

**THE UNIVERSITY OF THE WESTERN CAPE**

**Faculty of Law**

**LIBERALISATION OF TRADE IN SERVICES: ENHANCING THE  
TEMPORARY MOVEMENT OF NATURAL PERSONS (MODE 4), A LEAST  
DEVELOPED COUNTRIES' PERSPECTIVE**

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## **KEYWORDS**

Developing countries - Free movement of persons - General Agreement on Trade in Services - Least developed countries - Liberalisation - Natural persons - Trade barriers - Trade in services - Unemployment - World Trade Organization



## DECLARATION

I declare that, **Liberalisation of Trade in Services: Enhancing the Temporary Movement of Natural Persons (Mode 4), A Least Developed Countries' Perspective** is my own work, that it has not been submitted before for any degree or examination in any other university, and that all sources I have used or quoted have been indicated and acknowledge as complete references.

Edna Katushabe Mubiru

Signed..... May 2009



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## **DEDICATION**

I dedicate this work to my husband and best friend, Moses Mubiru.



## ACRONYMS

ACP	African Caribbean and Pacific
COMESA	Common Market for East and Central Africa
DDA	Doha Development Agenda
EEA	European Economic Area
ENT	Economic Needs Test
EPAs	Economic Partnership Agreements
FDI	Foreign Direct Investment
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Development Produce
ISCO-88	International Standard Classification of Occupation list
ITO	International Trade Organisation
LDCs	Least Developed Countries
MDGs	Millennium Development Goals
MFN	Most Favoured Nation
MRAs	Mutual Recognition Agreements
ODA	Official Development Assistance
OECD	Organisation for Economic Cooperation and Development
RTAs	Regional Trade Agreements
TNCs	Transnational Corporations
UN CPC	United Nations provisional Central Product Classification System
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organisation

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# 1 CHAPTER ONE: INTRODUCTION

## 1.1 A General Overview of the General Agreement on Trade in Services

Due to the increased growth of world trade in services and as a result of the view that services were and are still, a dynamic component of economic activity, in 1995 an agreement with a focus solely on trade in services was introduced in the World Trade Organisation (WTO).<sup>1</sup>

The General Agreement on Trade in Services (GATS) is one of the landmark achievements of the Uruguay Round. The GATS is the first, and only, set of multilateral rules covering international trade in services. The GATS was negotiated by the Governments themselves, and it sets the framework within which firms and individuals can operate and by implication also sets the ambit of how far states can go, and what they can do in terms of fulfilling their obligations in terms of the GATS.

The GATS provides a system of predictable and legally enforceable conditions for services trade<sup>2</sup>, and can have a potentially positive impact on investment, efficiency and growth.<sup>3</sup> Thus, creating a credible and reliable system of international trade rules; ensuring fair and equitable treatment of all participants;<sup>4</sup> stimulating economic activity and promoting trade and development through progressive liberalisation.<sup>5</sup>

The key objective of the GATS is to promote the progressive liberalisation of trade in services as a means of achieving economic growth and development for all countries, and

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<sup>1</sup> The WTO is an international, multilateral organisation, formed in 1995, which sets the rules for the global trading systems

<sup>2</sup> Background Note on GATS Mode 4 and Its Information Needs World Trade Organization and OECD Meeting of the Technical Subgroup on Movement of Natural Persons – Mode 4 Paris, 31 January -1 February 2005 at 2

<sup>3</sup> Adlung, R. and Carzaniga A. 'Health services under the General Agreement on Trade in Services'. (2001) 79(4) *Bull World Health Organ.* at 352

<sup>4</sup> The principle of non-discrimination

<sup>5</sup> WTO (2001) GATS - Facts and Fiction

[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 on 12/09/08) at 4

the development of developing countries.<sup>6</sup> It seeks to do this by applying to services trade the basic rules of the WTO, with the necessary modifications to taking into account the specific features and sensitivities of trade in services. While trade in goods has been governed by international trade rules since the General Agreement on Tariffs and Trade (GATT) came into effect in 1948, such an institution had never before governed trade in services until the GATS came into force in 1995.<sup>7</sup>

The GATS has two main parts: the framework agreement containing the general rules and disciplines; and the national schedules which list individual country's specific commitments on access to their domestic markets by foreign suppliers.

Trade in services refers to the sale and delivery of an intangible product, called a service, between a producer and consumer. Trade in services takes place between a producer and consumer that are, in legal terms, based in different countries, or economies; this is called International Trade in Services, which is governed by the GATS.<sup>8</sup>

The GATS defines trade in services as the supply of a service through any of the four Modes of supply.<sup>9</sup> Services include activities such as those listed in the W/120<sup>10</sup> which include health, education, water, pensions, transportation, communications, and distribution, services provided in hotels and restaurants, education, construction and accounting services.<sup>11</sup> Services have distinct characteristics from manufactured goods in international trade.<sup>12</sup> They include characteristics such as: intangibility,<sup>13</sup> non

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<sup>6</sup> Preamble to the GATS

<sup>7</sup> Mutume, G. 'Trading services: An opening or a noose? Africa puzzles over the implications of trade in Geneva'. (2002) 16 *Africa Recovery* at 26

<sup>8</sup> Trade in services [http://www.absoluteastronomy.com/topics/Trade\\_in\\_services](http://www.absoluteastronomy.com/topics/Trade_in_services) (Accessed on 6/2/09)

<sup>9</sup> Article 1 of the GATS

<sup>10</sup> 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)

<sup>11</sup> Choike - trade in services [http://www.choike.org/nuevo\\_eng/informes/1169.html](http://www.choike.org/nuevo_eng/informes/1169.html) (Accessed on 17/08/08)

<sup>12</sup> Hoekman B. and Kostecki M. (2001) 2 *The World Economy of the World Trading System; the WTO and Beyond* at 239

<sup>13</sup> Services are difficult to touch

storability,<sup>14</sup> heterogeneity<sup>15</sup> and joint production.<sup>16</sup> Economists have defined a service as “anything sold in trade that could not be dropped on your foot”.<sup>17</sup>

Movement of natural persons<sup>18</sup> under the GATS is dealt with at two points: first, Article 1 which is within the main text of the GATS; and, secondly, in the dedicated Annex of Movement of Natural Persons. A natural person is defined as a ‘human being, distinct from legal persons such as companies or organizations’.<sup>19</sup>

Article 1.2 of the GATS identifies four possible Modes for delivery of services, namely:

**Mode 1**, Cross-border supply – “from the territory of one Member into the territory of any other Member” (e.g. postal services or telecommunications);

**Mode 2**, Consumption abroad – “in the territory of one Member to the service consumer of any other Member” (e.g. visiting patient or student);

**Mode 3**, Commercial presence – “by a service supplier of one Member, through commercial presence in the territory of any other Member” (e.g. banks, hospitals, or construction firms that are owned by a foreign company); and

**Mode 4**, Presence of natural persons – “by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.” (e.g. executives or doctors).

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<sup>14</sup> It is impossible to store services in an inventory implying that it is not only difficult to trade services across space but also difficult to trade across time.

<sup>15</sup> Services are often non-standardised and tailored to customer needs therefore the degree of variation is very great.

<sup>16</sup> Services are produced and consumed at the same time, with customers participating in the production process.

<sup>17</sup> Lane, P. (1998) *World trade survey: The Wired Trade Organization* the Economist (3 October 1998) 516, as cited by Billy H. and Wendy M. (2008) *Science, Management and Engineering*. at 63

<sup>18</sup> Movement of natural persons refers to the entry and temporary stay of persons for the purpose of providing a service. It does not relate to persons seeking citizenship, permanent employment or permanent residence in a country.

<sup>19</sup> Trade in services [http://www.absoluteastronomy.com/topics/Trade\\_in\\_services](http://www.absoluteastronomy.com/topics/Trade_in_services) (Accessed on 6/2/09)

Reported research by the WTO notes that “no trade in services data is available broken down by Modes of supply”.<sup>20</sup> However, the WTO in 2002 made estimates of trade in services by Mode that suggested that 85 per cent of trade in services occurs in Modes 1 and 3, cross-border supply and Foreign Direct Investment (FDI). Mode 4 accounted for 1 per cent of global services trade, based on workers’ remittances and compensation to employees.

## 1.1 Statement of the problem

In the WTO negotiations under the GATS, developing countries<sup>21</sup> and Least Developed Countries (LDCs)<sup>22</sup> are ambitiously pursuing enhanced market access and national treatment commitments from developed countries for provision of services through the temporary presence of natural persons.<sup>23</sup>

Article IV of the GATS provides that increased participation of developing countries shall be facilitated through negotiated specific commitments of the GATS to strengthen their domestic services capacity, improve access to distribution channels and liberalise market



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<sup>20</sup> International Institute for Labour Studies (2006) GATS, Migration, and Labor Standards: DP/165/2006 by P.L. Martin. Available at: <http://www.ilo.org/inst> (Accessed on 1/10/08) at 1

<sup>21</sup> “A developing country is one that does not consider itself, or is not considered by others, in some or many respects as matching the characteristics of a **developed country**. Developing-country status remains largely self-declared. No objective standard is available to judge whether a country is truly a developing country. Often, developing countries are said to be those countries that are not **OECD** Members. To others, developing-country status equates with Membership of the **Group of 77**. Sometimes, developing countries are referred to collectively as the South since many of them are located in the southern hemisphere”. (Goode W. (2003) 4<sup>th</sup> Ed. Dictionary of Trade Policy Terms, 105)

<sup>22</sup> An LDC according to the United Nations is designated on the basis of the following indicators: low per capita GNP, low life expectancy at birth, low per capita calorie supplies, , low adult literacy rate, low share of manufacturing in GDP, share of employment in industry, and low export concentration ratio. The list currently includes Ethiopia, Gambia, Lesotho, Liberia, Malawi, Mali, Mozambique, Niger, Rwanda, Senegal, Sierra Leone, Somalia, Sudan, Togo, Uganda, Tanzania, and Zambia. (Goode W. (2003) 4<sup>th</sup> Ed. Dictionary of Trade Policy Terms, 222)

<sup>23</sup> Kategekwa, J. (2008) liberalisation of trade in health services: balancing Mode 4 interests with obligations to provide universal access to basic services, research paper 16, south centre.

access in Modes of supply of export interest, by establishing contact points to supply information related to respective markets. Article IV(3) further provides that special priority shall be given to the least developed country Members in view of their economic situation and their development, trade and financial needs. Furthermore, according to the GATS Preamble<sup>24</sup>, one of the key objectives of the Agreement is to increase the participation of developing countries in trade in services and to expand their services exports taking into account the unique economic situation of LDCs.

LDCs have identified semi-skilled categories of natural persons as the ones whose liberalisation will constitute meaningful market access to them. The GATS can thus be useful in realising this objective, by legalising an already existing international phenomenon that holds great development potential.<sup>25</sup>

Developing country governments and LDCs complain that current commitments under the GATS are limited to highly skilled occupations such as doctors, lawyers, and company executives, but what the developing countries are actually vying for most importantly is for developed countries to expand their Mode 4 commitments include low and semi-skilled workers, such as domestic or construction workers (guest workers), thus covering sectors in which they hold a competitive advantage.<sup>26</sup> It's important to note here, that the GATS provides for low and skilled labour, but is not limited to skilled labour only.

A number of shortcomings exist in the substance and text of Mode 4. Amongst the most prominent of these weaknesses are: the substantial discretion allowed to Members under Annex Clause 3<sup>27</sup>; this has resulted in countries putting in place regulatory

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<sup>24</sup> Paragraph 5 and 6

<sup>25</sup> Kategekwa J. (2006) Extension of Mode 4 Commitments to Include Unskilled Workers in the WTO. A Win Win Situation, Especially For LDCs at 6

<sup>26</sup> GATS Mode 4 and the Implications of Expansion, available at <http://www.tamejavi.com/trade-matters/issues/GATS-Mode-4-Fact-Sheet.htm> (Accessed on 1/10/08)

<sup>27</sup>Which provides that 'Members may negotiate specific commitments applying to the movement of all categories of natural persons supplying services under the Agreement and that only Natural persons

barriers that prevent or restrict the flow of labour. The absence of any agreed definition in the GATS on what constitutes “temporary” (although it has been defined negatively, as ‘not permanent residence’); The GATS merely exempts from its coverage measures regarding citizenship, residence, and employment on a permanent basis.<sup>28</sup> As a result, temporary workers are subjected to immigration legislation and labour market conditions which are quite cumbersome, non transparent<sup>29</sup>, costly and arbitrary.<sup>30</sup>

Recent economic trends show that services have gained in importance for growth and development of developing countries. Services account for over 70% of employment in developed countries, and for 35% in developing countries. And since 1990 the share of services in GDP has grown from 65% to 72% in developed countries and 45% to 52% in developing countries. World services trade has nearly tripled to \$ 2.4 trillion.<sup>31</sup>

Despite the fact that developing countries’ share of world services exports rose from 18% to 24% between 1990 and 2005, it is only Asia’s share of services exports that has increased, export shares of Latin America, the Caribbean, and Africa have been stagnant in effect, and developing country services exports are uneven”.<sup>32</sup> Over half of developing country services exports originate in only six countries, namely, China, Hong Kong China, India, Singapore, Republic of Korea, and Turkey, which account for about 80% of all developing country services exports, the rest of the developing countries including LDCs

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covered by a specific commitment shall be allowed to supply the service in accordance with the terms of that commitment ‘in effect limiting access in to their markets.

<sup>28</sup> WTO (1998) Presence of Natural Persons (Mode 4) background information: Secretariat Paper December

<sup>29</sup> More so the absence of criteria for ensuring the transparency, evaluating economic needs and, or labour market tests.

<sup>30</sup> The Australian Chamber of Commerce and Industry (2002) Advancing the liberalisation of the trade in services: Enhancing GATS Mode 4 – the movement of natural persons, at 14

<sup>31</sup> Puri, L. (2007) Trade In services and development implications commission on trade in goods and services, and commodities. UNCTAD at 1

<sup>32</sup> *ibid* at 1

account for the other 20%. This raises the question of how African LDCs can use this potential to participate in world services trade.<sup>33</sup>

LDCs according to the United Nations are characterised by three factors: (i) extremely low income, (ii) “human resource weakness,” including low education and literacy levels, and (iii) “economic vulnerability,” like instability of services exports, low share of Modern services in GDP, and the handicap of small domestic markets. The African LDCs are amongst the poorest countries in the world facing serious human and economic development challenges. Despite their diversity, high population growth rates, low levels of labour productivity, wage rigidity, high levels of unemployment and persistent under employment especially amongst the youth, all work towards to threatening attainment of the Millennium Development Goals (MDGs)<sup>34</sup> by 2015.

The combination of the above factors creates a strong comparative advantage in the supply of low and semi-skilled services along with LDCs’ interest in mitigating economic vulnerability by growing domestic services sectors and creating a level playing field for services export trade supported by the GATS<sup>35</sup>

Given that the African LDCs have an abundance of low skilled labour, the African LDCs, together with other LDCs are pursuing market access for their low skilled workers in the context of the WTO and the GATS through temporary movement of natural persons (Mode 4).<sup>36</sup>

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<sup>33</sup> *ibid* at 3

<sup>34</sup> The Millennium Development Goals (MDGs) are eight international development goals that 192 United Nations Member states and at least 23 international organizations agreed to achieve by the year 2015. They include reducing extreme poverty, reducing child mortality rates, fighting disease epidemics such as AIDS, and developing a global partnership for development.

<sup>35</sup> Crosby D. (2009) Advancing Services Export Interests of Least Developed Countries: Toward GATS Commitments on the Temporary Movement of Natural Persons for the Supply of Low-Skilled and Semi-Skilled Services. ICSTD at 2. also see <http://shameem.datamuse.net/index.php/2007/05/20/definition-of-ldc-by-united-nations/>

<sup>36</sup> Varma S. (2009) Facilitating Temporary Labour Mobility in African LDCs: Addressing Mode 4 Related Supply-side Constraints ICSTD at 4



In light of the above facts, this research intends to examine ways in which the GATS can be expanded to accommodate the requests of African LDCs with regard to Mode 4.

## **1.2 Hypothesis**

This study is based on the premise that African LDCs are currently not benefiting from the liberalisation of trade in services as currently laid down in the GATS especially with regard to the movement of natural person as encompassed in Mode 4.

This paper is going to advance the notion that if there is further liberalisation in Mode 4, African LDCs would benefit much more from the trade in services, than they are at present and improve their competitiveness in international trade.

## **1.3 Objective of the study**

The purpose of this research is to examine the impact of liberalisation of trade in services on African LDCs by highlighting the importance of services trade through Mode 4 (temporary movement of natural persons).<sup>37</sup> The paper will examine the nature of liberalisation to this Mode under the existing GATS framework, critically analyse the constraints on engaging in negotiations, specifically the national barriers that are hindering this movement, and make suggestions on ways of improving the nature of commitments on movement of natural persons in terms of Mode 4 to favour LDCs as laid down in Article VI of the GATS.

## **1.4 Significance of the study**

African LDCs are particularly concerned with Mode 4 given the fact that they have a comparative advantage in labour intensive services, and have a clear interest in promoting significant liberalisation under Mode 4.

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<sup>37</sup> Although 'temporary labour mobility' is a broader concept, it is used interchangeably with Mode 4 for the purpose of this paper.

Developing countries, and in particular LDCs, are currently net importers of trade in services. LDCs do not have the supply capacity or competitiveness necessary for supplying services in many sectors or other Modes of supply. Therefore, Mode 4 provides them with a realistic potential in the foreseeable future for exports of services trade due to their supply capacity in labour. Given the substantial need for low skilled workers in developed countries, LDCs may provide a good source of temporary workers. LDCs as a whole are projected to have over 230 million unemployed workers in 2010.<sup>38</sup>

Trade in services via Mode 4 is an increasingly important component of services exports for developing countries because this type of trade would benefit countries through remittances, return migration, and by filling specific skill gaps<sup>39</sup>

Several regulatory barriers still restrict much of trade via Mode 4.<sup>40</sup> Despite the fact that Article IV of the GATS provides for increased participation of developing countries (with special priority given to LDCs) through negotiated commitments, the participation of African LDCs in Mode 4 is still low.

In order for GATS liberalisation to make meaningful contribution to the economies of African LDCs, Members must extend the scope of their commitments beyond highly skilled professionals. Given that LDCs do not have capacity to compete with high skill professionals of other WTO Members, They are ready to export semi-skilled labour where they have a comparative advantage.<sup>41</sup>

This can be achieved if LDCs enhance their lobbying efforts to reduce the barriers in other countries, reduce their own barriers in areas where skills are scarce, and implement complementary policies, such as expanding the skill base and creating

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<sup>38</sup>South Centre (2005) GATS Mode 4 Negotiations and Low Skilled Workers.

<sup>39</sup> Cali, M., Ellis, K. and, Te Velde W. D. (2008) the Contribution of Services to Development and The Role of Trade Liberalisation and Regulation. *Global Forum on International Investment. Briefing Note 7*. OECD at 16

<sup>40</sup> As laid down in Article VI of the GATS in effect reinstates the sovereignty of states in determining who can enter in to their countries.

<sup>41</sup> Kategekwa J. (2006) Extension of Mode 4 Commitments to Include Unskilled Workers in the WTO. A Win Win Situation, Especially For LDCs at 2

incentives for return and developed countries make meaningful commitments under Mode 4.<sup>42</sup>

## 1.5 Scope of the study

The researcher will deal with the GATS and its impact on development in Africa and will be confined to Mode 4. The research will investigate the status of the Mode 4 negotiations in the WTO, and how African LDCs Mode 4 requests can be accommodated in the GATS.

## 1.6 Methodology

This study is literature based with emphasis being given to the analysis of the relevant available literature on the subject matter. The researcher used journal articles, international agreements, papers presented at conferences, dissertations, newspapers, and discussion papers. These were found in various libraries and on the Internet, to enable the researcher to adequately tackle this study.

## 1.7 Chapter outline

**Chapter One:** An introduction to the research. It outlines the aims and objectives of the study, advances the hypothesis, presents the methodology and outlines the layout of the paper.

**Chapter Two:** Gives a historical background to GATS, its structure, objectives and role, and discusses the benefits of Trade in services

**Chapter Three:** Discusses the general scope of mobility of labour (Mode 4) in the GATS, including, the growing demand for labour in developed countries and the availability of this labour in LDCs, and the impact of Mode 4 for on host and home countries. It also

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<sup>42</sup> Cali, M., Ellis, K. and Te Velde, W. D. (2008) at 16

discusses the status of Mode 4 negotiations in the WTO, highlighting the difficulties and constraints that African LDCs face in engaging in Mode 4 negotiations.

**Chapter Four:** Analyses the national barriers that are currently hindering this movement such as restrictions on entry and stay, and the regulations countries have put in place.

**Chapter Five:** Conclusion to the study, summarising the issues discussed and the conclusions drawn there from, and recommendations on the issues at hand.



## **2 CHAPTER TWO: HISTORY AND GENERAL FRAMEWORK OF THE GATS**

### **2.1 Introduction**

The GATS is an annex to the WTO Agreement, which governs and regulates international trade in services. The inclusion of a service specific agreement within the world trade system was a response to the fundamental changes in the global trade patterns that occurred during the last decades.<sup>43</sup>

This chapter attempts to provide a historical background of the GATS and in particular, purpose, structure and scope, highlighting the provisions that are relevant to Mode 4, as well as discussing the benefits of trading in services that accrue to Member states.

### **2.2 Historical Background and Development**

The GATS is one of the three pillars<sup>44</sup> of the WTO that came into force in 1995 but its roots trace back to the 1940's when countries led by the United States (US) drafted a world trade order consisting of three international institutions: the World Bank, the International Monetary Fund and the International Trade Organization (ITO).<sup>45</sup>

The ITO was meant to cover all international affairs dealing with employment, economic development, trade policy, competition policy and production of raw materials. In 1948 the GATT was put into effect as a first step on the path towards the ITO covering its chapter on commercial policy. It contained obligations and commitments to reduce tariffs, as well as to ensure free international trade of goods. When the foundation of the ITO failed due to various reasons, the GATT remained the only multilateral framework governing crossborder trade in goods.<sup>46</sup>

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<sup>43</sup> Hilger O. (2005): Pros and Cons of the General Agreement on Trade in Services (GATS), Working Paper 03. European School of Business at 5

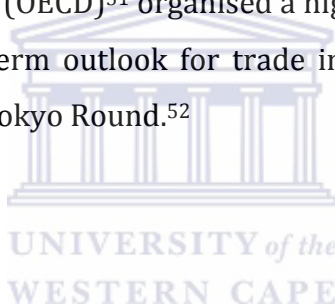
<sup>44</sup> The General Agreement on Tariffs and Trade (GATT) and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) constitute pillars 1 and 3

<sup>45</sup> Hilger O. (2005 at 2

<sup>46</sup> Hilger O. (2005 at 3

For several years, services crossed borders, but it wasn't until the 1970's that they were thought of as having the characteristic of being traded.<sup>47</sup> They were until that point referred to as "invisibles" and as such, were left out of the GATT regime and instead fell under the auspices of institutions that gave preference to regulatory rather than market based rules. This was because they could not be stored and because they had to be simultaneously produced and consumed.<sup>48</sup>

The evolution of trade in services involved three stages.<sup>49</sup> The first stage, referred to by Drake and Nicolaidis as the "consciousness raising" period, took place from 1972 to 1982. It was during this period that the issue of trade in services was first debated as fit for inclusion on the trade negotiating agenda.<sup>50</sup> The Organisation for Economic Cooperation and Development (OECD)<sup>51</sup> organised a high level meeting where a group of experts considered the long term outlook for trade in light of the changing industrial structures and the upcoming Tokyo Round.<sup>52</sup>



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<sup>47</sup> Drake W. and Nicolaidis K. (1992) 'Ideas and interests and institutionalization: Trade in services and the Uruguay Round'. *International organisations* 46(1) at 41

<sup>48</sup> Self J. R. and Zutshi B. K. (2003) *Mode 4: Negotiating Challenges and Opportunities* in Mattoo A. and Carzaniga A. (eds) *Moving People to Deliver Services* at 27

<sup>49</sup> Drake W. and Nicolaidis K. (1992) at 38

<sup>50</sup> OECD, *GATS: The Case for Open Services Markets* (2002) at 17

<sup>51</sup>Is an organisation that brings together the governments of countries committed to democracy and the market economy from around the world to: Support sustainable economic growth, Boost employment, Raise living standards, Maintain financial stability, Assist other countries' economic development and Contribute to growth in world trade. Its Membership includes: Australia, Canada, Denmark, European Communities, France, Germany, Italy, Japan, Korea Sweden, Switzerland, United Kingdom and the US.

<sup>52</sup> This was the seventh round of GATT multilateral trade negotiations. It took place between 1973 and 1979. 102 countries participated in this round. Both from the point of view of participation and the breadth of the negotiating agenda this was the biggest round up to that time. (Goode W. (2003) 4<sup>th</sup> Ed. *Dictionary of Trade Policy Terms*, 353 - 354)

As a result of this meeting, a report was presented and the phrase “trade in services” was launched.<sup>53</sup> In this report the group noted that they had not made a detailed examination of the question concerning international trade in services; however “given that services were a sector likely to expand rapidly in countries’ economies, the main need was to avoid any tendencies to protectionism and instead aim at achieving a more thorough liberalisation.”<sup>54</sup>

As Drake and Nicolaidis highlighted, the group took a huge leap by suggesting that services transactions could be considered trade and that the principles and norms that covered trade in goods could be applied to services, an issue that had never been framed in that way by the regulators or governing institutions.<sup>55</sup>

During this stage the US began making very strong diplomatic efforts to persuade other countries to prepare for multilateral negotiations on trade in services. The incentive came mainly from the US private sector service providers (the transnational corporations (TNCs)). The US objectives were twofold, and entailed, achieving the liberalisation of national impediments to internationally traded services and devising new multilateral rules to govern international transactions in the services sector of the world economy.<sup>56</sup>

However, the issue of services was met with a lot of resistance, this was because, except for the US, other OECD countries had just begun examining the issues involved and LDCs were even far from beginning to do so. Moreover there was still a good deal of

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<sup>53</sup> Self J. R. and Zutshi B. K. ‘Mode 4: Negotiating Challenges and Opportunities’ in Mattoo A. and Carzaniga A. (eds) (2003) *Moving People to Deliver Services* at 27 and Drake W. and Nicolaidis K. (1992) at 45

<sup>54</sup> OECD Report by the High Level Group on Trade and Related Problems (Paris:OECD,1973) quoted in Drake and Nicolaidis K. (1992) 45

<sup>55</sup> Drake W. and Nicolaidis K. (1992) at 45

<sup>56</sup> Malmgren B. H. ‘Negotiating International Rules for Trade in services’ (1985) *World Economy* at 11

“unfinished business” from the Tokyo round. They thus perceived the introduction of services as a distraction from the goods agenda.<sup>57</sup>

Developing countries (including LDCs) led by India and Brazil were opposed to the service negotiations<sup>58</sup> because they were suspicious that the US, and a handful of the other more advanced developed countries, simply wanted to consolidate their dominance in the international provision of services by forcing other countries to accept international rules which would limit the sovereignty and autonomy of smaller countries.<sup>59</sup> This was because they also assumed that their services industries wouldn't compete globally, and further assumed that the US wanted to liberalise trade in services, so that its TNCs would swoop down on the vulnerable LDC markets and as a result they would fail to develop their indigenous service industries.<sup>60</sup>

The **second stage** took place between 1982 and 1986. During this period governments began to assess what an agreement on the liberalisation of trade in services would mean for their national policies and capability.<sup>61</sup> This entailed looking at issues like: what changes would be required if regulations were re-defined as non-tariff barriers to trade; whether monetary stability would be influenced by the free provision of financial services; and the effect the free movement of professionals would have on quality and safety objectives.<sup>62</sup>

In 1984 the US submitted a “state of the art” report that highlighted the growing role of trade in services in the world economy, the conceptual issues involved, and the possible approaches to a new regime. As a result of this report, 15 other industrialised countries

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<sup>57</sup> Drake W. and Nicolaidis K. (1992) at 51

<sup>58</sup> Banga R. (2005) General Agreement on Trade in Services (GATS): India's Proactive Agenda UNCTAD-India, Interactive Session with Regional Media

<sup>59</sup> Malmgren B.H (1985) at 12

<sup>60</sup> Drake W. and Nicolaidis K. (1992) at 51

<sup>61</sup> *ibid* at 54

<sup>62</sup> *ibid*



followed with similar reports, resulting in shift in their positions towards a “hearty embrace” of the services negotiations.<sup>63</sup> However LDCs still opposed the services negotiations but in the next few years that followed, they progressively gave in to the service negotiations.<sup>64</sup>

However, a number of vexing conceptual ambiguities were of concern, (i) not all service transactions appeared to fit under the traditional definition of trade; (ii) the issue of definition, given that some cross border trade services were delivered by the temporary or permanent movement of producers and consumers this point raised the issue that if industrialised countries demanded FDI rules, then the LDCs might demand the

liberalisation of labour movement<sup>65</sup>; (iii) the issue of tariffs; (iv) the concept of comparative advantage required modification; (v) applicability of the MFN treatment and (vi) that services would have to be a progressive process and not simply added to the GATT.<sup>66</sup>

Consequently, the Members realised that although the GATT organisation was the appropriate venue for the negotiations, the GATT rules were insufficient, what was needed was a separate treaty drafted to meet the special circumstance of trade in services.<sup>67</sup>

In 1985 the GATT contracting parties established a committee to lay the ground work for a new round of negotiations. The committee had until July 1986 to draft a declaration that would be the basis for the final pre-negotiations at ministerial level in September that year.<sup>68</sup>

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<sup>63</sup> *ibid* at 56

<sup>64</sup> *ibid* at 64

<sup>65</sup> Thus from the onset, LDCs were interested in Mode 4, but up till now, there haven't been any meaningful commitments from developed countries on this issue.

