberalisation. An analysis of the profile of horizontal and sectoral commitments in Mode IV indicates that the countries are not taken full commitments in this Mode IV. Market access and national treatment are subject to the fulfilment of conditions and qualifications. However, it generally involves additional functional or hierarchical criteria, linked to other modes of supply of length of stay, the labour market and economic needs tests.

In addition, the conditions are not clearly defined in most schedules according to their criteria and procedures, creating a degree of non-transparency and subjectivity in their application. Thus, they can potentially be interpreted as covering low and semi-skilled service providers.

Thirdly, in regards with the nature of the Mode IV commitments themselves, market access and national treatment obligations in Mode IV are largely irrelevant in the sectoral schedules and refer to the horizontal commitments. Which are linked to a small subset usually the higher level of staff and services categories that are related to commercial presence abroad and subject to limitations.

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<sup>39</sup> Edna KM Liberalisation of Trade in Services: Enhancing the Temporary Movement of Natural Persons (Mode IV), A Least Developed Countries' Perspective (unpublished LLM thesis, University of the Western Cape, 2009) 46.

<sup>40</sup> Chanda R 'GATS and its implications for developing countries: Key issues and concerns' (2002) available at <http://www.un.org/esa/esa02dp25.pdf> (accessed 07 July 2015). (hereafter Chanda R (2002)).

<sup>41</sup> Chanda R (2002).

### 3.3.2 Limitations on the Current Mode IV Commitments

According to existing commitments in Mode IV, the most general market access and national treatment limitations concern the service provider. Therefore restrictions on the length of stay, eligibility conditions and additional requirements must be met.<sup>42</sup> Thus, many countries have included in their lists most problematic limitations, such as immigration laws and regulations, recognition related regulations, policies favouring domestic service providers, and restrictions on investment.<sup>43</sup>

#### 3.3.2.1 Horizontal Sectoral Commitments

The commitments in Mode IV are horizontal rather than sectoral, meaning that commitments and attached conditions apply to all service sectors. In addition, most of these horizontal commitments are 'unbound', except for certain categories of service providers, generally based on skill level, type of occupation and purpose of the movement. The sectoral commitments are unbound for Mode IV and refer to horizontal commitments. This implies that the needs and sectoral interests are not addressed by the commitments of Mode IV.

The much more restrictive nature of the commitments in this mode reflects the sensitivity of this mode of supply. It reflects a concern among developed countries that increased market access for skilled and semi-skilled workers would lead to an influx of immigrants in the developed country markets, given the comparative advantage of developing countries in the export of labour intensive services.<sup>44</sup>

Besides the existing limitations on the commitments, there are also MFN exemptions by countries in selected sectors. Although these exemptions are not related to Mode IV, a number of these exemptions are relevant to Mode IV such as preferential agreements, since by their nature they tend to have a greater impact on the movement of natural persons and commercial presence.<sup>45</sup>

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<sup>42</sup>Edna KM Liberalisation of Trade in Services: Enhancing the Temporary Movement of Natural Persons (Mode IV), A Least Developed Countries' Perspective (unpublished LLM thesis, University of the Western Cape, 2009) 43.

<sup>43</sup> Chanda R 'Movement of Natural Persons and Trade in Services: Liberalising Temporary Movement of Labour under the GATS' (1999) working paper No.51 ICRIER at 31. (hereafter Chanda R (1999)).

<sup>44</sup> Chanda R (1999) 31.

<sup>45</sup> Chanda R (1999) 20.

### 3.3.2.2 Structural Limitations with Mode IV Commitments

In the current context of the commitments, there is no separation of temporary and permanent mobility resulting from a fundamental flaw of the structure. For the reason that, the temporary movement of service providers usually comes as part of legislation on immigration and the labour market. This affects the permanent movement of international trade policy limiting the scope of the GATS Mode IV.<sup>46</sup>

The current structure of Mode IV commitments also suffers from a lack of clarity and consistency in the definition and coverage of different categories of service persons, and therefore is subject to arbitrary interpretation of movement. The lack of specificity in the definitions, the conditions used, adapted to the administrative discretion and discriminatory practices, reduce predictability.<sup>47</sup>

Another important limitation of the existing Mode IV commitments is that they are very restrictive. Even when sectors have been programmed; liberalisation in Mode IV is highly conditional.

### 3.3.2.3 Restrictions on the Temporary Movement of Natural Persons

Some of the main obstacles to the temporary movement of natural persons will be indicated in the lines below:

- a. Visa formalities, fees, prohibitions and quotas: The high cost of visas, quotas on foreign workers to use the available capacity.
- b. Economic Needs Tests (ENTs): are not defined in the GATS. ENTs are tests that access to market conditions on compliance with certain economic criteria; Labour market tests are the most common type of ENTs. While it is essential that national interests are given priority and protected, there are hidden restrictions in ENTs. There is no harmonised definition and methodology for conducting ENTs. Thus, this could be quite serious, non-transparent and

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<sup>46</sup> Dipankar D 'Movement of Natural Persons1 (Mode-4) Under GATS: Advantage Developing Countries' available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=949435](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=949435) (accessed 08 July 2015).

<sup>47</sup> Chanda R 'Movement of Natural Persons and the GATS' (2001) *World Economy*, Vol. 24 (5) at 643.

ideally restrictive, ENTs are the main barriers to entry that prevent the free movement of workers.<sup>48</sup>

c. Discretionary procedures and bureaucracy: Non-transparent bureaucratic tendencies end up fuelling corruption and the hidden costs for potential investors and employees that may restrict the movement of workers and potential investors.

d. The conditions of residency and nationality: For an employee or potential investor all countries require to have a valid work permit and / or a residence permit. The formalities, costs and bureaucracy associated with obtaining this documentation restrict movement for investors or employees.<sup>49</sup>

As for the above part was focused on the general main information regulated to the treatment of the movement of natural persons supplying services under a multilateral trade agreements, the following part particularly provides the South African's provisions on the GATS Mode IV.

### **3.4 South Africa's Commitments and General agreement on Trade in Services Mode IV**

In the field of services, South Africa has taken relatively extensive multilateral commitments on services in the mid-1990s in the Uruguay Round of trade negotiations, with coverage in 92 services sub-sectors out of a possible 160. South Africa also participated in the pursuit of multilateral negotiations on services in the 2000s. To this extent, South Africa took legally binding commitments in 1995 to liberalise services within the GATS of the WTO.<sup>50</sup>

These commitments are contained in a list of specific commitments. The list of specific commitments of each WTO Member is under the GATS and is part of it. In interpreting the provisions of GATS on public international law as stated in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, the interpretation of a concession in a Schedule to the GATS is no different than any other treaty text interpretation. Once South Africa has taken

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<sup>48</sup> Edna KM Liberalisation of Trade in Services: Enhancing the Temporary Movement of Natural Persons (Mode IV), A Least Developed Countries' Perspective (unpublished LLM thesis, University of the Western Cape, 2009) 43.

<sup>49</sup> GATS Mode IV 'How Trade in Services Can Help Developing Countries' available at [http://www.migrationdrc.org/publications/briefing\\_papers/BP4.pdf](http://www.migrationdrc.org/publications/briefing_papers/BP4.pdf) (accessed 25 June 2015).

<sup>50</sup> Cronjé JB 'A GATS Perspective on South Africa's Employment Services Bill' available at <http://www.tralac.org/discussions/article/5349-a-gats-perspective-on-south-africa-s-employment-services-bill.html> (accessed 22 June 2015).

liberalisation commitments in a specific services sector, it is under the obligation not to maintain or introduce discriminatory measures, unless that it was included in the Schedule of Specific Commitments of the Member State.<sup>51</sup>

South Africa as WTO Member state must define the negotiated commitments it undertakes in a list of specific commitments annexed to the GATS as an integral part of it. Non-compliance with any provision of the GATS or the specific commitment allows other WTO Member state to initiate dispute settlement proceedings under its enforcement regime.<sup>52</sup>

In terms of South Africa's schedule of specific commitments, horizontal commitments have been made in Mode IV on temporary movement of foreign services providers. These commitments apply horizontally to all sectors and sub-sectors in which commitments were undertaken. The commitments South Africa made on the temporary movement of natural persons supplying services to market access and national treatment for the following categories.<sup>53</sup> That is to say sales services, intra-corporate transferees, including executives, managers, specialists and professionals and staff engaged in the establishment of commercial presence. According to the country's GATS schedule, these persons have a temporary presence for a period of three years, unless otherwise specified, without the requirement of an economic needs test.<sup>54</sup>

In terms of Article XVI (2) (d) ENTs should not be applied to the categories of persons covered by Mode IV commitments of a country. The most common condition for determining market access in terms of labour market testing is the availability of similar workers in the host country or if a foreign worker would compete with or displace a domestic worker.<sup>55</sup> In many cases, the conditions of ENTs are not clearly defined, leaving wide discretion in their application and reduce the value of predictability and commercial

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<sup>51</sup> Cronje JB 'The Admission of Foreign Legal Practitioners in South Africa: A GATS Perspective' available at <http://www.tralac.org/files/2013/10/S13WP112013-Cronje-Admission-of-foreign-legal-practitioners-in-SA-20131002-fin.pdf> (accessed 08 July 2015). (hereafter Cronje JB 'The Admission of Foreign Legal Practitioners in South Africa: A GATS Perspective').

<sup>52</sup> Cronje JB 'The Admission of Foreign Legal Practitioners in South Africa: A GATS Perspective'.

<sup>53</sup> Cronje JB 'The Admission of Foreign Legal Practitioners in South Africa: A GATS Perspective'.

<sup>54</sup> Cronje JB 'The Admission of Foreign Legal Practitioners in South Africa: A GATS Perspective'.

<sup>55</sup> Cronje JB 'The Admission of Foreign Legal Practitioners in South Africa: A GATS Perspective'.

commitments.<sup>56</sup> South African's Mode IV commitments were envisaged to be undertaken in stages as discussed in the following paragraph.

### **3.4.1 South African's Mode IV Commitments**

The relevant commitments grant market access and national treatment for the following categories of persons who are engaged in the provision of services without the requirement of ENTs, for the following natural persons supplying services:

a. Intra-Corporate: Natural persons who have been used by a person who provides services in South Africa through a branch, subsidiary or affiliate established in South Africa and have been the prior employment of the corporation outside South Africa. Most schedules limit their commitments of leaders and other experts with specific knowledge which is essential for the respective service. Some schedules also contain information on the minimum wage or qualification. The stay of these persons varies from two to a maximum of five years.<sup>57</sup>

b. Executives: Natural persons within the organisation who run mainly on the organisation of the management or to set goals and policies of the organisation or a major component or function of the organisation. These persons exercise wide latitude in decision making and receive only general supervision, the board of directors or shareholders of the company. These persons are usually leaders of the respective companies, although there is no common definition concerning the content of the title 'Executive', which can range from three months to two years. Some countries require additional criteria such as the availability of specific investment funds or a specific period during which the person has been employed by the respective firm.<sup>58</sup>

c. Managers: Natural persons within an organisation who primarily direct the organisation or a department or section of the organisation, supervise and control the work of other, have the

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<sup>56</sup> Cronje JB 'The Admission of Foreign Legal Practitioners in South Africa: A GATS Perspective' available at <http://www.tralac.org/files/2013/10/S13WP112013-Cronje-Admission-of-foreign-legal-practitioners-in-SA-20131002-fin.pdf> (accessed 08 July 2015). (hereafter Cronje JB 'The Admission of Foreign Legal Practitioners in South Africa: A GATS Perspective').

<sup>57</sup> Cronje JB 'The Admission of Foreign Legal Practitioners in South Africa: A GATS Perspective'.

