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STUDY INTO POLICY INSTRUMENTS AFFECTING LABOUR MOVEMENT TO SOUTH AFRICA AND THE GENERAL AGREEMENT ON TRADE IN SERVICES

By

Gary Eisenberg

I: INTRODUCTION:

The entry of foreign nationals into the Republic of South Africa is regulated by statute[1], regulations promulgated in terms of such statute and policies administered by the Department of Home Affairs. In particular, this paper deals with the class of foreign persons seeking temporary access to South Africa's labour market to supply services, in as far as such access is covered by the General Agreement on Trade in Services (hereinafter "GATS").[2]

Trade in services is defined by the GATS as the production, distribution, marketing, sale or delivery of a service (a) from the member territory of one Member into the territory of any other Member; (b) in the territory of one Member to the service consumer of any other member; (c) by a service supplier of one Member, through the commercial presence[3] in the territory of any other Member; and (d) by a service supplier of one Member, through the presence of natural persons of a Member[4] in the territory of any other Member.[5]

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[1] The Aliens Control Act of 1991, as amended.

[2] ***The Results of the Uruguay Round of Multilateral Trade Negotiations: Legal Texts***, (June 1994), GATT Secretariat, Annex 1B, 325 et seq.

[3] See Article XXVIII(d), which defines "commercial presence" as "any type of business or professional establishment" including a branch or representative office, or other sort of juridical body.

[4] The fundamental objective of all multinational trade agreements, particularly the GATT and the GATS of the Uruguay Round is to sanctify the principle of "Most-Favoured –Nation" treatment in respect to all

Trade in services is not *per se* a question of immigration law or policy. When trade in services involves the movement of natural persons of one member into the territory of another member immigration law issues arise. This aspect of GATS is framed by its ***Annex on Movement of Natural Persons Supplying Services under the Agreement***.[6] While the general regulatory regime affecting labour movement is wide and deep, the existing focus of GATS in this regard is narrow and pointed.

Section 2 of the Annex expressly negates the application of GATS to "measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis." Migratory controls to safeguard the integrity of borders and order of movement of natural persons are beyond the reach of the GATS, except that the application of such controls should not nullify or impair the benefits accruing to any member in terms of specific commitments which may have been negotiated.[7]

This paper therefore deals with those aspects of South Africa's immigration regulatory regime relating to foreign nationals seeking non-permanent ("temporary") entry into the South African labour market for purposes of supplying a service therein.

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ascribing member parties. With respect to trade in goods, their origin determines the application of the MFN principle. With respect to "natural persons", their immigration status determines the application of the MFN principle. See GATS Article XXVIII(k) which defines a natural person of another member, *inter alia*, as a national of that other member or a "permanent resident" in the "importing" member, where that member "accords substantially the same treatment to its permanent residents as it does to its nationals." This is the case in South Africa.

[5] See Article 1(2).

[6] *The Legal Texts* at 353.

[7] Section 4 of the *Annex.*

II: POLICY INSTRUMENTS

In practice, the only aspect of GATS which relates to the movement of labour by service suppliers seeking market access are each member's specific commitments.[8] The focus of this paper is confined to that part of the GATS dealing with "*specific commitments*."[9] South Africa's specific horizontal commitments[10] relate to the market access of three categories of service providers, which categories have their direct equivalents in South Africa's domestic legislation regulating the temporary market access of foreign nationals. This is remarkable since the text of South Africa's horizontal commitments in terms of the GATS provides a valuable commentary to the domestic legislative provisions, even though there appears to have been no correlation at all between those two realms at their respective formulation or negotiation stages.

South Africa's horizontal commitments relate only to the following three categories of natural service providers: (i) service salespersons; (ii) intra-corporate transferees (including executives, managers, specialists and professionals) and (iii) personnel engaged in establishment.

