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Trans-Border Movement of Natural Persons under the General Agreement on Trade in Services (Gats) and Right to Work

Dr. Shima Zaman^{*}

ABSTRACT *The General Agreement on Trade in Services (GATS) provides framework for temporary and short-term movement of individuals for work. However, the commitment of the GATS is highly uneven across different service sectors and the different modes of supply. It permits the temporary cross-border movement of only skilled, expert and professional service providers to the exclusion of semi-skilled and unskilled labour. This article argues that since many developing countries and LDCs have a comparative advantage in exporting labour-intensive services and manpower, the failure to liberalise Mode 4 which deals with trans-border movement of natural persons, limits the overall value of the GATS for these countries. By limiting Mode 4 within the cross-border movement of skilled personals, the GATS in fact undermines the right to work of the huge semi-skilled and unskilled labourers of the world who suffer from unemployment in their respective countries due to poor employment opportunities. Considering the overall poverty and unemployment situation of developing countries and LDCs, Mode 4 could be extended to include cross-border movement of unskilled and semi-skilled persons under the GATS.*

KEYWORDS *Comparative advantage, trans-border movement, skilled and unskilled workers, liberalization. Temporary movement*

1. Introduction

The General Agreement on Trade in Services (GATS) is often considered as the single most achievement of the Uruguay Round (UR) negotiations. However, from a human rights perspective, the GATS has been the subject of great controversy for its failure to address the issue of GATS Article 1.2 dealing with Mode 4: Temporary Movement of Natural Persons (TMNP) to ensure the movement of semi-skilled and unskilled labourers of developing countries and the Least Developing Countries (LDCs). By opening the scope

of Mode 4 the GATS could have contributed to implementing its human right obligations regarding the right to work of vast majority of unskilled and semi-skilled workers of developing countries and LDCs.

This article focuses on the scope of the movement of semi-skilled and unskilled labourers of developing countries and LDCs, the impediments within GATS provision, how the GATS members can fulfill their obligations in ensuring the right to work of all citizens and the overall situation of Mode 4 in relation to the movement of unskilled and semi-skilled persons from developing countries and LDCs in which they claim a comparative advantage.

2. Human Right to Work and Movement of Natural Persons under the GATS

The GATS is the internationally recognised framework for temporary and short term movement of individuals for work in an orderly, systematic, and mutually agreed upon manner. The GATS addresses trade in services through four modes of supply. These include: (1) cross border supply; (2) consumption abroad (movement of consumers to the home country of the service supplier); (3) commercial presence (movement of capital); and (4) movement of natural persons (temporary cross-border movement of labour). However, the commitments of the GATS have been highly uneven across different service sectors and also across the different modes of supply. In particular, liberalisation has been strikingly limited in the case of movement of natural persons under Mode 4. It permits the temporary cross-border movement of only skilled, expert and professional service providers to the exclusion of semi-skilled and unskilled labour. Since many developing countries and LDCs have a comparative advantage in exporting labour-intensive services and manpower, the failure to liberalise Mode 4 limits the overall value of the GATS for these countries. By limiting Mode 4 within the cross-border movement of skilled persons, the GATS in fact undermines the right to work of the huge semi-skilled and unskilled labourers of the world who suffer from

unemployment in their respective countries due to poor employment opportunities.

However, if the skilled workers can enjoy the benefit of Mode 4, the unskilled workers must also have the same opportunities. For developing countries, overburdened with huge semi-skilled and unskilled, unemployed workers, ensuring the right to work for these unskilled and unemployed labourers is very much important for their economic development. Considering the overall poverty and unemployment situation of developing countries and LDCs, Mode 4 could be extended to include cross-border movement of unskilled and semi-skilled persons under the GATS.