<sup>58</sup> Cronje JB 'The Admission of Foreign Legal Practitioners in South Africa: A GATS Perspective'.

authority to hire and fire or recommend hiring, firing or other personnel actions and exercise discretionary authority over day to day operations to a higher level.<sup>59</sup>

d. Specialists: Natural persons within an organisation who possess knowledge at an advanced level of continued expertise and who possess proprietary knowledge of the organisation's product, service, research equipment, techniques or management. Thus, these commitments do not provide free access to national labour markets, but only provide for the possible authorisation for national companies to temporarily employ foreign specialists.<sup>60</sup>

e. Professionals: Natural persons who are engaged under a service contract negotiated by a juridical person of another Member country to the activity at a professional level. These persons possess the necessary academic credentials and professional qualifications, which have been duly recognised by the professional association in South Africa. This category of people is only a limited range of sectors and is limited by several additional requirements. These include specific periods of previous employment, professional qualifications and experience.<sup>61</sup>

However, these categories are not exhaustive. For example, India has argued for adding another category, individual professionals, to the existing categories. The country has then also called for further expansion in the scope of professional categories to include middle and lower level professionals.<sup>62</sup>

The Centre for Development and Enterprise (CDE) argues<sup>63</sup> that South Africa has two closely related shortages. One is a lack of productive skills and practical skills, and the other is a shortage of people who are employable, self employable or easily recyclable by

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<sup>59</sup> Cronje JB 'The Admission of Foreign Legal Practitioners in South Africa: A GATS Perspective' available at <http://www.tralac.org/files/2013/10/S13WP112013-Cronje-Admission-of-foreign-legal-practitioners-in-SA-20131002-fin.pdf> (accessed 08 July 2015). (hereafter Cronje JB 'The Admission of Foreign Legal Practitioners in South Africa: A GATS Perspective').

<sup>60</sup> Cronje JB 'The Admission of Foreign Legal Practitioners in South Africa: A GATS Perspective'.

<sup>61</sup> Cronje JB 'The Admission of Foreign Legal Practitioners in South Africa: A GATS Perspective'.

<sup>62</sup> Dipankar D 'Movement of Natural Persons I (Mode-4) Under GATS: Advantage Developing Countries' available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=949435](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=949435) (accessed 30 June 2015).

<sup>63</sup> CDE 'South Africa's New Immigration Law: A salvageable instrument for economic growth' (2002) The Centre for Development and Enterprise Executive Summary, Parktown, Johannesburg available at: <http://www.cde.org.za/south-africa-s-new-immigration-law-a-salvageable-instrument-for-economic-growth/> (accessed 13 July 2015).

employers in a modern style, knowledge and technology.<sup>64</sup> The CDE propose solutions to this problem as South African education and training systems are dramatic. They argue that, while vitally necessary, courageous reforms needed to equip a large number of South Africans with the skills the economy needs will take years to implement. The harsh reality is that the only short-term policy option is to resort to migration policy based on the market.<sup>65</sup>

However, the legal skilled movement cannot be viewed with the same objective as that of unskilled illegal movement of natural persons and illegal movement of natural persons is a threat to the South African security.<sup>66</sup>

Therefore, the movement of skilled workers is rising globally. However, it is important to note that this movement is more a temporary nature, thus alleviating some of the concerns of policy makers in countries of origin who constantly feared that the ongoing movement of skilled labour has harmful effects on countries of origin. The means of access in temporary movement indicate that developing countries such as South Africa is now able to manage this movement of skills to its own advantage, to ensure that governments are now better placed to monitor their skilled labour from their departure abroad.

### 3.4.2 South Africa Mode IV Liberalisation

It is imperative to the South African government to implement with more knowledge the liberalisation of Mode IV. Therefore, considering that the skilled workers for human resources in South Africa develop simultaneously with economic growth to avoid regression in economic growth.<sup>67</sup> With electricity demand now exceeding supply in South Africa, one of the main challenges identified was that of a lack of skills, a clear sign that the production of skills in South Africa did not match its growing economy.<sup>68</sup>

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<sup>64</sup> CDE 'South Africa's New Immigration Law: A salvageable instrument for economic growth' (2002) The Centre for Development and Enterprise Executive Summary, Parktown, Johannesburg available at: <http://www.cde.org.za/south-africa-s-new-immigration-law-a-salvageable-instrument-for-economic-growth/> (accessed 13 July 2015). (hereafter CDE 'South Africa's New Immigration Law: A salvageable instrument for economic growth').

<sup>65</sup> CDE 'South Africa's New Immigration Law: A salvageable instrument for economic growth'.

<sup>66</sup> CDE 'South Africa's New Immigration Law: A salvageable instrument for economic growth'.

<sup>67</sup> CDE 'South Africa's New Immigration Law: A salvageable instrument for economic growth'.

<sup>68</sup> Cronje JB 'The Admission of Foreign Legal Practitioners in South Africa: A GATS Perspective' available at <http://www.tralac.org/files/2013/10/S13WP112013-Cronje-Admission-of-foreign-legal-practitioners-in-SA-20131002-fin.pdf> (accessed 08 July 2015).

The proliferation of multinational companies in the global business affects countries that seek more foreign direct investment in the global community. The importance of the implementation of effective national laws on the movement of natural persons will increase companies' production.<sup>69</sup>

South African multinationals are now looking to compete globally and are more exposed to competition from the international community through the policy of open trade, which makes it imperative for South Africa to meet these issues as it engages with the continent and the world community.

Most countries treat the movement of natural persons as migration rather than a trade issue, complicating the negotiations of GATS Mode IV with considerations such as the movement of labour and national security, which mainly relate to permanent migration.

The multilateral framework of the GATS is more likely to produce unrealistic expectations for low and semi-skilled labour. The GATS negotiations eliminate the focal point not only for developed countries, but also for developing countries that is their skilled workers.<sup>70</sup> Thus, the non-inclusion of low and semi-skilled labour in the GATS Mode IV commitments does not mean that it is not a critical problem but rather that the regulation of low and semi-skilled labour is currently best regulated bilaterally where countries have flexibility. Trust must be built in regulating the movement of highly skilled workers on a temporary basis before moving to multilateral commitments focused on low and semi-qualified labour.<sup>71</sup>

Policy makers in South Africa in the ministries of trade, labour and home affairs must fulfil their respective mandates that the overwhelming majority of skilled South Africans have gone traditionally to the United States, the United Kingdom, Canada and Australia.<sup>72</sup> South Africans who left for these destinations were not service suppliers temporarily in another

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<sup>69</sup> Cronje JB 'The Admission of Foreign Legal Practitioners in South Africa: A GATS Perspective'.

<sup>70</sup> Cronje JB 'The Admission of Foreign Legal Practitioners in South Africa: A GATS Perspective' available at <http://www.tralac.org/files/2013/10/S13WP112013-Cronje-Admission-of-foreign-legal-practitioners-in-SA-20131002-fin.pdf> (accessed 08 July 2015). (hereafter Cronje JB 'The Admission of Foreign Legal Practitioners in South Africa: A GATS Perspective').

<sup>71</sup> Cronje JB 'The Admission of Foreign Legal Practitioners in South Africa: A GATS Perspective'.

<sup>72</sup> Cronje JB 'The Admission of Foreign Legal Practitioners in South Africa: A GATS Perspective'.

Member country of the WTO. Thus, raising questions of a brain drain is sometimes in an exaggerated way that negatively affects the country.<sup>73</sup>

Although the potential make is strongly in favour of South Africa, it must use its skilled labour to meet its development objectives by regulating the movement of natural persons involved in the supply of the services.

The movement of persons involved in the supply of services is affected by political considerations notwithstanding a number of positive factors in favour of skilled labour liberalisation. The national regulations have not been reformed to reflect the GATS commitments.<sup>74</sup> For example, if the GATS focus on the temporary movement of service providers, some countries fear that this may facilitate permanent migration. These fears are often on credible evidence and research; such fears are misplaced and should not applied low and semi - skilled labour, rather than the highly skilled labour.<sup>75</sup> Notwithstanding the weak disappointing figures of Mode IV liberalisation, this sector offers the greatest potential for growth.

The increase in organised crime and international terrorism has compounded the sensitivities in the movement of natural persons, especially in developed countries.<sup>76</sup> It is not very probable for the GATS Mode IV liberalisation negotiations, even if it is a viable option in the migration process because it promotes circulation and temporary flows of people.<sup>77</sup>

For the reasons of these difficulties, bilateral and regional agreements liberalisation of the GATS Mode IV is increasingly seen as an alternative option. This is a valid point in that the lessons and experiences created from bilateral and regional agreements can be taken within the multilateral framework when countries are more comfortable with the regulation of bilateral and regional movement of highly skilled workers.<sup>78</sup>

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<sup>73</sup> Rooyen VJ *The New Great Trek; The Story of South Africa's White Exodus* (2000) Unisa Press Pretoria 12. (hereafter Rooyen VJ (2000)).

<sup>74</sup> Rooyen VJ (2000) 12.

<sup>75</sup> Pillay P 'The GATS: implications and possible ways forward for the SADC' (2003) paper presented at UNESCO Conference on Globalisation and Higher Education.

<sup>76</sup> Rooyen VJ *The New Great Trek; The Story of South Africa's White Exodus* (2000) Unisa Press Pretoria 12. (hereafter Rooyen VJ (2000)). Rooyen VJ *The New Great Trek; The Story of South Africa's White Exodus* (2000) Unisa Press Pretoria 12. (hereafter Rooyen VJ (2000)).

<sup>77</sup> Rooyen V J (2000) 14.

<sup>78</sup> Khumalo N 'Trade in Services: From Controlling to Managing the Movement of Persons in SADC' (2007) in Trade Policy Report No. 16 SAIJA Johannesburg 12.

### **3.4.3 The Factors Limiting the Implementation of the Temporary Movement of Natural Persons in South Africa**

The implementation of the commitment was seen to be a challenge by South Africa as it relates to all requisite reforms to policies, statutory rules and administrative practices. Through the harmonisation of laws that requires modification of the domestic laws, statutory instruments and administrative. Some bilateral arrangements between South Africa and its neighbour's countries allowing people to move freely into South Africa without visas and stay without time bounds.<sup>79</sup>

This arrangement provides for the expansion of the current visa exemption to be non-time bound compared to 30 days of stay to one year exemption from the requirements of a permit and a visitor exemption. South Africa and Lesotho citizens don't need to report in the direction of immigration when entering or leaving South Africa.

The recognition of academic qualification is not automatic. South African Qualification Association (SAQA) in Pretoria is the only verification office of foreign qualifications.

### **3.4.4 Motives behind Establishment of Barriers to the Movement of Natural Persons in South Africa**

South Africa adopting the GATS commitment approves the temporary movement of natural persons on the one hand, and continued the implementation of barriers to temporary movement of natural persons on the other hand; thus, these obstacles may be for following reasons: amongst other reason fear of rising unemployment and increase of illegal migrants.

#### **3.4.4.1 The Fear of Rising Unemployment**

The South African population is mainly composed of semi-skilled and unskilled workers. South Africa is struggling with high levels of unemployment, particularly of semi-skilled and unskilled labour. Thus, the liberalisation of the movement of natural persons, particularly those of low and unskilled will further the unemployment situation. This fear, especially for the South African population is very important that the support of the majority of citizens

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<sup>79</sup> Cronje JB 'The Admission of Foreign Legal Practitioners in South Africa: A GATS Perspective' available at <http://www.tralac.org/files/2013/10/S13WP112013-Cronje-Admission-of-foreign-legal-practitioners-in-SA-20131002-fin.pdf> (accessed 08 July 2015).

comes to semi-and-unskilled, that would expose the South African labour force and livelihoods would face intense resistance.<sup>80</sup>

#### **3.4.4.2 Possibility of Increase of Illegal Migrants**

Another reason why South Africa continue to put obstacles is the fear of a possible increase or influx of foreigner's not only legal participants, but more importantly, the entry of illegal immigrants.<sup>81</sup>

#### **3.4.5 Some Measures to Enhance Temporary Movement of Natural Persons in South Africa**

To promote the movement of natural persons in South Africa, some steps may be analysed as the mutual recognition of qualifications, to make labour markets more flexible, to simplify administrative procedures and to develop the data base of skills in South Africa.<sup>82</sup>

##### **3.4.5.1 The Mutual Recognition of Qualifications**

There is a need for South Africa to cooperate with other countries for the mutual recognition of qualifications, licenses or other necessary regulations. To improve mutual recognition, South Africa should establish rules to ensure mutual recognition of qualifications (MRQs).<sup>83</sup>

##### **3.4.5.2 Make Labour Market more Flexible**

South Africa should try to make their labour markets more flexible by removing or reducing their particular needs test for potential workers from other Members. Regulations such as those requiring a company which intends to recruit a foreigner to provide sufficient evidence including advertising jobs in local newspapers should be removed.