II.1 ***Services salespersons***

Service Salespersons are defined as natural persons not based in South Africa and acquiring no remuneration from a source located within South Africa, who are engaged in activities related to representing a services provider for the purpose of negotiating for the sale of the services of that provider, without engaging in making direct sales to the general public or supplying services. The

[8] Section 3 of the *Annex.*
[9] These "specific commitments" are dealt with in PART III of the GATS in Article XVI on market access and in Article XVII on national treatment.
[10] South Africa: Schedule of Specific Commitments, GATS/SC/78, 15 April 1994.

temporary residence of such persons is limited to a ninety-day period.

"Services salespersons" are regulated by "business permits" within South Africa. Business permits are issued to foreign nationals who apply for permission to enter the Republic "to attend to business matters, other than business matters for which a work permit is required."[11] Business permits are issued for periods exceeding ninety-days.

A "work permit", on the other hand, may be issued to a foreign national who applies for permission (i) to be temporarily employed in the Republic with or without reward;[12] or (ii) to temporarily manage or conduct any business in the Republic for his own account or not.[13]

Despite the restrictive provisions of section 26(1)(b) of the Aliens Control Act, four types of work permits are issued in South Africa as a matter of policy. These are permits based on: (i) an offer of employment from a South African entity; (ii) the establishment of a business enterprise by the applicant in South Africa; (iii) the purchase of an existing commercial enterprise in South Africa or a part thereof; and (iv) on the secondment from a parent company abroad to a subsidiary in South Africa.[14]

However, South Africa's GATS commitments relate only to "intra-corporate transferees" and to "personnel engaged in establishment." In respect of these categories there appears to be

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[11] Section 26(1)(c).
[12] Section 26(1)(b)(i).
[13] Section 26(I)(b)(ii).
[14] The full panoply of South African immigration policy is set out in the so-called "Immigration Code," which is expressly not available to a member of the public. However, on request, the Department of Home Affairs may furnish a summary of existing policy on a particular issue, or upon specific written application, may reply with a "policy directive" giving the Department's ad hoc or regular policy stance on the question/s raised in the application. I refer in this instance to an undated document issued to me by the Policy Section of the Temporary Sub-Directorate of the Department of Home Affairs on 12 July 1999 (Policy Document).

no or little equivalence with South Africa's domestic policy framework.

II.2 ***Intra-corporate Transferees***

In its GATS commitments, South Africa has bound itself to the recognition of intra-corporate transferees, who are executives, managers, specialists or professionals, "***who have been employed by a juridical person that provides services within South Africa through a branch, subsidiary, or affillate established in South Africa and who have been in the prior employ of the juridical person outside South Africa for a period of not less than one year immediately preceding the date of application for admission***."

While South Africa's GATS commitments thus distinguish between "intra-corporate transferees", on the one hand, and "secondees" on the other, South Africa appears to have a single domestic policy category encompassing those foreign nationals seeking market access as representatives of a foreign legal entity, namely "secondments." The Department of Home Affairs states that it

"***is not averse to granting permits to key personnel (i.e. managing/financial directors, chief executive officers or specialised technical personnel), seconded by corporate business to take up temporary employment in their existing local branches. These transfers should, however, be kept to the minimum required for the effective and smooth running of the business***."[15]

There exists no regulatory or ***precise*** policy framework for the consideration of "secondment" work permit applications. Once again, however, it would make sense for the Department of Home

[15] Policy Document, at page 4.

Affairs to introduce a set of guidelines based on the language of South Africa's GATS commitments in these respects so as to provide both clarity and consistency between those international commitments and domestic regulation and practice.

Because of the glaring inadequacy of policy guidelines in these respects, immigration practitioners and market access seekers are bereft of certainty as to the specific nature of applications for transfers or secondments. Albeit the status quo, a number of policy requirements have been established through practice.

The enterprise in the foreign jurisdiction must have employed the applicant in the first place. From a policy perspective, it does not appear to matter to the Department that an individual has been employed for a single day prior to the lodgment of the application. South Africa's GATS commitments constitute maximum standards of regulation accorded service suppliers of other member countries, and therefore the absence of "bright-line" employment period requirements in South Africa's domestic regime is not to be construed adversely – unless, of course, policy should be modifies requiring the applicant to have been employed for a period exceeding a year before his secondment. On the contrary, by not requiring a one-year employment period as a precondition for a transfer or secondment, South Africa retains a great degree of flexibility in its consideration of applications for work permits falling below the one year threashold.