<sup>66</sup> Drake W. and Nicolaidis K. (1992) at 63

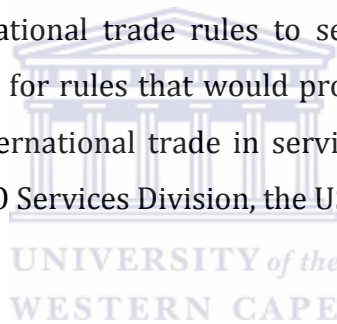
<sup>67</sup> *ibid*

<sup>68</sup> *ibid* at 65

The **third stage** took place in September 1986. After lengthy negotiations encompassing 123 Member states a unanimous agreement on a ministerial declaration which launched the Uruguay Round<sup>69</sup> was reached. It was during these negotiations that Member states agreed that the Uruguay Round would consist of “two distinct but parallel negotiations”, the first round would cover trade in goods and the second would tackle trade in services which would be legally outside the framework of the GATT.<sup>70</sup>

The final act of the Uruguay Round contained the Agreement establishing the WTO. Its remit was set out in a number of further agreements: the General Agreement on Tariffs and Trade (GATT), the General Agreement on Trade in Services (GATS) and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).<sup>71</sup>

The establishment of the GATS was a milestone in the history of the multilateral trading system as it extended international trade rules to services for the first time. It was introduced following pressure for rules that would provide transparency, predictability and non-discrimination in international trade in services.<sup>72</sup> As Wilkes<sup>73</sup> notes, quoting David Hartridge, Director, WTO Services Division, the US should be commended because,



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<sup>69</sup>This was launched at Punta del Este, Uruguay, on 25 September 1986 and concluded in Geneva on 15 December 1993 and signed by Ministers in Marrakesh, Morocco, on 15 April 1994. The subjects for negotiations, the widest of any GATT round, were *tariffs, non-tariff measures, tropical products* as a priority area, *natural resource-based products*, textiles and clothing, agriculture, review of GATT Articles, *safeguards, Tokyo Round* agreements and arrangements, subsidies and countervailing measures, *dispute settlement, trade-related aspects of intellectual property rights, trade-related investment measures* and the Functioning of the GATT System (FOGS). (Goode W. (2003) 4<sup>th</sup> Ed. Dictionary of Trade Policy Terms, 393 - 394)

<sup>70</sup> Self J. R. and Zutshi B. K. (2003) Mode 4: Negotiating Challenges and Opportunities in Mattoo A. and Carzaniga A. (eds) *Moving People to Deliver Services*, at 27; Drake W. and Nicolaidis K. (1992) 68

<sup>71</sup>Essential Background to Understanding the Current GATS Negotiations: A Briefing Paper Prepared By The British Screen Advisory Council On Behalf Of The European GATS Steering Group (2001) at 2

<sup>72</sup> Ibid at 2

<sup>73</sup> Wilkes L, GATS 2000: The End of Democracy? available at <http://home.clara.net/heureka/gaia/GATS.htm> accessed on 27/03/09

*“Without the enormous pressure generated by the American financial services sector, particularly companies like American Express and Citicorp<sup>74</sup>, there would have been no services agreement and therefore perhaps no Uruguay Round and no WTO.”*

Given the increasing significance of services for global trade, with services providing more than 60% of global output and in many countries a larger share of employment, the lack of a legal framework for international services was anomalous because the potential benefits of services liberalisation were at least as great as in the goods sector, and dangerous because there was no legal basis on which to resolve conflicting national interest.<sup>75</sup> And as such the coming in to force of the GATS provided a set of rules to govern services trade as well as provide a legal basis for dispute resolution.

### **2.3 Basic purpose**

As stated in the Preamble to the GATS, the main purpose of the Agreement is to contribute to trade expansion "under conditions of transparency and progressive liberalisation and as a means of promoting the economic growth of all trading partners and the development of developing countries".

Trade expansion is thus not seen as an end in itself, as some critical voices allege, but as an instrument to promote growth and development.<sup>76</sup> This link to development is further reinforced in the Preamble which states in paragraphs five and six, that the purpose of this agreement is to increase participation of developing countries in trade in services by strengthening their domestic services capacity and its efficiency and competitiveness,

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<sup>74</sup> These are Trans National corporations

<sup>75</sup> WTO (2001) GATS - Facts and Fiction at 4

[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 on 12/09/08) at 4

<sup>76</sup> Drake W. and Nicolaidis K. (1992) at 68. During the Uruguay round of negotiations, LDCs insisted that trade was a means to the end of economic development which implied that the principles of trade might have to bend to serve the goals of development

taking into account the special economic situation and the development, trade and financial needs of the LDCs.

The GATS contribution to world services trade rests on two main pillars: (a) ensuring increased transparency and predictability of relevant rules and regulations; and (b) promoting progressive liberalisation through successive rounds of negotiations. Within the framework of the GATS, the latter concept is tantamount to improving market access and extending national treatment to foreign services and service suppliers across an increasing range of sectors.<sup>77</sup>

It should be noted, at the onset, that the GATS does not entail deregulation. Rather, the Agreement clearly recognises governments' right to regulate, and introduce, new regulations, to meet national policy objectives, and the particular need of developing countries to exercise this right.

This paper will briefly discuss the general obligations and the specific commitments with a focus on Mode 4, with special reference to market access and the impact on LDC's.



## 2.4 Objectives

The objectives of GATS are aimed at promoting the economic growth of all trading partners and the development of developing countries through the expansions of trade in services. It seeks to achieve this by applying to the service trade the rules of GATT, with the modifications necessary to take into account its special features.<sup>78</sup>

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<sup>77</sup> the general agreement on trade in services: an introduction (2006) available at [http://www.wto.org/english/tratop\\_e/serv\\_e/serv\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/serv_e.htm)

<sup>78</sup> Preamble to GATS and Drake W. and Nicolaidis K. (1992) Ideas and interests and institutionalization: Trade in services and the Uruguay Round. International organisations 46, 1 at 63

## 2.5 Scope of the GATS

The GATS covers all internationally traded services with two exceptions: services provided to the public in the exercise of governmental authority as laid down in Article I(3), and, in the air transport sector, traffic rights and all services directly related to the exercise of traffic rights as provided for in the Annex on Airport Services.<sup>79</sup> The GATS defines services broadly and applies to all measures that affect services. These are divided in to 12 different groups which cover all aspects of a country's economy and range from business, communication services, construction and engineering, education, environment, health financial tourism, recreational, transport and other related services. As Pilger notes,

*"The scope of GATS is breathtaking. Almost every human activity is designated a "service", from transport and tourism to water, health and education...."*<sup>80</sup>

## 2.6 Modes of International service transactions

These services are delivered through four modes depending on the territorial presence of the supplier and the consumer at the time of the transaction. Pursuant to Article I (2), the GATS covers: crossborder trade which is defined to cover services flows from the territory of one Member into the territory of another Member (Mode 1); consumption abroad which refers to situations where a service consumer moves into another Member's territory to obtain a service (Mode 2); commercial presence implies that a service supplier of one Member establishes a territorial presence, including through ownership or lease of premises, in another Member's territory to provide a service (Mode 3); and presence of natural persons which consists of persons of one Member

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<sup>79</sup> WTO (2001) 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 on 12/09/08) at 1

<sup>80</sup> Pilger J. (2001), the violence of a few protesters in Gothenburg is trivial. Blair runs a violent government, which sells lethal weapons, 25 June 2001 available at <http://www.johnpilger.com/page.asp?partid=301> accessed on 27/03/09

entering the territory of another Member to supply a service (Mode 4). The Annex on Movement of Natural Persons however, specifies that Members remain free to operate measures regarding citizenship, residence or access to the employment market on a permanent basis.

## 2.7 General framework of GATS

The GATS consists of four main elements:<sup>81</sup>

- A framework of general rules and disciplines that apply to all measures affecting trade in services;
- National Schedules which list an individual country's specific commitments that apply only to service sectors and subsectors listed in a Member's schedule on access to their domestic markets by foreign suppliers;
- Liberalisation commitments specific to the service sectors and subsectors listed in each country's schedules; and
- Attachments, protocols and annexes addressing special conditions relating to individual sectors and Ministerial Decisions that relate to the implementation of the Agreement.

Each WTO Member lists in its national schedule those services for which it wishes to guarantee access to foreign suppliers. All commitments apply on a non-discriminatory basis to all other Members. In addition to the committed services, the schedules limit the degree to which foreign services providers can operate in the market.<sup>82</sup>

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<sup>81</sup> Hoekman, M. and Kostecki, M. (2001) *The Political Economy of the World Trading System* at 250

<sup>82</sup> WTO (2001) GATS - facts and fiction at 1

## **2.8 The legal framework of the GATS**

The GATS contains six parts. Part one sets out the scope and definition of the agreements, part two the general obligations and disciplines Member states agree to, part three sets out the specific commitments, part four progressive liberalisation, part five institutional provisions, and part six the final provisions.

This paper will briefly discuss the GATS provisions (general obligations) which have a bearing on Mode 4 commitments and negotiations.

### **2.8.1 Obligations under the GATS**

The general obligations outline the rules applicable to all Member states. Adherence thereto is of utmost importance to achieve the objective and ensure stability within this fast growing sector. These general obligations can be categorised into three, the unconditional general obligations, the conditional general obligations and the general provisions.

#### **2.8.1.1 Unconditional General Obligations**

These general obligations are adhered to by Member states regardless of the existence of specific commitments. They include the following;

#### **2.8.1.2 Most Favoured Nation Treatment (MFN)**

MFN is among the most important general obligations imposed by the legal framework. MFN principle requires that all Members accord immediately and unconditionally to LDCs suppliers no less favourable Mode 4 market access than they provide to any other Member with respect to all measures covered by the GATS.<sup>83</sup>

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<sup>83</sup> GATS Article II (1)

### 2.8.1.3 Domestic Regulation

Article VI on domestic regulation is one of the most important general provisions with regard to movement of natural persons, since Mode 4 is mainly constrained by various kinds of domestic regulations, ranging from labour market and immigration policies to tax and government procurement policies. Article VI requires Members to ensure that in sectors where specific commitments are undertaken “measures of general application affecting trade in services are administered in a reasonable, objective, and impartial way”, since domestic regulations are the most significant means of exercising influence and control over services trade.

It further seeks to ensure that,

*“measures relating to qualification requirements and procedures, technical standards, and licensing requirements do not constitute unnecessary barriers to trade in services and that such requirements are, (a) based on objective and transparent criteria; (b) not more burdensome than necessary to ensure the quality of the service; and (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.”<sup>84</sup>*

The Article also obligates Members to maintain or institute “judicial, arbitral or administrative tribunals or procedures” where individual service suppliers may seek legal redress. At the request of an affected service supplier these mechanisms should provide for the “prompt review of appropriate remedies for administrative decisions affecting trade in services” and further, that such procedures ensure an objective and impartial review.<sup>85</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

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<sup>84</sup> GATS Article VI(5)

<sup>85</sup> GATS Article VI



for transparency and objectivity in the criteria, nature, and administration of relevant domestic regulations<sup>86</sup>

Other important aspects of the general obligations are the rules that govern monopolies and service providers,<sup>87</sup> and other business practices<sup>88</sup> to restrain competition and thereby restrict trade.

#### **2.8.1.4 Transparency**

Transparency is another obligation under the GATS that's pertinent to Mode 4. 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 a signatory. Members are also required to inform the Council for Trade in Services<sup>89</sup> of any new laws, regulations, and administrative guidelines or amendments to the latter as relevant to the specific commitments filed by the Member.

The transparency provision also obliges Members to respond to requests for specific information on any measures affecting its commitments from other Members. Furthermore, Article IV(2) obligates developed countries Members, and to the extent possible other Members, to establish contact points to which developing country service suppliers can turn for relevant information.

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<sup>86</sup> Chanda R. (1999) Movement of Natural Persons and Trade in Services: Liberalising Temporary Movement of Labour under the GATS working paper No.51 ICRIER at 26

<sup>87</sup> GATS Article IV

<sup>88</sup> GATS Article IX

<sup>89</sup> The duties of the body are laid down in Article XXIV of the GATS

### **2.8.1.5 Conditional Obligations**

These 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 suppliers. Importantly, where a service is not contained in a Member's schedule, there is no guarantee of market access.<sup>90</sup>

### **2.8.1.6 Payments and Transfers**

Article XI provides that Members are to desist from applying restrictions on international transfers and payments for current transactions relating to its specific commitments except when the country is in serious balance of payment difficulties. Furthermore, Article XI(2) provides that the rights and obligations of IMF Members, under the Articles of Agreement of the Fund, shall not be affected. This is subject to the proviso that capital transactions are not restricted inconsistently with specific commitments, except under Article XII or at the request of the Fund. This is of importance to Mode 4 given that it's the main form money from service suppliers is sent to their home countries.

In effect conditional obligations are simply measures to ensure proper administration and implementation of the general obligations. However, in spite of the fact that a lot has been said, negotiated and agreed upon at these international forums, the implementation and enforcement of these obligations has created major gaps which always have detrimental effects on the developing states. This is because of the practical monitoring and implementation constraints.

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<sup>90</sup> ACCI: The General Agreement on the Trade in Services Review No.93 – November 2002 at 1

## **2.8.2 Other General Provisions**

### **2.8.2.1 Recognition**

Article VII on recognition is also a strong general discipline that is pertinent to the movement of natural persons. This Article grants Members the discretion to recognise the education, experience, and licensing and certification of a foreign service provider either in whole or in part, and either autonomously or by mutual agreement or by harmonisation. However, while granting flexibility to Members in the way they accord recognition, it also obligates Members to apply the criteria or standards for authorisation, licensing, or certification equally across all countries and not to use the latter as a “disguised restriction on trade in services”.

In addition, this Article requires Members granting recognition based on mutual agreements to provide opportunities to other interested Members to frame similar arrangements, and requires Members according recognition autonomously to provide adequate opportunity to other countries to demonstrate that education, experience, licenses, or certifications obtained or requirements met in the latter countries should be recognised. Article VII also stresses the need for recognition based on multilaterally agreed criteria and for the adoption of common international standards and criteria for recognition in relevant service sectors. It thus provides the basis for further negotiations on recognition disciplines in various sectors.

### **2.8.2.2 Economic Integration Agreements**

WTO Members are permitted 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 participants in the sense of national treatment. Recognising that such agreements may form part of a wider process of economic integration well beyond services trade, the Article allows the

above conditions to be considered in this perspective. It also provides for their flexible application in the event of developing countries being parties to such agreements.<sup>91</sup>

While Economic Integration Agreements must be designed to facilitate trade among participants, Article V also requires that the overall level of barriers is not raised vis-à-vis non-participants in the sectors covered. Otherwise, should an agreement lead to the withdrawal of commitments, appropriate compensation must be negotiated with the Members affected. Such situations may arise, for example, if the new common regime in a sector is modelled on the previous regime of a more restrictive participating country.<sup>92</sup>

Article V *bis* relates to, and provides similar legal cover for, agreements on labour markets integration. The main condition is that citizens of the countries involved are exempt from residency and work permit requirements provided the Council for Trade in Services is notified.



### 2.8.2.3 Exceptions to the General Obligations

The GATS provisions also allow for exceptions to be made for measures which are meant to protect public order and morals, to protect individuals, and to check professional misconduct, among other concerns. Thus, regulations and policies which are meant to address public concerns are exempt from market access and national treatment obligations, subject to the condition that they are used in a non-discriminatory manner and are not used as disguised restrictions on trade in services. On the whole, given the nature of regulations that affect trade via Mode 4, the GATS framework contains very important general provisions.<sup>93</sup>

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<sup>91</sup> GATS Article V

<sup>92</sup>The General Agreement on Trade in Services: An Introduction (2006) available at [http://www.wto.org/english/tratop\\_e/serv\\_e/serv\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/serv_e.htm) at 8 (accessed on 12/01/09)

<sup>93</sup> GATS Article XIV(e)

#### 2.8.2.4 Provisions relevant to Mode 4 not covered by the GATS

While the general provisions constitute a strong framework for Mode 4 based trade in services, some important regulations relevant to this Mode are not covered by GATS. Article XII on Government procurement rules out the application of MFN, market access, and national treatment obligations to government procurement, meaning that government procurement is not covered by GATS. In some cases, the existing obligations under the GATS are very weak. i.e. the provision on subsidies under Article XV. This Article only requires Members to enter into negotiations to develop multilateral disciplines on subsidies in recognition of the fact that subsidies have distortionary effects on trade in services. Countries are recommended to exchange information on subsidies and to engage in consultations on subsidies if there are adverse effects on trade.

Furthermore government procurement or differential subsidy policies are not covered by the GATS because they affect market access under Mode 4 and to the extent that Mode 4 is deemed to cause displacement of domestic workers and disruption and injury to the host country's market, emergency safeguards would also be relevant.

Transparency, recognition, and domestic regulation related obligations are quite strong in their wording and intent while also safeguarding domestic concerns. Taken together, these disciplines greatly reduce the scope for discretion in applying measures to restrict service trade through the movement of natural persons. This is particularly relevant in the case of Mode 4 where administrative and regulatory constraints are the main barriers.<sup>94</sup>

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<sup>94</sup> Chanda R. (1999) Movement of Natural Persons and Trade in Services: Liberalising Temporary Movement of Labour under the GATS working paper No.51 ICRIER 28

However, Members can seek recourse to the dispute settlement mechanism<sup>95</sup> if these provisions are violated. The main gaps in the framework are with regard to subsidies and government procurement policies as noted above, though with the proviso of moving towards strong multilateral disciplines in these areas in future rounds of negotiations.<sup>96</sup>

### 2.8.2.5 Specific commitments

Article XX requires each Member to have a Schedule of Specific Commitments which identifies the services for which the Member guarantees market access and national treatment and any limitations that may be attached. The Schedule may also be used to assume additional commitments. Commitments are undertaken with respect to each of the four different Modes of service supply and are negotiated on a bilateral basis between individual countries, but once a country adopts a commitment, that commitment must be applied to all other WTO Members under the MFN rules.

Specific commitments are made in terms of both market access, which requires countries to provide unlimited quantitative access<sup>97</sup> to their markets, and national treatment<sup>98</sup>, which requires countries to provide the same or better regulatory treatment to foreign service operators as that provided for domestic operators. Commitments thus guarantee minimum levels of treatment, but do not prevent Members from being more open or less discriminatory in practice.

Members are, to all intents and purposes, locked into these specific commitments once they have been made. The GATS provides countries with a right to specify the

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<sup>95</sup> GATS Article XXIII

<sup>96</sup> Paragraph 2 of the preamble which provides for the establishment of a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalisation and as a means of promoting the economic growth of all trading partners and the development of developing countries

<sup>97</sup> GATS Article XVI 2 (a-f)

<sup>98</sup> GATS Article XVII (1)

qualifications under which they will provide market access and national treatment for foreign services and service suppliers.<sup>99</sup> This is one of the major hindrances with regard to Mode 4, given that no meaningful commitments have been made and Mode 4 today accounts for less than two percent of the total value of services trade.

#### **2.8.2.6 Market Access**

In sectors where market access commitments are undertaken, Members are obliged not to maintain or adopt restrictions unless otherwise specified in their Schedule. The restrictions relate to;

- (a) The number of service suppliers allowed;
- (b) The value of service transactions or assets;
- (c) The number of operations or quantity of output;
- (d) The number of natural persons that may be employed;
- (e) 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
- (f) The participation of foreign capital in terms of a maximum percentage limit on foreign shareholding or the aggregate value of foreign investment.

The measures covered by Article XVI all take the form of quantitative restrictions. These measures, except for (e) and (f), are not necessarily discriminatory, taking into account that they may affect national as well as foreign services or service suppliers.

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<sup>99</sup> GATS Article XX

The introduction of a market access commitment in the GATS reflected the fact that contestability of service markets is frequently restricted by measures that apply to both foreign and domestic entities. The market access Article explicitly covers a number of such measures that were felt to be of particular importance. In practice, however, the market access obligation overlaps the national treatment requirement, as prohibited market access restricting measures may also violate national treatment.<sup>100</sup>

### 2.8.2.7 National treatment

National treatment implies the absence of all discriminatory measures that may modify the conditions of competition to the detriment of foreign services or service suppliers. This means a Member should not treat foreign services or service suppliers less favourably than it treats its own like services and service suppliers. The national treatment obligation applies regardless of whether or not foreign services and suppliers are treated in a formally identical way to their national counterparts. What matters is that they are granted equal opportunities to compete.

Most schedules consist of both sectoral and horizontal sections. The horizontal section contains entries that apply across all sectors subsequently listed in the schedule.

Members tend to make horizontal commitments applicable to Modes of supply, notably commercial presence and the presence of natural persons, rather than sectors that are often restrictive in nature. A common example is an economic needs test.<sup>101</sup>

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<sup>100</sup> Hoekman B. and Kostecki M. (2001) 2 *The political Economy of the World Trading System; the WTO and Beyond*. at 253

<sup>101</sup> GATS Primer: Understanding the WTO General Agreement on Trade in Services (2002) Friends of the Earth. available at [http://www.foe.co.uk/resource/briefings/GATS\\_primer.pdf](http://www.foe.co.uk/resource/briefings/GATS_primer.pdf) accessed on 9/01/2009 at 6 (accessed on 14/01/09)



Schedules of specific commitments are annexed to the GATS and form an integral part of the agreement.<sup>102</sup> While negotiating specific commitments, special consideration has to be given to certain objectives relating to developing countries. Developed countries have to establish contact points to facilitate access by LDCs service suppliers to information in relation to commercial and technical aspects of the supply of services in their respective countries. And special priority must be given to LDCs in respect of above provisions.<sup>103</sup>

Specific commitments are binding international obligations and cannot be amended unilaterally. However, a Member state may modify or withdraw a commitment three years after that particular commitment entered into force. The modifying state needs to negotiate with states affected due to the modification to reach consensus on any compensatory adjustment that the other states may encounter or had encountered.<sup>104</sup>

The Member modifying its schedule of specific commitments or wishing to eliminate any commitment in its schedule has to give notice of its intention to the Council of Trade in Services at least three months prior to the date when it wants the modification or elimination to take place.<sup>105</sup>

The specific commitments made by Members can be seen as a two step process. Each Member first decides which services sectors will be subject to the GATS market access

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<sup>102</sup> GATS Article XX (3)

<sup>103</sup> Las Das B. (1999) *The World Trade Organisation: A Guide to the Framework For International Trade*, at 337-338

<sup>104</sup> GATS Article XXI (2)(a)

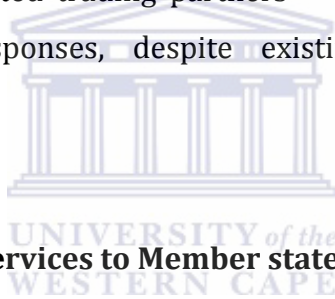
<sup>105</sup> GATS Article XXI(1)(b)

and national treatment disciplines. It then decides what measures will be kept in place for that sector which violate market access or national treatment.<sup>106</sup>

#### **2.8.2.8 Additional commitments**

Finally, Members may also undertake additional commitments with respect to measures not falling under the market access and national treatment provisions of the Agreement. Such commitments may relate to issues, such as, the use of standards, qualifications or licenses.<sup>107</sup>

The purpose of commitments is to ensure stability and predictability of trading conditions. However, commitments are not a straitjacket. They may be re-negotiated against compensation of affected trading partners<sup>108</sup> and there are special provisions that allow for flexible responses, despite existing commitments, in specified circumstances.



#### **2.9 The benefits of trade in services to Member states**

The growing economic significance of services trade required a legal framework specifically adjusted to services in order to yield sustainable increases in prosperity. This was fulfilled with the establishment of the GATS. In that respect, the setting up of a multilateral framework that was subject to internationally accepted rules must be seen as a success by itself.

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<sup>106</sup> Adlung R., Carzeniga A., Hoekman B., Kono M., Mattoo A. and Tuthill L (2002) *The GATS: Key Features and Sectors* in Hoekman B, Mattoo A, and English P,(eds) (2002) *Development, Trade, And The WTO A Handbook* at 260 - 261

<sup>107</sup> GATS Article XVIII

<sup>108</sup> GATS Article XXI

As the crossborder trade in services increases it is to be anticipated that it could become an important source of economic growth and development to many countries in the developing world.<sup>109</sup> In 1995 world trade in commercial services, measured on a balance of payments basis, accounted for around one-fifth of world exports and imports of goods and services.<sup>110</sup>

The liberalisation of services has potential advantages related to the GATS rules that can be classified into the following three broad categories from which all Member countries can benefit.<sup>111</sup>

### **2.9.1 Increased competition**

Services liberalisation can contribute to economic development (only) if it results in competition and a more efficient supply of services. Competition in open services markets tends to create a more efficient service infrastructure that may serve as an engine for growth for the whole economy. Competition and growth normally result in lower consumer prices, better quality, wider choice, faster innovation and more efficient processes. It is generally acknowledged that an efficient service sector is a decisive prerequisite for a positive development of all industrial branches.

#### **2.9.1.1 Faster innovation**

Countries with liberalised services markets have seen greater product and process innovation in sectors, such as, telecommunication, financial services and information technology.

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<sup>109</sup> Mattoo A. and Wunsch S. (2004) Pre-empting protectionism in Service : The GATS and outsourcing, available at <http://www.ije.com/publications/papers/wunsch0204.pdf> at 4

<sup>110</sup> Chang P., Karsenty G., Mattoo A. and Richtering J. (1998) GATS, the Modes of Supply and Statistics on Trade in Services at 13

<sup>111</sup> WTO (2001) GATS - facts and fiction at 5

### **2.9.1.2 Consumer savings**

There is strong evidence in many services, not least telecommunications, that liberalisation leads to lower prices, better quality and wider choice for consumers. Such benefits, in turn, work their way through the economic system and help to improve supply conditions for many other products. Thus, even if some prices rise during liberalisation, for example the cost of local calls, this tends to be outweighed by price reductions and quality gains elsewhere.