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<sup>80</sup> Cronje JB 'The Admission of Foreign Legal Practitioners in South Africa: A GATS Perspective' available at <http://www.tralac.org/files/2013/10/S13WP112013-Cronje-Admission-of-foreign-legal-practitioners-in-SA-20131002-fin.pdf> (accessed 08 July 2015). (hereafter Cronje JB 'The Admission of Foreign Legal Practitioners in South Africa: A GATS Perspective').

<sup>81</sup> Cronje JB 'The Admission of Foreign Legal Practitioners in South Africa: A GATS Perspective'.

<sup>82</sup> Cronje JB 'The Admission of Foreign Legal Practitioners in South Africa: A GATS Perspective'.

<sup>83</sup> This will be the object of the next chapter of this Mini-thesis.

### 3.4.5.3 Simplify Administrative Procedures

There is a need for South Africa to simplify administrative procedures for obtaining documents such as work permits. South Africa can also try to harmonise their management procedures, making it easier for potential migrant workers.<sup>84</sup>

Predictability is a key concern for investors and best practice involves having clear policies and consistent application of the law. Transparency issues are critical as they relate to the conduct and effectiveness of ENTs used in the workplace.

### 3.4.5.4 Development of the Database of Skills in South Africa

South Africa needs to develop skills and vacancy databases that will be publicly available to potential qualified citizens. This can be done in collaboration with that institution such as International Organisation for Migration (IOM). This will help by providing opportunities for skilled workers in Member countries of the GATS that may consider taking a job in the country to go to Europe or America.

## 3.5 Conclusion

The commitments made so far by developed countries are in favour of highly skilled workers. There is no real liberalisation in Mode IV from the point of view of developing countries. Although developing countries identified Mode IV and in particular the supply of low - skilled workers and semi-skilled given their abundance of labour. However, the pursuit of liberalisation of Mode IV provides benefits to both developed and developing countries. Developed countries need to improve the structure of commitments on Mode IV for this to be achieved. South Africa as a Member of the WTO should respect and implement the provisions of the GATS Mode IV. South Africa has made horizontal commitments on temporary movement of service providers. The potential benefits of liberalisation such as increase employment opportunities, attraction of foreign investment and help to create opportunities adapted to the reality created by international trade will be useful for economic growth. There is an interconnection between trade, labour and immigration policy. South

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<sup>84</sup> Makochehanwa A & Maringwa J 'Increase Temporary Movement of Natural Persons in the SADC Region: what should be done' available at [http://www.tips.org.za/files/10.Increasing\\_Temporary\\_Movement\\_in\\_SADC\\_-\\_SSD.pdf](http://www.tips.org.za/files/10.Increasing_Temporary_Movement_in_SADC_-_SSD.pdf) (accessed 08 July 2015).

Africa has to adapt to the changing international landscape in order to remain competitive and meet its political, social, cultural and economic interests. The further liberalisation of the GATS Mode IV proves necessary. Although South Africa has taken GATS commitments on Mode IV, the special treatment measures of the previous recognition of foreign academic and professional qualifications will constitute a violation of the MFN obligation under Article II of the GATS. South Africa will need to obtain a WTO waiver to maintain these measures for a limited period of time. If not, any WTO Member may invoke the dispute settlement procedures against it to secure the withdrawal of inconsistent measures



## Chapter IV

### The Recognition of Foreign Qualifications in South Africa

#### 4.1 Introduction

The commitments in services made by South Africa under the GATS of the WTO, enables foreign companies to establish and use the service professional's suppliers, given that they have the necessary academic and professional qualifications which were recognised by the relevant professional association in South Africa. The recognition of foreign qualification seeks to investigate existing national practices for the assessment, evaluation and recognition of foreign-based experiences in South Africa. The national assessment practices are examined under the complex requirements of modern labour markets. There is widespread evidence of substantial under-utilisation of immigrant skills.<sup>1</sup>

Challenging economic growth prospects in this context to improve outcomes in the labour market in South Africa is a central issue to be addressed, to ensure that the potential of the skills of workers to economic growth is fully exploited. The strategy has identified improving outcomes in the labour market for immigrants as a key step to reach the goal of employment.<sup>2</sup>

In the current environment of economic globalisation and the internationalisation of education, the learner and labour mobility requires the recognition of qualifications across borders more than ever.<sup>3</sup> The qualifications obtained in the education and training system of one country are still not necessarily known or understood in another country. Because of this, qualification holders wishing to study and enter the labour market in another country should ensure the recognition of their qualifications in advance.<sup>4</sup> Institutions seeking to admit holders of foreign qualification must also understand these qualifications as accurately as possible. It's necessary to realise that such recognition often sound good, but are notoriously difficult to implement.

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<sup>1</sup> Desiderio MV, Schuster A & Urso G 'Recognition of Qualifications and Competences of Migrants' (2013) International Organisation of Migration Brussel Belgium 21. (hereafter Desiderio MV, Schuster A & Urso G (2013).

<sup>2</sup> Desiderio MV, Schuster A & Urso G (2013) 21.

<sup>3</sup> Desiderio MV, Schuster A & Urso G (2013) 22.

<sup>4</sup> Desiderio MV, Schuster A & Urso G (2013) 22.

The South African approach to the recognition of foreign qualifications putting a system in place to manage migration can be beneficial to South Africa. This would allow for a planned use of the skills available, even if these are of foreign origin.<sup>5</sup> It has to be borne in mind that some of these foreigners have impeccable skills and credentials that were acquired over a long period. The lack of a formal recognition process can frustrate a natural person to progress in another country and can limit mobility of skills and blocks the assimilation of qualified people, which are especially important for the South African economy.<sup>6</sup>

Underemployment and over qualification may result from several factors. So while in the case of the South African citizens, they depend essentially on the difference between the level of demand and labour supply in specific sectors or specific occupations.<sup>7</sup> In most developed countries, foreign qualifications, particularly if earned in developing countries, are greatly reduced in the labour market. However, foreigners are confronted by discrimination, language barriers and difficulties of foreign qualifications in their country of destination, the same goes for work experience abroad.<sup>8</sup>

This chapter will investigate existing national practices for the assessment, validation and recognition of foreign qualifications based on selected experiences in South Africa. National practices will be examined in relation to the complex requirements of modern labour markets and different needs of various skills groups of foreigners in order to explore possible brainpower of different groups of foreigners residing in South Africa. In addition, this chapter will provide definition and discuss conceptual issues regarding recognition of foreign qualifications. Then, this chapter will look into the South African qualification assessment system; and look at the mutual recognition and trade agreements.

## **4.2 Definitions and Conceptual Issues Regarding Recognition of Foreign Qualifications**

The definition of recognition of foreign qualifications is adopted according to the terminology of South African education and training policy to evaluate, validate and

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<sup>5</sup> Desiderio MV, Schuster A & Urso G 'Recognition of Qualifications and Competences of Migrants' (2013) International Organisation of Migration Brussel Belgium 21. (hereafter Desiderio MV, Schuster A & Urso G (2013).

<sup>6</sup> Desiderio MV, Schuster A & Urso G (2013) 22.

<sup>7</sup> Desiderio MV, Schuster A & Urso G (2013) 23.

<sup>8</sup> Desiderio MV, Schuster A & Urso G (2013) 23.

recognise the qualifications acquired abroad. There are regulations and evaluation procedures to education and skills that have been implemented in South Africa.<sup>9</sup>

The concept of recognition includes: first, the holistic process that facilitates understanding of foreign qualifications and the subsequent establishment of foreign qualification holders for purposes of work or studies. Secondly, the concept recognition is the formal decision by an employer or education and training provider, or any other interested party, to accept the qualification for a particular purpose. Thirdly, the concept recognition is the formal acknowledgment by the competent authority of a foreign qualification, which allows the qualification holder access to education or employment in the receiving country. For further details, the qualifications concept covers different aspects as formal qualification and job requirements that will be well lighted below:

- a. Formal Qualification: the formal outcome (certificate, diploma or title) of an assessment and validation process which is obtained when a competent body in South Africa determines that a person has achieved learning outcomes to given standards and possesses the necessary skills to do a job in a specific field of work.<sup>10</sup> A qualification confers official recognition of the value of learning outcomes in the labour market and in education and training. A qualification can be a right to exercise a profession or a legal entitlement to practice a trade.<sup>11</sup>
- b. Job requirements: the knowledge, skills and competencies required to perform specific tasks related to a particular work position.<sup>12</sup>

Formal learning is defined as learning that occurs in an organised and structured environment, for example in an education or training institution or on the job and is explicitly designated as learning in terms of objectives, times or resources.<sup>13</sup> Formal learning is

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<sup>9</sup> Desiderio MV, Schuster A & Urso G 'Recognition of Qualifications and Competences of Migrants' (2013) International Organisation of Migration Brussel Belgium 24. (hereafter Desiderio MV, Schuster A & Urso G (2013).

<sup>10</sup> Desiderio MV, Schuster A & Urso G (2013) 24.

<sup>11</sup> Desiderio MV, Schuster A & Urso G (2013) 25.

<sup>12</sup> Desiderio MV, Schuster A & Urso G (2013) 25.

<sup>13</sup> Desiderio MV, Schuster A & Urso G (2013) 26.

intentional from the perspective of the learner. It typically leads to validation and certification.<sup>14</sup>

Although a number of multilateral frameworks for the recognition of qualifications have been implemented in recent years, recognition systems continue to differ widely from one country to another.<sup>15</sup>

Definition of regulated and non-regulated professions and the type of recognition procedures apply in each case. In most countries, there are professions that require authorisation from the competent authorities, there are defined as regulated professions. The definition of what is regulated and non-regulated occupations differ; recognition procedures generally apply to regulated professions.<sup>16</sup>

As for unregulated professions, the recognition of qualifications is not a general requirement. Where the learning outcomes are taken into account for the assessment of a foreign qualification, the recognition process may focus more on results achieved and skills obtained, rather than input criteria such as charging labour and program content.<sup>17</sup> However, documentation of the qualification does not always contain clear learning outcomes. Then, the recognition authority's bodies may have to deduct the output of a degree of contextual information such as its place in the national education system or qualification framework.<sup>18</sup>

Partial recognition of formal learning and remedial courses: When full recognition is not granted, recourse to the alternative form of recognition, partial or conditional can be applied. An alternative recognition may include remedial courses offered by the competent authority to compensate for differences with the required qualification.<sup>19</sup> The recognition of qualifications and its conceptual issues was defined in general in the preceding lines. The recognition of qualifications in the South African perspective will be examined in the following lines.

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<sup>14</sup> Desiderio MV, Schuster A & Urso G 'Recognition of Qualifications and Competences of Migrants' (2013) International Organisation of Migration Brussel Belgium 24. (hereafter Desiderio MV, Schuster A & Urso G (2013)).

<sup>15</sup> Desiderio MV, Schuster A & Urso G (2013) 24.

<sup>16</sup> Desiderio MV, Schuster A & Urso G (2013) 24.

<sup>17</sup> Desiderio MV, Schuster A & Urso G (2013) 25.

<sup>18</sup> Desiderio MV, Schuster A & Urso G (2013) 25.

<sup>19</sup> Desiderio MV, Schuster A & Urso G (2013) 26.

### 4.3 South African Perspective Regarding Recognition of Foreign Qualification

South Africa is in the most dynamic period of political, economic and social change the country has ever known. Home Affairs Minister Malusi Gigaba in a prepared speech to an International Students Dialogue on International Migration in Johannesburg on 01 October 2015 said:

'...No country can produce all of the skills it needs... Skilled immigrants make an important contribution in destination economies and he proposed that South Africa to be at the top of list of destinations for prospective skills across Africa and the world....'<sup>20</sup>

Thus, the recognition of foreign academic and professional qualifications is a major challenge and in some cases creates an obstacle to the mobility of the labour.<sup>21</sup> For foreign professionals to get their qualifications recognised in another country, accreditation authorities must be convinced that local and foreign qualifications are comparable.<sup>22</sup>

As they are either harmonised or considered equivalent or they meet the external criteria as an international standard. This requires confidence in the quality of the education system of another country and professional standards. However, the evaluation process for a foreign application is accelerated and the prospect of successful registration is increased if the foreign qualification is achieved in a country covered by an international agreement governing the mutual recognition of qualifications and professional competence.<sup>23</sup>

Providing market access to establish firms and to transfer professional staff should not be confused with the recognition of their academic and professional qualifications.<sup>24</sup> The recognition of diplomas and other qualifications obtained abroad should be considered separately from market access commitments. South Africa is not under obligation to recognise the education or experience obtained, requirements met, or licenses or certifications

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<sup>20</sup> Times 'Gigaba invites foreign students to become new South Africans' available at <http://www.timeslive.co.za/politics/2015/10/01/Gigaba-invites-foreign-students-to-become-new-South-Africans> (accessed 03 October 2015).