Considerations as to how long and in what capacity such individual has been employed prior to transfer may have a bearing on the Department's discretionary assessment. One could only suppose that the Department would not look kindly on an application involving the transfer of an individual, who occupied his position for ten years as the tea and cookie maker at head-office, to South Africa to take up the position of senior manager of the employer's subsidiary there. Obviously, the applicant's capability to occupy

the relevant position in South Africa is a significant factor in the Department's assessment and the applicant's qualifications and experience will be considered accordingly.

The relationship between the overseas entity and the South African entity is a significant factor, since that relationship constitutes the core of this type of application. Practice has established or at least indicates a number of fundamental principles.

An "affiliation" or similar relationship between the two entities is not sufficient to support this type of application. While neither the GATS nor the text of South Africa's commitments thereto defines "affiliate," an "affiliate" relationship is probably somewhat broader but related to the GATS' definition of "commercial presence".[16] Commercial presence includes any type of business or professional establishment through a juridical establishment or representative office. However, South Africa's domestic policy on the nature and extent of the foreign entity (employing the service provider) and the South African "entity" is far narrower and restrictive.

The relationship must be established by a bilateral or mutual sharing of ownership between the entities. The foreign enterprise must own a "significant" interest (although not necessarily the majority interest) in or share equity with the South African entity. According to the policy division of the Department's temporary residence section, if an individual owned the foreign enterprise and also owned the South African concern, the absence of an actual equity tie between the two entities will prevent an application from being considered as a "secondment" application.[17]

An individual owning in excess of 25% of the foreign company cannot apply in this category. The Department has apparently

[16] Article XXVIII(d) of the GATS.

[17] This is an altogether artificial approach which defies realistic commercial practice. For instance, if the South African entity is constituted as a close corporation, only a natural person may own membership therein, thus preventing the overseas entity from owning such an interest in it.

established this rule in order to prevent abuse of this type of application process. For instance, the Department does not expect the employer in this category to prove that the applicant is uniquely qualified for the offered position. The Department is also not concerned about the value of the direct investment which underlies the equity holding of the parent in South Africa. The "25% rule" thus effectively limits the risk of evasion of the normal work permit application rules.

Whether or not the South African enterprise has been formally and legally constituted determines where the application may be processed and considered. If the South African enterprise is not a legal entity, such as a trust, close corporation or company or any variation thereof, the application will be processed and considered by the Department in South Africa. The current average processing time if this happens is anywhere between eight and ten weeks.

If, on the other hand, the foreign entity owns a share in or the whole of a legally constituted entity in South Africa then the application may well be considered by Departmental officials at the South African representative office in the foreign jurisdiction where the application is lodged. This has the effect of cutting down processing time enormously. It is not unknown that such applications are considered and authorised on the same day as lodgment.

From a domestic policy perspective it would be at least politically appropriate to preserve but not to surpass the maximum standards enshrined in South Africa's international GATS commitments. For instance, South Africa is bound to allow transfers of foreign nationals employed by a foreign juridical person that provides services within South Africa through a branch, subsidiary or *affiliate*. In practice, however, South Africa does not allow for transfers that are based on transfers within "affiliated" entities

(such as contractually associated companies, or entities owned by a common natural person). The nature of the equity relations between juridical entities is what in principal allows for "intra-corporate transfers." This inconsistency does create unnecessary barriers to entry and therefore it would be advisable to fine-tune domestic policy to fit within the purview of those commitments.

II.3: *Personnel Engaged in Establishment*

South Africa has also bound itself to the recognition of personnel engaged in establishment, who are "***natural persons who have been employed by a juridical person for a period of longer than one year immediately preceding the date of application for admission and who occupy a managerial or executive position and are entering South Africa for the purpose of establishing a commercial presence[18] on behalf of the juridical person***."