## **2.9.2 Predictability and transparency**

The GATS commitments have real value in providing secure and predictable conditions of access to markets, which benefits traders, investors, and, ultimately, all of us as consumers. Transparent, foreseeable and reliable conditions in foreign markets may encourage FDI. That, in turn, could enhance technology transfer and might have positive impacts for many other economic branches.

### **2.9.2.1 Technology transfer**

Services commitments at the WTO help to encourage FDI. Such FDI typically brings with it new skills and technologies that spill over into the wider economy in various ways: domestic employees learn the new skills (and spread them when they leave the firm); domestic firms adopt the new techniques; and firms in other sectors that use services sector inputs, such as, telecommunications and finance, benefit too.

### **2.9.2.2 Economic performance**

An efficient services infrastructure is a precondition for economic success. Services, such as, telecommunications, banking, insurance and transport, supply strategically important inputs for all sectors, goods and services. Without the spur of competition they are unlikely to excel in this role to the detriment of overall economic efficiency and growth. An increasing number of governments thus rely on an open and transparent environment for the provision of services.

### 2.9.3 Improved market access

For service companies, open markets provide an opportunity to capitalise on their competitive strengths, to generate economies of scale and thus to become more profitable. The WTO promotes this aspect as a key element for the development strategies of developing countries.

#### 2.9.3.1 Development

Access to world class services helps exporters and producers in developing countries to capitalise on their competitive strength, whatever the goods and services they are selling. A number of developing countries have also been able, building on foreign investment and expertise, to advance in international services markets, from tourism and construction to software development and health care. Services liberalisation has thus become a key element of many development strategies.

International trade can play a major role in the promotion of economic development. Developed countries argue that liberation of trade in services can only be beneficial for developing countries, particularly through FDI and access to imports of service. However, many developing countries are sceptical as to the benefits accruing to them both in terms of market access and strengthening of their supply capacity.<sup>112</sup>

Trade statistics show, however, that there are regional variations. On the export side, developed countries recorded above average shares of services in their total exports, while developing countries recorded shares of services below the global average. On the import side, it was the reverse, with developing countries importing above average and developed countries importing below average.<sup>113</sup>

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<sup>112</sup>Mashayekhi M, GATS 2000 Negotiations Options for Developing Countries, available at [http://www.southcentre.org/index.php?option=com\\_content&task=view&id=252&Itemid=1&lang=frp](http://www.southcentre.org/index.php?option=com_content&task=view&id=252&Itemid=1&lang=frp)  
At 3

<sup>113</sup> Chang P., Karsenty G., Mattoo A. and Richter J. (1998)GATS, the Modes of Supply and Statistics on Trade in Services at 13 - 14

The share of developing countries in the world exports of commercial services was less than 20% in 1999, despite the fact that they constitute about 90% of the Membership of the WTO. Moreover, this share has not shown any increase over the past few years. On the other hand, developing countries' share in world commercial services imports increased by about 15% during the same period. This is just one indication of lack of effective implementation of the GATS Article IV on "Increasing Participation of Developing Countries".<sup>114</sup>

Even though the WTO recognises the need for all peoples to benefit from the increased opportunities and welfare gains that the multilateral trading system generates, this however, is not what is happening because the rules negotiated during the GATS negotiations were purely geared to benefit the developed states. This was evidenced during the negotiations at these meetings which were dominated by developed states to ensure maxim benefit for their own constituencies. This was openly displayed during the ministerial meeting held at Cancun<sup>115</sup> where the developing states demanded that their interests and concerns be taken seriously, this meeting ground to a standstill due to the developed states' stubbornness in refusing to give in to the demands of the developing states.

The key concern for African LDCs is not only whether the flow of trade is maximized but also the developmental aspects of such trade, including its contribution to building a competitive services sector and maximization of the overall level of development at the national level which can be achieved through increased market access and further liberalisation.<sup>116</sup>

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<sup>114</sup> WTO (2001) Increasing Participation of Developing Countries in International Trade in Services: Effective Implementation of Article IV of GATS S/CSS/W/131. Council for Trade in Services Special Session. Communication from Cuba, Pakistan, Senegal, Sri Lanka, Tanzania, Uganda, Zambia and Zimbabwe

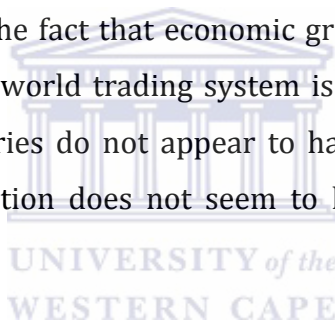
<sup>115</sup> Fifth Ministerial Conference held at Cancun 13 September 2003

<sup>116</sup> Mashayekhi M, GATS 2000 Negotiations Options for Developing Countries, available at [http://www.southcentre.org/index.php?option=com\\_content&task=view&id=252&Itemid=1&lang=frp](http://www.southcentre.org/index.php?option=com_content&task=view&id=252&Itemid=1&lang=frp) 3

Trade in services is of great importance to LDCs because it goes beyond pure economic significance due to the major role services play in achieving social and economic development objectives. It is also a means of addressing poverty and upgrading welfare, improving universal availability of the social dimension.<sup>117</sup>

However, despite these listed advantages, the GATS still remains the most controversial contract of the WTO. In the judgment of economists and experts in international law, it is seen as especially complicated and in certain areas yet uncompleted and provisional. From a formal point of view, the GATS cannot be considered as a complete set of rules that automatically results in continuous liberalisation effects. It rather contains simply the commitment of the contracting parties to further liberalisation talks. Thus, it is only the very first step towards a free flow of services.<sup>118</sup>

As Hilger points out, despite the fact that economic growth of the developing countries and their integration into the world trading system is heavily promoted in the written text of the GATS, these countries do not appear to have benefited massively from the Agreement. So far, their situation does not seem to have improved significantly as a result of the Agreement.



## **Conclusion**

In conclusion, given the fact that the significance of services is continuously growing, that, the services sector has become the engine of global economic growth, and taking into account the advantages that accrue as a result of trade in services, the question at hand is, are African LDCs fully benefiting from the GATS as it currently stands? As the German Secretary for Co-operation and Development pointed out, “the international

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<sup>117</sup> WTO (2003): Draft Modalities for the Special Treatment for Least-Developed Country Members in the Negotiations on Trade in Services, TN/S/W/13. Paragraph 2. May 2003

<sup>118</sup> Hilger O. (2005): Pros and Cons of the General Agreement on Trade in Services (GATS), Working Paper 03. European School of Business at 10

trade system still prefers countries that are economically more powerful, its impacts are still distributed asymmetrically to the detriment of the developing countries".<sup>119</sup>

African LDCs, however, feel that if there is further liberalisation of services in the GATS under Mode 4, they would gain better access to potential markets. This would result in them greatly benefiting from trade in services given that they have a comparative advantage in labour intensive services.<sup>120</sup>

Chapter Three will therefore address the general scope of mobility of labour (Mode 4) in the GATS, the growing demand for labour in developed countries, the availability of this labour in African LDCs, and the impact of Mode 4 for on host and home countries. It will also discuss the status of the negotiations in the WTO highlighting the difficulties and constraints that developing countries face in engaging in Mode 4 negotiations.



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<sup>119</sup>Pros and Cons of the General Agreement on Trade in Services (GATS), Working Paper 03. European School of Business at 13

<sup>120</sup> UNCTAD (2005) Trade in Services and Development Implications at 8



### 3 CHAPTER THREE: OVERVIEW OF TRADE IN SERVICES AND THE MOVEMENT OF NATURAL PERSONS

#### 3.1 Introduction

During negotiations in the Doha Development Round at the WTO, LDCs expressed a strong interest in gaining market access for their service providers to work abroad on a temporary basis. In particular, African LDCs<sup>121</sup> expressed interest in securing market access abroad for their semi-skilled and low skilled service providers in sectors where they believe these workers possess a competitive advantage.<sup>122</sup>

Article IV(1) of the GATS acknowledges the liberalisation of market access in sectors and modes of supply of export interest to developing countries as a key way in which their increased participation in international trade can be achieved. In Article IV(3) further singles out LDCs as having a special priority claim to this. The sectors and modes of supply as identified by LDCs are, therefore, an important indicator of how they can best be integrated into the world trading system. Paragraph 9 of the Modalities for the Special Treatment of LDCs<sup>123</sup> emphasises Mode 4 as presenting potential benefit to both sending and recipient Members.<sup>124</sup>

African LDCs have cited the potential development dividends that would accrue to them as a result of further liberalisation of trade in services via Mode 4. These include: remittances, and knowledge and skills acquired abroad that workers would bring back

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<sup>121</sup> WTO (2003) Draft Modalities for the Special Treatment for Least-Developed Country Members in the Negotiations on Trade in Services

<sup>122</sup> *Quaker United Nations Office – Geneva* Understanding GATS Mode 4: Return Migration of Temporary Workers Briefing Paper Vol 26, No. 4

<sup>123</sup> WTO (2003) Draft Modalities for the Special Treatment for Least-Developed Country Members in the Negotiations on Trade in Services

<sup>124</sup> Kategekwa J. (2006) Extension of Mode 4 Commitments to Include Unskilled Workers in the WTO: A Win Win Situation, Especially for LDCs at 6

on returning to their countries of origin.<sup>125</sup> However, GATS Mode 4 commitments remain largely restricted to high skilled movement<sup>126</sup>

This chapter will specifically deal with Mode 4, defining and assessing the nature of liberalisation that have taken place in this Mode under the existing GATS framework as well as discuss the implications of movement of natural persons on home states (LDCs) and host states (developed countries)

### 3.2 Definition and scope of Mode 4

The presence of natural persons has been defined as the fourth Mode in which traded services are supplied, “by a service supplier of one Member, through the presence of natural persons of a Member in the territory of any other Member” and is thus referred to as the GATS Mode 4.<sup>127</sup>

Mode 4 is uniquely different from the other modes of delivery because it is the only one that directly regulates people. In addition, it is the only one that parallels an already existing structure outside of the GATS, viz immigration regulations.<sup>128</sup>

The GATS Annex on Movement of Natural Persons Supplying Services outlines the scope of Mode 4 as being to cover ‘persons who are temporarily working in another Member country. It does not relate to persons seeking citizenship, permanent employment or

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<sup>125</sup> *Quaker United Nations Office – Geneva* Understanding GATS Mode 4: Return Migration of Temporary Workers Briefing Paper Vol 26, No4

<sup>126</sup> IOM: GATS Mode 4 available at <http://www.iom.int/jahia/jahia/pid/551>

<sup>127</sup> Sen R. and Rajan R. (2005) Liberalisation of Market Access in GATS Mode 4 and it’s Importance for Developing Countries.

<sup>128</sup> Ostrovsky A. A (2004) liberalisation of the temporary movement of natural persons and the gulf between unskilled and skilled service suppliers; suggestions for further liberalisation of GATS Mode 4.

permanent residence in a country'. The above definition limits the scope of Mode 4 by restricting its coverage only to the temporary movement of natural persons.<sup>129</sup>

It is important to highlight that the GATS Mode 4 does not prevent Members from regulating the access, entry or temporary stay of natural persons in their sovereign territory<sup>130</sup>. However, the measures may not be applied in such manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment. Taken as a whole, Mode 4 sets down some minimal rules on the movement of natural persons, but falls short of the substantially liberalising instrument preferred by commerce and industry. Nevertheless, Mode 4 provides some degree of transparency and is superior to the preceding situation, which was 'no rules at all'.<sup>131</sup>

Duration and purpose of stay can be used to further distinguish Mode 4 movement from other forms of temporary labour migration, given that Mode 4 service suppliers:

- only gain entry for a specific purpose (to fulfil a service contract as self-employed or as an employee of a foreign service supplier);
- are normally confined to one sector (as opposed to workers who enter under general migration or asylum programmes, and who can move between sectors); and
- are temporary (i.e., they are neither migrating on a permanent basis nor seeking entry to the labour market).

Furthermore, the scope of Mode 4 under the GATS does not exclude any level of skill. Therefore, low skilled service providers, such as, construction workers, and domestics,

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<sup>129</sup> Dey D. (2005) Movement of Natural Persons1 (Mode-4) Under GATS: Advantage Developing Countries at 3

<sup>130</sup> Carzaniga, A. (2003) The GATS, Mode 4 and Pattern of Commitments in Mattoo A. and Carzaniga A. (eds) *Moving People to Deliver Services*, at 23

<sup>131</sup> ACCI (2002) Advancing the Liberalisation of the Trade in Services: Enhancing GATS Mode 4 – the Movement of Natural Persons. The Australian Chamber of Commerce and Industry at 10

semi-skilled service providers, such as, repairmen and technicians, skilled professional service providers, such as, doctors and engineers, and services delivered to manufacturing and agricultural sector activities, such as, distribution, transport, and technical analysis type services, are all covered by the GATS.<sup>132</sup>

### **3.2.1 Limitations on the scope and definition of Mode 4**

However, there are some limitations to the way in which Mode 4 is defined under the GATS and some ambiguities regarding the scope and definition of this Mode. The first is that the distinction between foreign temporary workers whose services are contracted by a host country firm and foreign temporary workers who are employees of the host country firm may not be applicable in practice.<sup>133</sup>

The second source of ambiguity is the difficulty in defining “supply of a service”. While the GATS Mode 4 only covers services and service suppliers, it is difficult to tell what constitutes the supply of a service. For example, are fruit pickers to be viewed as temporary agricultural workers or as suppliers of fruit picking services. Similarly, with increased outsourcing of activities by sectors like manufacturing, it is often difficult to classify activities by sectors. Thus, there is lack of clarity about who is covered by Mode 4 from a sectoral perspective. It has been left to countries to interpret what constitutes a service as opposed to an agricultural or manufacturing activity and how broadly they define Mode 4.<sup>134</sup>

However, proponents of the GATS coverage argue that such services fall under the International Standard Classification of Occupation list (ISCO-88) of the United Nations provisional Central Product Classification System (UN CPC):

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<sup>132</sup> Chanda R. (2004) Movement and Presence of Natural Persons and Developing Countries: Issues and Proposals For The GATS Negotiations (T.R.A.D.E.) Working Papers 19 South Centre at 15

<sup>133</sup> Chanda R. (2004) at 16

<sup>134</sup> Chanda R. (2004) at 16

*“Services incidental to agriculture, hunting, forestry and fishing: services rendered on a fee or contract basis, mostly performed at the site where the agricultural production is done, e.g. services providing agricultural machinery with drivers and crew; harvesting and related services; services of farm labour contractors...”*

LDCs strongly support this position because their Mode 4 services suppliers have significant capacity to supply such services and several existing worker movement regimes cover agricultural “harvesting and related services”.<sup>135</sup>

A third limitation of Mode 4 as defined under the GATS is the ambiguity about the term “temporary”. There is no positive definition of “temporary” in the GATS. Instead, temporary is negatively defined as excluding permanent migration, i.e., individuals seeking access to the host country’s employment, or measures regarding citizenship, permanent residence, or employment on a permanent basis<sup>136</sup>. Given such ambiguity, Member countries are free to interpret the word “temporary”. This discretion is reflected in their commitments whereby they have used varying definitions for different categories of service providers.<sup>137</sup> In the ‘offers’ submitted by different countries, duration of such stay ranged from few weeks to few years only about one third of commitments include any specified duration of stay and these are mostly for intra-corporate transferees and business visitors.<sup>138</sup>

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<sup>135</sup> Crosby D. (2009) Advancing Services Export Interests of Least Developed Countries: Toward GATS Commitments on the Temporary Movement of Natural Persons for the Supply of Low-Skilled and Semi-Skilled Services. ICSTD at 12- 13

<sup>136</sup> Carzaniga, A. ‘The GATS, Mode 4 and Pattern of Commitments’ in Mattoo A. and Carzaniga A. (eds) (2003) *Moving People to Deliver Services*, at 23

<sup>137</sup> Chanda R. (2004) at 17

<sup>138</sup> International Organisation for Migration, GATS Mode 4 available at <http://www.iom.int/jahia/jahia/pid/551>

However, notwithstanding such limitations in defining Mode 4, the GATS Mode 4 can be broadly viewed as covering three groups of service persons:<sup>139</sup>

- Persons providing services where a foreign service supplier obtains a contract to supply services to the host country company and sends its employees to provide the services;
- Independent and self-employed service providers, i.e., an individual selling services to a host country company or to an individual and getting paid directly by the consumer; or
- Persons employed abroad by foreign companies established in the host country.

### 3.3 Categorisation of movements under Mode 4

Natural persons as defined under Mode 4 can be further grouped into five different categories<sup>140</sup>:

a) Business visitors: they keep residence and professional affiliation in their country of origin and whose temporary entry serves the conducting of negotiations on agreements concerning the supply of a service. Their stay is normally allowed for a period of between three to six months and is generally not subject to numerical quotas or additional qualifications.

b) Natural persons involved in the establishment of a foreign branch: they also move by order of a foreign firm. These persons are usually chief executives of the respective firms,

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<sup>139</sup>ibid

<sup>140</sup>Background Note on GATS Mode 4 and Its Information Needs World Trade Organization and OECD Meeting of the Technical Subgroup on Movement of Natural Persons – Mode 4 at 10; and Dey D. (2005) Movement of Natural Persons1 (Mode-4) Under GATS: Advantage Developing Countries at 3; and Lavenex S. (2002) Labour Mobility in the General Agreement on Trade in Services (GATS) – Background Paper at 8-9

although there is no common definition with regard to the contents of the title 'executive' nor to the duration of stay involved, which can range from three months to two years. Some countries require additional criteria such as, the availability of specific investment capital or a specified period during which the person has been employed by the respective firm.

c) Intra-corporate transferees of the same employer who are transferred from one branch to another. Most schedules limit their commitments to chief executives and other specialists who possess specific knowledge which is essential for the respective service. Some schedules also contain indications concerning minimum wage or qualification. The stay of these persons ranges from two to a maximum of five years.

d) Specialists: who move independently from prior employment by a service company. Commitments toward this kind of independent service supplier are rare and limited to specified qualifications, maximum quotas and economic needs tests<sup>141</sup> which give precedence to domestic workers. Thus, these commitments do not provide free access to domestic labour markets but merely foresee the possible authorization for national firms to temporarily employ foreign specialists.

e) Contractual service suppliers: they are employed by a foreign firm without any local branch who enter a Member Country for the purpose of supplying a contracted service. This category of persons is only listed by Switzerland and the EC for a limited range of sectors and is limited by several additional requirements. These include determined

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<sup>141</sup> Economic needs test means that the person can only be admitted if it can be proved that there is no equally qualified national person.

periods of prior employment, professional qualifications and experience, and an economic needs test.

However, these categories are not exhaustive. For example, India argued for the addition of another category, 'Individual Professionals', to the existing categories. It also called for further expansion in the scope of occupational categories to include middle and lower level professionals.<sup>142</sup>

On the other hand, LDCs have also advised the use of ISCO-88 developed by the International Labour Organization (ILO) for occupational categories.<sup>143</sup> The ISCO-88 has developed categories of low skill occupations, ranging from waiters to hairdressers and it holds the same status as the UN CPC classification on service sectors, which is used by Members to schedule sectoral commitments.

Moreover, by using occupation categories, the sensitive topic of "skill levels" addressed by developed countries is avoided. The term "unskilled", as used by some Members initially, was perceived to hold negative connotations.<sup>144</sup> It is important to note here, that LDCs are not seeking liberalisation of unskilled workers, but that of low and semi-skilled workers, considering the minimum qualifications proposed by LDCs in their revised request on Mode 4 for the categories in which they want liberalisation. LDCs propose that services suppliers have diplomas, certificates, and experience; all of these attainments do not fit within the meaning of unskilled<sup>145</sup>

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<sup>142</sup> Dey D. (2005) Movement of Natural Persons (Mode-4) Under GATS: Advantage Developing Countries at 3-4

<sup>143</sup> GATS Mode 4 Negotiations and Low Skilled Workers South Centre Analytical Note February 2005 at 9

<sup>144</sup> Dey D. (2005) at 3-4

<sup>145</sup> Kategekwa J. (2006) Extension of Mode 4 Commitments to Include Unskilled Workers in the WTO. A Win Win Situation, Especially for LDCs. at 1



### 3.4 Commitments on the Movement of Natural Persons

Little progress has been made in the liberalisation of the movement of service suppliers under Mode 4. Even by the modest standards of services trade liberalisation in the Uruguay Round, where the GATS commitments are guaranteed to a minimum level of treatment, the result was that countries tended to be conservative, with most committing to temporary labour migration frameworks that were even more restrictive than those they were already employing.<sup>146</sup>

#### 3.4.1 Current Mode 4 Commitments

The number of workers, occupations and sectors committed under Mode 4 is left to the individual countries. Developing country governments complain that current commitments are limited to highly skilled occupations such as, doctors, lawyers, and company executives. Mode 4 currently offers little more than existing wealthy country visas, since these sectors are already favoured by these systems.<sup>147</sup>

Furthermore, the commitments that have been made in this Mode are very limited in nature. Horizontal as well as sectoral commitments filed by countries have been the most limited in the case of the movement of natural persons relative to the other Modes of supply. The structure and substance of most existing Mode 4 commitments differ from all other Modes in that, among the four Modes of supply, Members have made the least number of commitments in Mode 4. In fact, no Member has scheduled full market access under Mode 4 in any sector.<sup>148</sup>

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<sup>146</sup> IOM: GATS Mode 4 available at <http://www.iom.int/jahia/jahia/pid/551>

<sup>147</sup> GATS Mode 4 and the Implications of Expansion  
<http://www.tamejavi.com/trade-matters/issues/GATS-Mode-4-Fact-Sheet.htm>

<sup>148</sup> Carzaniga, A. 'The GATS, Mode 4 and Pattern of Commitments' in Mattoo A. and Carzaniga A. (eds) (2003) *Moving People to Deliver Services*, at 24.

Specific sectoral commitments under Modes 1, 2, and 3 generally follow a “top-down” approach, starting from full sectoral liberalisation and adding any desired limitations to market access and national treatment. Mode 4 commitments, however, follow a “bottom-up” approach, starting from no market access. Virtually all WTO Members have scheduled “horizontal commitments” on Mode 4 that apply to all service sectors in their schedules except as provided in sector specific commitments.<sup>149</sup>

There are three types of commitments: (1) full commitments, which means that no restrictions are imposed; (2) partial commitments, which means that some limitations are imposed; and (3) unbound commitments, which means that the country has made no commitment is made.

Chanda identifies three main problems with the nature of liberalisation that has taken place in Mode 4. The first problem is the limited sectoral coverage of commitments. High income countries have scheduled 50 percent of service sectors while developing countries have scheduled only 11 percent of all service sectors. In both cases, these commitments remain subject to restrictions on market access and national treatment.<sup>150</sup>

Secondly, commitments filed in Mode 4, in most cases do not provide for unconditional liberalisation. An analysis of the profile of horizontal and sectoral commitments in Mode 4 indicates that countries on the whole have not made comprehensive commitments in this Mode. Market access and national treatment are subject to the fulfilment of additional conditions and limitations which usually relate to functional or hierarchical criteria, linkages to other Modes of supply length of stay, labour market and economic needs tests, etc. Moreover, in many of the schedules, the conditions are not clearly

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<sup>149</sup>Carzaniga, A. (2003) at 24.

<sup>150</sup> Chanda R. (1999) Movement of Natural Persons and Trade in Services: Liberalising Temporary Movement of Labour under the GATS working paper No.51 ICRIER 27 - 28

specified in terms of their criteria and procedures, creating some scope for non-transparency and subjectivity in their application. Only a small number of Mode 4 commitments are not qualified with respect to functional or hierarchical status and are not associated with commercial presence; thus, they can be potentially interpreted as covering suppliers of low and semi-skilled services of interest to LDCs.<sup>151</sup>

Thirdly, is the nature of the Mode 4 commitments themselves. Market access and national treatment obligations in Mode 4 are mostly unbound in the sectoral schedules and refer to the horizontal commitments. The latter in turn are bound for only a small subset of service personnel, typically at the higher level, and in categories that are related to commercial presence abroad, and subject to limitations.<sup>152</sup>

### **3.4.2 Limitations on the current Mode 4 Commitments**

Under the GATS, fewer commitments have been made in Mode 4 than for other Modes of supply, by both developed and developing countries. There are very few cases of full commitments, and fewer cases of partial commitments than for other Modes of supply.<sup>153</sup>

Under the existing commitments in Mode 4, the most prevalent market access and national treatment limitations relate to the type of service provider and the reason for movement and corollary restrictions on duration of stay, eligibility conditions, and additional requirements that must be satisfied. Thus, a large number of countries have included in their schedules the more problematic limitations, such as, immigration laws

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<sup>151</sup> WTO (1998) "Presence of Natural Persons (Mode 4) Background Note by the Secretariat", Document S/C/W/75, dated 8 December 1998. paras. 38 and 42

<sup>152</sup> Chanda R. (1999) Movement of Natural Persons and Trade in Services: Liberalising Temporary Movement of Labour under the GATS working paper No.51 ICRIER 27 - 28

<sup>153</sup> IOM: GATS Mode 4 available at <http://www.iom.int/jahia/Jahia/pid/551>

and regulations, recognition related regulations, policies favouring domestic service providers, and restrictions on investment.<sup>154</sup> These will be expounded on in Chapter four.

The following discussion highlights the main problems with the nature as well as the structure of commitments in Mode 4.