<sup>21</sup> Desiderio MV, Schuster A & Urso G 'Recognition of Qualifications and Competences of Migrants' (2013) International Organisation of Migration Brussel Belgium 26. (hereafter Desiderio MV, Schuster A & Urso G (2013).

<sup>22</sup> Desiderio MV, Schuster A & Urso G (2013) 27.

<sup>23</sup> Cronje JB 'Recognition of foreign qualifications: the case of Cuban engineers' available at <http://www.tralac.org/discussions/article/7097-recognition-of-foreign-qualifications-the-case-of-cuban-engineers.html> (accessed 12 September 2015).

<sup>24</sup> Desiderio MV, Schuster A & Urso G (2013) 27.

granted in any other Member State. GATS Article VII (1) provides that a Member State may recognise foreign qualifications, licenses and so on granted in a particular country.<sup>25</sup>

The recognition may be achieved through harmonisation or otherwise, be based on an agreement with another Member or may be unilaterally granted provided that such recognition is not granted in a manner which would constitute a means of discrimination between countries.<sup>26</sup>

This provision is an exception to the MFN obligation. In the case of an agreement between two or more countries, other countries should have the opportunity to negotiate their accession to this agreement. These agreements must be notified to the WTO according to GATS Article VII (4).<sup>27</sup>

South Africa and its regional economic partners are in various stages of negotiation or implementation of agreements that are supposed to facilitate the movement of professionals across borders. Agreement in principle to the adoption of agreed international standards for mutual recognition of foreign qualifications, especially in those professions with a high degree of generic skills content should be considered in the negotiation of these agreements.<sup>28</sup>

When South Africa recognises unilateral agreement of the recognition of qualifications, other WTO Member States should have the opportunity to demonstrate that education, experience, licenses or certifications obtained or requirements met in South Africa must be recognised according to GATS Article VII (2).<sup>29</sup> Unilateral recognition measures should also be notified to WTO.

GATS provide, if any, that the recognition of qualifications should be based on international standards and common criteria for the recognition and exercise of professions and trades of relevant services.<sup>30</sup>

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<sup>25</sup> Desiderio MV, Schuster A & Urso G 'Recognition of Qualifications and Competences of Migrants' (2013) International Organisation of Migration Brussel Belgium 27. (hereafter Desiderio MV, Schuster A & Urso G (2013).

<sup>26</sup> GATS Article VII (1) and (3).

<sup>27</sup> Desiderio MV, Schuster A & Urso G (2013) 27.

<sup>28</sup> Cronje JB 'Recognition of foreign qualifications: the case of Cuban engineers' available at <http://www.tralac.org/discussions/article/7097-recognition-of-foreign-qualifications-the-case-of-cuban-engineers.html> (accessed 12 September 2015).

<sup>29</sup> Desiderio MV, Schuster A & Urso G (2013) 28.

<sup>30</sup> GATS Article VII (5).

For example, the International Bar Association has developed and adopted guidelines contained in its General Principles for the establishment and regulation of lawyers and foreign standards and criteria for the recognition of professional qualifications for lawyers. These standards and criteria should be considered by South Africa when developing regulations or concluding agreements on the recognition of foreign credentials.<sup>31</sup>

GATS Article VI requires Member States to bring their domestic regulation into conformity with its WTO obligations. Article VI provides that in sectors where specific commitments are made all the internal measures that affect trade in services must be administered in a reasonable, objective and impartial manner.<sup>32</sup>

The motivation of this requirement is to prevent an erosion of the value of liabilities through non-discriminatory and non-quantitative obstacles hidden in national legislation or in the administration of it. If a Member State makes commitments in the professional services sector, it should provide for adequate procedures to verify the competence of professionals of any other Member State.<sup>33</sup>

In cases where authorisation and registration are required, the licensing requirements and qualifications must be based on objective and transparent criteria and cannot be trade restrictive or unnecessarily GATS Article VI (5). The local authorities should inform a foreign applicant of its decision on an application and, upon request, provide information regarding the status of the application.<sup>34</sup>

An applicant concerned has the right to challenge any administrative decision affecting trade in services, including decisions concerning the verification of professional skills, qualifications and licenses and to have such decisions reviewed by local courts or tribunals GATS Article VI (2) (a). Where the courts and legal proceedings, arbitral or administrative are not independent of the agency entrusted with the administrative decision Member States

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<sup>31</sup> Cronje JB 'Recognition of foreign qualifications: the case of Cuban engineers' available at <http://www.tralac.org/discussions/article/7097-recognition-of-foreign-qualifications-the-case-of-cuban-engineers.html> (accessed 12 September 2015).

<sup>32</sup> Desiderio MV, Schuster A & Urso G 'Recognition of Qualifications and Competences of Migrants' (2013) International Organisation of Migration Brussel Belgium 27. (hereafter Desiderio MV, Schuster A & Urso G (2013)).

<sup>33</sup> GATS Article VI.

<sup>34</sup> Desiderio MV, Schuster A & Urso G (2013) 28.

must ensure that the procedures in fact provide an objective and impartial evaluation of administrative decisions.

It is therefore essential to assess the existing and proposed legislation to regulate it in the light of the commitments made by South Africa under WTO law. This can then lead to the need to incorporate the relevant GATS provisions in the law of the land. However, the recognition of foreign academic qualifications does not automatically translate into professional recognition which is, as mentioned, a separate process regulated by the particular professional body.<sup>35</sup> The South African qualification assessment system will be discussed below.

#### **4.4 South Africa's Qualification Assessment System**

The recognition of foreign qualifications by SAQA was established by the Act 67 of 2008. The National Qualifications Framework involves both an assessment of a qualification which informs a decision to recognise a foreign diploma and formal recognition of this qualification entitling the holder to access qualification for studies, employment or other in South Africa.<sup>36</sup> The SAQA's function is to compare foreign qualifications with South African qualifications and make a recommendation on the recognition of the qualification in South Africa. Its recommendations are intended to have general guidelines and are not binding for other institutions, such as professional organisations or educational and training institutions. Its recommendations are merely a clarification of structural comparability and provide a starting point for other specific evaluation context.<sup>37</sup>

##### **4.4.1 Associated Concept to the Recognition of Foreign Qualification in the South African Qualification Authority**

The essential approach in establishing the rule of foreign qualifications was that of the determination of equivalence. However, it became clear that the concept of equivalence is

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<sup>35</sup> SAQA 'Criteria and Guidelines for the evaluation of Foreign Qualifications, the South African Qualifications Authority' available at: <http://www.saqa.org.za/docs/guide/2006/efq.pdf> (accessed 01 October 2015). (hereafter SAQA 'Criteria and Guidelines for the evaluation of Foreign Qualifications, the South African Qualifications Authority').

<sup>36</sup> SAQA 'Criteria and Guidelines for the evaluation of Foreign Qualifications, the South African Qualifications Authority'.

<sup>37</sup> SAQA 'Criteria and Guidelines for the evaluation of Foreign Qualifications, the South African Qualifications Authority'.

problematic in the sense of cultural bias and a desire to preserve, as well as ambiguity.<sup>38</sup> The confusion created by the different perceptions of recognition will be stated below:

a. Recognition versus Evaluation: The evaluation of foreign qualification does not constitute the whole recognition process. But it is an important and central element of the process. Evaluation is the process of analysis of foreign qualifications in terms of their original contexts and points of divergence and similarity with respect to qualifications and local contexts. This process is the function of the Centre for the Evaluation of Education Qualifications (CEEQ) of SAQA and central bodies or similar national consultative worldwide. Evaluation leads to recommendations that inform the process of acceptance and recognition.<sup>39</sup>

In order to distinguish between recognition and evaluation, international legal instruments usually refer to two types of bodies. The competent authorities officially charged with making formal and binding decisions on the recognition of foreign qualifications, as opposed to national information centre that assess the qualifications and provide advice and information on recognition issues.<sup>40</sup> An important difference between these two types of bodies is that national information centre offer advice, but do not have the authority to make binding decisions. The competent authorities for recognition make binding decisions in their specific contexts and can also have internal systems in place for evaluation.<sup>41</sup>

b. Academic against Professional recognition: Qualifications serve multiple purposes in the opening of learning and career paths. In general, the recognition is requested by either the qualifying holders for the purpose of further study or employment. Therefore, the need for recognition manifested mainly in two areas: Academic recognition, where the aim is to determine whether the candidate can be admitted to a program of further study. Professional

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<sup>38</sup> SAQA 'Criteria and Guidelines for the evaluation of Foreign Qualifications, the South African Qualifications Authority' available at: <http://www.saqa.org.za/docs/guide/2006/efq.pdf> (accessed 01 October 2015). (hereafter SAQA 'Criteria and Guidelines for the evaluation of Foreign Qualifications, the South African Qualifications Authority').

<sup>39</sup> SAQA 'Criteria and Guidelines for the evaluation of Foreign Qualifications, the South African Qualifications Authority'.

<sup>40</sup> SAQA 'Criteria and Guidelines for the evaluation of Foreign Qualifications, the South African Qualifications Authority'.

<sup>41</sup> SAQA 'Criteria and Guidelines for the evaluation of Foreign Qualifications, the South African Qualifications Authority'.

recognition, where the aim is to determine whether the qualification holder has the skills and competencies required to practice the profession or career in the receiving country.<sup>42</sup>

It is possible that the same qualification may be recognised differently for each of these goals. Various national and international legal instruments guiding the recognition process and different organs can be involved in each case.

#### **4.4.2 Roles in the Recognition Process of the South Africa Qualification Authority**

The recognition of foreign qualifications involves both a process to understand what a particular qualification signals and the result of that process. It's a decision to accept the qualification for a specific purpose. These points to two activities:

-Analysis and evaluation that informs a decision to recognise a foreign diploma. The competence to undertake such action requires the availability of the necessary knowledge base including access to information, the formal evaluation criteria either generic or specific to the context and the resources to carry out the evaluation.<sup>43</sup>

-Formal recognition of foreign qualifications and binding decision allowing the holder of the qualification to access employment or further studies. This can only be done if the enabling regulations are in place.<sup>44</sup>

The above roles could be mutually exclusive, but are not necessarily so. A special role player can have both the competence to evaluate and recognise the competence of the specific qualifications. Another may only have the competence to assess or recognise the jurisdiction. A decision-making body should have adequate knowledge, criteria and resources to allow for internal assessment if it does not engage the services of an external evaluation partner.<sup>45</sup> The national centres evaluate and offer advice intended to be as universally applicable as possible,

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<sup>42</sup> SAQA 'Criteria and Guidelines for the evaluation of Foreign Qualifications, the South African Qualifications Authority' available at: <http://www.sqa.org.za/docs/guide/2006/efq.pdf> (accessed 01 October 2015). (hereafter SAQA 'Criteria and Guidelines for the evaluation of Foreign Qualifications, the South African Qualifications Authority').

<sup>43</sup> SAQA 'Criteria and Guidelines for the evaluation of Foreign Qualifications, the South African Qualifications Authority'.

<sup>44</sup> SAQA 'Criteria and Guidelines for the evaluation of Foreign Qualifications, the South African Qualifications Authority'.

<sup>45</sup> SAQA 'Criteria and Guidelines for the evaluation of Foreign Qualifications, the South African Qualifications Authority'.

but do not take binding decisions. The competent recognition authorities make binding decisions on recognition.<sup>46</sup>

The functions of this body are described to facilitate access to accurate and reliable information on the system and qualifications of the country. It is to provide advice or information on recognition matters and assessment of qualifications, in accordance with national laws and regulations. In South Africa, the national centre of the evaluation described the role usually played by CEEQ at SAQA.<sup>47</sup> The CEEQ has, since its origins in the fifties, fulfilled the role of a national information centre. Also, it has given a new impetus for general recognition in South Africa and helped shape perceptions about the recognition and placement.