2.1 The right to work under international human rights instruments

The right to work is a fundamental economic and social human right strongly established in international law. It recognises that work is not solely a source of income that provides for the basic necessities in life but an integral prerequisite for a life of human dignity. Work's potential to satisfy social, intellectual and personal needs has made it an important element of life. Article 55 of the UN Charter in its prescriptions for international economic cooperation creates obligations for members to promote full employment, and Article 56 requires the members to take joint and separate action in cooperation with the Organisation in furtherance of the objectives set forth in Article 55.

A number of international instruments recognise and reaffirm the right to work as a human right. Article 23 of the UDHR states: 'everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment'.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) elaborates the right to work in the context of individual freedoms and economic, social and cultural development. According to Article 6, the right to work includes the right of everyone to the opportunity to gain their

living by work that they freely choose or accept. The Covenant also emphasises the role of the member-countries in realising this human right. According to Article 1(2) of ILO Convention No. 122, each member is under obligation to ensure that 'there is work for all who are available for and seeking work'.

The African Charter on Human and Peoples' Rights also recognises this right, emphasising conditions and pay. Article 15 states: 'Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work'. Article 1 of the European Social Charter states that the aim of the Charter will be to attain full employment, protection of the right of the workers and establishing free employment services for all workers.

According to Article 6(2) of the Additional Protocol, American Charter of Human Rights, contracting parties must adopt measures to make the right to work 'fully effective, especially with regard to the achievement of full employment'.

Thus, the human right to work recognises work as something to which each and every individual is entitled. The right to work means, first of all, the right to participate in the producing and servicing activities of human society and the right to participate in the benefits accrued through these joint activities to the extent that it guarantees an adequate standard of living. The right to work thus ensures that nobody is excluded from the economic sphere.

2.2 Scope of temporary movement of natural persons under GATS Mode 4

Economic development and the right to work are interconnected. The objective of the GATS is to ensure the progressive liberalisation of trade in services for economic development. The movement of labour under GATS Mode 4 opens an avenue for exercising the human right to work in international framework. The regulation of the GATS on temporary entry and stay of natural persons to deliver services abroad opens the scope for

exercising the right to work of the huge unskilled work force of developing countries and LDCs.

International trade law did not concern itself with the movement of labour. The GATT 1947 was concerned solely with trade in goods, and early attempts to expand its realm were unsuccessful (Hoekman, Matto and Sapir 2006). In the 1980s, the US sought to broaden trade liberalisation to include trade in services (Lavenex 2002). This expansion was initially resisted by developing countries, which were concerned about the impact of opening their economies to service providers from developed countries (Islam 2006). The interests of developed countries ultimately prevailed when agreement was reached in the Uruguay Round (UR) Negotiation for a comprehensive multilateral treaty on trade in services. The GATS came into force on 1 January 1995, contemporaneously with the establishment of the WTO.

Mode 4 involves the supply of a service 'by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member'. This means the crossing of the border by a natural person of one member for the purpose of delivering a service in the territory of any other member. The movement of natural person from one country to another can vary along several lines—length of stay, level of skills and nature of contracts. Therefore, the important question is, of which aspects of these variations Mode 4 covers. Since the GATS Annex on MNP under the agreement further elaborates Article 1.2 on TMNP, the two must be read together. In accordance with Article XXXI, the Annexes of the GATS form an integral part of the GATS Agreement. Some clauses of the Annex on MNP are important for defining the scope of the GATS.

Since GATS touches upon the sensitive issue of migration and domestic labour market policies Mode 4 and the Annex on MNP had to accommodate the conflicting interests of the countries involved in the UR negotiation. During the negotiation, developed countries tend to preserve their discretion to pursue highly selective immigration policies. Their interest in opening and

demanding market access targets highly skilled professionals. On the contrary, developing countries could benefit from the comparative advantage of cheaper labour costs and therefore tend to press for market access for semi-skilled and unskilled workers. This conflicting interest shaped the various positions in the controversial drafting history of the Annex MNP. Since developed countries had to gain from the inclusion in the GATS of services supplied through commercial presence in the territory of other members under Mode 3, developing countries insisted on the inclusion of movement of natural persons arguing that movement of people is as legitimate as establishing a commercial presence (Sauve and Stern eds. 2000).