There exists no equivalent policy instrument in South Africa's domestic immigration regulatory regime. There exist circumstances where foreign employees are "seconded" to South Africa to establish a commercial presence on behalf of their foreign employers. However, work permit applications for these purposes are processed through the normal channels, no matter the urgency, in the absence of specific policy guidelines and administrative decisions resulting from such applications are more or less arbitrary!

III: REGULATORY ENVIRONMENT

III.1 *General Work Permit Rules*

[18] See definition of "commercial presence" in Article XXVIII (d) of the GATS: "any type of business or professional establishment, including through (i) the constitution, acquisition or maintenance of a juridical person, or (ii) the creation or maintenance of a branch or a representative office within the territory of a Member for the purpose of supplying a service."

A number of general rules, applicable to all work permit applications, are pertinent to mention:

A work application may only be made, while the applicant is outside South Africa, in the country or territory of which the applicant validly holds a passport, or in which he or she normally lives and possesses domicile, and the applicant shall not be allowed to enter South Africa until a valid permit has been issued to him.[19] This rule is obviously of fundamental importance to applicants since most applicants find themselves in South Africa when they decide to apply for a work permit.

The policy explanation underlying this rule from a previous Chief Director for Migration is significant to reproduce here.[20] Before the latest amendments to the Aliens Control Act came into operation on 1 July 1996, applicants were allowed to apply for work permits while in South Africa. This situation apparently caused too much labour-market competition between unemployed South Africans looking for work and foreigners in the same position. Mandating that applicants apply from abroad and that they do not enter South Africa until such time as a valid permit has been issued to them was meant to stem the tide and to effectively reduce such competition. It could be argued that this new rule substantially reduces the risk of foreigners entering South Africa under false pretenses – entering expressly for purposes of holiday while their true intention is to enter to seek employment.

The problem with this rule, however, in the context of a developing economy severely short of foreign direct investment and advanced labour skills, is that most foreign prospective investors and work seekers utilising the legal process of gaining residence status and work authorisation in South Africa are not the

[19] Section 26(2)(a) read with Regulation 16(1) of the Aliens Control Regulations, *Government Gazette* No. 17254, 28 June 1996.
[20] See also an article on international business migration to South Africa, *Lead Shoes on Investors* in Financial Mail, 20 September 1996, pp 50-51.

type of individuals who compete with South Africa's unemployed. Having to apply from outside of South Africa, in practice, creates its own set of problems which deter applications more than support them.

Few exceptions to this rule exist. For instance, an individual may apply for a work permit inside South Africa before the validity of an existing work permit expires, or while an offer of employment has been extended to the holder of a so-called work-seeker's permit.[21]

This rule is sometimes applied in the extreme. If a foreign woman, for instance, marries a South African permanent resident or citizen, and enters South Africa to reside with him, she cannot apply for a work permit while inside South Africa. Even if such woman was tending her minor children, but wishes to establish a small business from home, she would have to return to her country of origin to make the necessary application and must await the outcome of the application before returning to South Africa. The only alternative course of action she may follow is to apply to the Minister for an exemption to the normal legislative rules [22] - such exemptions are rare.

III.2 ***Costs***

Currently the Department of Home Affairs charges R1020 for work permit applications of all types and applications to extensions thereto, and R270 for business permit extensions. It would appears that these costs are arbitrary but are decided by the Minister of Home Affairs in consultation with the Minister of Finance.

[21] See Sections 26(1)(e) and 26(2)((b). A workseeker's permit allows an individual to enter South Africa for the purposes of seeking employment in his particular occupation.

[22] Such exemption can be applied for in terms of section 28(2) of the Act, which section requires that the Minister of Home Affairs recognises her circumstances as "special." These exemption applications have proven to be extremely troublesome since they are invariably considered by Departmental officials in contravention of existing administrative law doctrine.

IV ***An Assessment of Current Policy on the Movement of Labour***

The consideration of applications for temporary residence permits by the Department of Home Affairs follows a particularly unstable and unpredictable pattern. A principal concern for applicants for work permits, in all categories including self-employment based on investment as well as skills-based employment, Departmental requirements for those work permit applications, the anticipated consideration time (from the point of lodgment to the issuance of a final decision), are vague and not self-evident. While primary legislation and regulations thereto are promulgated by *Government Gazette*, the actual requirements for the respective categories of work permit applications and the policies relating to Departmental consideration of such applications are published in an internal reference document titled (***Immigration Code***).