The evaluation service informs a variety of decision makers, who are not well informed about the systems and foreign qualifications, about appropriate levels of recognition of qualifications obtained in education and training systems other than the South African system. It provides guidelines for the placement for a range of purposes and facilitates access to information on education and training systems throughout the world, including the South African system. SAQA is currently mandated to evaluate qualifications in terms of Section 7 (5) of the SAQA Act, 58 of 1995.<sup>48</sup>

Academic recognition based on internal assessment is related contextually. It is therefore considered to be limited and not have a national position. This creates a need for coordination at national level. The purpose of professional recognition is to determine if the holder of the foreign qualification has the skills and competence to practice a profession or career.

The regulations for these professions in South Africa are being implemented by a number of statutory professional bodies mentioned in specific fields in which each could be considered as the competent authority for recognition. Evaluation of foreign qualifications takes place mainly internally through education committees and professional examinations, although

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<sup>46</sup> SAQA 'Criteria and Guidelines for the evaluation of Foreign Qualifications, the South African Qualifications Authority' available at: <http://www.saqqa.org.za/docs/guide/2006/efq.pdf> (accessed 01 October 2015). (hereafter SAQA 'Criteria and Guidelines for the evaluation of Foreign Qualifications, the South African Qualifications Authority').

<sup>47</sup> SAQA 'Criteria and Guidelines for the evaluation of Foreign Qualifications, the South African Qualifications Authority'.

<sup>48</sup> SAQA 'Criteria and Guidelines for the evaluation of Foreign Qualifications, the South African Qualifications Authority'.

some professional considers the recommendations of the CEEQ among other factors in their process. Decisions on recognition are confined to each of the professions in question and are therefore limited in scope.<sup>49</sup>

Professional recognition implies the recognition of foreign qualifications for employment purposes, where neither the professional activity, nor the relevant education, is regulated by law in South Africa. In this regard, employers in general could be regarded as competent authorities of implicit recognition, although they are normally not officially charged to make binding decisions of such nature. A central question is whether the skills in question are classified as scarce skills in the Department of Labour (DoL) and justify the issuance of a work permit by the Department of Home Affairs. The evaluation of these foreign qualifications by the CEEQ forms an integral part of the DoL process.<sup>50</sup>

#### **4.4.3 Relationships and Resulting Responsibilities' of the South Africa Qualification Authority**

The relationship between CEEQ and other central role players in the arena of recognition implies reciprocity. This requires sensitivity to the needs, strengths and weaknesses of different players and mutual understanding. There is a point of view that the unique strengths and specific needs of the competent recognition authorities in South Africa over the CEEQ as the national centre. The feedback from the recognition authorities is designed to increase awareness. It should also stimulate the desire to create new or improved links. This will be mutually beneficial and will strengthen the validity of the recognition of foreign qualifications in South Africa.<sup>51</sup>

It is clear that the CEEQ and the competent recognition authorities together have the capacity to meet most of each other's needs and that; in fact, the needs of one party are often the strengths of the other. The level, content and scope of the relationship will be determined by the level of awareness on both sides, both needs and the available capacity to meet these.

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<sup>49</sup> SAQA 'Criteria and Guidelines for the evaluation of Foreign Qualifications, the South African Qualifications Authority' available at: <http://www.saqqa.org.za/docs/guide/2006/efq.pdf> (accessed 01 October 2015). (hereafter SAQA 'Criteria and Guidelines for the evaluation of Foreign Qualifications, the South African Qualifications Authority').

<sup>50</sup> SAQA 'Criteria and Guidelines for the evaluation of Foreign Qualifications, the South African Qualifications Authority'.

<sup>51</sup> SAQA 'Criteria and Guidelines for the evaluation of Foreign Qualifications, the South African Qualifications Authority'.

After reviewing the different concept of recognition, its role and responsibilities resulting from the South African system of recognition of qualifications in the following paragraphs, mutual recognition in South Africa will be discussed.

#### **4.5 Mutual Recognition of Foreign Qualifications in South Africa**

The free movement of workers is an essential element of the economic integration agreement in South Africa. The free movement of workers creates many social and political challenges. At the heart of society's concerns is the belief that foreign workers will replace local workers, that they exert additional pressure on limited government resources through the use of social services and that the temporary residence becomes permanent residence.<sup>52</sup> These perceptions create political ramifications, because in the field of politics, perception often trumps the truth. In fact, South Africa as well as other countries do not have all the right skills available in the local labour market that are needed at any particular moment in time to achieve the economic and development objectives.<sup>53</sup>

If the South African education system has not developed workforce, knowledge and skills required in the labour market, the necessary skills could be achieved by other means. One of the main challenges associated with the movement of workers across borders is the lack of recognition of qualifications and academic and professional experience obtained abroad. In practice, for a qualified foreign professional person to practice their profession in South Africa, they need to requalify and obtain the required qualifications or their foreign qualifications must be recognised by the South African system.<sup>54</sup>

An obligation to requalify from scratch for a similar qualification could be a significant barrier to entry into the foreign labour market. Recognition, in contrast, requires a high level of confidence in the quality of the education system and professional standards of the host country.<sup>55</sup> In the case of recognition, the countries will consider the recognition on a reciprocal basis if local and foreign academic and professional qualifications are comparable,

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<sup>52</sup> SAQA 'Criteria and Guidelines for the evaluation of Foreign Qualifications, the South African Qualifications Authority'.

<sup>53</sup> Cronje JB 'Recognition of Foreign Qualifications: the case of Cuban engineers' available at <http://www.tralac.org/discussions/article/7097-recognition-of-foreign-qualifications-the-case-of-cuban-engineers.html> (accessed 12 September 2015). (hereafter Cronje JB 'Recognition of foreign qualifications: the case of Cuban engineers').

<sup>54</sup> Cronje JB 'Recognition of Foreign Qualifications: the case of Cuban engineers'.

<sup>55</sup> Cronje JB 'Recognition of Foreign Qualifications: the case of Cuban engineers'.

because they are either harmonised or considered equivalent. In the case of harmonising, the two different standards or procedures are grouped into one. With equivalence, different standards and procedures coexist, but are treated as if they are the same because they produce the same results.<sup>56</sup>

With the conclusion of the agreement of mutual recognition, countries agree to accept and recognise the requirements, certificates and licenses of each other because they are harmonised or considered equivalent or because they meet external criteria as an international standard. Therefore, mutual recognition agreements are concluded between two or more countries as a means of achieving regulatory convergence.<sup>57</sup> The MRAs negotiations, however, are often a long, complex, expensive and time-consuming exercise. A country that wants to be party to MRAs, first of all, must meet certain basic requirements, such as having a national regulator of the profession in the system, an accreditation system and a national register of professionals.

The professions are generally regulated to correct market failures such as information asymmetries between professionals and consumers. This is because many professions are so specialised and sophisticated that consumers cannot determine the quality of service delivered to them. Regulated professions have a number of common characteristics to know that they are all based on knowledge and expertise obtained from a higher education institution; the right to practice depends on the assessment of competencies; and they all have a general public interest and ethical component.<sup>58</sup>

The process of being admitted to practice a particular profession is relatively standardised in many countries; the courses leading to university degrees are accredited by a professional body and or government authority.<sup>59</sup> Academic qualifications are normally supplemented by a work experience period in a supervised function during which the graduate acquires practical experience and is tested in the relevant skills. After successfully completing both the

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<sup>56</sup> Cronje JB 'Recognition of Foreign Qualifications: the case of Cuban engineers' available at <http://www.tralac.org/discussions/article/7097-recognition-of-foreign-qualifications-the-case-of-cuban-engineers.html> (accessed 12 September 2015). (hereafter Cronje JB 'Recognition of foreign qualifications: the case of Cuban engineers').

<sup>57</sup> Cronje JB 'Recognition of Foreign Qualifications: the case of Cuban engineers'.

<sup>58</sup> Zarrilli S 'Moving Professionals beyond National Borders: Mutual Recognition Agreements and the GATS' (2005) available at [http://unctad.org/en/Docs/ditctncd20052\\_en.pdf](http://unctad.org/en/Docs/ditctncd20052_en.pdf) (accessed 01 August 2015). (hereafter Zarrilli S 'Moving Professionals beyond National Borders: Mutual Recognition').

<sup>59</sup> Zarrilli S 'Moving Professionals beyond National Borders: Mutual Recognition'.

academic and vocational training, a person gets the professional status and admitted to a professional body.<sup>60</sup>

Responsibility for education and training of professionals is usually shared between academic institutions offering technical and theoretical training.<sup>61</sup> The employers who practice practical skills, the regulatory authority ensure standards and accrediting qualifications. The professional bodies ensure a code of conduct, the level of professionalism and continuing professional development.<sup>62</sup>

#### **4.5.1 Mutual Recognition of both Academic and Professional Qualifications**

Mutual recognition can refer to the mutual recognition of both academic and professional qualifications. The recognition of academic qualifications concerns the recognition of diplomas and curricula, and the ability to pursue further academic studies.<sup>63</sup>

The recognition of professional qualifications refers to the right of entry into a profession after license to practice is granted by the competent body.<sup>64</sup> Mutual recognition works best in professions where there are high levels of commonality between the qualification activities in terms of education and training underpinning the profession in the country of origin and destination.<sup>65</sup>

When minor differences or anomalies in professional activities are identified, they are usually treated by a coping mechanism requiring training in supervised base or an aptitude test covering only training issues that are lacking in other qualification.<sup>66</sup>

Mutual Recognition Agreements (MRAs) are based on mutual acceptance, in whole or in part, academic and professional qualifications obtained in a country without having to re-qualify in another host country. The parties to a mutual recognition agreement entail certain

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<sup>60</sup> Zarrilli S 'Moving Professionals beyond National Borders: Mutual Recognition Agreements and the GATS' (2005) available at [http://unctad.org/en/Docs/ditctncd20052\\_en.pdf](http://unctad.org/en/Docs/ditctncd20052_en.pdf) (accessed 01 August 2015). (hereafter Zarrilli S 'Moving Professionals beyond National Borders: Mutual Recognition').

<sup>60</sup> Zarrilli S 'Moving Professionals beyond National Borders: Mutual Recognition'.

<sup>61</sup> Zarrilli S 'Moving Professionals beyond National Borders: Mutual Recognition'.

<sup>62</sup> Zarrilli S 'Moving Professionals beyond National Borders: Mutual Recognition'.

<sup>63</sup> Zarrilli S 'Moving Professionals beyond National Borders: Mutual Recognition'.

<sup>64</sup> Zarrilli S 'Moving Professionals beyond National Borders: Mutual Recognition'.

<sup>65</sup> Zarrilli S 'Moving Professionals beyond National Borders: Mutual Recognition'.

<sup>66</sup> Cronje JB 'Mutual Recognition of the Foreign Qualifications' available at <http://www.tralac.org/publications/article/7223-mutual-recognition-of-professional-qualifications-the-east-african-community.htm> (accessed 18 September 2015).

principles of mutual confidence or trust and comparability of the quality of education and training systems of each other's countries. MRAs take two main approaches to mutual recognition.

First, the harmonisation approach is recognition on a profession to profession basis due to the harmonisation and coordination of the conditions of education and training of each profession. For example, in the case of a mutual recognition agreement covering architects, architects should all follow the same university course in all universities offering the degree program in the country party to the agreement. They will undertake the same training for the same period of time and sit for the same professional examination. The professional organisation of each country party to the MRAs will implement and follow the same code of professional conduct.<sup>67</sup>

This process allows the free movement of professionals because their education and training is the same in all countries party to the MRAs. It demands that all parties agree that an architect of a Member State who is professionally qualified can practice the profession of architecture in other countries party to the agreement, without further inquiry.<sup>68</sup> Even with this approach to mutual recognition implementation can be difficult because the education and training programs are subject to periodic review confidence that in each case a matter of negotiation renewed.<sup>69</sup>

Secondly, the approach of equivalence provides mutual recognition based on the acceptance of broad equivalence of qualifications without prior harmonisation of education and training needs. This approach does not necessarily lead to automatic market access and is often accompanied by a compensation measure to fill the gaps in education and training systems of the countries that are parties to the MRAs.