Developing countries mainly brought this issue during the UR on the ground that restriction on the MNP is discriminatory. Under such pressure for parity in factor movement, consensus was reached in December 1988 to address the temporary entry of natural persons where such movements are essential for developing countries. It opened the possibility of pushing for entry commitments for semi-skilled or unskilled employees, such as construction workers travelling abroad to work with a construction company from their home country. However, there was no compromise as to which categories of persons should be covered.

The initial proposal of developed countries was reflected in a proposal from the US in October 1989, according to which the scope of the GATS should be limited to the temporary entry of nationals of any other member who are senior managerial personnel. To counter this proposal in June 1990, a group of eight developing countries expressly demanded the inclusion of all personnel without distinction as to skills or position in corporate hierarchies. In the midst of this substantive disagreement, in December 1990, a procedural agreement was reached to deal with the issue in a separate annex on labour mobility. As a result, the Dunkel Draft of December 1991, which closely resembles the final version of the Annex on MNP, moved the issue forward.

However, the Annex reflected primarily the concerns of developed countries: cross border movement of technicians and supervisors (Stewart 1993). The draft provided for the express inclusion of 'all categories' of natural persons, leaving the actual degree of liberalisation to be the subject to discussion in the ensuing negotiations on specific commitments. Parties were encouraged to bilaterally negotiate commitments they wished to undertake regarding the movement of natural persons (Stewart 1993). In fact, the concerns of developing countries failed to generate improved offers on movement of semi-skilled and unskilled labour, and at the end of the UR, these negotiations had not resulted in universally satisfactory results.

The Ministerial Decision adopted at Marrakesh on 15 April 1994 established a Negotiating Group on Temporary Movement of Natural Persons in order to continue the negotiations. The Group concluded its works in July 1995. The few additional commitments conceded became the annexes to the Third Protocol to the GATS, which entered into force on 30 January 1996.

Annex on Movement of Natural Persons Supplying Services

Paragraph 1 of the Annex specifies two categories of natural persons: (1) those who are directly service suppliers of another member, and (2) those who are employed by a service supplier of a member. This provision compliments Article 1.2(d), but it can give rise to some confusion. Here, the natural persons of one member are providing services to another member. As long as they directly provide services to the consumers, there is no controversy. When they provide services being 'employed' by a service supplier, confusion arises regarding to which member the 'service supplier' belongs.

Article XXVIII(g) of the GATS defines 'service supplier' as 'any person that supplied a service', and it can be 'either a natural person or a juridical person'. GATS Article XXVIII(f) defines 'service of another Member' as a service that is supplied 'in the case of the supply of a service . . . through the presence of natural persons, by a service supplier of that other Member'. If taken literally,

this service supplier must not be from the host country since it implies that there is no inter-state trade involved. More specifically, the service supplier must be from the exporting member. However, there is no such limitation imposed in Paragraph 1 of the Annex on MNP. Hence, there is ample scope for interpretation that the 'service supplier' can be very much from the home country itself, which employs natural persons of the exporting member to supply the service.

A clear observation of the Annex on MNP reveals that it contains only two independent rules, stated in Paragraphs 2 and 4 respectively. The rule in Paragraph 2 forms the substantive core of the Annex on MNP. According to this rule, the GATS does not apply, as mentioned above, to measures relating to four specific matters: access to the employment market, citizenship, residence and employment on a permanent basis. This limitation contradicts the objectives of negotiation on trade in services set forth in Ministerial Declaration, which included 'progressive liberalisation of trade in services in a transparent manner, to expand service trade and promote economic growth in all members, with special attention to the development needs of developing countries'. In fact, this provision reduces the scope of application of the entire agreement by providing that any measures that falls within the scope of these categories is not subject to the obligations and disciplines of the GATS (Wolfrum, Stoll and Fernaugle eds 2008). This clause protects developed countries' employment markets and immigration policies.