### **3.4.2.1 Horizontal versus sectoral commitments**

Commitments in Mode 4 are horizontal rather than sectoral, which means that the commitments and attached conditions apply to all service sectors. Moreover, most of these horizontal commitments are “unbound” except for specified categories of service providers, based generally on the level of skill, type of occupation and purpose of movement. The sectoral commitments are unbound for Mode 4 and refer to the horizontal commitments. This implies that sectoral needs and interests are not addressed by the Mode 4 commitments.<sup>155</sup>

The significantly 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 labour would lead to an influx of immigrants into developed country markets, given the comparative advantage of developing countries in exporting labour intensive services.<sup>156</sup>

Further to the existing limitations on commitments, there are also MFN exemptions by countries in selected sectors. Although these exemptions are not Mode related, a good

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<sup>154</sup> Chanda R.(1999) at 31

<sup>155</sup> Chanda R. (2004) Movement and Presence of Natural Persons and Developing Countries: Issues and Proposals For The GATS Negotiations (T.R.A.D.E.) Working Papers 19 South Centre at 18

<sup>156</sup> Chanda R. (1999) Movement of Natural Persons and Trade in Services: Liberalising Temporary Movement of Labour under the GATS working paper No.51 ICRIER at 29

number of these exemptions are relevant to Mode 4 (such as preferential agreements), since by their very nature they tend to have a greater impact on the movement of natural persons and on commercial presence.<sup>157</sup>

### 3.4.2.2 Bias towards highly skilled labour

Commitments in Mode 4 refer almost exclusively to higher level personnel.<sup>158</sup> Entry requirements are bound for three main categories of service providers. These are business visitors, personnel engaged in setting up a commercial presence and personnel in speciality occupations. More than 40 percent of Mode 4 commitments relate to executives, managers, and specialists and another 50 percent deal explicitly with intra-company transferees whose mobility is intimately related to FDI. These are all categories that are typically linked to some form of commercial presence, i.e., movement of capital.<sup>159</sup> Only 17 percent of all horizontal entries cover low skilled personnel. Sectoral commitments similarly facilitate the entry of only higher level personnel in professional, managerial and technical categories as specified in the horizontal schedules.<sup>160</sup>

Not even one WTO Member has scheduled sector specific Mode 4 commitments targeted at semi-skilled or low skilled services. Although residual commitments in some Members' schedules might be interpreted as cover limited to semi-skilled or low skilled services, the overwhelming majority of GATS Mode 4 commitments apply to highly skilled professionals<sup>161</sup>

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<sup>157</sup> Chanda R. (1999) Movement of Natural Persons and Trade in Services: Liberalising Temporary Movement of Labour under the GATS working paper No.51 ICRIER 31

<sup>158</sup> IOM: GATS Mode 4 available at <http://www.iom.int/jahia/jahia/pid/551>

<sup>159</sup> Chanda R. (2001) Movement of Natural Persons and the GATS', *World Economy*, Vol. 24 (5) at 641

<sup>160</sup> OECD (2003) Service Providers on the Move: the Economic Impact of Mode 4, Working Party of the Trade committee at 13

<sup>161</sup> WTO (1998) "Presence of Natural Persons (Mode 4) Background Note by the Secretariat", Document S/C/W/75, dated 8 December 1998 para 42

Existing GATS commitments, therefore, have almost no practical economic relevance to African LDCs, who do not generally have the means to make Mode 3 services investments. Since most developing countries are capital poor and recipients rather than sources of FDI in services, and by definition can supply low and semi-skilled, but not highly skilled, services suppliers.<sup>162</sup> In effect, the Mode 4 liberalisation achieved to date has been of limited significance for the African LDCs whose comparative advantage lies in the export of low and medium skilled, labour intensive services because the commitments in this sector and Mode are very restrictive.<sup>163</sup>

### 3.4.2.3 Structural problems with Mode 4 commitments

Under the existing framework of commitments, there is no separation of temporary and permanent movement, resulting in a fundamental flaw with the structure. Due to this only, temporary movement of service providers usually comes under the purview of immigration legislation and labour market policy (which affect permanent movement as well), not of international trade policy limiting the scope of Mode 4 via the GATS.<sup>164</sup>

The existing structure of Mode 4 commitments also suffers from lack of clarity and uniformity in the definition and coverage of the various categories of service persons. The personnel are not defined in the schedules or in the agreement and are thus subject to the arbitrary interpretation of immigration officials and consular offices. The lack of specificity in definitions, and some of the conditions used, like the economic needs and labour market tests (listed in many of the schedules), which are not clearly defined in

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<sup>162</sup> Crosby D. (2009) Advancing Services Export Interests of Least Developed Countries: Toward GATS Commitments on the Temporary Movement of Natural Persons for the Supply of Low-Skilled and Semi-Skilled Services ICSTD at 12

<sup>163</sup> Labour mobility and the WTO: Liberalising Temporary Movement, (2004) in *Global Economic Prospects* World Bank at 144

<sup>164</sup> Dey D (2005) Movement of Natural Persons1 (Mode-4) Under GATS: Advantage Developing Countries At 3

terms of criteria used, lend themselves to administrative discretion and discriminatory practices, and thus reduce predictability.<sup>165</sup>

#### **3.4.2.4 Restrictions attached**

Another important limitation of the existing Mode 4 commitments is that they are very restrictive. Even when sectors have been scheduled, liberalisation in Mode 4 is highly conditional. The restrictive conditions<sup>166</sup> attached to the Mode 4 commitments include:

- a) Entry restrictions for certain sectors and categories of personnel;
- b) Restrictions on the duration of stay of natural persons;
- c) Pre-employment conditions and other related requirements;
- d) Economic needs, labour market, and management needs tests;
- e) Quantitative restrictions by numerical quotas for persons who can enter, specifications on the proportion of total number of employees and total wages;
- f) Requirements for technology and skill transfer (training local staff);
- g) Discriminatory tax treatment;
- h) Requirement of government approval;
- i) Requirement of work permits, residency, and citizenship in certain sectors;
- j) Recognition of professional qualifications by the importing country; and
- k) Restrictions via minimum investment requirements.

Many countries have also indicated that their commitments would be suspended in the case of labour management disputes. Industrialised countries have also subjected their

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<sup>165</sup> Chanda R. (2001) Movement of Natural Persons and the GATS', *World Economy*, Vol. 24 (5) at 643

<sup>166</sup> Chanda R (2004) Movement and Presence of Natural Persons and Developing Countries: Issues and Proposals for the GATS Negotiations. (T.R.A.D.E) South Centre at 19

offers in business services to various conditions relating to labour and technical standards, specified educational and other qualifications, Membership of associations, and specifications on technical experience.<sup>167</sup>

In summary, the commitments that have been made in Mode 4 by developed countries are characterised by the following: (i) poor sectoral coverage where Mode 4 is important; (ii) there are limited sector specific entries for Mode 4 and the horizontal entries stand for the sectoral commitments in this Mode; (iii) there are conditions attached to the horizontal commitments; (iv) the commitments are too skewed towards skilled and qualified labour and on labour that is tied to commercial presence. In effect, virtually no meaningful liberalisation has been undertaken in Mode 4. The significance to African LDCs is limited due to the exclusion of relevant categories of service providers, the extensive use of restrictions specifically in categories which matter to them, and the lack of transparency and clarity in commitments which creates possibilities for discrimination and arbitrary interpretation of the commitments.<sup>168</sup>

### **3.5 The Case for Mode 4 liberalisation for low and semi-skilled workers**

#### **3.5.1 The demand for low skilled labour**

The demand for temporary foreign workers has been growing in the developing countries. Foreign workers, including skilled, unskilled, and seasonal workers, are allowed to enter and stay under temporary and seasonal work permits for periods ranging from 3 months to four years. In the US, Canada, and Australia there are special programs for temporary workers to meet labour market needs.<sup>169</sup>

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<sup>167</sup> Chanda R (2004) at 19

<sup>168</sup> Chanda R (2004) at 20

<sup>169</sup> Chanda R. (2004) at 11



Developed countries are facing changing demographic and economic trends<sup>170</sup> that project an important need for increased low skilled worker participation over the next 50 years (2000 to 2050). Reduction in labour supply is the main contributing factor to the shortage low skilled workers in many of the major developed countries such as the US, Australia and Germany.<sup>171</sup>

The demographic imbalance between aging populations of the North (developed countries) and relatively younger population of South (developing countries) particularly, the numbers of unemployed low skilled workers of in African LDCs would open up opportunities for the movement of natural persons from South to North.<sup>172</sup>

### **3.5.2 Declining labour supply**

In some developed countries such as Germany, Netherlands and Sweden, labour supply is projected to stagnate or fall in the next 10 years if present demographic trends continue. According to demographic projections by the United Nations, the populations of the European Union and Japan are expected to fall by 10% and 14% respectively between 2000 and 2050, representing a decline of about 55 million in all. The share of young adults in those countries is also shrinking. In contrast to EU and Japan, estimates indicate, that the Africa LDCs work force would remain young for a very long time. While developing countries like India enjoy comparative advantage in comparison with developed countries in the supply of huge numbers of cheaper service providers both

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<sup>170</sup> These include; early retirement, aging population, falling birth rate increase in affluence of population and time spent in higher education of young population

<sup>171</sup> South Centre (2005) GATS Mode 4 Negotiations and Low Skilled Workers, South Centre Analytical Note

<sup>172</sup> Dey D. (2005) Movement of Natural Persons (Mode-4) Under GATS: Advantage Developing Countries at 5

skilled and low skilled, the highly populated African LDCs with large numbers of unemployed workers have a comparative advantage mainly in low skill occupations.<sup>173</sup>

The four demographic and economic trends that are contributing to the falling trend in labour supply include; (i) developed countries are facing an aging population. A population with a large percentage of older persons reduces the number of working persons or labour supply in a population; (ii) early retirement policies that remove older men from the labour pool; (iii) significant portions of young person's entering the labour force at a later stage thereby lowering the amount of new persons entering the workforce at any given time. This is mainly due to the fact that young persons are spending longer periods of time in higher education before entering the workforce; (iv) low birth rates in developed countries.<sup>174</sup>

### **3.5.3 Need for low skilled workers is rising**

As a result of increased technology advancements of knowledge based services and better telecommunication infrastructure, temporary movement of skilled personnel is expected to decline. In sectors where there is little alternative to using people, rather than technology,<sup>175</sup> demand for low skilled workers such as; nurses, maids, midwives, gardeners, cab drivers, agricultural workers, is likely to increase to serve the aging population, who over the next 50 years are projected to make up a large percentage of populations in developed countries.<sup>176</sup> Thus some demographers and economists see Mode 4 as an increasingly necessary way to “plug this gap”.<sup>177</sup>

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<sup>173</sup>Dey D. (2005) Movement of Natural Persons1 (Mode-4) Under GATS: Advantage Developing Countries at 6

<sup>174</sup> South Centre (2005) GATS Mode 4 Negotiations and Low Skilled Workers, South Centre Analytical Note

<sup>175</sup> Dey D. (2005) at 6

<sup>176</sup> Kategekwa J. (2006) Extension of Mode 4 Commitments to Include Unskilled Workers in the WTO. A Win Win Situation, Especially For LDCs at 4

<sup>177</sup> Gent S. and Skeldon R. ( 2005) Globalisation & Poverty: GATS Mode 4 How Trade in Services Can Help Developing Countries briefing No. 4, Development Research Centre on Migration November 2005 at 2

Changing lifestyles of the wealthy people in developed countries has also led to a rising trend in the need for workers for certain low skilled workers. These include domestic services, such as cleaning and childcare. Given that the economic growth pattern in developed countries requires a large reliable supply of labour to work in all aspects of its complex and vast economies, which include a source of low skilled labour, a fast growing labour force of low skilled workers is required, whether provided domestically or from abroad.<sup>178</sup> However, the advantage lies with LDCs who have vast pools of unemployed low skilled workers.

#### **3.5.4 Foreign workers needed to prevent declining labour supply**

Developed countries facing a fall in the supply of low skilled labour will not be able to reverse this projected trend without reversing their aging populations, early retirement policies, low birth rates etc. Reversing these current trends may be quite challenging, impossible or not desirable for developed countries. For example, reversing early retirement policies may not be politically feasible in some countries as there may be opposition from workers who have held strong expectations and economic incentives from early retirement policies. Even if it were possible, increased labour force participation would have to be sustained additionally through increased birth rates which would not begin having an impact on labour supply for the next 20 to 25 years for many developed countries.<sup>179</sup>

Based on a 50 year (2000 to 2050) projection scenario, McDonald and Kippen<sup>180</sup> anticipated that for many developed countries such as New Zealand, Australia, Canada, Germany, Sweden, Italy, Greece, Spain and the Netherlands, the best outcomes can be

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<sup>178</sup> McDonald P. And Kippen R. 'Labor Supply Prospects in 16 Developed Countries, 2000–2050' (2001) 27(1)

*Population and Development Review* at 5

<sup>179</sup> South Centre (2005) GATS Mode 4 Negotiations and Low Skilled Workers, South Centre Analytical Note at 4

<sup>180</sup> McDonald P. And Kippen R. 'Labor Supply Prospects in 16 Developed Countries, 2000–2050' (2001) 27(1)

*Population and Development Review* at 6- 9

achieved by collectively increasing: 1) fertility rates; 2) domestic labour force participation (e.g. extending retirement ages); and 3) foreign worker inflow. In Australia, the total labour force could increase by 60%, in Canada by about 38% and Netherlands by about 22%.<sup>181</sup>

The second scenario, which involved only increasing foreign worker inflow to 0.5% of the country's population, seemed a more realistic option than increasing fertility rates and domestic worker participation given their difficulties, as it yielded the best forecast or largest numbers in total labour force for developed countries like the US, United Kingdom, France, Japan and Sweden from 2000 to 2050.<sup>182</sup>

### **3.5.5 Labour policies in selected developed countries**

Most developed countries have vast numbers of both high and low skilled foreign workers. Provisions for entry by low skilled or semi-skilled workers are mainly through bilateral labour agreements and seasonal and guest worker programmes, usually reached between governments, employers, and industry representatives.<sup>183</sup> This suggests that developed countries fully realise, their need for low skilled labour given the number of foreign worker policies and short-term worker schemes for low skilled labour<sup>184</sup>

For example, although the US has limited its GATS Mode 4 commitments to the highly skilled however, the US operates schemes to allow middle and low skilled workers to come and work. Under various kinds of Visa, such as the H-2B visa for non-agricultural

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<sup>181</sup> South Centre (2005) GATS Mode 4 Negotiations and Low Skilled Workers, South Centre Analytical Note at 5

<sup>182</sup> *ibid* at 5

<sup>183</sup> Chanda R. (2004) Movement And Presence Of Natural Persons And Developing Countries: Issues And Proposals For The GATS Negotiations (T.R.A.D.E.) working paper 19 South Centre at 6

<sup>184</sup> South Centre (2005) GATS Mode 4 Negotiations and Low Skilled Workers, South Centre Analytical Note at 5

workers which requires that not only the stay but also the job itself to be temporary. However, few low skill occupations are included under this visa.<sup>185</sup>

In Canada, although most foreign labour policies are for high skilled workers, it does also allow for foreign low skilled labour movements through its Temporary Foreign Worker Programs, which provides employment for foreign workers in areas with labour shortages. Similarly, the United Kingdom has a Sectors Based Scheme for foreign workers to be employed in the hospitality sector, Germany also provides work permits to foreign workers for low skill occupations such as lorry drivers and Australia allows low skilled workers through guest worker schemes or working holiday visas.<sup>186</sup> It should be noted that most of these programmes are incorporated in regional trade agreements (RTAs).

#### **3.5.5.1 Regional Trade Agreements and the GATS**

According to Chanda<sup>187</sup>, RTAs address Mode 4 in various ways and can be classified in five broad categories; the first consist of agreements like the European Union's, European Economic Area (EEA) which provides for free movement of labour between Member states. this is the ultimate Model for labour mobility, but it is clearly not appropriate since Member countries have to have similar levels of development; The second type of agreements, permit mobility of labour for professionals, university graduates, skilled persons and selected occupations, for example, the North American Free Trade Agreement (NAFTA) which provides one year renewable NAFTA visas; the third type consist of agreements Modelled on the GATS but with additional elements an example being, the Asian Free Trade Area (AFTA) agreement, which is based on

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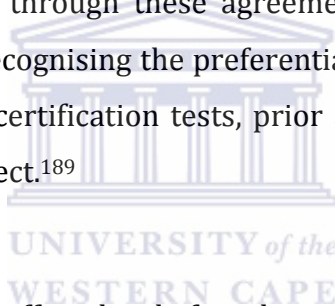
<sup>185</sup> Winters A. L., Walmsley L. T., Wang Z. K, Grynberg R. (2003) Liberalising Temporary Movement of Natural Persons: An Agenda for the Development Round at 18 - 19

<sup>186</sup> South Centre (2005) GATS Mode 4 Negotiations and Low Skilled Workers, South Centre Analytical Note at 6

<sup>187</sup> Chanda R. (2004) Movement And Presence of Natural Persons And Developing Countries: Issues And Proposals For The GATS Negotiations (T.R.A.D.E) Working paper 19 South Centre at 6-8

principles of market access and national treatment; the fourth consists of agreements like Mercosur<sup>188</sup>, which replicate the GATS by determining market access only on the basis of specific commitments and only for those categories of service providers that are covered under the regional framework. The US signed such a free trade agreement with Chile and Singapore. Numerical ceilings were placed on the number of persons permitted from these two countries at 1,400 and 5,400 for Chile and Singapore respectively for one year. However, these numbers are carved out from the overall H-1B visa quota ceiling under the US horizontal commitment in Mode 4 under the GATS. Thus, this comes at the expense of countries that are not party to these RTAs and, lastly, there are agreements, which do not contain provisions on labour mobility or services.

The basic principles that run through these agreements are transparent criteria and procedures, reciprocity, and recognising the preferential trading relationship. There are no conditions such as labour certification tests, prior approval procedures, petition, or other procedures of similar effect.<sup>189</sup>



Chanda argues that most RTAs offer a level of market access commitment higher than the GATS does, with additional sectors and skill levels covered in the regional framework but excluded from the GATS commitments owing to the need to extend these on an MFN basis under the GATS. However, Snape and Bosworth<sup>190</sup> are of the view, that these structural differences in the agreements can provide a Model from which to draw lessons for the GATS.

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<sup>188</sup> is the largest trading bloc in South America

<sup>189</sup> Winters A. L., Walmsley L. T., Wang Z. K., Grynberg R. (2003) Liberalising Temporary Movement of Natural Persons: An Agenda for the Development Round at 18 - 19

<sup>190</sup> Snape H. and Bosworth M. 'Advancing Services Negotiations' in Schott J. J. *The World Trading System: Challenges Ahead* (1996) Institute of International Economics at 199

In summary, these agreements generally tend to cover highly skilled labour and it's only in the context of bilateral seasonal or temporary worker type labour market arrangements that lower skilled and non-professional occupational categories tend to be covered. The latter reflects the fact that developed countries want to retain flexibility and discretion in granting market access to lower skilled service providers and in monitoring and enforcing their conditions of stay and return, which are done more easily bilaterally than can be done regionally and even more multilaterally.<sup>191</sup> However, the GATS is managed well, these developed countries can still handle this multilaterally as Snape and Bosworth pointed out these RTAs arrangements can be used as a Model to handle low skilled and semi-skilled labour multilaterally.

### **3.5.6 LDCs Mode 4 supply capacity**

The LDC Group, in its Dakar Declaration<sup>192</sup> by LDC Trade Ministers identified Mode 4 as an area of export interest in the GATS market access negotiations. LDC Members are currently net importers of trade in services. LDCs do not have the supply capacity or competitiveness necessary for supplying services in many sectors or other Modes of supply. Therefore, Mode 4 provides a realistic potential in the foreseeable future for LDC exports of services trade due to their supply capacity in labour.<sup>193</sup>

Given the substantial need for low skilled workers in developed countries, and that the labour force in LDC is an important productive resource,<sup>194</sup> LDCs may provide a good source of temporary workers, considering that they are faced with the challenge of

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<sup>191</sup> Chanda R. (2004) Movement And Presence of Natural Persons And Developing Countries: Issues And Proposals For The GATS Negotiations (T.R.A.D.E) Working paper 19 South Centre at 8

<sup>192</sup> Trade Ministers from the 49 Member group of Least Developed Countries met in Dakar, Senegal (4 -5 May, 2004) to take stock of the current Doha round of trade negotiations. available at [http://www.mincom.gov.bd/images/additional\\_images/Dakar%20Declaration.doc.pdf](http://www.mincom.gov.bd/images/additional_images/Dakar%20Declaration.doc.pdf)

<sup>193</sup> Dey D. (2005) Movement of Natural Persons (Mode-4) Under GATS: Advantage Developing Countries at 6

<sup>194</sup> UNCTAD (2006) the Least Developed Countries Report, Developing Productive Capacities at 167

developing their productive capacities to ensure that it is more fully and productively employed.<sup>195</sup>

Most LDCs have high populations, and densities. This creates a surplus of people, constantly on the move in search for employment. According to the Food and Agriculture Organisation of the United Nations (FAO) estimates, the total labour force of the LDCs was 312 million people in 2000. Between 1990 and 2000, the labour force increased by 71 million, and is expected to grow between 2000 and 2010 by a further 89 million to reach 401 million<sup>196</sup> Currently, the largest shares of unemployed persons in most LDCs fall under Level -1 (low skilled workers) of the International Standard Classification of Education-76.<sup>197</sup> (see Table 1 for individual country projections).



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<sup>195</sup> *ibid* at 167

<sup>196</sup> UNCTAD (2006) *the Least Developed Countries Report, Developing Productive Capacities* at 168

<sup>197</sup> South Centre (2005) *GATS Mode 4 Negotiations and Low Skilled Workers*, South Centre Analytical Note SC/TADP/AN/SV/12 February 2005 at 7



Table 1 List of unemployment of total economically active population of individual African LDC Member countries projected for the year 2010

Country	Unemployment (in thousands)
Angola	5467
Benin	2952
Burkina Faso	5010
Burundi	3263
Central African Republic	1470
Chad	3458
Congo	20147
Gambia	628
Guinea	3755
Guinea Bissau	487
Lesotho	687
Malawi	4773
Mali	4856
Mozambique	8036
Niger	4724
Rwanda	3608
Sierra Leone	1842
Tanzania	16493
Togo	1855
Uganda	10437
Zambia	4083

\*Data extracted from Total and Economically Active Population (Male and Female ages 20 to 56) Estimates and Projections for Years 1990 to 2010 from the International Labour Organisation LABORSTA Labour Statistics Database.

\*\*Djibouti is not included in this data.

Given the fact that developed countries are increasingly faced with problems of skill shortages and an ageing labour force, they constitute the countries generating demand for Mode 4 trade, while it is the developing countries with large pools of competitive manpower that generate supply for the same.<sup>198</sup> As Allan Winters notes,

*In the case of Mode 4 trade, potentially large returns would be feasible if medium and less skilled workers, which are relatively abundant in developing countries, were allowed to move and provide their services in developed countries. The review of existing empirical studies of factor mobility and the new estimates agree that there are huge returns to even relatively small movements of labour. An increase in developed countries' quotas on the inward movements of both skilled and unskilled temporary workers equivalent to 3% of their workforces would generate an estimated increase in world welfare of over \$US150 billion p.a.<sup>199</sup>*

While there is fear that such a large supply of labour might limit employment opportunities, and create downward pressure on labour markets, it should be recalled that the short term, “non-intrusion-on-domestic-employment market- nature of Mode 4 in the GATS”, if handled well, can allay such fears. An effectively managed Mode 4 regime under the GATS can lead to greater efficiency of global companies with minimal impact on domestic markets.<sup>200</sup>

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<sup>198</sup> Sen R. and Rajan R. (2005) Liberalisation of Market Access in GATS Mode 4 and Its Importance for Developing Countries August at 2

<sup>199</sup> Winters A. L. 'the Economic Implications of Liberalising Mode 4 Trade' in Mattoo A. and Carzaniga A. (eds) (2003) *Moving People to Deliver Services*, at 59

<sup>200</sup> Kategekwa J. (2006) Extension of Mode 4 Commitments to Include Unskilled Workers in the WTO. A Win Win Situation, Especially for LDCS at 4

### 3.6 Implications of temporary movement of labour on home and host countries

The impact of temporary labour migration on home and host countries is difficult to measure, this is because, the impact is specific to the type of labour in question, the sector receiving or sending the labour, the regulations in place, and many other factors that may vary across countries. It also depends on whether it complements or facilitates trade in other modes such as commercial presence, and whether it can be replaced by other modes of supply. Regardless, there are both costs and benefits to the countries sending and receiving the labour.<sup>201</sup>

Both developed and developing countries have much to gain from an increased flow of workers. Developed countries benefit because they gain workers whose skills are in short supply. Also, as demographics drive up the average age in developed countries, migration allows an influx of younger workers who contribute to pension systems that would otherwise be actuarially unviable. LDCs gain from higher wages as well as from the remittances that accrue from migration.<sup>202</sup>

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A study estimated that substantial gains up to \$US 200 billion could be made if there was a 3% increase in Mode 4 (particularly through a quota for low skilled movement of persons from developing countries to OECD countries).<sup>203</sup>In 2003, remittances to developing countries amounted to \$US 93 billion, nearly double the amount of official development assistance (ODA). The total amount of resources remitted may, however, be two or three times higher, since a large number of transactions are realized through

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<sup>201</sup> Chanda R. (2004) Movement And Presence of Natural Persons And Developing Countries: Issues And Proposals For The GATS Negotiations (T.R.A.D.E) Working paper 19 South Centre at 13

<sup>202</sup> World Bank (2004) Labour mobility and the WTO: Liberalising Temporary Movement, in *Global Economic Prospects 2004* at 143

<sup>203</sup> Dey D. (2005) Movement of Natural Persons1 (Mode-4) Under GATS: Advantage Developing Countries at 2

informal channels. For many LDCs, remittances as a share of gross domestic Product (GDP) and imports are larger than in the case of developing countries.<sup>204</sup>

Jansen and Piermatini have identified three possible trade promoting effects of temporary movement of natural persons on the host and home country economy. These are through (a) *impact on relative prices*: imported services compete with the domestic services pulling down the relative price; (b) *impact on consumer preferences*: foreigners may prefer consuming goods from their home country. But after their return back home, acquired host country lifestyle may get reflected in their preference for host country goods, (c) *impact on transaction cost*: improved quality of different services due to more trade in services via Mode 4, likely to reduce the transaction cost of the economy.<sup>205</sup> In effect, there are costs to both home and host countries. However, this discussion however is focuses on the benefits that accrue to both home and host states.

### 3.6.1 Home Countries

The reason many commentators see GATS Mode 4 as a boon for developing countries and African LDCs in particular, is that it allows them to exploit a relative abundance of low and semi-skilled workers. Greater market access for developing country citizens should yield economic benefits directly in terms of payments to workers and remittances as well as other, less tangible, benefits on return. In addition temporary workers abroad may bolster the productivity of those who remain behind through the transfer of ideas, technology, facilitating entry to markets, networks and so on. All these apply to other types of migrants as well, but the economic benefits of Mode 4 are expected to accrue

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<sup>204</sup> UNCTAD (2005) Trade in Services and Development Implications. at 5

<sup>205</sup> Jansen M. and Piermartini R. (2005) the Impact of Mode 4 Liberalisation on Bilateral Trade Flows, Staff Working Paper at 2

from the temporary nature of migration and the scale of migration that liberalisation could potentially ensure.<sup>206</sup>

According to the World Bank brief, "Migration and Development," recorded remittances to developing countries were estimated to reach \$283b in 2008 compared to a revised \$265b in 2007."<sup>207</sup>

The contribution of remittances to development and poverty reduction has also been well documented where for LDCs it well exceeds ODA levels and is second to FDI.<sup>208</sup> Trends in remittances for the African LDCs show it has continued to increase as a percentage of gross national Income (GNI) of the top 10 LDC remittance recipients, 5 were African LDCs<sup>209</sup> in 2007 and in 2006 there were 6 African LDCs.<sup>210</sup> The Uganda Central Bank's governor Emmanuel Mutebile, at an investment summit in Uganda, stated that "Remittances during the financial year 2007/08 hit sh1.9 trillion."<sup>211</sup>

Furthermore, temporary workers in the middle to lower skilled categories tend to send a larger portion of their income home<sup>212</sup>. Specific examples such as Mali, Senegal and Burkina Faso, Lesotho and Uganda illustrate how remittances have lead to investment in African LDCs in areas such as infrastructure, education and health, housing and

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<sup>206</sup> Gent S. and Skeldon R. ( 2005) Globalisation & Poverty: GATS Mode 4 How Trade in Services Can Help Developing Countries briefing No. 4, Development Research Centre on Migration November 2005 at 2

<sup>207</sup> *The New Vision* (2009) 'LDCs Have High Hopes in Kyeyo Money (remittances)'. (12th January, 2009) available at <http://newvision.co.ug/D/8/220/667801/%5C> accessed on 12/01/2009

<sup>208</sup> Maimbo S. M and Ratha D. (2005) *Remittances Development Impact and Future Prospects* at 2

<sup>209</sup> Sudan, Senegal, Uganda, Lesotho and Togo

<sup>210</sup> Varma S. (2009) Facilitating Temporary Labour Mobility in African LDCs: Addressing Mode 4 Related Supply-side Constraints ICSTD at 6

<sup>211</sup> Home is the Best Summit-2 29-30 December 2008 organised by the Uganda Investment Authority, LDCs Have High Hopes in Kyeyo Money (remittances) *The New Vision* 12th January, 2009 available at <http://newvision.co.ug/D/8/220/667801/%5C> accessed on 12/01/2009

<sup>212</sup> UNCTAD (2003) Increasing The Participation of Developing Countries Through Liberalisation of Market Access In GATS Mode 4 For Movement of Natural Persons Supplying Services Note by the UNCTAD Secretariat, TD/B/COM.1/EM.22/2 June 2003 at 9

entrepreneurial activities and where it has also acted as a stimulus for savings, growth and a positive impact on foreign exchange reserves.<sup>213</sup>

Remittances not only improve a countries' ability to finance development objectives, but also trickle down to the livelihoods of recipients, allowing them to engage in economic activity.<sup>214</sup> The Uganda Central Bank's governor further stressed that remittances play an important role in poverty reduction, not only through increased household purchasing power for essentials like food, housing, education and health but u as a source of insurance from economic downturns.<sup>215</sup> This is increasingly becoming very important to African LDCs, who have a lot of low and semi-skilled workers.