Although the approach carries the risk of making more arbitrary decision in the evaluation of foreign qualifications, it proved to produce faster and more concrete results. The reasoning

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<sup>67</sup> Cronje JB 'Mutual Recognition of the Foreign Qualifications' available at <http://www.tralac.org/publications/article/7223-mutual-recognition-of-professional-qualifications-the-east-african-community.htm> (accessed 18 September 2015). (hereafter Cronje JB 'Mutual Recognition of the Foreign Qualifications').

<sup>68</sup> Cronje JB 'Mutual Recognition of the Foreign Qualifications'.

<sup>69</sup> Plimmer F 'Mutual Recognition of Professional Qualifications: The European Union System' (2004) available at [https://www.fig.net/pub/jakarta/papers/ps\\_05/ps\\_05\\_2\\_plimmer.pdf](https://www.fig.net/pub/jakarta/papers/ps_05/ps_05_2_plimmer.pdf) (accessed 01 August 2015).

behind this approach is that national qualifications should be considered equivalent.<sup>70</sup> It allows for compensatory measures to be imposed where qualifications or work experience lack in the requirements of the host country.<sup>71</sup>

It also exempts professionals who work on a temporary basis in another Member State from having to apply for recognition of their qualifications in the host country unless the exercise of the profession has health or safety implications.<sup>72</sup> It provides that a registered professional in a country has the right to practice a profession equivalent in the other country without the need for further testing and examination. In cases where people have obtained foreign academic qualifications, the competent professional or legal agency of the host country may impose conditions on the registration in order to obtain equivalence. These conditions would be based on an assessment of whether professional activities in a qualification registered in the respective countries are much the same.<sup>73</sup>

There are many challenges associated with the negotiation of mutual recognition agreements, regardless of the approach adopted to achieve mutual recognition. The education and training, the testing process and licensing are complex and difficult to assess and compare. There are also numerous implementation challenges and techniques that must be addressed. For example, the variety of professional activities undertaken by a professional in a country may differ from the variety of activities of a professional match in another country.<sup>74</sup> Ultimately, any system of mutual recognition should be given a credible way to respond to public concern that foreign professionals are less skilled than local professionals and they provide substandard services. Therefore, the various challenges of mutual recognition and trade agreement will be discussed in the lines below.

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<sup>70</sup> Cronje JB 'Mutual Recognition of the Foreign Qualifications'.

<sup>71</sup> Plimmer F 'Mutual Recognition of Professional Qualifications: The European Union System' (2004) available at [https://www.fig.net/pub/jakarta/papers/ps\\_05/ps\\_05\\_2\\_plimmer.pdf](https://www.fig.net/pub/jakarta/papers/ps_05/ps_05_2_plimmer.pdf) (accessed 01 August 2015).

<sup>72</sup> Cronje JB 'Mutual Recognition of the Foreign Qualifications'.

<sup>73</sup> Zarrilli S 'Moving Professionals beyond National Borders: Mutual Recognition Agreements and the GATS' (2005) available at [http://unctad.org/en/Docs/ditctmcd20052\\_en.pdf](http://unctad.org/en/Docs/ditctmcd20052_en.pdf) (accessed 01 August 2015). (hereafter Zarrilli S 'Moving Professionals beyond National Borders: Mutual Recognition').

<sup>74</sup> Zarrilli S 'Moving Professionals beyond National Borders: Mutual Recognition Agreements and the GATS'.

#### 4.5.2 Mutual Recognition and Trade Agreement

The GATS of the WTO recognises the importance of facilitating the movement of workers across borders to allow international trade. It acknowledged that the temporary movement of people across borders is complementary to the provision of other forms of trade in services such as the establishment of a commercial presence in another country.<sup>75</sup>

For example, both the establishment of commercial presence and the temporary movement of people refer to the cross-border movement of services providers to where the service is supplied and consumed. In many cases, this would require qualifications and experience of a person to be recognised by the host state in order to provide the service or establish a commercial presence.<sup>76</sup>

The GATS provides a legal framework for the temporary movement of people to provide services in other WTO Member States to recognise the training and experience of foreign workers, however, the GATS can have limitations.<sup>77</sup> The ability of people to temporarily cross the border to provide a service under the GATS is subject to the negotiation of specific commitments on market access and national treatment. In the absence of mutual recognition, on domestic regulation provides where specific commitments regarding professional services are undertaken, each Member shall provide for adequate procedures to verify the competence of professionals of any other Member.<sup>78</sup>

In many cases, the economic value of market access commitments agreed with the inscription of numerical quotas and imprecise definitions of categories. This allows national authorities to modify the regulatory requirements at all times. It is unclear whether the GATS govern the employment of foreigners by domestic firms.<sup>79</sup> It defines the temporary movement of persons supplying a service in the GATS Article I: 2 (d) that the provision of a service by a service

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<sup>75</sup> Cronje JB 'Mutual Recognition of the Foreign Qualifications' available at <http://www.tralac.org/publications/article/7223-mutual-recognition-of-professional-qualifications-the-east-african-community.htm> (accessed 18 September 2015).

<sup>76</sup> Cronje JB 'Mutual Recognition of the Foreign Qualifications' available at <http://www.tralac.org/publications/article/7223-mutual-recognition-of-professional-qualifications-the-east-african-community.htm> (accessed 18 September 2015). (hereafter Cronje JB 'Mutual Recognition of the Foreign Qualifications').

<sup>77</sup> Cronje JB 'Mutual Recognition of the Foreign Qualifications'.

<sup>78</sup> Cronje JB 'Mutual Recognition of the Foreign Qualifications'.

<sup>79</sup> Cronje JB 'Mutual Recognition of the Foreign Qualifications'.

supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.<sup>80</sup>

The Annex on movement of natural persons supplying services under the GATS limits the scope of temporary movement in paragraph 1 to individuals who are Member service providers and individuals who are employed by a Member of a service provider in respect of the provision of a service.<sup>81</sup> It excludes those persons involved in other sectors such as agriculture and manufacturing. This definition covers only two types of persons namely those who are themselves a service supplier and those employed by a service supplier. Members are also not prevented from applying national rules on the entry and temporary stay of foreigners in their territories, including measures necessary to protect the integrity of its borders.<sup>82</sup>

The GATS Article VII provides for a Member to recognise the education and experience a person obtained or licenses or certifications granted in a particular country as part of its standards or criteria for the authorisation, licensing and certification of service providers. In further, it provides for such recognition, which may be achieved through harmonisation or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously.<sup>83</sup> In cases where the Members do recognise the qualifications of other Members, such recognition should be possible based on multilaterally agreed criteria.<sup>84</sup>

The GATS requires Members to work with intergovernmental and non-governmental organisations to develop common international standards and criteria for the recognition of qualifications and the practice of services trade.<sup>85</sup> An example of such cooperation is the WTO guidelines on mutual recognition in the Accountancy Sector, which provides non-binding guidelines for governments and entities included in the negotiations of mutual

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<sup>80</sup> Cronje JB 'Mutual Recognition of the Foreign Qualifications' available at <http://www.tralac.org/publications/article/7223-mutual-recognition-of-professional-qualifications-the-east-african-community.htm> (accessed 18 September 2015). (hereafter Cronje JB 'MutualR Recognition of the Foreign Qualifications').

<sup>81</sup> Cronje JB 'Mutual Recognition of the Foreign Qualifications'.

<sup>82</sup> Cronje JB 'Mutual Recognition of the Foreign Qualifications'.

<sup>83</sup> Cronje JB 'Mutual Recognition of the Foreign Qualifications'.

<sup>84</sup> GATS Article VII: 1.

<sup>85</sup> Cronje JB 'Mutual Recognition of the Foreign Qualifications'.

recognition in the accounting industry.<sup>86</sup> The guidelines cover both the negotiation process and content of the mutual recognition agreements. Undoubtedly, companies may be more willing to outsource certain internal functions such as accounting services to countries where the academic and professional qualifications are in line with international accounting standards.<sup>87</sup>

Other international and regional professional organisations are also increasingly formulating standards and best practices for specific professions. The formulation of harmonised international standards will reduce the need for MRAs. For example, the existence of several bilateral mutual recognition agreements concluded by South Africa and other countries on academic qualifications to develop the so-called Washington Agreement in 1988. The aim of the agreement is the recognition of equivalence accredited engineering education programs leading to an engineering degree. It is essentially a quality assurance process based on global best practices. It recommends that graduates of programs accredited by accreditation bodies in each Member country are recognised by other countries as having met the academic requirements for entry to engineering practice.<sup>88</sup>

It covers undergraduate degrees in engineering profession, while the engineering technology programs and postgraduate level are not covered by it. The current signatories to the Washington Agreement have agreed to make comparable their respective accreditation procedures. They accept each other's accredited degrees, agreed to identify and encourage the implementation of best practices and recognised the need to encourage national authorities in charge of licensing and registration to implement the agreement.

At the meeting in October 1997 of the signatories to the Washington Agreement, it was agreed to create an independent forum called the Engineers Mobility Forum (EMF).<sup>89</sup> Its objectives are to facilitate the international movement of Professional Engineers, establish an international register of engineers, promote best practices, assess and remove barriers to the

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<sup>86</sup> Cronje JB 'Mutual Recognition of the Foreign Qualifications' available at <http://www.tralac.org/publications/article/7223-mutual-recognition-of-professional-qualifications-the-east-african-community.htm> (accessed 18 September 2015). (hereafter Cronje JB 'Mutual Recognition of the Foreign Qualifications').

<sup>87</sup> Cronje JB 'Mutual Recognition of the Foreign Qualifications'.

<sup>88</sup> Hay AJ & Greenwood P 'International Mutual Recognition of Engineers' available at <http://www.ieagreements.org/Washington-Accord/> (Accessed 03 October 2015). (hereafter Hay AJ & Greenwood P 'International Mutual Recognition of Engineers').

<sup>89</sup> Hay AJ & Greenwood P 'International Mutual Recognition of Engineers'.

international movement of engineers, finally, to encourage governments and licensing authorities to adopt the agreement of the EMF. Therefore, EMF is an international effort to deal with the second stage of the development of professional engineering, namely professional development and registration.<sup>90</sup>

The EMF International Register of engineers is intended to provide a framework for the recognition of experienced engineers by bodies responsible in each country. Professionals included in the register are exempt from or obtain simplified access to licenses or registration in other participating countries.<sup>91</sup>

Following the Washington Accord, a similar agreement was developed for embedded engineering technologists or incorporated engineers, called the Sydney Agreement. This was signed in 2001 by the professional associations of Australia, Canada, Ireland, New Zealand, UK, South Africa and Hong Kong - China. Another similar agreement, the Dublin Agreement for engineering technicians, was signed in May 2002 among the professional associations of Canada, Ireland, the United Kingdom and South Africa.<sup>92</sup>

The Forum of mobility for engineering technologists emerged from the Sydney Agreement and was modelled on the agreement of the EMF.<sup>93</sup> The interest in these initiatives is growing internationally and the engineering profession has entered into various agreements such as the Washington, Sydney and Dublin. These agreements recognise the equivalence of university degrees. The signatories to the Washington Agreement also created a Mobility Forum for independent engineers facilitating international mobility by an international register of professional engineers.<sup>94</sup>

The starting point of all these agreements is that a person registered in a country shall be considered to have met the international standard of competence and should only be minimally evaluated primarily for local knowledge before to be registered in another country that is party to the agreement.

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<sup>90</sup> Hay AJ & Greenwood P 'International Mutual Recognition of Engineers' available at <http://www.ieagreements.org/Washington-Accord/> (Accessed 03 October 2015). (hereafter Hay AJ & Greenwood P 'International Mutual Recognition of Engineers').

<sup>91</sup> Hay AJ & Greenwood P 'International Mutual Recognition of Engineers'.

<sup>92</sup> Hay AJ & Greenwood P 'International Mutual Recognition of Engineers'.

<sup>93</sup> Hay AJ & Greenwood P 'International Mutual Recognition of Engineers'.