Paragraph 3 of the Annex MNP consists of two sentences. The first sentence deals with the possibility of negotiating specific commitments with regard to the movement of natural persons. By inserting the words 'all categories' in this sentence, Members are given explicit leeway to distinguish, in their respective Schedules, not only between different service sub-sectors but also between different categories of natural persons (Wolfrum, Stoll and Fernaugle eds 2008). Due to this sub-section all Members have indeed scheduled Mode 4 commitments utilising their ability to confine their obligations regarding

market access and NT to particular categories of natural persons. The second sentence of Paragraph 3 explains the legal effect of such commitments by stating that 'natural persons covered by a specific commitment shall be allowed to supply the service in accordance with the terms of that commitment'. These sentences merely restate the normative content of other GATS provisions. The restrictions enumerated in Paragraph 2 limit the scope of possible specific commitments connecting Mode 4 of supply.

The GATS does not require a country to open its borders to foreign labour. Countries need only do so to the extent that they have made binding commitments with respect to market access, National Treatment or other matters. The nature of labour migration facilitated by the GATS depends on the schedules of commitments that governments make under Mode 4. Thus, although the GATS is neutral on the surface as to whether it facilitates skilled, semi-skilled or unskilled migration, the actual migration flows are determined by the preferences of countries as revealed in their undertakings in successive trade rounds.

Julia Nielson of the OECD has noted, 'Even by the modest standards of Uruguay Round liberalisation on trade in services, little was achieved on Mode 4'. The Mode 4 commitments are heavily tilted towards highly skilled persons. Empirically, 'countries' commitments so far have been heavily weighted towards facilitating the migration of highly skilled persons (Aleinikoff and Chetail eds. 2003). Of the horizontal commitments, about 42 per cent relate to intra-company transfers, 28 per cent to executives and managers, 13 per cent to visitors involved in sales negotiations, 10 per cent to other business visitors and seven per cent to independent contractors. Significantly for developing countries, only about 17 per cent of all commitments (horizontal or specific) are directed towards allowing market access for low-skilled personnel (which developing countries have in comparative advantage) (Charnowitz 2002). Even then, access is often further

limited by an economic needs test in the receiving country that excludes the alien if it has not been shown that no qualified domestic workers are available.

Paragraph 4 of the Annex on MNP specifies that the GATS shall not prevent a member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory. This is balanced by the proviso that states such a measure is not applied in such a manner as to nullify or impair benefits under the terms of commitments as referred to in Paragraph 3. This is again counter-balanced by footnote 13 of the Annex to MNP, which restricts the scope of nullification or impairment by stating that 'the sole fact of requiring a visa for natural persons of certain Members and not for those of others shall not be regarded as nullifying or impairing benefits under a specific commitment'.

It seems that this set of regulations concerning the movement of natural persons reflects a compromise between developed and developing countries (Wolfrum 2008), which is ultimately against the interest of LDCs and developing countries. Paragraphs 1 and 3 of the Annex on MNP recognise the interests of developing countries in having all categories of natural persons supplying services in Mode 4 as part of the legal framework of the GATS, including the transfer of low- and semi-skilled employees. Paragraph 2 safeguards the interests of developed countries in keeping effective control of their labour market and immigration policies by restricting the scope of Article 1.2(d). Paragraph 4 is a compromise in safeguarding the interests of both developed and developing countries. While it permits the developed countries to take measures to regulate the entry of natural persons in their territory, at the same time it requires these countries to ensure that the policies or measures are not used in order to escape the obligations assumed in specific commitments. Practically, Paragraph 4 defines the scope for current and future negotiations.