Furthermore Mode 4 movement of labour can be seen as a strategy to fight unemployment for African LDCs given their high unemployment levels<sup>216</sup>

Considering that developed countries have a preference for skilled labour the possibilities of 'brain drain' and loss of human capital can have a negative impact on development and the distribution of income. As well as affect the critical services at the home countries in sectors like education, medical and health care.<sup>217</sup> However, because of the temporariness of Mode 4 as envisaged in the GATS, the issue becomes one of gain, as opposed to brain drain. A well managed Mode 4 that has inbuilt mechanisms assuring return to the home countries can lead to a more comprehensive movement of skills,

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<sup>213</sup> Varma S. (2009) at 6

<sup>214</sup> South Centre (2006) Increasing LDC Participation in Services through Special Priority Market Access in the WTO policy brief No.5 September at 2; Kategekwa J. (2006) Extension of Mode 4 Commitments to Include Unskilled Workers in the WTO. A Win Win Situation, Especially for LDCs at 5

<sup>215</sup> Home is the Best Summit-2 29-30 December 2008 organised by the Uganda Investment Authority, LDCs Have High Hopes in Kyeyo Money (remittances) *The New Vision* 12th January, 2009 available at <http://newvision.co.ug/D/8/220/667801/%5C> accessed on 12/01/2009

<sup>216</sup> WTO (2004) World Trade Report 2004 *Exploring the Linkage between the Domestic Policy Environment and International Trade* at 47

<sup>217</sup> Chanda R. (2004) Movement And Presence of Natural Persons And Developing Countries: Issues and Proposals For The GATS Negotiations(T.R.A.D.E) working paper 19 South Centre at 13

resulting in more optimal technology transfer, and potentially more investment when people return home.<sup>218</sup>

Although increased Mode 4 market access would greatly benefit African LDCs in terms of business experience and skills enhancement while abroad as well as remittance transfers and capital accumulation, these short term gains could potentially affect medium and long term interests unless African LDC governments adopt strategies to apply the benefits of Mode 4 trade to domestic development objectives.<sup>219</sup>

### **3.6.2 Host countries**

From the perspective of the host countries temporary movement of workers, including service suppliers, may help to alleviate problems caused by specific demographic challenges, as discussed above, such the phenomenon of an ageing population, characterizing most developed countries increases the demand for health and domestic services and poses risks to the sustainability of social security systems based on a “pay as you go” structure. The temporary movement of young foreign workers to developed countries may re-equilibrate the share of the working population. Finally, Temporary movement of labour may represent an alternative to illegal immigration, liberalisation of Mode 4 may reduce the size of the illegal labour market.<sup>220</sup>

However, for host countries, the impact of foreign labour depends on the impact of such workers on productivity, costs, the factor intensity of production, and the extent of

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<sup>218</sup> Kategekwa J. (2006) Extension of Mode 4 Commitments to Include Unskilled Workers in the WTO. A Win Win Situation, Especially for LDCs at 5

<sup>219</sup> Crosby D. (2009) Advancing Services Export Interests of Least Developed Countries: Toward GATS Commitments on the Temporary Movement of Natural Persons for the Supply of Low-Skilled and Semi-Skilled Services. ICSTD at 4

<sup>220</sup> WTO (2004) World Trade Report 2004 Exploring the Linkage between the Domestic Policy Environment and International Trade at 49

substitutability or complementarity between foreign and domestic workers. Gains are likely due to transfer of skills and knowledge embodied in foreign workers and at lower costs. But these gains need to be weighed against costs due to displacement of domestic workers (Given that Mode 4 relates only to temporary movements of workers weakens the argument only marginally), costs in the form of social security, health care, and education. However, such costs are generally smaller in the case of temporary foreign workers.<sup>221</sup>

Host countries however, still grapple with the fear that Mode 4 mobility might be a preliminary step towards permanent migration and the costs on their economy, such as, unemployment for their own citizens being one of them.<sup>222</sup> This has resulted in reduced political support for Mode 4 commitments for the temporary supply of low and semi skill services. More so, illegal immigration of low and semi-skilled workers has diminished market opportunities for African LDCs.<sup>223</sup>

However, the balance of costs and benefits also depends on the regulatory framework of the host country. The extent to which costs can be lowered or skills can be transferred depends on the conditions that are enforced on foreign workers. Foreign suppliers may be forced to comply with domestic arrangements on wages, prices, and taxes which could erode their economic advantage and reduce the scope for trade or transfer of skills and knowledge. Thus, the regulations in place in host countries are critical in determining the scope and implications of trade in services through the temporary movement of labour.<sup>224</sup>

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<sup>221</sup> Chanda R. (2004) Movement And Presence of Natural Persons And Developing Countries: Issues And Proposals For The GATS Negotiations (T.R.A.D.E) Working paper 19 South Centre at 14

<sup>222</sup> WTO World Trade Report 2004 at 49

<sup>223</sup> Crosby D. (2009) Advancing Services Export Interests of Least Developed Countries: Toward GATS Commitments on the Temporary Movement of Natural Persons for the Supply of Low-Skilled and Semi-Skilled Services. ICSTD at 19

<sup>224</sup> Chanda R. (2004) Movement And Presence of Natural Persons And Developing Countries: Issues And Proposals For The GATS Negotiations (T.R.A.D.E) Working paper 19 South Centre at 14



### 3.7 The status of negotiations on Mode 4

From the beginning of the GATS negotiations, the developing countries considered a liberalisation of service trade as a threat for their own economies and parts of their sovereignty.<sup>225</sup> However, they later warmed up to the GATS, but from the onset, developing and LDCs countries were interested in the liberalisation of Mode 4.<sup>226</sup>

Developing countries and LDCs believe that the negotiations would provide an opportunity for them to achieve commercially meaningful market access commitments in sectors and Modes of interest to them, particularly labour intensive services (Mode 4, where they have a comparative advantage) and devise effective benchmarks for the implementation of Article IV.<sup>227</sup> Their key concern was not only whether the flow of trade was maximised, but also the developmental aspects of such trade, including its contribution to building a competitive services sector and as such developing countries and LDCs have persistently negotiated for the liberalisation of Mode 4.

The was emphasised by H.E. Dr Toufiq Ali, Ambassador of Bangladesh, speaking on behalf of the 30 LDC Members of the WTO at the Special Session of the Council for Trade in Services at which the modalities for the special treatment for least-developed country (LDC) Members in the negotiations on trade in services were adopted, where he mentioned that “We (LDCs) consider the negotiations on services as of prime importance to the LDC group,” He emphasised that the most important means of supplying services was through “the export of services supplied by less skilled persons.”<sup>228</sup>

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<sup>225</sup> Malmgren B. H. Negotiating International Rules for Trade in services (1985) World Economy at 12

<sup>226</sup> Drake W. and Nicolaidis K. (1992) at 63

<sup>227</sup> Mashayekhi M, GATS 2000 Negotiations Options for Developing Countries, available at [http://www.southcentre.org/index.php?option=com\\_content&task=view&id=252&Itemid=1&lang=frp](http://www.southcentre.org/index.php?option=com_content&task=view&id=252&Itemid=1&lang=frp) 3

<sup>228</sup> WTO News: 2003 Press release, Press/351, September 3, 2003 GATS Negotiations: WTO Members agree on ways to boost LDC participation in services negotiations

However, there are essentially two factors affecting the Mode 4 negotiations; the first being that most countries do not distinguish between temporary movement and permanent migration in terms of their administrative modalities and mechanisms, thus blurring the distinction between the two. In essence, they treat movement of natural persons as a migration rather than a trade issue, thus complicating the Mode 4 negotiations with considerations such as labour displacement and national security that relate mainly to permanent migration flows. As a result, the "negotiations on the movement of service providers have been slow and contentious, and illustrate the difficulty of the integration of immigration policy decisions into trade negotiations."<sup>229</sup>

The second factor is that there has been a lot of emphasis on higher skilled and professional service providers under the Mode 4 negotiations given that there is already large amount of intra corporate transfers reflecting the globalization of production operations and thus the existing momentum in this higher skilled area. This momentum however is lacking in the case of low and semi-skilled service provider categories which are of greatest interest to developing countries and LDCs.<sup>230</sup> Hence, LDCs face a great challenge in addressing their primary interest under Mode 4 as the momentum for moving forward in such skill categories and the requisite environment for negotiating these categories, has to be created. Notwithstanding such difficulties, progress on lower skilled categories is essential if the Mode 4 negotiations are to be especially meaningful for LDCs.<sup>231</sup>

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[http://www.wto.org/english/news\\_e/pres03\\_e/pr351\\_e.htm](http://www.wto.org/english/news_e/pres03_e/pr351_e.htm)

<sup>229</sup> Keely C. B. (2002) Globalization Transforms Trade-Migration Equation Migration Policy Institute December available at <http://www.migrationinformation.org/feature/display.cfm?ID=73> (accessed on 12/03/09)

<sup>230</sup> Chanda R. (2004) Movement and Presence of Natural Persons and Developing Countries: Issues and Proposals For The GATS Negotiations (T.R.A.D.E.) Working Paper 19 South Centre at 3

<sup>231</sup> Chanda R. (2004) at 4

A further issue to the progress of Mode 4 negotiations is whether existing (and still developing) bilateral and regional agreements could be 'better' at liberalising international movement. The bilateral and regional agreements that are proliferating to the benefit of both developed and developing countries tackle flexibility issues and cultural concerns in particular.<sup>232</sup> Gent and Skeldon are of the view, that in the foreseeable future any liberalisation of movement for low and semi-skilled workers is likely to be made through bilateral agreements.

### **3.8 The stages of negotiations on Mode 4**

The stages of Mode 4 negotiations shall be dealt with in two parts, the first part gives a historical overview and the second part gives the current status of the mode 4 negotiations with a focus on the LDCs Mode 4 revised request.

#### **3.8.1 A historical overview**

##### **3.8.1.1 The Uruguay Round (1986 – 94)**

During this the Uruguay round, developing countries and LDCs were against the inclusion of 'services in the agenda of trade negotiations as most of them were not competitive in the service sectors like financial and telecommunication services which were of interest to developed countries. <sup>233</sup> However, when their position changed, developing countries and LDCs negotiated the inclusion of Mode 4 as a GATS Mode of supply in order to balance developed country interests in supplying services through Mode 3 "commercial presence" (*i.e.*, foreign investment in services sectors). To date, many developed and developing countries have made extensive Mode 3 commitments.

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<sup>232</sup> Gent S. and Skeldon R. (2005) Globalisation & Poverty: GATS Mode 4 How Trade in Services Can Help Developing Countries briefing No. 4, Development Research Centre on Migration November 2005 at 4

<sup>233</sup> Dey D. (2005) Movement of Natural Persons1 (Mode-4) Under GATS: Advantage Developing Countries at 7

But the current paucity of meaningful Mode 4 commitments to shows that the system has failed to deliver the expected balance between Modes 3 and 4.<sup>234</sup>

From the very beginning, negotiations on the GATS in general and Mode 4 in particular were dominated by clash of interest between the developed and developing countries. While the former favoured a limited liberalisation of temporary movement of highly qualified personnel such as specialist or managers, the later insisted on the liberalisation of labour movement unrelated to commercial presence (this includes low and semi-skilled personnel, as well as independent contractors).<sup>235</sup>

A group of eight developing countries<sup>236</sup> presented a proposal to WTO on June 18, 1990, which foresaw the temporary 'cross-border movement of personnel covering unskilled, semiskilled and skilled labour without arbitrary distinction relating to skills or position in corporate hierarchies and without infringing on national immigration, residence or citizenship laws.'<sup>237</sup> During the Uruguay Round, governments made commitments in the Movement of Natural Persons. However, it was agreed that negotiations to improve commitments would take place in the six months after the WTO came into force in January 1995. The negotiations achieved Modest results and ended on 28 July 1995.<sup>238</sup> Article XIX of GATS committed to start a new round in January 2000 to progressively liberalise trade in services.

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<sup>234</sup> Crosby D. (2009) Advancing Services Export Interests of Least Developed Countries: Toward GATS Commitments on the Temporary Movement of Natural Persons for the Supply of Low-Skilled and Semi-Skilled Services. ICSTD at 13

<sup>235</sup> Dey D. (2005) Movement of Natural Persons1 (Mode-4) Under GATS: Advantage Developing Countries at 7

<sup>236</sup> These included, Argentina, Columbia, Cuba, Egypt, India, Mexico, Pakistan and Peru

<sup>237</sup> Lavenex S. (2002) Labour Mobility in the General Agreement on Trade in Services (GATS) Background Paper, the Political Economy of Migration in an Integrating Europe (PEMINT) working paper 1/2002, March. At 4

<sup>238</sup> WTO Services Negotiations: Negotiating mandates

[http://www.wto.org/english/tratop\\_e/serv\\_e/nego\\_mandates\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/nego_mandates_e.htm)

### **3.8.1.2 The first phase of negotiations (January 2000 and June 2002)**

Out of the 126 proposals received, a very small number of countries namely Canada, Colombia, the European Communities, India, Japan, and the US offered ideas in their proposal for improving Mode 4.<sup>239</sup>

India was a notable exception among the developing countries. She had played a proactive role in the GATS negotiation process from its very early stage. Her communication to WTO at the very early stage of Mode4 negotiations pointed out that the then existing Mode 4 commitments made by the developed nations were largely linked to commercial presence, which were of very limited use to developing countries and LDCs who were primarily interested in the movement of independent professionals and other persons.<sup>240</sup>

In line with their perceived comparative advantage, the document called for further expansion in the scope of occupational categories to include middle and lower level professionals in the existing coverage of 'other persons' and 'specialists'. The proposal made concrete arguments to separate temporary service providers under the GATS from permanent labour flows, so that normal immigration procedures did not hinder the commitments made on temporary mobility. The proposed advocated the introduction of a special GATS Visa for Mode 4 temporaries and proposed that the GATS Visa would operate outside the normal immigration procedures.<sup>241</sup>

### **3.8.1.3 The Doha Development Agenda (DDA)**

Pursuant to the Doha mandate,<sup>242</sup> Member countries were to submit initial request for specific commitments by June 30, 2002 and initial offers by March 31, 2003. The deadline

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<sup>239</sup> Dey D. (2005) at 7

<sup>240</sup> Winters A. L. (2005) Developing Country Proposals for the Liberalisation of Movements of Natural Service Suppliers, Development Research Centre on Migration, Globalization and Poverty, January. at 8

<sup>241</sup> Winters A. L. (2005) at 8

<sup>242</sup> As per paragraph 15 of Doha Ministerial Declaration dated November 14,2001

for completion of negotiation under DDA was January 1, 2005. This phase may be subdivided into three periods: (a) June 30, 2002 to March 31, 2003; (b) March 31, 2003 to March 2006, (c) March 2006 to the beginning of the Plurilateral Services Negotiation Approach, as per the Hong Kong Ministerial Declaration. This new negotiation approach between groups of countries had started from March 27, 2006.

(a) June 30, 2002 to March 31, 2003: Though the deadline for initial offers passed on March 31, till July 10, 2003, only 30 Members had submitted their initial offers, of which 15 were developing countries. The reasons cited for the lukewarm response from developing countries included; First, it was alleged that developed countries had put pressure on developing countries to commit to allow commercial presence to their firms in a wide range of sectors (under Mode 3 of GATS) whilst the developed countries themselves were not making any commitments on liberalizing Mode 4. Due to this imbalance, some developing countries did not have the incentive to provide significant offers. Secondly, there were many developing countries that did not make requests or made only superficial requests, as they did not have the capacity to be able to increase their services exports or commercial presence in other countries. For them, there was hardly any incentive to provide offers of new commitments.<sup>243</sup>

(b) March 31, 2003 to March 2006: Frustrated by the slow progress on Mode 4 negotiations, a group of developing countries submitted a new paper on "Proposed liberalisation of Mode 4 under GATS Negotiations" to WTO on July 3, 2003. Claiming that there was a greater convergence of interests in Mode 4 between developed and developing countries in 2003 than during the Uruguay Round, the paper quoted studies by Prof. Alan Winters where the author claimed that an increase in developed countries' quotas for incoming Mode 4 by 3 percent of their labour forces would generate annual

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<sup>243</sup> Dey D. (2005) Movement of Natural Persons 1 (Mode-4) Under GATS: Advantage Developing Countries at 8

gains of over US\$ 150 billion. "Commitments continue to be basically limited to categories of personnel related to commercial presence while developing countries were interested in commitments for categories delinked with commercial presence" in effect, many developing countries expressed disappointment at the level of ambition shown in this area, which is crucial for many of them. The paper listed the four proposals<sup>244</sup> in the following areas for faster progress of negotiation.

*(i) On the nature of commitments: the developing countries proposed the recognition and use of "common categories of movement" under Mode 4, linked and delinked from commercial presence in Members' horizontal commitments; (ii) On administrative procedures: the paper suggested a separate visa or sub-set of procedures for temporary movement leading to more transparent, timely and less burdensome grant of visas for temporary movement under GATS. (iii) On recognition of qualifications: the paper proposed ways to address the issue (iv) On a framework for possible solution to Mode 4 liberalisation: the paper suggested to devise a Model Schedule for Mode 4 commitments aimed at greater uniformity and predictability in commitments.*

During this time, the LDCs also started to raise their voices in different forums for better market access for low skilled workers in which very little attention was paid. Just before the start of Cancun Ministerial Conference,<sup>245</sup> on 7th may 2003, Zambia, on behalf of the LDC Members presented the "Draft Modalities for the Special Treatment for Least Developed Country Members in the Negotiations on Trade in Services."<sup>246</sup> On 3rd September, 2003, the WTO Special Session of the Council of Trade in Services adopted the Modalities for the Special Treatment for Least-Developed Country Members in the Negotiations on Trade in Services.

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<sup>244</sup> Martin K (2003), Services talks move slowly, developing countries skeptical on further liberalisation, TWN Report, Geneva 12 July

<sup>245</sup> WT/MIN(03)/20 23 September 2003

<sup>246</sup> TN/S/W/137 May 2003 see Annex 3

During this session the WTO Director-General Dr Supachai Panitchpakdi said that “By agreeing on ways for providing special priority to LDCs in the services negotiations, WTO Members continue to put into action the overarching commitment in the Doha Development Agenda.” He further said that “This agreement is a timely boost to LDC participation in these negotiations as Members intensify their bilateral market access bargaining.”<sup>247</sup>

Mentioning about the scope, paragraph 9 of the declaration states that: “It is recognized that the temporary movement of natural persons supplying services (Mode 4) provides potential benefits to the sending and recipient Members. LDCs have indicated that this is one of the most important means of supplying services internationally. Members shall to the extent possible, and consistently with Article XIX of the GATS, consider undertaking commitments to provide access in Mode 4, taking into account all categories of natural persons identified by LDCs in their requests”<sup>248</sup>

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Progress on Mode 4 negotiation was very slow. “Like a rudderless ship, it was not heading to anywhere”.<sup>249</sup> Between March 31, 2003 and March 14, 2006 sixty-nine Member countries had submitted ‘initial offers’. Again, between May 19, 2005 and January 31, 2006, twenty nine Member countries submitted ‘revised’ offers. Out of these twenty nine, aside from EU, USA, Japan, Turkey, Switzerland, Australia, others were from developing countries and LDCs.

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<sup>247</sup> WTO News: 2003 Press release, Press/351, September 3, 2003 GATS Negotiations: WTO Members agree on ways to boost LDC participation in services negotiations  
[http://www.wto.org/english/news\\_e/pres03\\_e/pr351\\_e.htm](http://www.wto.org/english/news_e/pres03_e/pr351_e.htm)

<sup>248</sup> WTO News: 2003 Press release, Press/351, September 3, 2003 GATS Negotiations: WTO Members agree on ways to boost LDC participation in services negotiations

<sup>249</sup> Dey D. (2005) Movement of Natural Persons 1 (Mode-4) Under GATS: Advantage Developing Countries at 10



As expected, the developing countries and LDCs were disappointed, by the absence of commitments by the developed countries in their area of comparative advantage (supply of low and semi-skilled workers). In an UNCTAD meeting on services on 16th March, 2005, the developing countries and LDCs communicated in clear terms that they would move forward in the WTO's services negotiations only if there was a "big leap" in commitments by the developed countries on the movement of natural persons (Mode 4).<sup>250</sup> In response to this, few developed countries submitted their 'revised offers'. However, an analysis of the 'revised offers' submitted during May-June 2005 by developed countries like USA, EU, Japan and Australia showed that, as before, developed countries continued with their preference for skilled professionals. Their offers pertaining to Mode 4 were restricted mainly to 'Horizontal Commitments' and barring few high skilled categories like business visitors, intra-corporate transferees etc. And their commitments to market access remained unbound.<sup>251</sup>

At the Trade Negotiations Committee meeting at WTO on July 21, 2005, the Chairman, Alejandro Jara of the Service Negotiation reported that

*"Notwithstanding the fact that the number of offers has improved since my last report, it was widely acknowledged that the overall quality of initial and revised offers is unsatisfactory. Few, if any, new commercial opportunities would ensue for service suppliers. Most Members feel that the negotiations are not progressing as they should. It is clear that much more work will be necessary in order to bring the quality of the package to a level that would allow for a deal."*<sup>252</sup>

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<sup>250</sup> Third World Network, April 6, 2005, TWN Info Service on WTO and Trade Issues (Apr05/2) Martin Khor Shashikant S. (2005) "GATS talks will move only with a "big leap" in Mode 4"(TWN), Geneva, 17 March 2005 <http://www.twinside.org.sg/title2/twninfo198.htm>

<sup>251</sup> Dey D. (2005) Movement of Natural Persons 1 (Mode-4) Under GATS: Advantage Developing Countries at 10

<sup>252</sup> WTO Document TN/S/20.

Furthermore, according to him, a considerable number of Members felt that the 'request-offer method' alone was not producing results and many wanted to explore alternative negotiating methods. Developed countries under the leadership of EU had put pressure on the negotiators to have the request-offer system "complemented" by other multilateral and plurilateral approaches.<sup>253</sup>

As a result, the process of negotiation upon liberalisation concessions within the GATS became subject to fierce criticism. Negotiations were based on a request – offer system, and as a result, Members were "offering" liberalisation concessions for areas they are willing to and "requesting" other Members to open sectors they wished to access. This was done "behind closed doors".... based on that, the negotiations are suspected to have followed the principle of "you scratch my back and I scratch yours."<sup>254</sup>

The WTO Ministerial at Hong Kong in December 2005 decided the following: (i) plurilateral Approach to future negotiation on services along with existing Request-offer Approach. (ii) outstanding initial offers to be submitted as soon as possible. (iii) plurilateral requests should be submitted by 28 February 2006 or as soon as possible thereafter. (iv) a second round of revised offers to be submitted by 31 July 2006. (v) final draft schedules of commitments shall be submitted by 31 October 2006.

The Hong Kong Ministerial had steered the modalities of the GATS negotiations towards the direction demanded by the EU and other developed countries. The alternative services proposal<sup>255</sup> of the G-90 developing countries (submitted in the mid way of the

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<sup>253</sup> WTO Document TN/S/20

<sup>254</sup> Hilger O. (2005) Pros and Cons of the General Agreement on Trade in Services (GATS) Working Paper 2005-03 at 17

<sup>255</sup> Alternative Annex C (Services) by the G-90 (ACP, African Union and LDCs)

conference) was not reflected in the ministerial declaration. Under the proposed “complementary approaches”, developing countries would have to commit to liberalise a significant number of sectors and to strengthen the liberalisation process by removing all restrictions allowed under the GATS. They were particularly targeted to liberalise Mode 3 (commercial presence).<sup>256</sup>

In a plurilateral setting, the developed countries enjoyed additional leverage to subject the developing countries to negotiate with the “Friends of Services.”<sup>257</sup> “This would erode the flexibilities available to developing countries to liberalise only in sectors they choose to and to the extent they wanted to.’ In August 2005, India, along with few more countries,<sup>258</sup> submitted another paper to the WTO on Mode 4. The paper sought to reduce barriers to temporary movement of professionals and once again demanded for the introduction of a GATS visa.<sup>259</sup>

(c) March 2006 to the beginning of the Plurilateral Services Negotiation Approach. As per Hong Kong Ministerial Declaration, the new negotiation approach between groups of countries had started from March 27, 2006 though the plurilateral process started on February 28 with the submission of collective requests for market access. Out of the 22 ‘requests’ submitted, 16 pertained to specific sectors or sub-sectors. A further 3 of the plurilateral requests were related to Modes of supply. It’s important to note, that none of the LDCs received plurilateral requests.<sup>260</sup> This could be in part because paragraph 26 of

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<http://www.tradeobservatory.org/library.cfm?refid=78019>

<sup>256</sup> Dey D. (2005) Movement of Natural Persons 1 (Mode-4) Under GATS: Advantage Developing Countries at 11

<sup>257</sup> there were such ‘Friends Groups’ for 19 sub-sectors

<sup>258</sup> The “Friends of Mode 4” grouping included Thailand, the Philippines, Pakistan, China, Mexico, Chile, Brazil, Argentina, Egypt and some Central American nations.

<sup>259</sup> Dey D. (2005) at 11

<sup>260</sup> ICSTD ‘Plurilateral Services Negotiations Set to start on 27’ (2006)10 *BRIDGES weekly Trade News Digest* (22 March, 2006) at 4

the Hong Kong Ministerial Declaration provided that in recognition of the particular circumstances of LDCs, they are not expected to undertake new commitments.

In turn, LDCs were called upon to indicate their priority sectors and Modes so that these can be taken into account. Referring to Mode 4, the Modalities recognize the potential benefits provided by the movement of natural persons to both sending and recipient countries. Furthermore, Members envisage, to the extent possible and consistent with Article XIX of the GATS, to undertake commitments on that Mode taking into account “all categories of natural persons identified by LDCs in their requests.”<sup>261</sup> As a result, in May 2006, Zambia on behalf of the LDCs presented a revised offer.<sup>262</sup>

### **3.8.2 The current state of negotiations**

#### **3.8.2.1 The LDC Mode 4 revised request**

This request came second to an initial one that had failed to achieve any meaningful response from recipient Members. The intention of this revised request was to implement Paragraph 9 of the LDC Modalities, which, inter alia, called on LDCs to identify sectors and Modes of export interest to them, so that Members can take these into account in their revised offers as well as eventual schedules of commitments.<sup>263</sup>

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<sup>261</sup> WTO Service Negotiations: Negotiating mandates

[http://www.wto.org/english/tratop\\_e/serv\\_e/nego\\_mandates\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/nego_mandates_e.htm)

<sup>262</sup> WTO (2006) LDC Group Request on Mode 4, Communication from the Delegation of Zambia on Behalf of the LDC Group, JOB(06)/155 (24 May 2006).