<sup>94</sup> Cronje JB 'Mutual Recognition of the Foreign Qualifications' available at <http://www.tralac.org/publications/article/7223-mutual-recognition-of-professional-qualifications-the-east-african-community.htm> (accessed 18 September 2015).

MRAs may not be concluded between governments. Some that are concluded by professional or regulatory organisations raises concerns about the legal status of these agreements.<sup>95</sup> However, GATS Article I: 3 (a) provides that the GATS applies to measures taken by the Members' central, regional or local authorities and as well as non-governmental bodies in the exercise of powers delegated by central, regional or local governments and authorities. Business organisations are in most cases determined in terms of legal instruments. They exercise delegated functions which are binding for the state and subject to GATS disciplines.<sup>96</sup>

The movement of labour across borders is a well established phenomenon outside the framework of the WTO. Many countries manage work schemes providing temporary traffic for workers from specific countries in specific sectors and for certain periods of time. These bilateral or plurilateral arrangements offer embodiments of temporary movement of skilled and less skilled workers.<sup>97</sup> However, these agreements are difficult to incorporate into the GATS framework for a number of reasons. Once the preferences offered by foreign worker programs are entered in the lists of specific commitments, they are legally binding and almost non-reversible. Countries prefer the flexibility offered by the autonomous regimes that can be changed depending on political and economic circumstances. For example, the obligation of the GATS most favoured nation treatment Article II prohibits discrimination among Members regarding the source of labour.<sup>98</sup>

In addition, measures to ensure a temporary stay, such as postponing salary until return or excluding social security systems, must be registered in the lists of specific commitments as national treatment limitations.<sup>99</sup> In the absence of a safeguard mechanism GATS Article X and in light of the strict requirements of the provision on general exceptions GATS Article

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<sup>95</sup> Cronje JB 'Mutual Recognition of the Foreign Qualifications' available at <http://www.tralac.org/publications/article/7223-mutual-recognition-of-professional-qualifications-the-east-african-community.htm> (accessed 18 September 2015). (hereafter Cronje JB 'Mutual Recognition of the Foreign Qualifications').

<sup>96</sup> GATS Article I: 3(a).

<sup>97</sup> Cronje JB 'Mutual Recognition of the Foreign Qualifications'.

<sup>98</sup> GATS Article II.

<sup>99</sup> Winters L A *The Temporary Movement of Workers to Provide Services GATS Mode IV* (2008) A Handbook of International Trade in Services 480-541.

XIV, the capacities of Members to address cultural and social sensitivities and internal security problems that may occur as a result of the mobility of the workforce are limited.<sup>100</sup>

However, the GATS provide for flexibility, including an exception to the MFN rule where two or more Members conclude preferential trade in services agreements GATS Article V.<sup>101</sup> This allows a limited number of Members to reach an agreement to facilitate the temporary movement of persons within the framework of a comprehensive agreement liberalising trade in services covering virtually all service sectors, volume of trade and all modes of supply. Such an agreement must also meet other requirements set forth in Article V of the GATS, including the elimination of existing discriminatory measures and / or the prohibition of new or more discriminatory measures, either at the entry into force of the agreement or in accordance with an agreed schedule thereafter. An agreement under Article V of GATS may also provide for the recognition of education and experience of those obtained in one of the Member States parties to the agreement and excluding others.<sup>102</sup>

This approach of mutual recognition requires a clear distinction between the roles and responsibilities of national regulatory and professional bodies and the existence of national bodies to participate in the negotiation and implementation of mutual recognition agreements.

The mutual recognition agreements should have among others provisions on the academic and professional qualification requirements. The registration procedures legally recognised professional skills, common code of conduct, disciplinary procedures and the provisions relating to the administration of the agreement.<sup>103</sup> In practice, a registered professional person in another partner state shall practice in accordance with the professional code of ethics of the competent authority of the host country.

The negotiation of market access for the free movement of persons can be treated together with other trade-related issues in a preferential trade agreement.<sup>104</sup> However, providing market access to foreign workers in a preferential trade agreement does not automatically lead to the recognition of their qualifications on the foreign labour market. The parties to a preferential trade agreement will have to cooperate with each other for the reciprocal

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<sup>100</sup> Winters L A *The Temporary Movement of Workers to Provide Services GATS Mode IV* (2008) A Handbook of International Trade in Services 480-541. (hereafter Winters L A (2008)).

<sup>101</sup> Winters L A (2008) 486.

<sup>102</sup> Winters L A (2008) 490.

<sup>103</sup> Winters L A (2008) 492.

<sup>104</sup> Winters L A (2008) 493.

recognition of academic and professional qualifications.<sup>105</sup> The harmonisation of qualifications can be too laborious and time consuming. If mutual recognition is based on the recognition of qualifications and acceptance of each other as equivalent bodies, while regulatory and professional bodies should be required to cooperate to make the movement of professionals a reality.

#### **4.6 Conclusion**

South Africa is facing many constraints to implement the commitments made under the free movement of natural persons because the movement of natural persons is a trade issue. The negotiation of market access for the free movement of persons can be treated together with other trade-related issues as the recognition of qualifications.

South Africa must cooperate to ensure the recognition of academic and professional qualifications. Consideration should be given to the approach of mutual recognition. South Africa may unilaterally recognise academic and professional qualifications of some WTO Members especially their neighbours. Most of these provisions are previous commitments of South Africa and should be reviewed. Nevertheless, recognition may be justified as an exception to MFN. When recognition occurs, it should where possible be based on common international standards and criteria. The unilateral recognition of qualifications of certain Members of the WTO imposes an obligation on South Africa to give any other WTO Member an adequate opportunity to demonstrate that education, experience, licenses and certificates obtained or requirements met in that other Member State should also be recognised. Furthermore, Article VII of GATS imposes an obligation on South Africa to inform the Council for Trade in Services of the measures. South Africa is yet to notify the Council of its existing unilateral recognition measures.

Permanent residents and local qualification requirements constitute national treatment limitations under Article XVII of the GATS and should, if sustained, be registered in the list of specific GATS commitments of the country. This would require the amendment of the list of specific commitments of the country and, if requested by a Member concerned, the negotiation of compensatory adjustments such agreements must be notified to the WTO.

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<sup>105</sup> Winters L A *The Temporary Movement of Workers to Provide Services GATS Mode IV* (2008) A Handbook of International Trade in Services 480-541.

In addition, once the new legislation comes into force, South Africa will be obliged to inform the WTO of the new law. The making of specific commitments under the GATS creates some policy implications for a country. Nothing in the GATS prevents a country from maintaining or introducing technical or commercial regulations to meet the objectives of national policy. However, it determines to some extent how a country can regulate its scheduled services sectors. The GATS provisions and specific commitments are binding international obligations and non-compliance will have legal consequences for South Africa. It is therefore obliged to ensure that any regulation made by South Africa under existing and future legislation complies fully with the obligations and commitments of the GATS. Finally, a set of autonomous disciplines must be developed to facilitate the movement of people. As a response to the mobility of temporary workers in comparison with permanent migration and mutual recognition of qualifications and experience to facilitate the movement of skills could also be considered.



## Chapter V

### Conclusion and Recommendations

#### 5.1 Conclusion

This study highlighted the fact that trade in services has gained thrust and importance in the last decade, both at the multilateral and regional level. At multilateral trade in services is governed by the GATS, which requires that Members of the WTO to take successive round of negotiations built especially in matters of agenda.

It has been argued that the commitments under international law and their implementation in terms of domestic law to facilitate new regulations have a significant interaction. Consequently, South Africa as a WTO Member has made commitments in services under the GATS allowing the temporary movement of natural persons across borders but the prior recognition of qualification constitutes a barrier to this commitments.<sup>1</sup>

The liberalisation of services under Mode IV of the GATS would provide better access to potential labour markets in South Africa. However, South Africa acted to implement the liberalisation of the GATS to ensure ease of temporary movement of natural persons across borders.<sup>2</sup>

Considering that market access and national treatment are two critical parameters negotiable conditions for entry into the South African labour market. Thus, the participation of natural persons remains a challenge and many obstacles that require the elimination or modification of discriminatory internal regulations.<sup>3</sup>

That can be solved by following specific commitments to the diverse nature of the agreements and obligations to trade in services that were acting by South Africa. In which slow down the temporary movement of natural persons include strength requirements of recognition of foreign academic and professional qualifications.<sup>4</sup>

However, the non recognition of foreign academic and professional qualifications is a major challenge and creates a barrier to labour mobility.

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<sup>1</sup>See chapter 2.3 The General Agreement on Trade in Services General Framework.

<sup>2</sup> See chapter 2.2.1 Scope of Application of the General Agreement on Trade in Services.

<sup>3</sup> See chapter 2.3.1 Most Favoured Nation Principle.

<sup>4</sup> See chapter 2.4 Specific Commitments.

There is no real liberalisation in Mode IV from the perspective of developing countries including South Africa because developed countries made commitments in favour of highly skilled workers.<sup>5</sup> The further liberalisation of Mode IV offers benefits to both developed and developing countries. So, developed countries need to improve the structure of commitments on Mode IV for this to be done as there are plenty of workers for the low and semi-skilled in developing countries.<sup>6</sup>

It has been argued that South Africa has made horizontal commitments on the temporary movement of service providers and should respect and implement the provisions of GATS Mode IV.<sup>7</sup> The potential benefits of liberalisation of Mode IV such as increasing employment opportunities for foreign companies operating locally, attracting foreign investment and helping to create opportunities adapted to the reality created by trade in services will be useful for the South African economic growth.<sup>8</sup>

South Africa must adapt to the changing of trade in services context in order to stay competitive and meet the political, economic, cultural and social mark as there is an interconnection between trade, labour and immigration policy.<sup>9</sup>

The special measures of treatment putting in order by South Africa to the liberalisation of trade in services Mode IV as the prior recognition of foreign academic and professional qualifications is a violation of the MFN obligation under Article II of the GATS.<sup>10</sup> As South Africa had made horizontal commitments on Mode IV and must comply with the obligations and commitments to the further liberalisation of services in the country but after all, South Africa can obtain a WTO waiver if it wants to maintain such measures for a limited period of time.<sup>11</sup>

Certainly, South Africa has to develop the further liberalisation of services to facilitate the movement of natural persons as a response to the mobility of temporary workers. South Africa must ensure that the regulations made under the existing and future legislation

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<sup>5</sup> See chapter 3.2.4 Movement of the Highest Skilled Workers.

<sup>6</sup> See chapter 3.3.1 Commitments on the Current Mode IV.

<sup>7</sup> See chapter 3.4.2 South Africa Mode IV Liberalisation.

<sup>8</sup> See chapter 3.4.2 South Africa Mode IV Liberalisation.

<sup>9</sup> See chapter 3.4.1 South African's Mode IV Commitments.

<sup>10</sup> See chapter 3.4.3 The Factors Limiting the Implementation of the Temporary Movement of Natural Persons in South Africa.

<sup>11</sup> See chapter 3.4.1 South African's Mode IV Commitments.

complies fully with the requirements and GATS commitments on the temporary movement of natural persons. As the provisions of GATS and the specific commitments are the international obligations, the violation of these standards will have negative consequences on the South African economy.<sup>12</sup>

However, there are some problems in this commitment of Mode IV.<sup>13</sup> The current structures are biased toward highly skilled professions, such as doctors, lawyers, business executives and professional service categories, usually those related to commercial work. These include business visitors and staff participating in the establishment of commercial presence, as intra-corporate transferees.<sup>14</sup>

The commitments in this Mode IV are horizontal rather than sectoral.<sup>15</sup> Most of these horizontal commitments are unbound except for certain categories of service providers, generally based on skill level. In the current context of the commitments, there is no separation of temporary and permanent movement. Therefore, the temporary movement of service providers usually come within the scope of the legislation on immigration and the labour market policy affecting the permanent movement without international trade policy limiting the scope of the GATS Mode IV.<sup>16</sup>

The current structure of Mode IV commitments in South Africa also suffers from a lack of clarity and consistency in the definition and coverage of different categories of services.<sup>17</sup> These commitments relate primarily under contract to a foreign institution. They rarely cover the self-employed or independent service providers. These commitments on Mode IV are very restrictive even when sectors have been scheduled and the liberalisation in Mode IV is highly conditional in South Africa.<sup>18</sup>

These regulatory obstacles posed by South Africa to protect their national labour markets are particularly serious to the mobility of labour in particular of temporary workers, as South

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<sup>12</sup> See chapter 2.4 Specific Commitments.