Scope and impediments for cross-border movement of semi-skilled and unskilled workers under Mode 4 and Annex on MNP

The Annex on MNP provides opportunities for the cross-border movement of semi-skilled and unskilled workers, but they are restricted to some conditions the implementations of which sometimes nullify the scopes for such movement. Mode 4 so far has been used to open avenues for skilled natural persons, but the GATS itself has a number of Articles, the interpretation of which can reveal that the movement of unskilled persons is not impossible within the GATS.

Mandate for Movement of Natural Persons Under GATS Provisions

Article IV(1) of the GATS acknowledges the liberalisation of market access in sectors and modes of supply of export interests to developing countries as a key way in which their increased participation in international trade can be achieved. In Article IV(3), LDCs are singled out as having special priority in this case. The Hong Kong Ministerial Declaration 2005 also reemphasises the liberalisation of market access in sectors and modes of supply of export interest to developing countries. The sectors and modes of supply are therefore an important indicator of how developing countries and LDCs can be best integrated into the world trading system.

Article IV(1)(c) opens the scope for developing countries and LDCs to argue for the market access of unskilled labourer in which they have comparative advantage in unskilled workers. This Article is a mere reiteration of the object of the negotiations and the specific commitments that form the core of the GATS. The significance of this Article lies in the fact that it exhorts developed country Members to give special attention to the service sectors and modes of supply, which are of particular significance to the export interests of developing countries in the multilateral negotiations on services trade liberalisation. Therefore, this Article opens the scope for market access in Mode 4. Since the GATS does not exclude any sectors on the basis of skill

levels, undertaking commitments to provide market access in Mode 4 taking into account all categories of natural persons can ensure the human right to work for all within the trade regime.

Labour Markets Integration Agreements (LMIA) of the GATS, as laid down in Article Vbis, to some aspect can be a ground to think if the labour mobility issue can be included in the main provisions of the GATS. It reads:

[T]his Agreement shall not prevent any of its Members from being a party to an agreement establishing full integration of the labour markets between or among the parties to such an agreement, provided that such an agreement:

(a) exempts citizens of parties to the agreement from requirements concerning residency and work permits;

(b) is notified to the Council for Trade in Services.

This Article has two different aspects. Positively, it recognises the scope for integrating the labour mobility issue within the GATS, and negatively, it restricts its scope within bilateral agreements. With this Article, the contracting parties recognise that the establishment of integrated labour markets should not be frustrated by the application of the Most Favoured Nation (MFN) rule, potentially demanding free market access for natural persons of all members. However, the fact is, in international law, such agreements are rare. Countries that pursue liberal trade policies hesitate to open their employment markets to foreigners on a non-selective basis. This type of bilateral or multilateral agreement is only possible where countries have a similar level of economic development, enjoy geographical proximity and wish to maintain, or establish, extraordinarily close political and socio-economic links among themselves.

Critics argue that Article V bis is a factor that clouds the GATS' application to employment markets (Charnowitz 2002). After all, if the GATS does not apply to the employment market in the first place, why is this Article

necessary? The question is whether the WTO is slipping down the labour policy slope by insisting that recognised agreements has exemptions regarding residency and work permits. Whatever the consequence of this Article, the importance of it lies in the fact that it allows the temporary movement of natural persons seeking employment in the territory of another country under a bilateral treaty. It is not impossible that, if framed broadly, an LMIA can also address Mode 4 supply.

Apart from these provisions of the GATS, LDCs also show an interest in market access for the temporary movement of semi-skilled workers to ensure the right to work for them. Paragraph 9 of the LDC Modalities emphasises Mode 4 as presenting potential benefits to both sending and receiving countries. It also acknowledges that LDCs have indicated this Mode as one of the most important means of supplying services internationally. However, the Annex on MNP when read with Article 1.2(d) creates too many constraints for semi-skilled and unskilled workers to move abroad for work.