<sup>263</sup> Kategekwa J. (2006) Extension of Mode 4 commitments to include unskilled workers in the WTO. A win win situation, especially for LDCs at 6

The main features of the LDC revised request on Mode 4 are;

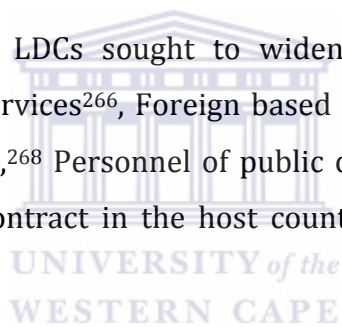
- Expanding the sectoral scope of Mode 4 commitments
- Liberalisation de-linked from commercial presence
- Commitments for independent professionals, business visitors, contractual service suppliers and 'others' with the latter being widened to explicitly include categories such as installers, maintenance and repair workers, graduate trainees, personnel of public or private enterprises in another WTO Member with a state contract in the host country and some other kinds of personnel
- Extending commitments beyond minimum qualifications to include diplomas and experience so that semi-skilled workers can be covered using new ways such as demonstrated experience to assess competence where there are non-formal qualifications involved
- Widening the range of alternatives to proving competence (such as occupational certification by guilds, agencies in the home country, proficiency certificates, etc.) and speeding up the process for verification to within three months
- setting up skills testing facilities
- reduction in quantitative restrictions
- reduction in ENTs
- direct receipt of remuneration by services suppliers
- Exclusion of wage parity as a precondition to entry
- Option of contract renewal
- providing an option for contract renewal

In the revised request on Mode 4, LDCs showed key sectors in which they wanted liberalisation on Mode 4 in the GATS negotiations. Some of these include professional services, computer related services, research and development services, real estate

services, communication services, education services, financial services, health and related social services, tourism and travel related services, recreational, cultural and sporting services, and transport services.<sup>264</sup>

A unique theme of the LDC request, (as compared to the plurilateral request on Mode 4) is that it clearly targeted the inclusion of categories beyond highly skilled providers. The request did this by broadening the scope of services providers whose competencies and qualifications met the standard for Independent Professionals, Business Visitors, and Contractual Services Suppliers. LDCs proposed that such qualifications be diplomas, university degrees, or demonstrated experience, presenting these as substitutable options.<sup>265</sup>

In the category of “Others”, LDCs sought to widen commitments to include such categories as Installers and services<sup>266</sup>, Foreign based self employed transport services provider<sup>267</sup>, Graduate trainees,<sup>268</sup> Personnel of public or private enterprises in another WTO Member with a State contract in the host country<sup>269</sup>, Persons of internationally



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<sup>264</sup> Paragraph 6 of the WTO (2006) LDC Group Request on Mode 4, Communication from the Delegation of Zambia on Behalf of the LDC Group, JOB(06)/155 (24 May 2006)

<sup>265</sup> Kategekwa J. (2006) at 7

<sup>266</sup> Who would be foreign-based natural self employed persons that enter into the territory of another Member to install or service machinery and/ or equipment for a service mentioned in the commitment of the host country.

<sup>267</sup> These would include individuals, who enter the territory of another WTO Member temporarily to provide or facilitate internal, international land, air, rail or water transport

<sup>268</sup> These would include non-resident natural persons with a diploma, university degree or post-graduate qualification who enter or remain in another WTO Member territory pursuing post graduate work for the purpose of obtaining appropriate work experience, business techniques or methods of a service mentioned in the commitment of a Member.

<sup>269</sup> This would include employees of a foreign based private or state enterprise who enter the territory of another WTO Member temporarily in order to perform a service contract (s) between their employer and a State or government department are envisaged. However as Kategekwa points out, it is not clear how this request fits within the exclusion in Article 3 (b) which excludes services supplied in the exercise of governmental authority.

recognized reputation<sup>270</sup> Artists, sportsmen and women<sup>271</sup>, and Fashion Models<sup>272</sup> The requirements for certain of these categories are expanded to include holders of certificates.

### **3.8.2.2 The difficulties and constraints faced by African LDCs in the Mode 4 negotiations**

To date, there has been no response on the LDC request. Instead, negotiations on Mode 4 have focused on the Plurilateral Mode 4 request. As noted earlier, LDCs did not participate in plurilateral negotiations. In many cases, demanders in plurilaterals were themselves ready to make commitments of the level requested. However, given that LDCs were excluded from making commitments by the Hong Kong Ministerial Declaration, it is possible that Members did not find it important to discuss with LDCs.

Another key reason why LDCs did not participate in these negotiations is that they do not have the resource ability to fly in capital based experts to attend each of the services clusters, which were the forum for plurilateral negotiations. Most of the Geneva-based delegates are not services experts. In any event, LDC delegates are often overwhelmed by the number of meetings in other areas of the WTO negotiations agenda.<sup>273</sup> Half of the LDCs in the WTO can't afford a single negotiator to defend their interests yet developed countries like the US have around 250 negotiators.<sup>274</sup>

Furthermore, this is tainted by the fact that due to their weak financial and structural powers, the participation of the LDCs in the negotiations is often seen by developed

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<sup>270</sup> Who are invited to higher educational institutions, scientific research institutes, public educational institutions, and non-governmental organizations.

<sup>271</sup> Participating in competitive or non-competitive events..

<sup>272</sup> Taking part in public or private performances

<sup>273</sup> Kategekwa J. (2006) at 8

<sup>274</sup> Friends of the Earth/ The Catholic Agency for Overseas Development (CAFOD)

countries as insufficient in order to ensure equal and non-discriminating results. They and their interests appear to be de facto excluded.<sup>275</sup>

Although, some of the sectors plurilateral request on Mode 4 overlap with those that are reflected in the LDC request, such as financial, construction, transport, and others, several of the sectors of key export interest to LDCs such as Health, Tourism, and Recreation do not appear. Therefore, such sectors have not received detailed exchange on potentials for liberalisation. Even in the seemingly overlapping sectors, LDCs are looking at extending the scope beyond highly skilled professionals as Kategekwa<sup>276</sup> points out,

*“LDCs want holders of diplomas, certificates, and people with proven experience, all to be eligible to supply services under the GATS, sometimes in a self employed capacity, de-linked from commercial presence. LDCs also want commitments for business visitors, and “others.” Members should seriously consider the LDC request, to assist them in taking into account this group’s interest in the preparation of their revised offers.”*

As such, in July 2006, the WTO Director General-Pascal Lamy called negotiations on the Doha Development Agenda ‘to a halt because too many countries refused to compromise on their offers and the gaps between key players remained too wide’. Naturally all trade related negotiations including GATS and Mode 4 were postponed.<sup>277</sup>

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<sup>275</sup> Hilger O. (2005) Pros and Cons of the General Agreement on Trade in Services (GATS) Working Paper 2005-03

<sup>276</sup> Kategekwa J. (2006) at 7

<sup>277</sup> WTO 2006 News Items, DDA June/July 2006 Modalities: Talks suspended. ‘Today there are only losers.’ Summary 24 July 2006

[http://www.wto.org/english/news\\_e/news06\\_e/mod06\\_summary\\_24july\\_e.htm](http://www.wto.org/english/news_e/news06_e/mod06_summary_24july_e.htm) accessed on 9/2/09



The negotiations had stalled because LDCs and developing country governments were pushing for Mode 4 commitments covering low and semi-skilled sectors. Developed countries claimed they were reluctant to cede control of immigration to the WTO because of security concerns. The Mode 4 issue is increasingly becoming a deal breaker for developing country negotiators especially the LDCs.<sup>278</sup>

In sum, the offers submitted in the context of the DDA reflect some, but not much, “potential” improvement on Mode 4 commitments and virtually none on low and semi-skilled service suppliers.<sup>279</sup> The Hong Kong Ministerial Declaration set out laudable objectives for Mode 4 negotiations, and targeted new and improved commitments on issues of interest to LDCs. The categories of contractual service suppliers, independent professionals, and “others” are targeted, and a reference is made to delinking market access from the commerce presence Mode of supply and to reducing ENTs.<sup>280</sup> Moreover, some positive “signals” were expressed at the Services Signaling Conference held in Geneva in July 2008. It was reported that “most participants indicated their readiness to improve access conditions for Mode 4. In several statements, these signals were expressly linked to the developments character of this Round.”<sup>281</sup> However, the interests of African LDCs remain unaddressed in the GATS negotiations.

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<sup>278</sup> GATS Mode 4 Fact Sheet: GATS Mode 4 and the Implications of Expansion. American Friends Service Committee <http://www.tamejavi.com/trade-matters/issues/GATS-Mode-4-Fact-Sheet.htm> accessed on 9/2/09

<sup>279</sup> Mamdouh (2008) WTO Symposium Mode 4 of the GATS – Taking Stock and Moving Forward Taking Stock and Moving Forward”, Geneva, 22-23 September 2008, available at [http://www.wto.org/english/tratop\\_e/serv\\_e/mouvement\\_persons\\_e/sym\\_sept08\\_e/mamdouh\\_e.ppt#256.1.Mode4-Definition,commitments,stateofplayinthenegotiations](http://www.wto.org/english/tratop_e/serv_e/mouvement_persons_e/sym_sept08_e/mamdouh_e.ppt#256.1.Mode4-Definition,commitments,stateofplayinthenegotiations) accessed on 12/11/08

<sup>280</sup> Crosby D. (2009) Advancing Services Export Interests of Least Developed Countries: Toward GATS Commitments on the Temporary Movement of Natural Persons for the Supply of Low-Skilled and Semi-Skilled Services. ICSTD at 15

<sup>281</sup> Report by the Chairman of the Trade Negotiations Committee (JOB(08)/93) (30 July 2008).

### 3.8.2.3 The future of Mode 4 negotiations

The future outcomes of Mode 4 negotiations under the GATS rest on the bargaining capability of the LDCs. To date, developed countries' offers in Mode 4 remain unambiguous. Developed countries neither made specific Mode 4 commitments for the supply of low skilled and semi-skilled services in the Uruguay Round nor offered to make commitments in response to LDC requests under the Doha Development Agenda. Rather, the increasing need for such services in "consuming" countries is met under unilateral or bilateral arrangements with favoured trading partners and in some cases through illegal and unregulated immigration.<sup>282</sup>

LDCs general demands were reasonable, but these were not supported by developed countries offers or negotiating tactics. As such LDCs must learn the tricks of negotiation in a multilateral frame work and the learning must be extremely fast. Given that the future of Mode 4 negotiations, would decide the fate of millions of the unemployed labour force of the African LDCs.<sup>283</sup>



On the face of it, the multilateral trade negotiations under the auspices of WTO Doha round seem to have put the developmental issues on the trade negotiating agenda. But what is actually lacking is effective implementation and delivery. So far developed countries, have not moved beyond rhetoric when it comes to actually providing benefits to LDCs.<sup>284</sup> As the former Director General of the WTO Renato Ruggiero stressed, "It will be hard to claim that the GATS provides the basic infrastructure for world trade so long

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<sup>282</sup> Crosby D. (2009) at 3

<sup>283</sup> Dey D. (2005) Movement of Natural Persons1 (Mode-4) Under GATS: Advantage Developing Countries at 17

<sup>284</sup> Metha P.S and Kumar P. (2007) WTO Doha and Special measure for Less Developed Countries. Briefing paper No. 7 CUTS international at 6

as the services that carry the world's goods and service providers are not properly covered by it."<sup>285</sup>

## **Conclusion**

In conclusion, African LDCs have identified Mode 4 and in particular the supply of low and semi-skilled labour given their abundance of labour. In spite their persistence in negotiations, there has not been any meaningful liberalisation in Mode 4 from the developing country point of view. Commitments made to date by developed countries are biased towards highly skilled labour. As discussed above, both parties stand to benefit if there is further liberalisation of Mode 4. Thus developed countries need to improve the structure of commitments on Mode 4 for this to be realized.

Another issue that LDCs grapple with is the issue of national barriers that developed countries have put in place, to restrict the temporary movement of personnel. In their revised request, LDCs have suggested ways in which these barriers can be overcome to ease access. Chapter four is therefore going to analyse the national barriers developed countries have put in place that hinder movement under Mode 4. Chapter five will discuss the proposals to overcome these barriers and make recommendations on how the structure of Mode 4 commitments by developed countries can be improved.

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<sup>285</sup> OECD (2002) GATS: The Case for Open Services Markets at 77

## **4 Chapter Four: Barriers to Mode 4 Supply of Services by African LDC Low and semi-skilled Workers**

### **4.1 Introduction**

Several significant barriers prevent or restrict the flow of low or semi-skilled services suppliers from African LDCs to services consumers located in developed countries. Most of such barriers are not specific to African LDC services suppliers but apply generally to Mode 4 trade. Nevertheless, many barriers have a disproportionate effect on African LDCs due the additional costs and burdens which are more difficult for African LDCs to overcome.<sup>286</sup>

Trade in services under Mode 4 is still limited relative to its potential due to a number of regulatory barriers posed by countries with the aim of protecting their domestic labour markets and satisfying security concerns fuelled by substantial immigration.<sup>287</sup> This is probably indicative of the highly regulated and protected nature of this form of services trade relative to all others and reflects the sensitivities' developed countries have in opening up their labour markets to foreign labour especially low and semi-skilled labour and the potential impact on local jobs, wages, quality and social stability.<sup>288</sup>

Furthermore, as a result of the extensive restrictions on movement of natural persons, the potential for such labour flows remains untapped. This fact is evident from the relatively small share of temporary workers in the overall labour market for most

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<sup>286</sup> Crosby D. (2009) Advancing Services Export Interests of Least Developed Countries: Toward GATS Commitments on the Temporary Movement of Natural Persons for the Supply of Low-Skilled and Semi-Skilled Services. ICSTD at 17

<sup>287</sup> Cali, M., Ellis, K. and, Te Velde W. D. (2008) the Contribution of Services to Development and the Role of Trade Liberalisation and Regulation. Global Forum on International Investment. Briefing Note 7. OECD at 16

<sup>288</sup> Chanda R. (2004) Movement And Presence of Natural Persons And Developing Countries: Issues and Proposals For The GATS Negotiations(T.R.A.D.E) working paper 19 South Centre at 9

countries and the small share of trade in services represented by temporary workers within overall trade in goods and services and relative to other forms of trade in services.<sup>289</sup>

In the case of Mode 4, potentially large returns would be feasible if medium and less skilled workers, who are relatively abundant in African LDCs and for whom the proportionate gap in productivity between home and host countries is greatest, were allowed to move and provide their services in developed countries.<sup>290</sup>

Trade liberalisation involves providing greater market access to foreign firms by lowering the barriers to trade. This is a relatively straightforward concept for goods trade, where liberalisation involves the reduction of tariffs<sup>291</sup>. It is infinitely more complex for services, where the nature of trade and the types of barriers encountered are very different.<sup>292</sup> The barriers imposed on services can be characterised as being opaque and not easy to quantify. Given the varied modalities of services trade, tariffs are not very effective to protect national service sectors, as such, most barriers to trade take the form

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<sup>289</sup> Chanda R. (2004) at 2-3

<sup>290</sup> Chaudhuri S., Mattoo A. and Self R (2004) Moving People To Deliver Services: How Can The WTO Help?. World Bank Policy Research Working Paper 3238, March 2004 at 3-4

<sup>291</sup> A tariff is a customs duty on merchandise imports, it levied either as an *ad valorem tariff* (percentage of value) or as a *specific tariff* (e.g. \$7 per 100kg). Tariffs give a price advantage to similar locally-produced goods and raise revenues for the government. (Goode W. (2003) 4<sup>th</sup> Ed. Dictionary of Trade Policy Terms, 347)

<sup>292</sup> Hodge J. Liberalisation of Trade in Services in Developing Countries in Hoekman B, Mattoo A., and English P., (eds.) (2002) *Development, Trade, And The WTO: A Handbook* at 221

of non-tariff barriers.<sup>293</sup> From the liberalisation point of view, these non-tariff barriers are very complex and are linked to administrative regulatory traditions.<sup>294</sup>

Hoekman and Brago<sup>295</sup> observe that the regulatory and government barriers to the provision of services by natural persons may be categorised in three groups: (i) general immigration legislation including visa requirements; (ii) labour market regulation governing the issuance of work permits etc. (iii) and regulations defining foreigners' ability to work in individual areas.<sup>296</sup> Chanda (2004) points out that;

*It is important to note that not all of the above regulations are necessarily barriers. Many of these regulations, particularly those concerning recognition and to some extent even regulations concerning differential treatment...often stem from public policy concerns such as consumer protection, public interest and security concerns. It is really regulations such as immigration laws and procedures, labour market policies, or regulations attaching prior conditions to the employment of foreign service providers which act as barriers to the movement of natural persons.*<sup>297</sup>

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<sup>293</sup> These are government measures other than *tariffs* that restrict trade flows. Examples include *quantitative restrictions, import licensing, voluntary restraint arrangements* and *variable levies*. They generally now contravene the WTO rules (Goode W. (2003) 4<sup>th</sup> Ed. Dictionary of Trade Policy Terms, 264)

<sup>294</sup> Lavenex S. (2002) Labour Mobility in the General Agreement on Trade in Services (GATS) – Background Paper Working Paper 1 March 2002 The Political Economy of Migration in an Integrating Europe (PEMINT) At 6

<sup>295</sup> Hoekman B and Braga C. (1997), Protection and Trade in Services: A Survey. World Bank Research Paper No. 1747 at 6 also see Lavenex S. (2002) Labour Mobility in the General Agreement on Trade in Services (GATS) – Background Paper Working Paper 1 March 2002 The Political Economy of Migration in an Integrating Europe (PEMINT) At 6

<sup>296</sup> Stephenson S. M. Approaches to Liberalizing Services at 24 – 25; Chanda R. Movement of Natural Persons and the GATS: Major Trade Policy Impediments in Hoekman B, Mattoo A., and English P., eds (2002) *Development, Trade, And The WTO: A Handbook* at 305

<sup>297</sup> Chanda R. (2004) Movement and Presence of Natural Persons and Developing Countries: Issues and Proposals For The GATS Negotiations (T.R.A.D.E.) Working Papers 19 South Centre at 14 -15

This chapter will discuss the above categories of regulations and how they constrain service trade through labour movement bearing in mind that some of the regulations are permissible given commitments scheduled under the GATS such as Article XVI (market access), Article XVII (National treatment) and Article XVIII (other conditional commitments) and these include numerical quota for access to the national labour market; licensing and qualification requirements; residency requirements and non-eligibility under subsidy schemes; discrimination with regard to mandatory social insurance systems (e.g. denial of pension entitlements); or restrictions affecting the mobility of family Members etc. The other barriers are not even covered by the formal scope of the GATS. The Annex on the Movement of Natural Persons expressly exempts measures regarding citizenship and residence as well as the rules governing permanent employment from the disciplines of the Agreement. Accordingly, the commitments made under the schedules do not go beyond existing regulations regarding e.g. the issue of visas for temporary stay. Moreover, the operation of visa requirements only for natural persons of certain Members, but not for others, is not *per se* regarded as contrary to the GATS. Still, even if the formal scope of the GATS is thus limited, the processes involved still hinder the movement of temporary labour. However, all the barriers shall be discussed to give a comprehensive view of the policies that affect the movement of natural persons.

## **4.2 Restrictions on the entry and stay of natural persons**

The main restriction on movement of natural persons originates in the immigration and labour market policies of individual countries. Temporary movement of labour is not separated from permanent movement of labour and comes under the purview of immigration legislation and labour market conditions. The restrictions include cumbersome application and processing procedures for visas and permits, strict eligibility conditions for such applications, quantitative limits on entry, wage parity requirements, biases against semi and low skilled services providers, limitations on the

duration of stay and transferability of employment in the overseas market.<sup>298</sup> The procedures for the issuance of work permits and visas are time consuming and burdensome. A typical application requires exhaustive details about the employer, the wages to be paid by the employer, details of the candidate in terms of his experience, skills, and training, and verification of other personal details.<sup>299</sup>

#### 4.2.1 Visa requirements

One of the main restrictions on movement of natural persons is visa and work permit related procedures. The main problem here is that such procedures do not separate between temporary and permanent movement of labour. They subject Mode 4 to usual immigration legislation and labour market conditions, which are applicable to migrant workers, though in principle Mode 4 is supposed to be distinct from permanent migration. Moreover, such regulations are often quite cumbersome, non transparent, costly and arbitrary. These administrative and procedural barriers include strict eligibility conditions for applications of work permits or visas, cumbersome procedures for actual application and processing of these visas and permits, and limitations on the length of stay and transferability of employment in the overseas market.<sup>300</sup>

Often temporary workers may be subject to a two permit entry procedure, one for an entry visa and another for a work permit. It may be necessary in some cases to leave the passport in the embassy during the processing period, taking anywhere between a week to one month, during which time the service provider is unable to travel to another country. This is a major impediment to the smooth flow of exports of many services. The irony being that these processes tend to be more streamlined for higher categories of

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<sup>298</sup> Chanda R. Movement of Natural Persons and the GATS: Major Trade Policy Impediments in *Development, Trade, And The WTO: A Handbook* Hoekman B, Mattoo A., and English P., eds (2002) at 305

<sup>299</sup> Chanda R. (2001) Movement of Natural Persons and the GATS', *World Economy*, Vol. 24 (5), May 2001, at 634

<sup>300</sup> Chanda R. (1999) at 15



service personnel, indicating the inherent biases against categories of labour where developing countries have a stronger interest.<sup>301</sup> Furthermore, all of these restrictions raise the direct and indirect costs (due to delays and uncertainty) of entering the foreign market, thereby often eroding the cost advantage of the foreign service supplier and curtailing the scope for trade in services via Mode 4.<sup>302</sup>

Generally, in many countries, the time required for processing visas for highly skilled personnel is much less as compared to processing visas for low skilled. It is believed that highly skilled personnel can add more value to the host country's economy than low skilled personnel which leads to discrimination between the treatment of the two categories.<sup>303</sup> Such differences in entry conditions across skill and functional levels is mainly due to labour displacement concerns that are typically associated with entry of lower level service providers. In effect, these conditions amount to a discrimination against lower level and less skilled personnel and tend to hurt developing countries which have a comparative advantage in exactly these groups of service providers.<sup>304</sup>

In practice, Members states have complete authority to grant or deny visas for any reason. For this reason, negotiating proposals in the Doha Development Agenda have included provisions to improve transparency of Members' visa regimes.<sup>305</sup>

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<sup>301</sup> Chanda R. (2004) at 10

<sup>302</sup> *ibid* at 9

<sup>303</sup> Shah A. And Parikh V. (2002) Movement of Natural Persons under the GATS in the Software Services Sector available at [www.wto.org/english/tratop\\_e/serv\\_e/symp\\_apr\\_02\\_parikh\\_e.doc](http://www.wto.org/english/tratop_e/serv_e/symp_apr_02_parikh_e.doc) (accessed on 16/03/09) at 4

<sup>304</sup> Chanda R. (2004) at 10

<sup>305</sup> WTO (2006) "LDC Group Request on Mode 4", Communication from the Delegation of Zambia on Behalf of the LDC Group, JOB(06)/155 (24 May 2006); Collective Request – Mode 4 Movement of Natural Persons, available at <http://www.uscsi.org/publications/papers/collective/Mode4.pdf>

#### 4.2.2 Cumbersome and non transparent immigration procedures

Often, the lack of transparent immigration procedures makes it difficult and discouraging to obtain visas in a short span of time. Sometimes the filing process for visa applications may take from two weeks to over two months or even longer, at times almost a year, due to the cumbersome nature of the application requirements such long and tedious processes hurt service sectors where personnel need to be shipped overseas at short notices and where delays mean a loss of opportunities and business.<sup>306</sup> Furthermore, the long process of reviewing visa applications could sometimes render the purpose of the visit meaningless.<sup>307</sup>

#### 4.2.3 Prior adequate search in national markets

The laws of some WTO Member countries mandate that the employers carry out a thorough job search in the country before availing of the services of foreign employees or service providers. The employer must also provide evidence of an extensive search for a local person before hiring a foreign national, often having to comply with stringent advertising requirements and search specifications (as in the European Economic Area and Canada<sup>308</sup>) and to demonstrate difficulties in training a local person.<sup>309</sup>

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<sup>306</sup> Chanda R. (2001) Movement of Natural Persons and the GATS', *World Economy*, Vol. 24 (5), May 2001, at 635

<sup>307</sup> Shah A. And Parikh V. (2002) Movement of Natural Persons under the GATS in the Software Services Sector available at [www.wto.org/english/tratop\\_e/serv\\_e/symp\\_apr\\_02\\_parikh\\_e.doc](http://www.wto.org/english/tratop_e/serv_e/symp_apr_02_parikh_e.doc) accessed on 16/03/09 at 5

<sup>308</sup> For instance, Canada's Seasonal Agricultural Worker Program (CSAWP) with Mexico and the Caribbean has an institutional framework that clearly delineates the duties and obligations of public and private stakeholders in the process of recruitment of foreign workers. Canadian employers are required to demonstrate their inability to fill the vacant positions with residents, including their advertisement efforts. In its application, the employer must provide information on the number of workers needed, duration and location of employment, and a description of the work.