The *Immigration Code* is a volume numbering hundreds of pages and it includes a "*Visa code*"(which sets out definitive lists of visa requirements, restrictions and exemptions in respect of all countries of the world). The *Immigration Code* is expressly restricted to Departmental officials and other authorized personnel and despite numerous administrative challenges by legal practitioners, the Department of Home Affairs refuses to circulate or promulgate the *Immigration Code* to licensed immigration consultants, to attorneys, or for that matter to any other member of the public or other licensed professional.

Departmental officials holding authority to consider temporary residence permit applications, who are stationed either in South Africa's Consular offices abroad, or at the administrative Head Quarters, regional and local offices of the Department of Home Affairs, are line functionaries without authority to apply policy

guidelines beyond the rigid and narrow confines of those guidelines as they have been set out in the *Immigration Code.* In other words, a great number of work permit applications do not follow those guidelines set out in the *Immigration Code* or in *directives* which are circulated from the Head Office to Departmental officials from time to time.

For instance, a specific set of guidelines apply to skills-based work permit applications requiring economic needs tests. A principal requirement for such applications is that the position offered to the foreign applicant is advertised in "national media" for a period of no less than thirty days. A recent case involved an application by a Hungarian software developer with specialised expertise in the telecommunications industry and with advanced skills as a C++ programmer analyst. The application was submitted to the South African Embassy in Budapest and contained eighteen pages of advertisements, which were placed in local newspapers in Cape Town, Johannesburg as well as in specialised computer periodicals which are circulated throughout South Africa, such as *ComputingSA.*

A senior administrative official in the Sub-Directorate for Temporary Residence, at the Head Office in Pretoria, refused to grant to that applicant a work permit because those national media in which the advertisements were circulated, namely *ComputingSA*, did not appear on a list of acceptable periodicals issued by the Media Section of the Department of Home Affairs. The refusal was immediately appealed and a great deal of persuasion of the attorney's part resulted in the Department accepting the fact that even national specialised periodicals conformed to "national media" as set out in the *Immigration Code.*

Due to the high unemployment rate in South Africa, the Department of Home Affairs has for the past few years, been emphasizing the increased need to have specialist representative

bodies in particular sub-sectors and the Department of Labour review applications so that the Department of Home Affairs can render decisions in consonance with those recommendations. For instance, the Department of Home Affairs refers or apparently is mandated to refer each and every skills-based work permit application to the Department of Labour. The process of referral and consideration by the Department of Labour is closed and arbitrary. A great number of serious administrative problems arise from time to time when officials within the Department of Labour are co-opted by private employment agencies and are pressured to assist in moving business to them. For instance, the Department of Labour in Cape Town, has become well-known for stalling work permit applications so that certain private employment agencies have a fair chance to place their own candidates into positions offered by local companies. The Department of Home Affairs appears to have bowed to various political forces by giving up regulatory control over the aspect of work permit consideration and processing requiring the Department of Labour's recommendations.

This is from a policy perspective a dangerous way of satisfying purely political, but substantively unjustifiable, pressure in light of the inability of the State and private economy to absorb an ever growing rate of unemployment.

According to various officials in the Department of Home Affairs, more reliance will be placed on input from the Department of Labour in future, but what remains a mystery is how the Department of Labour and its consideration of work permit applications as part of the overall work permit application processing regime will be regulated.

The Department of Home Affairs also appears to be particularly sensitive as to whether a skills-based work permit applicant should, *as a matter of policy*, be allowed market access if in his field of

occupation no formal qualifications or experience are required. Cases involving specialised marketing managers (including leisure sport watches), hairdressers, and restaurant managers have arisen where the Department of Home Affairs have refused to grant work permits to them because South Africans, currently unemployed, could easily be trained up for such positions without having to have any formal qualifications or experience in those fields of occupation. While the Department of Home Affairs has apparently not established policy guidelines in these respects. The degree of discretion enjoyed by Departmental officials authorized to consider authorized to consider such applications, allows decisions to be rendered which satisfy the political expectations of more senior personnel within the Department of Home Affairs, but which have no precedential or formal basis.