2.3 Labour mobility in regional trade agreements

The claim for labour mobility is not new. A number of regional trade agreements (RTAs) provide the scope for the full mobility of labour. Article 18 of the EC Treaty gives every EU citizen a fundamental and personal right to move freely within the territory of the member states subject to some limitations. Its Article 39 provides for the freedom of movement of workers, which includes access to employment in other member states. Free movement of workers in the EU covers all forms of employment, including salaried or wage-earning employment and self-employment. The Agreement on the European Economic Area (EEA) allows EEA citizens to enter any member state of the EU as workers, self employed, service providers, or recipients. The Agreement Amending the Convention Establishing the European Free Trade Association (EFTA) provides for similar provisions. The Agreement introduces free movement for workers, the self-employed, and persons with no gainful employment who otherwise have sufficient financial means. It also

confers the right of access to work. These rights cover all persons who are integrated into the regular labour market of one of the EFTA states.

The Services Protocol of Australia-New Zealand Closer Economic Relations (ANZCERTA) provides for full market access for all service suppliers (Article 4). ANZCERTA does not cover general labour mobility. The reason may be that under the Trans-Tasman Travel Arrangement the nationals of Australia and New Zealand are free to live and work in each other's countries for an indefinite period. The Andean Labour Migration Instrument, adopted by the Andean Community comprising Bolivia, Colombia, Ecuador, Peru and Venezuela in 2003, allows the citizens of those countries to circulate freely within the Community for employment purposes.

2.4 Impediments to the movement of semi-skilled and unskilled workers under TMNP and annex on MNP

A number of factors including GATS provisions and the regulatory policy of member countries pose a threat to the movement of semi-skilled and unskilled workers abroad for employment through migration only for a temporary period.

Article 1.2(d) denies the possibility of foreign nationals moving into a country in order to take up employment with a domestic service supplier, thereby limiting the scope for semi-skilled and unskilled workers to work in a foreign establishment. According to Paragraph 1 of the Annex on MNP, natural persons are either 'service suppliers of a Member' or 'natural persons of a Member who are employed by a service supplier of a Member, in respect of the supply of a service'. It seems from the wording of Paragraph 1 that foreign nationals moving into another member country can take up employment with a domestic service supplier. This ambiguity raises the divergence of opinion as to the interpretation of Paragraph 1 and Article 1.2(d), which are important for the interests of semi-skilled and unskilled workers. The narrow interpretation admits that Paragraph 1 leaves room for interpretation as to whether the term

'employed by a service supplier of a Member' also includes foreigners employed by local companies, but denies such an interpretation in accordance with Article 1.2(d). 'While the wording of the Annex does not rule out this possibility, Article 1.2(d) of the agreement seems to cover only foreigners employed by foreign-owned companies (as noted above, the Article applies to services provided 'by suppliers of one Member, through presence of natural persons of a Member in the territory of any other Member')

Thus, while foreigners would fall under the GATS if they work on a contractual basis as independent suppliers for a locally owned firm, they would seem not to be covered if they were employees of that firm. Moreover, a more convincing assumption is that the drafters of the GATS did not intend to create any contradictory regulation, so the two should be read together to avoid conflicting interpretation (Wolfrum 2008). Accordingly, Mode 4 of trade in services is limited to:

supply of a service by a service supplier of one member, through the presence of natural persons of a member in the territory of any other member, while natural persons are either service suppliers or employed by a service supplier, in respect of the supply of a service. (Wolfrum 2008)

However, some support an extensive interpretation of Paragraph 1 arguing that the issue is not determined by law (Grynberg 2002). A broader interpretation of Paragraph 1 is important for securing the movement of semi-skilled and unskilled labourers from developing countries to developed countries and that can ensure their right to work.