<sup>309</sup> Chanda R. (2001) Movement of Natural Persons and the GATS', *World Economy*, Vol. 24 (5), May 2001, at 635

A somewhat weaker requirement is that employers take timely and significant steps to recruit and retain sufficient national workers and that no worker be laid off for a certain period preceding and following the filing of any work permit or visa application (e.g. in the US for speciality occupations)<sup>310</sup> Therefore, even though a foreign service supplier possess better qualifications or work experience, if there is a local person who can satisfy the needs of the employer, that local person must be given preference over the foreigner.<sup>311</sup>

#### 4.2.4 Economic Needs Test (ENT)

One of the most pervasive measures affecting movement of natural persons is that of economic needs tests (ENTs). ENTs, which often take the form of labour market tests, management needs tests, manpower planning requirements or other types of tests and conditions.<sup>312</sup> As a matter of fact, the widespread use of ENTs has emerged as one of the major barriers to the free movement of service providers. The discretionary and non-transparent nature of such tests certainly reduces the predictability of trading conditions.<sup>313</sup>

The ENT is a mechanism used by governments to subject the granting of market access to demand or supply conditions in the market. The main problem with these tests is that they are usually vague in wording and intent and not clearly specified in terms of

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<sup>310</sup> Chaudhuri S., Mattoo A. and Self R (2004) Moving People To Deliver Services: How Can The WTO Help?. World Bank Policy Research Working Paper 3238, March 2004 at 2-3

<sup>311</sup> Shah A. And Parikh V. (2002) Movement of Natural Persons under the GATS in the Software Services Sector available at [www.wto.org/english/tratop\\_e/serv\\_e/symp\\_apr\\_02\\_parikh\\_e.doc](http://www.wto.org/english/tratop_e/serv_e/symp_apr_02_parikh_e.doc) (accessed on 16/03/09) at 5

<sup>312</sup> UNCTAD (2003) Report of the Expert Meeting on Market Access Issues in Mode 4 (Movement of Natural Persons to Supply Services) and Effective Implementation of Article IV on Increasing the Participation of Developing Countries at 6

<sup>313</sup> Chaudhuri S., MattooA. and Self R (2004) Moving People To Deliver Services: How Can The WTO Help?. World Bank Policy Research Working Paper 3238, March 2004 at 2-3

objective and transparent criteria or how they are to be administered.<sup>314</sup> In the absence of any other identifiable market failures which may justify the need for such tests, their use is purely protectionist with the intent of substituting foreign with domestic labour.<sup>315</sup> Most experts agree that ENTs act as discriminatory measures, detracting from the predictability and certainty of market access conditions.<sup>316</sup>

In the context of Mode 4, ENTs are the most pervasive and intractable measure affecting movement of natural persons and are most prevalent in areas like medical and dental services. They tend to cover categories like contractual and employment based temporary workers such as technicians, and other professionals. ENTs also apply to some lower skilled occupations such as construction work, tour operator services and taxi services.<sup>317</sup>

#### 4.2.5 Quantitative limits (Quotas)

Quantitative restrictions are often used to restrict international trade in services, although the intangibility and non storability of many services implies that quotas may be applied to providers of services rather than services per se.<sup>318</sup>

Several countries place quantitative limits on the number of visas issued to temporary overseas workers. These quantitative restrictions as well as procedural difficulties raise

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<sup>314</sup> WTO (2004) World Trade Report 2004 Exploring the Linkage between the Domestic Policy Environment and International Trade at 55

<sup>315</sup> Chanda R. (2001) Movement of Natural Persons and the GATS', *World Economy*, Vol. 24 (5), May 2001, at 637

<sup>316</sup> UNCTAD (2003) Report of the Expert Meeting on Market Access Issues in Mode 4 (Movement of Natural Persons to Supply Services) and Effective Implementation of Article IV on Increasing the Participation of Developing Countries TD/B/COM.1/64 TD/B/COM.1/EM.22/3 27 November 2003 at 6

<sup>317</sup> Chanda R. (2004) at 11

<sup>318</sup> Hoekman B. and Braga C.A (1997) Protection and Trade in Services: A Survey The World Bank March 1997 at 7

the direct and indirect costs of hiring foreign workers and erode the cost advantage of the foreign service supplier.<sup>319</sup>

Not only can these quantitative restrictions be a cap on the economic expansion of the country itself, but they can also restrict cross-border trade in services<sup>320</sup>. For example, the H-2B Temporary Non - Agricultural Workers Program, sets a yearly quota of 66,000 visas, [which is filled every year on opening day]. On the other hand, the US H-2A Agricultural Workers Program does not set any specific numerical ceiling but requires U.S. employers to meet an ENT by demonstrating that they are unable to fill the relevant jobs with US workers and that the employment of foreigners will not adversely affect US workers.<sup>321</sup>

#### 4.2.6 Wage parity requirement

Wage parity is an important part of the labour certification process in many countries and can delay the issuance of work permits and visas. This requirement mandates that a foreign service provider must be paid wages equal to those being paid to domestic service providers. Therefore, this immigration regulation prevents employers from giving lower wages for to foreign services providers for such labour intensive services.<sup>322</sup>

Several Members have expressly reserved the right in their current GATS schedules to operate wage-parity and/or minimum-wage requirements. For example, the EC's schedule provides that 'laws and regulations regarding entry, stay, work and social security measures shall continue to apply, including regulations concerning period of

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<sup>319</sup> Chanda R. Movement of Natural Persons and the GATS', (2001) 24 (5) *World Economy*, at 635

<sup>320</sup> Shah A. And Parikh V. (2002) at 6

<sup>321</sup> Crosby D. (2009) Advancing Services Export Interests of Least Developed Countries: Toward GATS Commitments on the Temporary Movement of Natural Persons for the Supply of Low-Skilled and Semi-Skilled Services. ICSTD at 18

<sup>322</sup> Shah A. And Parikh V. (2002) Movement of Natural Persons under the GATS in the Software Services Sector available at [www.wto.org/english/tratop\\_e/serv\\_e/symp\\_apr\\_02\\_parikh\\_e.doc](http://www.wto.org/english/tratop_e/serv_e/symp_apr_02_parikh_e.doc) (accessed on 16/03/09) at 5

stay, minimum wages as well as collective wage agreements'. The US and Switzerland have also scheduled similar limitations.<sup>323</sup>

In US for instance, the employer is required to obtain prevailing wage information from authorities or other sources and pay at least 95 percent of this wage rate to foreign candidates. In the EEA countries, wage rates paid to foreign candidates must be in line with the rates that have been set by collective labour agreements. Work permit applications are normally refused if the candidate is shown to be earning less than the minimum agreed wage for the type of work specified. Failure to comply with the wage legislation can create problems in receiving future work permits, rejection of work permit applications, and penalties.<sup>324</sup> Furthermore, local laws may even require employers to pay a premium to employ foreign service suppliers, including coverage of travel expenses, lodging and meals.<sup>325</sup>

Although some of these requirements ultimately aim at providing a non discriminatory environment as well as protect foreign workers,<sup>326</sup> as a practical matter they may unnecessarily undermine or nullify any cost competitiveness or comparative advantage that African LDCs service suppliers have over domestic suppliers.<sup>327</sup>

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<sup>323</sup> Adlung R. (2009) Services Liberalisation from a WTO/GATS Perspective: In Search of Volunteers WTO Staff Working Paper Ersd-05 February 2009 at 11

<sup>324</sup> Chanda R. Movement of Natural Persons and the GATS', (2001) 24 (5) *World Economy*, at 635

<sup>325</sup> Crosby D. (2009) Advancing Services Export Interests of Least Developed Countries: Toward GATS Commitments on the Temporary Movement of Natural Persons for the Supply of Low-Skilled and Semi-Skilled Services. ICSTD at 19

<sup>326</sup> Chaudhuri S., Mattoo A. and Self R. (2004) Moving People To Deliver Services: How Can The WTO Help? World Bank Policy Research Working Paper 3238, at 2-3

<sup>327</sup> UNCTAD (2003) Report of the Expert Meeting on Market Access Issues in Mode 4 (Movement of Natural Persons to Supply Services) and Effective Implementation of Article IV on Increasing the Participation of Developing Countries TD/B/COM.1/64 TD/B/COM.1/EM.22/3 27 November 2003 at 8

In sum while wage parity may be required from the perspective of home country workers, it negates the very basis of cross country labour flows which stems from endowment based cost differentials between countries. The principle underlying the wage parity requirement is that overseas nationals are to be hired to address the shortage of service providers in the host country and not to save money by hiring cheap labour from abroad. However, the wage parity requirement also acts to and works against the very concept of comparative advantage based on cost differentials.<sup>328</sup>

#### **4.2.7 Restrictions on flexibility**

Restrictions also apply to natural persons after they enter the foreign market. There are limitations on the transfer of work permits and mobility of the service provider within the host country. The work permit usually pertains only to the specific job detailed in the application and does not permit the individual to take up any other work in the host country. To transfer, the entire application process has to be repeated. While such provisions are intended as safeguards, they limit the flexibility of moving service personnel to various client sites to render the service and act as a disincentive to hiring foreign nationals.<sup>329</sup>

#### **4.2.8 Limited duration of stay**

The work permits or visas that are issued by countries are valid only for the specified duration usually ranging from three months to five years, depending on the nature of the position, the candidate's skill level, and other criteria.<sup>330</sup> While these permits are

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<sup>328</sup> Chanda R. (2004) at 9

<sup>329</sup> Chanda R. (1999) Movement of Natural Persons and Trade in Services: Liberalising Temporary Movement of Labour under the GATS working paper no.51 ICRIER at 18

<sup>330</sup> Chanda R. (2001) Movement of Natural Persons and the GATS', *World Economy*, Vol. 24 (5), May 2001, at 636

extendable or renewable, the procedure for the extension or renewal is cumbersome, expensive and stringent.<sup>331</sup> Often, after the long wait in filing and processing information, only a single entry permit may be granted, thus requiring the service provider or company to undergo the same cumbersome process once again. Such procedures may discourage companies, typically smaller ones from hiring foreign nationals and may force them to use local persons who may be in short supply and more costly.<sup>332</sup> This also is a major disadvantage to African LDCs given that the processes tend to be a lot easier for skilled personnel in comparison to low or semi-skilled personnel.

#### **4.3 Regulations concerning recognition, certification and licensing**

Non recognition of qualifications and work experience as well as burdensome licensing requirements and the regulations of professional bodies also represent a major barrier for foreign service suppliers.<sup>333</sup>

Requirements concerning qualifications, work experience, and licensing or certification are common for accredited services such as legal, accountancy, and medical services. The required licenses are often accorded by the government or by the professional bodies concerned.<sup>334</sup>

Recognition requirements may altogether prevent market access for the foreign service providers or may limit the provider to specific activities following entry. Recognition

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<sup>331</sup> Shah A. And Parikh V. (2002) at 6

<sup>332</sup> Chanda R. (2004) Movement and Presence of Natural Persons and Developing Countries: Issues and Proposals for the GATS Negotiations (T.R.A.D.E) Working Paper 19 South Centre at 11

<sup>333</sup> Mattoo A. 'Developing countries in the New Round of GATS Negotiations: Towards a Pro-Active Role' in Hoekman B. and Martin W. (Eds) (2001) *Developing Countries and the WTO: A Pro Active Agenda* at 84 - 85

<sup>334</sup> Hoekman B. and Braga C.A (1997) *Protection and Trade in Services: A Survey* at 7



related regulations are usually motivated by the need to ensure high quality of service and adherence to specified codes of professional conduct. Criteria such as citizenship, however, are discriminatory. In some sectors that have no formal certification or licensing procedures, there is an element of discretion in determining equivalence between work experience and educational qualifications or training.<sup>335</sup> Meaning that, the applicant may not get the job simply because they do not satisfy the eligibility criteria even though the applicant is qualified for the job and as a result might not be able to obtain the visa.<sup>336</sup>

Whereas recognition related regulations are usually motivated by the need to ensure high quality of service and adherence to specified codes of professional conduct, the criteria used for granting recognition are often discriminatory. For instance, recognition is often granted on the basis of nationality.<sup>337</sup> For example in the US, candidates are generally required to have at least three years' post graduation experience in the occupation and a degree directly related to it. Such discretion in according recognition means that previous experience and qualifications are often not duly recognised.<sup>338</sup>

These qualifications and skills for entry purposes are assessed using various mechanisms. One important mechanism is mutual recognition agreements which are signed between two countries or groups of countries at the national or sub-federal levels for specific sectors and occupations and are typically administered by relevant professional bodies and associations. MRAs are mostly used in certified and licensed

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<sup>335</sup>Chanda R. Movement of Natural Persons and the GATS: Major Trade Policy Impediments in *Development, Trade, And The WTO: A Handbook* Hoekman B, Mattoo A., and English P., eds (2002) at 305

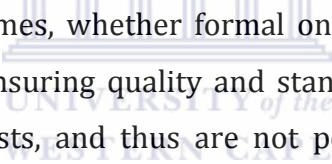
<sup>336</sup> Shah A. And Parikh V. (2002) Movement of Natural Persons under the GATS in the Software Services Sector available at [www.wto.org/english/tratop\\_e/serv\\_e/symp\\_apr\\_02\\_parikh\\_e.doc](http://www.wto.org/english/tratop_e/serv_e/symp_apr_02_parikh_e.doc) accessed on 16/03/09 at 6

<sup>337</sup> Chanda R. Movement of Natural Persons and the GATS', (2001) 24 (5) *World Economy*, at 636

<sup>338</sup> Ibid at 637

professions like medical and accountancy services where there are established international standards and practices, and benchmarking and determining cross country equivalence is feasible.<sup>339</sup>

Another mechanism for according recognition is a test of competence. This test takes various forms including an employer interview or test; an on-the-job competency assessment, during or after a period of service; a probationary or trial period of supervised work; an examination of knowledge, skills and language skills and an assessment of credentials or paper qualifications, where institutions or individuals are assessed for comparability, 'substantial' equivalence or equivalence. Such tests may be implemented by employers, government agencies or professional bodies and associations.<sup>340</sup>



Even though recognition schemes, whether formal ones like MRAs or otherwise, have public policy objectives like ensuring quality and standards of services and protecting consumer and national interests, and thus are not per se protectionist, it is in their implementation and procedural aspects that they may act as market entry barriers. They may impose additional costs or curtail the scope for practice. These recertification and competence tests are subject to various problems of administration and bias. Moreover, they impose financial and time-related costs. They also tend to create an uneven playing field between countries that are party to such MRAs and those that are not or between preferred source countries (for historical, cultural or other reasons) and others.<sup>341</sup>

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<sup>339</sup> Chanda R. (2004) Movement and Presence of Natural Persons and Developing Countries: Issues and Proposals for the GATS Negotiations (T.R.A.D.E) Working Paper 19 South Centre at 12

<sup>340</sup> Ibid

<sup>341</sup> Ibid

This problem of certification and verification of qualifications is even more difficult in the case of lower skilled occupations such as repair and maintenance services, masonry and construction work, where there may be no formal paper qualifications. Actual demonstration of work quality may be the only means of judging competence. Thus, such occupations are not conducive to facilitating market access through the framing of MRAs.<sup>342</sup>

Qualification and licensing requirements should not be applied to African LDC low skilled service suppliers who do not possess specific educational qualifications. However, domestic licensing regimes do apply in semi-skilled sectors and required certification may be expensive, time consuming or unavailable in the home country.<sup>343</sup>

#### **4.4 Differential treatment of Foreign Service providers**

Trade in services via Mode 4 is also constrained by policies that discriminate against foreign services providers. In addition to more stringent qualification requirements for foreign services providers, and citizenship and residency conditions, there is differential treatment in the form of taxes, benefits, subsidies, and government procurement policies.<sup>344</sup>

Services providers may be required to make social security contributions in the host country even though they are on deputation abroad for a period less than that required

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<sup>342</sup> Chanda R. (2004) at 12

<sup>343</sup> Crosby D. (2009) Advancing Services Export Interests of Least Developed Countries: Toward GATS Commitments on the Temporary Movement of Natural Persons for the Supply of Low-Skilled and Semi-Skilled Services. ICSTD at 19

<sup>344</sup> Chanda R. Movement of Natural Persons and the GATS: Major Trade Policy Impediments in Hoekman B, Mattoo A., and English P., eds (2002) *Development, Trade, And The WTO: A Handbook* at 305

to be eligible for social security benefits in the future. Government procurement policies may give preference in procurement and price to domestic suppliers of services. Requirements for government approval, authorization requirements on acquisition and remittance of foreign exchange, and restrictions on the nature of the legal entities and on the establishment of local offices may also discriminate against foreign services providers.<sup>345</sup>

#### 4.4.1 Social security contributions and taxes

Social security taxes and benefits often result in differential treatment between foreign and domestic service providers. For instance, temporary service providers in the US economy are required to make social security payments like Medicare and FICA taxes to the US government in the absence of tax treaties between the home country and the US. These contributions are required even though the service provider is on deputation abroad for a period which is less than that required to avail of social security benefits in the future (ten years in the case of the U.S).<sup>346</sup> The service provider not only pays social security taxes in the US, but also continues to make his contributions back home and does not recover his contributions upon returning to the home country. In effect, there is double taxation of earnings, eroding the cost advantage of working in the US.<sup>347</sup>

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<sup>345</sup> *ibid* at 305

<sup>346</sup> Chanda R. (2001) Movement of Natural Persons and the GATS', *World Economy*, Vol. 24 (5), May 2001, at 637

<sup>347</sup> Shah A. And Parikh V. (2002) Movement of Natural Persons under the GATS in the Software Services Sector available at [www.wto.org/english/tratop\\_e/serv\\_e/symp\\_apr\\_02\\_parikh\\_e.doc](http://www.wto.org/english/tratop_e/serv_e/symp_apr_02_parikh_e.doc) accessed on 16/03/09 at 7

#### 4.4.2 Priority in government procurement

Another common source of discrimination against foreign service providers is government procurement and sourcing policies.<sup>348</sup> Government procurement policies are often designed to favour domestic over foreign providers of services, as well as goods, by means of preference margins and outright prohibitions.<sup>349</sup> While this area is still not under the GATS, it should be included so as to facilitate freer movement under Mode 4.<sup>350</sup>

These discriminatory government procurement regulations and price-based preferences to domestic suppliers are common in areas such as education, data processing, and nonmedical professional services.<sup>351</sup>

Given that government contracts comprise a large share of the market for a number of services, the impact of discriminatory procurement policies on trade in services may be large. For example Under the Buy American Act, the U.S. government offers a 6 percent price preference to domestic suppliers of goods and services, a 12 percent preference to small businesses and firms located in regions with high unemployment, and a 50 percent preference for defence related contracts. This is supplemented by outright bans on foreign sourcing for certain types of products.<sup>352</sup>

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<sup>348</sup> Chanda R. (1999) at 21

<sup>349</sup> Stern R. M. (2002) Quantifying Barriers to Trade in services in Hoekman B, Mattoo A., and English P., eds (2002) *Development, Trade, And The WTO: A Handbook* at 248

<sup>350</sup> Shah A. And Parikh V. (2002) Movement of Natural Persons under the GATS in the Software Services Sector available at [www.wto.org/english/tratop\\_e/serv\\_e/symp\\_apr\\_02\\_parikh\\_e.doc](http://www.wto.org/english/tratop_e/serv_e/symp_apr_02_parikh_e.doc) accessed on 16/03/09 at 4

<sup>351</sup> Chanda R. (1999) at 22

<sup>352</sup> Hoekman B. and Braga C.A (1997) Protection and Trade in Services: A Survey The World Bank March 1997 at 7

#### 4.4.3 Government approval

The nature of government approval or authorization that is required by foreign service providers in setting up operations, and even in remitting monies to their home country is severe and many a times, inflexible.<sup>353</sup> For example real estate limitations restrict foreigners from buying property in the host economy.<sup>354</sup> These approval procedures not only tend to favour domestic service providers, but in some cases may altogether preclude entry by foreign service providers. The criteria for authorization and failure to grant permission are often not defined and thus entry is subject to discretionary approval by government authorities.<sup>355</sup> Such limitations may act as important factors in discouraging foreign workers from working in the host economy.<sup>356</sup>

#### 4.4.4 Government subsidies

Government subsidies are also used to discriminate between domestic and foreign services persons. Such policies are common, explicitly or implicitly, in service sectors such as construction, communication, and transport and for purposes such as research and development. For instance, some governments subsidize pre-feasibility studies for construction and engineering projects to domestic service providers. In addition, rules with regard to accounting or advertising practices, and consumer protection laws may also potentially discriminate against foreign services providers.<sup>357</sup>

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<sup>353</sup> Shah A. And Parikh V. (2002) at 4

<sup>354</sup> WTO (2004) World Trade Report 2004 *Exploring the Linkage between the Domestic Policy Environment and International Trade* at 56

<sup>355</sup> Chanda R. (2004) at 14

<sup>356</sup> WTO (2004) World Trade Report 2004 *Exploring the Linkage between the Domestic Policy Environment and International Trade* at 56

<sup>357</sup> Chanda R. (2001) Movement of Natural Persons and the GATS', *World Economy*, Vol. 24 (5), May 2001, at 638

Although there are no strong general disciplines on subsidies under the GATS, such policies are accepted if countries include them in their commitments. However government subsidization policies also create an uneven playing field between domestic and foreign services persons.<sup>358</sup>

## **Conclusion**

In conclusion, there are several explicit and implicit barriers to services trade through movement of natural persons. Although such measures are not necessarily motivated by protectionist reasons, in practice they have the effect of inhibiting such trade by raising costs, creating opaqueness, uncertainties and discretionary scope, reducing earnings, and ultimately even undermining the very basis of such trade.<sup>359</sup>

Available statistics show that Mode 4 trade accounts for 1 percent (a very small fraction) of total trade in services. This is not considered to be a reflection of the potential for Mode 4 but a reflection of the existing limits and restrictions imposed on the movement of people.<sup>360</sup> However, empirical studies indicate that even marginal liberalisation of barriers affecting movement of natural persons can produce large gains. Recent estimates indicate that if developed countries increase their quotas on movement of skilled and low skilled temporary workers by an equivalent of 3 percent of their workforce, the world welfare would rise by more than US \$150 billion a year, with these gains being widely shared within the world economy.<sup>361</sup> Moreover, the greater the differences in wages (given that African LDCs are willing to provide cheap labour) or

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<sup>358</sup> Chanda R. (2004) at 14

<sup>359</sup> *ibid*

<sup>360</sup> Development Research Centre on Migration, Globalisation & Poverty: GATS Mode 4 How Trade in Services Can Help Developing Countries briefing No. 4, November 2005 at 2

<sup>361</sup> Winters L. A. The Economic Implications of Liberalizing Mode 4 Trade in Mattoo A. and Carzaniga A. (eds.) (2003) *Moving People to Deliver Services*, at 59

factor returns between the source and host countries, the greater would be the potential for gains, implying that the greatest gains would arise in the context of temporary movement of low skilled workers whom African LDCs have in plenty. Thus, there is considerable scope to expand trade in services through movement of natural persons and to for African LDCs especially to benefit from such trade.





## 5 Chapter 5: Recommendations and Conclusion

### 5.1 Summary and conclusion

The goal of this paper was to examine the impact of liberalisation of trade in services, and in particular to assess whether African LDCs are benefiting from the nature of liberalisation that has taken place in Mode 4 under the existing GATS framework.

This paper has found that:

Although the economic growth of the LDCs and their integration into the world trading system is heavily promoted in the written text of the GATS, these countries do not appear to have benefited massively from the Agreement. So far, their situation does not seem to have improved significantly as a result of the Agreement. This is because, despite the fact that world trade in services has expanded considerably developing countries in particular LDCs, are the biggest importers of services while developed countries are the biggest exporter's services. However, African LDCs feel that if there is further liberalisation of services in the GATS under Mode 4, they would gain better access to potential markets resulting in them greatly benefiting from trade in services given that they have a comparative advantage in labour intensive services.

However, the commitments to this Mode are extremely problematic. The existing structure of Mode 4 commitments are:

- (a) Biased towards high skilled occupations, such as, doctors, lawyers, company executives and professional services categories, typically those that are linked to commercial work. These include business visitors, and personnel engaged in setting up a commercial presence, such as intra-corporate transferees

- (b) Commitments in Mode 4 are horizontal rather than sectoral; most of these horizontal commitments are “unbound” except for specified categories of service providers, based generally on the level of skill.
- (c) Under the existing framework of commitments, there is no separation of temporary and permanent movement, and as a result, temporary movement of service providers usually come under the purview of immigration legislation and labour market policy (which affect permanent movement as well), not of international trade policy limiting the scope of Mode 4 via the GATS
- (d) The existing structure of Mode 4 commitments also suffers from lack of clarity and uniformity in the definition and coverage of the various categories of service persons. The commitments mostly cover contractual employees of a foreign establishment. They rarely cover self-employed or independent service suppliers.
- (e) Another important limitation of the existing Mode 4 commitments is that they are very restrictive. Even when sectors have been scheduled, liberalisation in Mode 4 is highly conditional. These regulatory barriers posed by countries with the aim of protecting their domestic labour markets barriers are particularly severe on the mobility of factors, particularly, temporary Labour.

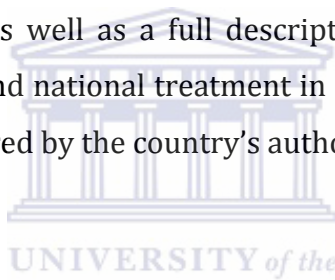
In sum, virtually no meaningful liberalisation has been undertaken in Mode 4. The significance to African LDCs is limited due to the exclusion of relevant categories of service providers, the extensive use of restrictions specifically in categories which matter to them, and the lack of transparency and clarity in commitments which creates possibilities for discrimination and arbitrary interpretation of the commitments.

It is against the backdrop of these conclusions that the following steps are proposed in order to realise greater liberalisation and effective market access for African LDCs under Mode 4.

## 5.2 Recommendations

### 5.2.1 Improving transparency

It is paramount to improve transparency: existing regulations, including barriers and limitations relating to the movement of natural persons, should be reflected in countries' commitments, either as a part of market access, national treatment or, if appropriate, as an additional commitment column. Furthermore, suggestions have been made for countries to provide detailed information to the WTO, in a consolidated form,<sup>362</sup> of all measures (particularly administrative measures) pertaining to the temporary admission of natural persons covered by commitments. The consolidated form could include information on the material or evidence required for an applicant seeking temporary admission, a description of the complete process for the application's submission, consideration and approval, as well as a full description of the manner in which any limitations to market access and national treatment in respect of the temporary entry of natural persons are administered by the country's authorities.



### 5.2.2 Improving the structure of commitments in Mode 4

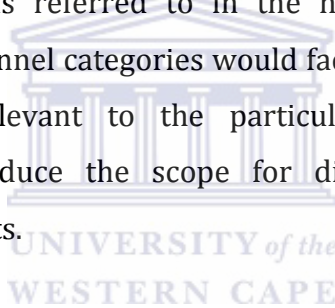
Developed countries should aim at supplementing the horizontal commitments in Mode 4 with sector specific commitments in this Mode, especially in the sectors that have been clearly identified by African LDCs as of importance to them. In addition, these sectoral commitments must be detailed and specific, in terms of measures that are applicable to individual sectors and in terms of service personnel categories relevant to each sector. In effect, countries should broaden the scope of their commitments by expanding the coverage of commitments beyond those linked to commercial presence

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<sup>362</sup> Temporary migration and its relation to trade in services World economic and social survey 2004 137

Countries need to make unambiguously worded and well-defined sectoral commitments with clearly outlined criteria for application of any limitations, for all subsectors within the sector that has been scheduled. All limitations, conditions, and exceptions should be clearly set out in the sectoral schedules, both for market access and national treatment, rather than being broadly outlined in the horizontal schedules. Countries must also take steps to furnish information on these measures in line with the GATS Article III.

Specificity and detail will also require improved targeting of categories of services providers to whom the commitments and limitations are applicable. This can be done by introducing more disaggregated categories of service providers in the sectoral schedules which fit within the broad categories of intra-corporate transferees, business visitors, specialists, and other persons referred to in the horizontal commitments. A finer classification of services personnel categories would facilitate clear and detailed sectoral commitments which are relevant to the particular sector or subsector under consideration and would reduce the scope for discretion and discrimination in implementing the commitments.



### **5.2.3 Broadening the classification of service providers**

Members should focus on expanding the categories of services providers covered by the horizontal commitments to remove the current bias toward higher level personnel. It is important to include semi-skilled and low skilled providers and to make the commitments more relevant to the interests of the African LDCs with expertise in these categories. The coverage can be expanded by defining the coverage of the “other persons”<sup>363</sup>. This expansion should allow for the inclusion of semi-skilled and Low skilled

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<sup>363</sup> In the LDC Group Request on Mode 4, Communication from the Delegation of Zambia on Behalf of the LDC Group, JOB(06)/155 (24 May 2006) in the category of “Others”, LDCs sought to widen commitments to

personnel in these latter categories by specifying relevant criteria and by modifying or removing certain conditions relating to skills, pre-employment, and job responsibilities that at present favour higher level persons. In this context, common coverage and definition of these broader categories would help.

The need is thus for “complementarity rather than substitutability” between the sectoral and horizontal schedules. Neither set of commitments should dilute the other<sup>364</sup>

Agreement on a common list of occupations and definitions would ensure predictability and comparability in commitments, enhance the value of the commitments made, and would better facilitate cross references to national legislation and administrative procedures.<sup>365</sup> Developing countries, including LDCs, have noted a number of occupations where they already are supplying services internationally and have specific interests in liberalizing market access in the context of the GATS.<sup>366</sup> LDCs have advised the use of the International Standard Classification of Occupation (ISCO-88) developed by the ILO for occupational categories.<sup>367</sup> The ISCO-88 has developed categories of low and semi-skilled occupations, ranging from construction workers to hairdressers, and it holds the same status as the UN CPC classification on service sectors, which is used by Members to schedule sectoral commitments. It should be possible to make use of ISCO-88

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include such categories as Installers and services, Foreign based self employed transport services provider Graduate trainees, Personnel of public or private enterprises in another WTO Member with a State contract in the host country, Persons of internationally recognized reputation Artists, sportsmen and women, and Fashion Models The requirements for certain of these categories are expanded to include holders of certificates.

<sup>364</sup> Chanda R. (2001) Movement of Natural Persons and the GATS', *World Economy*, Vol. 24 (5), May 2001, Oxford Blackwell Publishers, at 647

<sup>365</sup> Temporary migration and its relation to trade in services World economic and social survey 2004 137

<sup>366</sup> UNCTAD (2003) Report of the Expert Meeting on Market Access Issues in Mode 4 (Movement of Natural Persons to Supply Services) and Effective Implementation of Article IV on Increasing the Participation of Developing Countries TD/B/COM.1/64 TD/B/COM.1/EM.22/3 27 November 2003 at 11

<sup>367</sup> GATS Mode 4 Negotiations and Low Skilled Workers South Centre Analytical Note February 2005 at 9

to arrive at the list of categories and skill levels that can be negotiated, and to incorporate these into the GATS (W/120) Services Sectoral Classification List.