It would therefore appear that those commitments to which South Africa has bound itself in terms of the GATS pertain two categories of market access seekers which do not encroach on the politically sensitive realities of South Africa's domestic landscape.

The issue of *transparency* in respect of the implementation and application of immigration regulations, policies and procedures, is an issue of serious legal significance. Researchers have observed that countries operating under an Anglo-Saxon-type of legal system (such as Australia, Canada, New Zealand, United Kingdom and United States) tend to be invariably more explicit and detailed in their legislation and published implementing regulations with respect to both the scope and implementations than those countries operating under a Latin-type legal system (such as the European Union and Japan). Apparently the latter tend to be far less explicit in their published laws and implementing regulations leaving far more room for discretionary substantive and procedural

administrative rules.[23] South Africa is particularly unique in terms of its own legal commitment to full transparency in the implementation and application of legal rules, both substantive and procedural. Constitutionally, "every person has the right to lawful administrative action where any of their rights or interests is affected or threatened, procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened, be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reason for that action had been made public, and administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened".[24]

Every person, including foreign nationals who are within the purview of the constitutional jurisdiction of the Republic of South Africa possess such rights. Therefore, any foreign national within the Republic of South Africa has a potential claim to administrative action on the part of the Department of Home Affairs which is lawful, procedurally fair and transparent.[25]

The mandatory provisions of Article III of the GATS Agreement are in consonance with South Africa's domestic constitutional mandate on transparency of the public administration and the way it implements and applies law. The various World Trade Organizations agreements, including the GATS, emphasize transparency and thus the "prompt" publication of all material legal measures affecting cross-border trade. With respect to trade in services and to the movement of natural persons across its

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[23] See Noyell, T, *Barriers to Trade in Labour Services*: P*roposals for Strengthening GATS Commitments on the Temporary Movement of Natural Persons From the Perspective of Developing Country,* Unctad draft paper, 15 May 1995, at 4-5.

[24] Section 33 of the Constitution of the Republic of South Africa, read with section 23 of Schedule 6 of such Constitution.

[25] See in particular section 195(1) of the Constitution of the Republic of South Africa which section states in pertinent part that the "public administration must be governed by the democratic values and principals enshrined in the Constitution, including the following principals… services must be provided impartially, fairly, equitably and without bias, public administration must be accountable, transparency must be fostered by providing the public with timely, assessable and accurate information".

borders, South Africa falls short of the requirements of Article III. For instance, Article III(1) requires that "each member shall publish promptly… at the latest by the time of their entry into force, all relevant measures of general applications which pertain to or affect the operation of this Agreement". Article III(3) proceeds to mandate that "each Member shall promptly and at least annually inform the Council for Trading Services of the introduction of any new, or any changes to existing, laws, regulations or administrative guidelines which significantly affect trading services covered by its specific commitment under this Agreement".

As is evident from the discussion contained in this chapter, although policy guidelines which materially and significantly affect the movement of natural persons into South Africa in terms of South Africa's GATS schedule of commitments, the frequency of such changes and vagueness in respect of many of those guidelines make it difficult or impossible to clearly articulate in any publications those "guidelines". The lack of transparency generated by confusion between officials in the Department of Home Affairs vested with responsibility over policy matters not only makes general publication difficult or impossible, but creates a frequent and serious pattern of confusion of Consular officials stationed abroad.

As above-mentioned, work permit applications and applications for business permits by foreign national subject to visa requirements are in the normal course dealt with by Consular officials stationed in such applicants' home countries. The lack of transparency and thus clarity in the existence, implementation and application of policy guidelines affecting applications for and consideration of temporary residence permits impede market access, effectively violating both Article II on MFN treatment and Article III on transparency.