Second, Paragraph 2 of the Annex on MNP permits measures that prevent natural persons from having access to the employment market of a host Member country. Under the GATS, an employed person means a person who is sent abroad in connection to a specific service for a defined period. The reason behind the restriction on access to the employment market of the host country is to secure the market for the national work force. However, several studies have drawn attention to the potential benefits arising from a

progressive relaxation of barriers to labour mobility. Winters suggested that if developed countries were to raise three percent of their labour force by raising their quotas on temporary workers from developing countries, they would realise an overall gain of US\$150 billion each year (Mattoo and Carzaniga eds 2003). The study concludes that the gains from such liberalisation would be shared equally by developed and developing countries (Mattoo and Carzaniga eds. 2003). Most importantly, from a development perspective, these findings suggest that the largest benefits would come from the movement of lower-skilled workers, as those workers are spread more evenly over the economy, benefiting more sectors than highly skilled ones. A study revealed that the elimination of global restrictions to labour mobility generates worldwide efficiency gain ranging from 15–67 per cent of the world gross domestic product. When only skilled labour is allowed to migrate welfare gains are smaller—from 1–3 per cent of world gross domestic product (COECD 2002).

For developing countries, opportunities for labour mobility are important. Especially in a situation of saturated labour markets, the departure of workers exerts a downward pressure on unemployment, and an upward pressure on (low) wages (OECD 2002). Consequently, the temporary movement of workers can help to ease the strain on domestic labour markets, working abroad can be an escape route from unemployment, and it can reduce a country's overall unemployment rate (Winters 2003).

Furthermore, the income of the worker forms a major source of capital inflows and investment for many developing countries (Winters 2003: 161). In 2001, workers' remittances to developing countries stood at US \$72.3 billion, considerably higher than total official development assistance and private non-foreign direct investment (FDI) flows, and 42 percent of total FDI flows to developing countries that year. The statistics show that overall remittances include every category of workers: skilled, semi-skilled and unskilled. Considering the huge quantity of unskilled labourers of developing countries, it is easily understandable to conclude that the temporary movement of these

workers will ensure more remittances for the economy of developing countries. Thus, labour mobility broadens employment opportunities for workers, especially where these are not available in the home country, and can facilitate the broader objectives of adhering to Millennium Development Goals (MDGs), the right to work, human rights and the right to development standards.

Third, the Annex on MNP gives leeway to countries in regulating national policy in order to protect national interests as long as they are not trade restrictive. The types of regulation often used by countries inclusively include immigration regulation on the entry, regulation on the recognition of qualifications, work experience and training, differential treatment of domestic and Foreign Service personnel and entry conditional on commercial presence (McGuire 2002). These regulations create obstacles for the movement of semi-skilled or unskilled natural persons from developing countries and LDCs. In particular, border measures such as quotas and economic need tests (ENTs) are maintained by all Members to regulate or impede the entry of service suppliers into their market (Crosby 2009). The ENT implies that domestic employers have to prove that no domestic worker is available to do the relevant job in order to be able to employ a foreign worker. Such procedures are time consuming and costly for employers, making it significantly less attractive to hire foreign workers as opposed to domestic ones. Even if these border measures can be overcome, there are additional burdens for foreign workers. They have to provide mandatory social security contributions, which are not returned to them. Moreover, the non-recognition of professional qualification and work experience also represent major barriers for LDCs (Crosby 2009). The combined effects of all these requirements make this rule unfair for LDC service providers.

Fourth, Mode 4 accounts for less than two percent of the total value of service trade. Most importantly, present commitments refer almost exclusively to higher level personnel. More than 40 percent of Mode 4 commitments are for

corporate transferees whose mobility is related to FDI; another 50 percent of commitments cover executives, managers, specialists and business visitors (Mattoo and Carzaniga eds. 2003). This means that the Mode 4 liberalisation achieved so far has been of limited significance for developing countries whose comparative advantage lies in the export of medium, low-skilled and unskilled labour intensive services. The GATS provides no guaranteed access for Mode 4 suppliers. Access is determined by the nature of each member's specific commitments on (a) their scope or sector coverage; and (b) the nature and extent of limitations imposed on market access and NT affecting the movement of natural persons as service providers (Ghosh 1997). In other words, within a sector listed in the national Schedule, a member may include restrictions on movement of persons as service providers while liberalising other modes of supply (Ghosh 1997).