#### **5.2.4 Broadening the GATS Framework on Movement of Natural Persons**

In addition to working within the existing framework of commitments, it is also necessary to establish multilateral guidelines on some issues, to strengthen some of the existing GATS provisions, and, overall, to broaden the reach of the GATS framework with respect to Mode 4.

##### **5.2.4.1 Separating temporary from permanent labour flows (the GATS visa)**

Temporary service providers should be treated separately from permanent migrants, they should ideally fall outside the purview of immigration related laws and labour market regulations, and their entry and stay should be treated under a separate set of regulations. As such, services providers delivering services overseas on a temporary basis should not be subject to the usual immigration rules and procedures, the usual visa categories, and work permit related requirements. This would reduce the administrative burdens, delays, and costs they face in entering the foreign market. It would also make it easier to address issues, such as, social security, wage parity, and recognition by allowing for more liberal treatment in the case of temporary service providers.

Therefore, a universally applicable visa specific to the GATS should be implemented, “a GATS visa”. According to a UNCTAD report<sup>368</sup>, experts felt that the United Kingdom’s experience could serve as an example to be adopted by other developed countries. The

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<sup>368</sup> UNCTAD (2003) Report of the Expert Meeting on Market Access Issues in Mode 4 (Movement of Natural Persons to Supply Services) and Effective Implementation of Article IV on Increasing the Participation of Developing Countries TD/B/COM.1/64 TD/B/COM.1/EM.22/3 27 November 2003 at 8

United Kingdom has established a GATS permit to facilitate the implementation of its commitments under the GATS for contractual workers. The procedure is simple, efficient and transparent, and facilitates quick decision making that can be carried out by one person in cases where the requesting party meets all the requirements.

The GATS visa should include mechanisms for finding out the status of applications at each stage of the visa and work permit issuance process, to notify delays and additional formalities, to question the grounds for rejection, and to have easy access to information on all administrative procedures and formalities involved in the application process. The establishment of a separate body relating to GATS visas within the overall immigration framework of a country may be useful as a contact point for such redress and information needs. Furthermore, renewal of the GATS visa should be simple and inexpensive to facilitate sectoral, geographic, and inter-firm mobility as long as the foreign service provider remains within the GATS visa category.

Safeguard mechanisms can also be introduced to prevent misuse of such visas and entry into the permanent labour market of the host country, such as, by having more stringent requirements for first-time applicants and by making it very difficult to transfer from the GATS visa to the other visa categories which permit working on a permanent basis and later transferring to permanent residence and citizenship status.<sup>369</sup> Governments should also work at designing programs that ensure return of people who have been working under Mode 4. This could be done through co-ordination with sending countries. This will help tackle the fear host countries have of temporary labour becoming permanent. Therefore, there is need for more transparent information sharing between governments for this purpose.

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<sup>369</sup> Chanda R. (2001) at 649

#### 5.2.4.2 Wage parity

Countries should also de-link the wage parity condition from the visa issuance process. At present, wage parity is a cumbersome pre-condition for the issuance of visas and the conditions on wages do affect the comparative advantage of African LDCs and developing countries in respect of some labour intensive services where there is body shopping.

It is proposed that wage parity should not be a pre-condition for entry, instead it should be a transparent requirement de-linked from visa procedures.<sup>370</sup>

#### 5.2.4.3 Social security

It was noted earlier that one problem faced by temporary services providers is the requirement to pay social security taxes in the host country and to make similar contributions in the home country, although one is not eligible to receive the benefits accruing from the social security contributions in the host country. Since such double taxation is simply unfair, it must not be permitted under GATS.

One alternative in this regard could be for social security charges from temporary migrant workers to be paid into separate funds and reimbursed upon workers' return to their home country.<sup>371</sup>

Another alternative would be double taxation agreements between home and host countries to ensure that the worker does not have to pay tax twice on the same income.<sup>372</sup>

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<sup>370</sup>Collective Request – Mode 4 Movement of Natural Persons, available at <http://www.uscsi.org/publications/papers/collective/Mode4.pdf> (Accessed on 8/04/09)

<sup>371</sup>Labour Mobility and the WTO: Liberalizing Temporary Movement Global Economic Prospects 2004 at 163

<sup>372</sup> In the case of Canada's *Seasonal Agricultural Worker Program (CSAWP) with Mexico and the Caribbean*, Canada has Tax Treaties with Barbados, Jamaica, Mexico and Trinidad and Tobago which exempt from



#### 5.2.4.4 Recognition

The GATS already contains a strong provision for recognition under Article VII. This provision addresses issues of transparency, non-discrimination, and objectivity in the granting of recognition, and also encourages countries to enter into mutual recognition agreements<sup>373</sup>, or to extend recognition autonomously to other Member countries.

Each country has different licensing requirements for people providing services and particular methods for, or barriers to, recognising qualifications acquired abroad. A multilateral framework for recognising qualifications would increase transparency and aim to reduce the domestic regulatory burden.<sup>374</sup> In effect, Members would have to adopt a more flexible approach to the recognition of qualifications, by not only considering degrees, but also diplomas, certificates, experience, and the like, as substitutable options. For technical standards, it is imperative that they are not unreasonably high as proposed in the LDC's revised request.

Some countries have negotiated MRAs in order to overcome the barriers posed by licensing regimes. MRAs "have mostly been negotiated between developed countries and between countries with close cultural and historical linkages"<sup>375</sup> and a great many LDCs have such linkages. In connection with MRAs LDCs will need to seek a significant level of

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taxes workers earnings under certain thresholds. Although LDCs have been increasingly concluding double taxation treaties, simplified instruments focusing exclusively on the workers income taxes could be considered with a view to facilitate the conclusion of treaties permitting to avoid double taxation of LDC low and semi- skilled workers in as many countries as possible.

<sup>373</sup> For instance, the Japan Philippines Economic Partnership Agreement provides for Philippino nurses and caregivers to work in Japan after undergoing mandatory training in Japan, including Japanese language, for a period of 3-4 years. <http://japan.pinoy-abroad.net/jpepa.htm> (accessed on 9/04/09). The Philippines ratified the Agreement on 8 October 2008, while Japan ratified it in 2007.

<sup>374</sup> Development Research Centre on Migration, Globalisation & Poverty: GATS Mode 4 How Trade in Services Can Help Developing Countries briefing No. 4, November 2005 at 4

<sup>375</sup> UNCTAD (2005) Trade in Services and Development Implications, Note by the UNCTAD Secretariat, TD/B/COM.1/71, 20 January 2005, para. 51.

technical assistance targeting the creation of capacity to certify qualifications as necessary to obtain value from the agreement.

#### 5.2.4.5 Economic needs tests

Countries have been resorting to different types of ENTs and ENT-type measures that could be more or less restrictive with respect to Mode 4. For example, the US applies pre-admission and post-admission checks, where the most rigorous measure would be the pre-admission check, taking a considerable period of time to complete – up to two years at times. Some experts<sup>376</sup> suggested that for most countries that are exporters in this area, a move from pre-admission to post-admission checks may become one way to reduce bureaucratic administrative processes, as the Government would delegate authority to employers to select qualified persons for given posts in their firms, and would only later verify that the procedures are in place.

Another suggestion is that ENTs be removed entirely for certain categories of workers, although these are likely to be skilled, professional and business categories.<sup>377</sup> Best practices and examples of removal of ENTs by some developed countries, like Norway, the EU, Canada or Japan, need to be broadened, deepened and replicated in categories of interest to African LDCs.<sup>378</sup>

In sum, ENTs should be applied in a non-discriminatory and transparent manner. Specific mention of (i) the service sectors and occupations to which the ENTs are to be applied

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<sup>376</sup> UNCTAD (2003) Report of the Expert Meeting on Market Access Issues in Mode 4 (Movement of Natural Persons to Supply Services) and Effective Implementation of Article IV on Increasing the Participation of Developing Countries TD/B/COM.1/64 TD/B/COM.1/EM.22/3 27 November 2003 at 7

<sup>377</sup> Development Research Centre on Migration, Globalisation & Poverty: GATS Mode 4 How Trade in Services Can Help Developing Countries briefing No. 4, November 2005 at 4

<sup>378</sup> UNCTAD (2003) 6

must be made; (ii) the definition, criteria and conditions to be used in applying the ENTs; and (iii) the duration of application of the ENTs should all be made.<sup>379</sup>

### 5.2.5 Regional Trade Agreements

Certain features of the bilateral initiatives are easily extendable to the GATS framework. Chief among these are the specificity, clarity and transparency with which worker categories, sectoral coverage and employment terms and conditions are clearly defined, these are some of the defining and good features of successful bilateral schemes.

Several countries have addressed barriers to Mode 4 services supply through RTAs, ranging from allowing free movement of all workers to facilitating recruitment and visa procedures. The most liberal regimes, like those underpinning the European Union, allow services suppliers to locate in EU Member States as a “fundamental freedom.”<sup>380</sup> For example, LDC Members of the Common Market for Eastern and Southern Africa (COMESA) have set a similar goal of economic integration and free movement of workers for 2025.<sup>381</sup> COMESA LDCs will need to develop new regulations to implement this goal over time, and the development of this regime could serve as a useful template for discussions outside of the region.

African LDCs in the Africa, Caribbean and Pacific (ACP) group will also need to formulate requests for services market access in Economic Partnership Agreements (EPAs) with

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<sup>379</sup>Collective Request – Mode 4 Movement of Natural Persons available at <http://www.uscsi.org/publications/papers/collective/Mode4.pdf>

<sup>380</sup> The Treaty Establishing the European Community (EC Treaty) lays down the principle that the self-employed may freely exercise an activity either by setting up in another Member State (*freedom of establishment*: ECT Article 43) or by supplying services across frontiers in other Member States while remaining in the country of origin (*freedom to provide services*: ECT Article 49).

<sup>381</sup>Articles 4(6)(e) and 164 of the COMESA Treaty, and [http://www.comesa.int/countries/comesa/publications/vision/vision\\_chapter\\_6/view](http://www.comesa.int/countries/comesa/publications/vision/vision_chapter_6/view)

the EU. In addition to substantive commitments on market access, EPAs present an opportunity for African LDCs to obtain technical assistance, training, and capacity building that could include a strong component on worker movement. LDCs can look to EPAs being negotiated and implemented with Caribbean and North African countries since these agreements call for the development of disciplines on worker movement. LDCs, particularly those engaged in regional EPA negotiations with EU, would be justified in requesting market access for low and semi-skilled sectors of export interest.

### **5.3 Conclusion**

This paper has highlighted the limited nature of liberalisation that has occurred under the GATS framework for the movement of natural persons. Significantly more liberal commitments are required in this Mode if African LDCs are to be able to exploit their comparative advantage in labour intensive services. Commitments for low and semi-skilled workers under Mode 4 will lead to development for African LDCs given that their key concern is the developmental aspect of such trade. They would increase incomes for a wider range of people, and improve their livelihoods, thereby contributing to the attainment of the MDGs to rid the world of poverty. As discussed, both sending and receiving countries stand to mutually benefit from the liberalisation of Mode 4. It should not be forgotten that the Doha Round is about development. If managed efficiently, liberalisation of markets for low and semi-skilled providers stands to make real contributions to the development dimension of Doha, and would signal great political flexibility on the part of developed countries. Services are an important component of the Doha and given the concept of a single undertaking, a meaningful package in the services area will be important to ensuring a successful conclusion of the Round.

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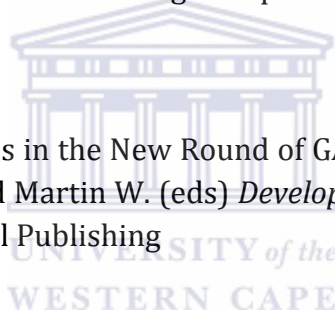
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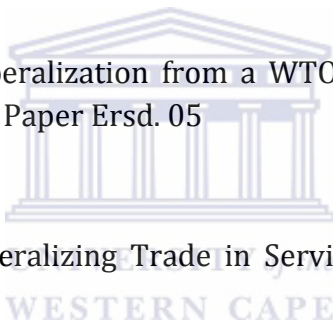
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## ANNEXES

### Annex 1

#### Low and Semi-Skilled Services Categories

The table below reproduces a partial listing of the occupation categories found in the International Standard Classification of Occupations (ISCO-88) that are appropriate for low- and semi-skilled workers prepared by the South Centre.<sup>382</sup>

#### MAJOR GROUP 5 - SERVICE WORKERS AND SHOP AND MARKET SALES WORKERS

51 PERSONAL AND PROTECTIVE SERVICES WORKERS

511 TRAVEL ATTENDANTS AND RELATED WORKERS

5111 Travel attendants and travel stewards

5112 Transport conductors

5113 Travel guides

512 HOUSEKEEPING AND RESTAURANT SERVICES WORKERS

5121 Housekeepers and related workers

5122 Cooks

5123 Waiters, waitresses and bartenders

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<sup>382</sup> South Centre (2005) GATS Mode 4 Negotiations and Low Skilled Workers, SC/TADP/AN/SV/12, at 12-16.



513 PERSONAL CARE AND RELATED WORKERS

5131 Child-care workers

5132 Institution-based personal care workers

5133 Home-based personal care workers

5139 Personal care and related workers not elsewhere classified

514 OTHER PERSONAL SERVICES WORKERS

5141 Hairdressers, barbers, beauticians and related workers

5142 Companions and valets

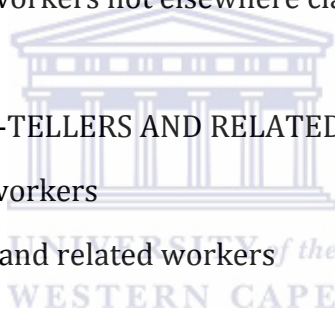
5143 Undertakers and embalmers

5149 Other personal services workers not elsewhere classified

515 ASTROLOGERS, FORTUNE-TELLERS AND RELATED WORKERS

5151 Astrologers and related workers

5152 Fortune-tellers, palmists and related workers



516 PROTECTIVE SERVICES WORKERS

5161 Fire-fighters

5162 Police officers

5163 Prison guards

5169 Protective services workers not elsewhere classified

52 MODELS, SALESPERSONS AND DEMONSTRATORS

521 FASHION AND OTHER MODELS

5210 Fashion and other models

522 SHOP SALESPERSONS AND DEMONSTRATORS

5220 Shop salespersons and demonstrators

523 STALL AND MARKET SALESPERSONS

5230 Stall and market salespersons

## **MAJOR GROUP 7 - CRAFT AND RELATED TRADES WORKERS**

71 EXTRACTION AND BUILDING TRADES WORKERS

711 MINERS, SHOTFIRERS, STONE CUTTERS AND CARVERS

7111 Miners and quarry workers

7112 Shotfirers and blasters

7113 Stone splitters, cutters and carvers

712 BUILDING FRAME AND RELATED TRADES WORKERS

7121 Builders, traditional materials

7122 Bricklayers and stonemasons

7123 Concrete placers, concrete finishers and related workers

7124 Carpenters and joiners

7129 Building frame and related trades workers not elsewhere

Classified

713 BUILDING FINISHERS AND RELATED TRADES WORKERS

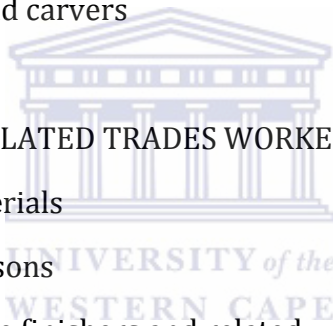
7131 Roofers

7132 Floor layers and tile setters

7133 Plasterers

7134 Insulation workers

7135 Glaziers



7136 Plumbers and pipe fitters

7137 Building and related electricians

714 PAINTERS, BUILDING STRUCTURE CLEANERS AND RELATED TRADES WORKERS

7141 Painters and related workers

7142 Varnishers and related painters

7143 Building structure cleaners

72 METAL, MACHINERY AND RELATED TRADES WORKERS

721 METAL MOULDERS, WELDERS, SHEET-METAL WORKERS, STRUCTURALMETAL PREPARERS, AND RELATED TRADES WORKERS

7211 Metal moulders and coremakers

7212 Welders and flamecutters

7213 Sheet metal workers

7214 Structural-metal preparers and erectors

7215 Riggers and cable splicers

7216 Underwater workers



722 BLACKSMITHS, TOOL-MAKERS AND RELATED TRADES WORKERS

7221 Blacksmiths, hammer-smiths and forging-press workers

7222 Tool-makers and related workers

7223 Machine-tool setters and setter-operators

7224 Metal wheel-grinders, polishers and tool sharpeners

723 MACHINERY MECHANICS AND FITTERS

7231 Motor vehicle mechanics and fitters

7232 Aircraft engine mechanics and fitters

7233 Agricultural- or industrial-machinery mechanics and fitters

724 ELECTRICAL AND ELECTRONIC EQUIPMENT MECHANICS AND FITTERS

7241 Electrical mechanics and fitters

7242 Electronics fitters

7243 Electronics mechanics and servicers

7244 Telegraph and telephone installers and servicers

7245 Electrical line installers, repairers and cable jointers

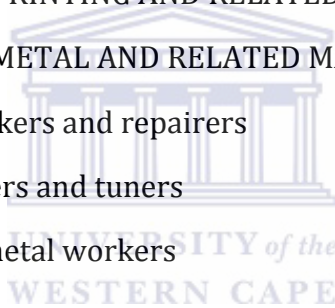
73 PRECISION, HANDICRAFT, PRINTING AND RELATED TRADES WORKERS

731 PRECISION WORKERS IN METAL AND RELATED MATERIALS

7311 Precision-instrument makers and repairers

7312 Musical instrument makers and tuners

7313 Jewellery and precious-metal workers



732 POTTERS, GLASS-MAKERS AND RELATED TRADES WORKERS

7321 Abrasive wheel formers, potters and related workers

7322 Glass makers, cutters, grinders and finishers

7323 Glass engravers and etchers

7324 Glass, ceramics and related decorative painters

733 HANDICRAFT WORKERS IN WOOD, TEXTILE, LEATHER AND RELATED MATERIALS

7331 Handicraft workers in wood and related materials

7332 Handicraft workers in textile, leather and related Materials

734 PRINTING AND RELATED TRADES WORKERS

7341 Compositors, typesetters and related workers

7342 Stereotypers and electrotypers

7343 Printing engravers and etchers

7344 Photographic and related workers

7345 Bookbinders and related workers

7346 Silk-screen, block and textile printers

74 OTHER CRAFT AND RELATED TRADES WORKERS

741 FOOD PROCESSING AND RELATED TRADES WORKERS

7411 Butchers, fishmongers and related food preparers

7412 Bakers, pastry-cooks and confectionery makers

7413 Dairy-products makers

7414 Fruit, vegetable and related preservers

7415 Food and beverage tasters and graders

7416 Tobacco preparers and tobacco products makers

742 WOOD TREATERS, CABINET-MAKERS AND RELATED TRADES WORKERS

7421 Wood treaters

7422 Cabinet makers and related workers

7423 Woodworking machine setters and setter-operators

7424 Basketry weavers, brush makers and related workers

743 TEXTILE, GARMENT AND RELATED TRADES WORKERS

7431 Fibre preparers

7432 Weavers, knitters and related workers

7433 Tailors, dressmakers and hatters  
7434 Furriers and related workers  
7435 Textile, leather and related pattern-makers and cutters  
7436 Sewers, embroiderers and related workers  
7437 Upholsterers and related workers  
744 PELT, LEATHER AND SHOEMAKING TRADES WORKERS  
7441 Pelt dressers, tanners and fellmongers  
7442 Shoe-makers and related workers

## **MAJOR GROUP 9 - ELEMENTARY OCCUPATIONS**

91 SALES AND SERVICES ELEMENTARY OCCUPATIONS

911 STREET VENDORS AND RELATED WORKERS

9111 Street food vendors

9112 Street vendors, non-food products

9113 Door-to-door and telephone salespersons

912 SHOE CLEANING AND OTHER STREET SERVICES

ELEMENTARY OCCUPATIONS

9120 Shoe cleaning and other street services elementary occupations

913 DOMESTIC AND RELATED HELPERS, CLEANERS AND LAUNDERERS

9131 Domestic helpers and cleaners

9132 Helpers and cleaners in offices, hotels and other establishments

9133 Hand-laundrers and pressers

914 BUILDING CARETAKERS, WINDOW AND RELATED CLEANERS

9141 Building caretakers

9142 Vehicle, window and related cleaners

915 MESSENGERS, PORTERS, DOORKEEPERS AND RELATED WORKERS

9151 Messengers, package and luggage porters and deliverers

9152 Doorkeepers, watchpersons and related workers

9153 Vending-machine money collectors, meter readers and related workers

916 GARBAGE COLLECTORS AND RELATED LABOURERS

9161 Garbage collectors

9162 Sweepers and related labourers

92 AGRICULTURAL, FISHERY AND RELATED LABOURERS

921 AGRICULTURAL, FISHERY AND RELATED LABOURERS

9211 Farm-hands and labourers

9212 Forestry labourers

9213 Fishery, hunting and trapping labourers

93 LABOURERS IN MINING, CONSTRUCTION, MANUFACTURING AND TRANSPORT

931 MINING AND CONSTRUCTION LABOURERS

9311 Mining and quarrying labourers

9312 Construction and maintenance labourers: roads, dams and similar constructions

9313 Building construction labourers

932 MANUFACTURING LABOURERS

9321 Assembling labourers

9322 Hand packers and other manufacturing labourers

933 TRANSPORT LABOURERS AND FREIGHT HANDLERS

9331 Hand or pedal vehicle drivers

9332 Drivers of animal-drawn vehicles and machinery

9333 Freight handlers





## Annex 2

### COMMUNICATION FROM THE LDC GROUP

#### Draft Modalities for the Special Treatment for Least-Developed Country Members in the Negotiations on Trade in Services

The following communication has been received from the Permanent Mission of Zambia, on behalf of the Least-Developed Country Members, with the request that it be circulated to the Members of the Council for Trade in Services. This communication contains a revision of an earlier draft circulated as JOB(02)/205, dated 2 December 2002.

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#### **I. OBJECTIVES AND PRINCIPLES**

In pursuance of the objectives of the GATS and following Article XIX:3, special treatment for least-developed country (LDC) Members shall be granted by providing special priority to the LDC Members in the implementation of paragraphs 1 and 2 of Article IV. Particular account shall be taken of the serious difficulty of the LDCs in undertaking negotiated specific commitments in view of their special economic situation and their development, trade and financial needs.

The importance of trade in services for LDCs goes beyond pure economic significance due to the major role services play for achieving social and economic development objectives and as a means for addressing poverty and upgrading welfare, improving universal availability and access to the basic services, in ensuring sustainable development, including social dimension. LDC Members are facing serious difficulty in addressing a number of complex issues simultaneously, they lack institutional and human capacities to analyse and respond to offers and requests. This should be factored into the negotiating process in general and regarding the individual requests made to the LDCs.

Together with the Guidelines and Procedures for the Negotiations on Trade in Services (S/L/93), the Modalities for the Special Treatment for Least-Developed Country

Members in the Negotiations on Trade in Services shall ensure the maximum flexibility for the LDC Members and shall form the basis for the negotiations.

## **II. SCOPE**

Considering the serious difficulty of LDCs in undertaking negotiated specific commitments in view of their special economic situation, Members shall present requests which are compatible with the developmental, economic and financial needs of the LDCs and which are limited in terms of numbers of sectors and modes of supply and scope of commitments.

LDCs shall retain maximum flexibility in undertaking commitments in a manner consistent with their development needs. Members shall not seek the removal of conditions, which LDCs may attach when making access to their markets available to foreign services suppliers and which are aimed at achieving objectives of Article IV. For so long as they remain LDCs, no LDCs shall be required to offer national treatment. LDCs shall not be requested under Article XVIII to undertake additional commitments on regulatory issues, which may go beyond their institutional, regulatory and administrative capacities.

Members shall grant full market access and national treatment to LDCs in the sectors and modes of supply of export interest to them. To achieve effective implementation of the provisions contained in Article IV:3, preferential market access mechanism shall be established for ensuring effective access of LDCs to markets of other Members. Additional commitments ensuring increasing participation of the LDCs in the sectors of their trading interest shall be offered by developed countries. For this purpose, LDCs shall indicate those sectors and modes of supply that represent a priority in their development policies, so that the WTO Members take these priorities into account in the negotiations.

Developed country Members shall promote and strengthen their investment and export/import promotion programmes for LDCs with the view to building domestic services capacity and its efficiency and export competitiveness.

Members shall assist least-developed countries in obtaining training and transfer of technology, and shall undertake other specific measures that support the development of their infrastructure and services exports through enterprise level actions and schemes and intergovernmental cooperation programmes, and making appropriate financial resources available for such specific measures.

Members shall facilitate and ensure the improvement of access to services and service suppliers of LDC Members to distribution channels and information networks, especially in tourism, transport, audiovisual, and construction services, *inter alia* through promotion of intergovernmental cooperation programmes. Members shall take appropriate measures to discipline certain business practices that restrain competition and thereby restrict participation of services suppliers from LDCs in trade in services.

The temporary movement of natural persons (Mode 4), particularly of unskilled and semi-skilled persons, provides the greatest potential benefit to the sending and recipient countries. For LDCs, this is the most important means of supplying services internationally and eliminating poverty. Members shall, accordingly, undertake commitments to provide access to all categories of natural persons from LDCs, particularly unskilled and semi-skilled persons, for supplying services under the GATS without the application of economic needs test.

LDCs shall be granted maximum credit for their autonomous trade liberalization without scheduling them as binding commitments. Credit shall not be requested from LDCs by other Members.

In developing multilateral rules and disciplines, including under Article VI:4 (Domestic regulation), X (Emergency safeguard measures), XIII (Government procurement) and XV (Subsidies), Members shall specifically account for interests and difficulties of LDCs.

Targeted and coordinated technical assistance and capacity building including for the purposes of strengthening their domestic services capacity and its efficiency and competitiveness, by WTO and other relevant multilateral, regional and bilateral development partners, shall be provided, on a priority basis, to assist LDCs. Technical assistance shall also provide for institutional and human capacity building and undertaking regulatory reform. Assistance shall be accorded in line with special priority given to LDCs with the objective of effectively implementing their increasing participation in world trade. In pursuance of Paragraph 14 of the Guidelines, technical assistance shall be provided to LDCs to carry out national assessments of trade in services in overall terms and on a sectoral basis with reference to the objectives of the GATS and Article IV in particular, and taking into account their special economic situation and their development trade and financial needs.

### **III. MECHANISMS AND PROCEDURES**

The review of the progress achieved in the implementation of the modalities for LDCs shall be a standing item on the agenda of the Special Session of the Council for Trade in Services. In evaluation of the results attained in negotiations in terms of the objectives of

Article IV, the special needs of the LDCs shall be examined with respect to ensuring their increasing participation in trade in services. Negotiations shall be adjusted in the light of the results of the review as provided in paragraph 14 of the Guidelines and Procedures for the Negotiations on Trade in Services (S/L/93).

Each report by the Chairman of the Special Session of the Council for Trade in Services to the Trade Negotiations Committee shall report in a special section, on the issues outlined in this document. This section shall build upon the above evaluation and shall be drafted in close collaboration with LDCs. In particular, the report shall examine whether the special needs of the LDCs have been adequately addressed; and whether the negotiations contributed to the increasing participation of LDCs.

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