<sup>13</sup> See chapter 3.3 Obstacles to Mode IV Commitments.

<sup>14</sup> See chapter 3.3.1 Commitments on the Current Mode IV.

<sup>15</sup> See chapter 3.3.2.1 Horizontal Sectoral Commitments.

<sup>16</sup> See chapter 3.4.3 The Factors Limiting the Implementation of the Temporary Movement of Natural Persons in South Africa.

<sup>17</sup> See chapter 3.4.1 South African's Mode IV Commitments.

<sup>18</sup> See chapter 3.4.2 South Africa Mode IV Liberalisation.

Africa acted to protect their national through the prior recognition of foreign qualifications.<sup>19</sup> In short, virtually no significant liberalisation was undertaken in Mode IV of the GATS in the country.

In all cases, recognition of foreign qualifications in South Africa has an impact on the markets for professional services and business opportunities for foreign professionals who wish to provide services.<sup>20</sup>

The lack of recognition of foreign qualifications will force foreign professionals to repeat in the host country many qualification requirements they have already fulfilled in their home country.<sup>21</sup> South Africa must cooperate with its partner's bodies to ensure the recognition of academic and professional qualifications. As there are many constraints to the implementation of commitments under the free movement of foreign and the recognition of their qualifications on the South African labour market.<sup>22</sup> Hence, consideration should be given to mutual recognition of qualifications approach. Then the participation of South Africa in the MRAs will help to facilitate market access for foreign professionals and ensuring the quality of services.<sup>23</sup> Such agreements shall be notified to the WTO. In addition, once the new legislation comes into force, South Africa will be obliged to inform the WTO of the new law.

The MRAs negotiations, however, are often a long, complex, expensive and time-consuming exercise.<sup>24</sup> A country that wants to be party to MRAs, first of all, must meet certain basic requirements, such as having a national regulator of the profession in the system, an accreditation system and a national register of professionals.<sup>25</sup> Furthermore, it must have the ability to evaluate draft standards to compare the education and training systems, and formulate positions.<sup>26</sup>

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<sup>19</sup> See chapter 4.1 Introduction.

<sup>20</sup> See chapter 4.3 South African Perspective Regarding Recognition of foreign Qualification.

<sup>21</sup> See chapter 4.3 South African Perspective Regarding Recognition of foreign Qualification.

<sup>22</sup> See chapter 4.4.3 Relationships and Resulting Responsibilities' of the South Africa Qualification Authority.

<sup>23</sup> See chapter 4.4.3 Relationships and Resulting Responsibilities' of the South Africa Qualification Authority.

<sup>24</sup> See chapter 4.5 Mutual Recognition of Foreign Qualifications in South Africa.

<sup>25</sup> See chapter 4.5 Mutual Recognition of Foreign Qualifications in South Africa.

<sup>26</sup> See chapter 4.5.1 Mutual Recognition of both Academic and Professional Qualifications.

## **5.2 Recommendations**

The changes proposed in the GATS would need to be supported by domestic measures and internal reforms within each country to facilitate as well as benefits arising from the liberalisation of movement of natural persons. One such area concerns recognition, countries would need to assess the level of training and certification systems for national and individual services sectors to ensure uniform standards in the country. In light of the above study, the recommendations will be divided into general recommendations and specific related to qualifications.

### **5.2.1 General Recommendations**

South Africa must improve the structure of existing commitments and the framework of the GATS for the introduction of the modifications proposed in the commitments of the multilateral rules on important regulatory issues on this Mode IV of trade in services. Similarly, improved commitments have greater relevance if there are general principles to facilitate their implementation.

South Africa may also need to raise their national standards to acceptable international level if there is a major divergence to establish professional bodies for certain sectors and ensure their cooperation with similar bodies abroad. Licensing and certification procedures may need to be established in some services, which currently absent, to facilitate the movement of professionals.

South Africa should implement a subset of the immigration legislation to deal with temporary migration and guidelines for GATS visa. South Africa would need to conclude bilateral agreements with markets that are important destinations for their business. More importantly, South Africa needs to be more transparent about their national regulations. Without more transparency on the part of South Africa, most of the proposed recommendations would not be enforceable or effective.

Therefore, it is crucial for South Africa to improve transparency to the applicable regulations, including barriers and limitations on the movement of natural persons. This transparency should be reflected in the commitments of South Africa, whether in the context of market access, national treatment or where appropriate, as an additional commitment column.

In addition, suggestions has made for South Africa to provide detailed information to the WTO, in a consolidated form, of all the specific actions of administrative measures for the temporary entry of natural persons, subject to commitments. The consolidated form could include hardware information or evidence necessary for an applicant who seeks temporary entry. A description of the complete process of presentation, examination and approval of the request, and a full description on how all limitations on market access and national treatment in respect of the temporary entry of natural persons are administered by the South African's authorities.

South Africa has to improve the structure of Mode IV commitments, should seek to complement the horizontal Mode IV commitments with industry specific commitments. In addition, these sectoral commitments must be detailed and specified in terms of actions that are applicable to particular sectors and in terms of categories of personnel services relevant to each sector. Indeed, South Africa should broaden the scope of their commitments by increasing the coverage of commitments beyond those linked to commercial presence.

South Africa should clearly formulated and well-defined sectoral commitments with clearly defined criteria for the application of any limitation, for all subsectors in the sector that was expected. All limitations, conditions and exceptions should be clearly set out in the Sectoral schedules, for market access and national treatment, rather than being widely described in the horizontal schedules. South Africa should also take steps to provide information about these measures in accordance with Article III of the GATS. Specificity and detail should also better target the providers of categories to which commitments and limitations apply.

This can be done through the introduction of more detailed categories of service providers in the sectoral schedules match in the broad categories of intra-corporate transferees, business visitors, specialists and other persons mentioned in horizontal commitments. More detailed classification categories of personnel services would facilitate clear and detailed sectoral commitments that are relevant to the sector or sub-sector especially in the study and could reduce the scope of the discretion and discrimination in the implementation of commitments.

South Africa should focus on the expansion of the categories of service providers covered by the horizontal commitments to eliminate the partiality to the current management staff. It is important to include qualified suppliers, lower and semi-skilled, and take the most relevant commitments. This expansion should allow the inclusion of semi-skilled and low-skilled

persons, in these latter categories specifying the relevant criteria and modification or removal of certain conditions related to skills, pre-employment and job responsibilities. The need is therefore complementarities rather than substitutability between sectoral and horizontal lists.

South Africa has a number of professions where they are already providing services internationally and has specific interest in liberalising market access in the GATS Mode IV. South Africa must develop GATS commitments on the movement of natural persons. In addition to work within the existing framework of commitments, it is also necessary to establish multilateral guidelines on certain issues, to strengthen some of the existing provisions and globally, to expand the scope framework regarding the GATS Mode IV.

The temporary service providers should be treated separately from permanent migrants in South Africa, ideally they should not answer the reach of immigration laws and regulation of the labour market, but their entry and stay must be dealt under a separate regulation; such as service providers who offer services abroad on a temporary basis should not be subject to normal immigration rules and procedures, categories of regular visas and work permit requirements. This would reduce the administrative burden, time and costs they face in entering the South African labour market. It would also be easier by giving them a more liberal treatment in the case of temporary service providers.

The GATS already contains strong provision for recognition under Article VII. This provision deals with issues of transparency, non-discrimination and objectivity in the granting of recognition, and also encourages countries to conclude mutual recognition agreements or extend autonomously to the recognition of other Member countries. Each country has different requirements for licensing for people providing services and special methods or barriers to the recognition of qualifications acquired abroad.

A South African framework for the recognition of qualifications would increase transparency and aim to reduce the burden of South Africa national regulations on the recognition of qualifications. Indeed, South Africa would have to adopt a more flexible approach to the recognition of qualifications, not only by considering the degrees but also of diplomas, certificates, experience and options such as substitutable.

### **5.2.2 Specific Recommendations Related to Recognition of Qualifications**

The results of the recognition of qualifications is an issue that has been highlighted in order to get a clear picture of the relative share that recognition can play in the use of corresponding skills, improvements are needed in the area of collection and analysis of the effect for foreign data, in terms of integration into the South African labour market.

The recommendations are expressed as minimum qualification comparable closest to South Africa who can be identified, referring also, where possible, at a particular level of the NQF. By adopting this approach, the Centre for the Evaluation of Education recognises the international trend to move away from the simple determination of equivalence for a plan that actively promotes the acceptance or recognition.

Different methods for the recognition of qualifications and skills can be applied in South Africa. According to qualifications and skills that must be evaluated by the academic or professional, formal or non-formal / informal or for recognition, which is for further education or employment. Some approaches are based on the length of education, training, others on the learning outcomes. It is not appropriate to establish the recognition of single path applicable to all types of powers and skills or to serve for purposes of recognition. The harmonisation of the various methods should be encouraged to enter and fully recognise any foreign jurisdiction.

The fragmentation of responsibility for the assessment and recognition of qualifications and skills is observed in South Africa to a greater or lesser extent. This could be linked to the administrative structure of South Africa on the recognition of qualifications. The fragmentation of the recognition of qualifications and skills system usually results in a high degree of complexity of the recognition of qualifications process, which could discourage foreign seek to have their qualifications recognised. Actions that could be taken to reduce the complexity of the recognition process include creating a single window for the recognition and coordination between the different authorities involved in the recognition process in South Africa.

The recognition process should be increased to ensure that the assessment procedures are adapted to the needs of the real labour market, gaps in foreign access to information on existing ways of recognition of qualifications. While a lack of transparency on the

functioning of the system, a lack of awareness among employers of the functioning and results of recognition procedures, both aspects must be addressed to improve the relevance of recognition procedures for the integration of foreigners in the South African labour market. Increased awareness of South Africa recognition system and results of foreign side is needed to reduce barriers to information that may hinder employment and skills in the country.

South Africa has to reduce foreign-related disturbances with foreign qualifications that are facing in entering the South African labour markets. The disparities between their skills and the needs of skills to jobs, foreign qualifications must be evaluated as soon as possible at SAQA. However, recognition of qualifications and skills alone may not be sufficient to improve the results of the foreign labour market in South Africa.

The lack of sufficient knowledge of English in South Africa, the level necessary to perform the specific professional activity can be a barrier to inclusion in the South African labour market, the effects of the recognition hampering. The language factor is likely to be less important for highly skilled workers who have their qualifications recognised in South Africa because they generally aim of jobs characterised by intensive use of English in the workplace.

The South African government can consider taking into account the specific needs of foreigners in the validation of skills acquired through non-formal and informal learning. Such an approach could provide an additional positive impact on the prospects for integration into the labour market of foreigners through the detection and recognition of the value of skills and qualities. It also facilitates mobility of employment and the match between the skills of foreign market needs and work to fill skills gaps.

Some features of bilateral trade agreement initiatives are easily expandable, successful for the GATS framework. Among these are the specificity, clarity and transparency with which categories of workers and employment terms and conditions are clearly defined.

South Africa must negotiated MRAs to overcome the obstacles posed by authorisation regimes. MRAs have mostly been negotiated between developed countries and between countries with close cultural and historical linkages. In collaboration with MRAs, South Africa will need to find a significant level of technical assistance to strengthen the capacity to

certify the qualifications necessary to obtain the value of the agreement by the implementation of MRAs with other countries.

However, the benefits that may bring MRAs and its proliferation, it seems that it would not be in the interest of South Africa to stand away from these agreements. In consideration of the actual or potential trade impacts that MRAs negotiating grant, South Africa can voluntarily agree to implement these agreements and could include in their schedules of specific commitments on professional qualifications for the movement attracter natural persons to South Africa.

Technical cooperation and capacity building increase efficiency and professional services sector competitiveness in South Africa. This would improve the business opportunities and make the most interested institutions and more able to participate in the MRAs negotiations. The procedures to develop MRAs should be simplified and made more quickly to facilitate the broader participation of the country. The lack of publicity and sufficient transparency on the MRAs may make private companies and the public less willing to rely on the services provided by foreign professionals.

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