Finally, in the last two paragraphs of the GATS preamble, members express their desire to 'facilitate the increasing participation of developing countries in trade in services and expansion of their service exports'. A specific provision concerning the need of LDCs expresses the collective desire of the participating members to take 'particular account of the serious difficulty of the LDCs in view of their special economic situations and their development, trade and financial needs'. Moreover, a special position of LDCs has been emphasised by dedicating a separate clause (IV:3) for them. However, as of December 2011, the GATS refuses to provide for any SDT that would make it possible to allocate quotas or grant specific commitments for them (Marchetti 2004). On 17 December 2011, at the WTO Ministerial Conference, ministers reaffirmed the LDC accession guidelines adopted in 2002 and agreed to a waiver that makes it possible for members wishing to grant LDCs greater access to their service markets.

The right to work is well recognised in international human rights instruments. From a human rights perspective, allowing semi-skilled and unskilled workers to move from developing to developed countries opens avenues for countries

to implement and enforce human rights obligations. The movement of semi-skilled and unskilled workers under the GATS facilitates the members to implement and fulfil their international human rights obligations. However, until now, no specific and effective measures have been undertaken by the Members to ensure it. The Report by the Chairman, Ambassador Fernando de Mateo, submitted on 21 April 2011 to the Trade Negotiations Committee, shows that Mode 4 commitments and offers continue to be insufficient: According to which:

Many of the sub-sectors of interest to developing countries were still not covered and in many cases, there were important geographical carve-outs from the sectors indicated horizontally. The offers by many Members were still linked to commercial presence and made subject to nationality and residency requirements. Numerical ceilings and economic needs tests remained a significant cause of concern.

3. Conclusions

The GATS is an important instrument that is necessary for regulating the development of international trade in services, inevitable at the age of globalisation. It is still a work-in-progress, and the above discussion has highlighted many ambiguities regarding its scope and effects, especially with respect to human rights. It is possible that the implementation of the GATS principles and rules would have a positive effect on the protection and development of particular human rights. However, it is very unlikely to have a positive effect on human rights issues if the GATS remains opaque and closed. The provisions of the GATS need to be reviewed to promote service trade-induced economic development in developing countries and LDCs, which will in turn promote and protect these human rights, particularly economic, social and cultural rights.

It is quite clear that the liberalisation of the movement of people that is not for resettlement purposes would result in gains to the world economy and especially to most developing countries and LDCs. An important step would be to implement such an arrangement for semi-skilled and unskilled workers.

The movement of these workers from developing to developed countries promises to yield the greatest gains because this is where the difference between factor prices is largest and where there is considerable scope for movement. This would also ensure the right to work of the huge numbers of unemployed workers of developing countries. Maintaining some basic services within the government is crucial for the poorest of the poor people who are unable to enjoy those rights due to their marginalised socio-economic conditions.

GATS Article 1.2(d) may be amended to remove the obstacle for natural persons to be employed by the service provider of the host country. Since Article 1.2(d) and Annex on MNP must be read together, it is important for both to contain similar language. There remains no scope for narrow interpretation to limit the movement of natural persons. GATS Article IV:3 may be amended to include the SDT principle so that developed countries can take into consideration the vulnerable situation of LDCs in making special commitments in services. Paragraph 2 of the Annex on MNP may be redrafted to include delinking market access from the commercial presence mode of supply and to reducing immigration rules and sovereignty issues. Provisions to ensure the entry of natural persons seeking employment may be included with reasonable yet facilitating conditions to allow the vast majority of semi-skilled and unskilled workers access to the employment market of developed countries.

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