V ***FUTURE DIRECTION OF POLICY***

Of relevance to this particular study are those WTO negotiations relating to obstacles to the movement of natural persons. Of principal importance to the future direction of South Africa's immigration policy is South Africa's *international* commitment to progressively liberalize its trade in services, including its specific commitments relating to the movement of natural persons across its borders.[26]

On 1 April 1999 the Minister of Home Affairs, Dr M.G. Buthelezi, released the White Paper on International Migration which deals with a new immigration policy for the Republic of South Africa, which has already been approved by the Cabinet and will in due course be translated into a body of new legislations. The emergence of this White Paper coincides with South Africa's preparations for upcoming WTO negotiations. These parallel developments appear to have and continue to unfold in isolation to each other and for this reason alone there is great cause for concern that South Africa's international commitments will run into conflict with domestic developments.

As explained above, the GATS "shall not apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis". The GATS is only concerned with trade in services, and from that perspective only specific aspects of South Africa's emergent domestic immigration policy are of significance to this study. The primary mode of migration regulations covered by South Africa's existing commitments under the GATS are the "intra-corporate transferee" permits. While this type of migration instrument is known as "secondment" in South Africa's current policy language[27] no such

[26] See Article XI of the GATS.

[27] According to Ms L Dippenaar, Administrative Head of the Policy Section, Sub-Directorate for Temporary Residence, Department of Home Affairs, Pretoria, per telecon on 30 July 1999.

instrument is referred to or discussed in the White Paper. However there is indication in the White Paper that classifications of temporary residence members could be left to regulations rather than being entrenched in legislations[28] but notwithstanding that suggestion, it is readily apparent that the future policy of South Africa's migratory system has developed in complete isolation to South Africa's past and current negotiations within the WTO services context.

Perhaps one of the salient issues to be addressed in the implementation of domestic immigration regulations is ***transparency***.[29] The ability of service providers to rely on current immigration regulations is weak. Even for legal practitioners in the field, it is impossible to articulate with any specificity a number of important policy considerations, including the difference between "secondments" and "transfers", the specific differences between "business" and "work" permits, and the specific criteria defining the basis for intra-company transfers, and the ability of service providers to change the condition of their entry into the Republic (for instance, from a "visitor" to "business"). Departmental officials vested with the responsibility of applying the contents of the Immigration Code, provisions of existing legislation and the regulations thereto, as well as various circulars issued from time to time, are not "technocrats". Immigration policy is inherently technical and a great number of practical problems arise when Departmental officials attempt to apply those policies and "rules" as they individually see fit. This gives rise to a great number of anomalous and haphazard results. This, in turn, has caused a public furor in South Africa and this is a serious situation that future policy-makers should attempt to cure.

[28] White Paper at 7.3.
[29] Article III of the GATS.

Unfortunately, the despute settlement and enforcement provisions of the GATS[30] are inconsequential. It is for that reason not anticipated that future WTO negotiations will bring any further pressure to bear upon the Department of Home Affairs to restructure itself in such a way as to eliminate the inefficiencies currently being encountered and which are anticipated to be encountered under the new system suggested by the White Paper. While the emphasis of the White Paper is the enforcement of immigration laws in the domestic arena, there is very little said in the White Paper about the rights of foreign migrants, including service providers, to have administrative decisions adversely affecting them properly reviewed.[31] Whatever South Africa's future commitments will be in terms of a re-negotiated GATS, it is of fundamental importance that South Africa's immigration system incorporates impartial administrative review bodies – either as an integral part of South Africa's future Immigration Services Department[32]or as independent administrative judicial entities within the overall judicial system of South Africa – so that the technical integrity of South Africa's immigration legal regime can be preserved. While the White Paper emphasizes law enforcement, the GATS emphasizes the rights of affected service providers, and future domestic and international policy should coincide to reduce this gap.

There appears to be a critical chasm between the scope of the GATS and the restrictions to the application of the GATS as providers in the Annex on Movement of Natural Persons Supplying Services under the Agreement. Article I(2)(b) of the GATS defines trade in services as "the supply of a service by a service supplier of one Member, through presence of natural

[30] Article XXIII.
[31] See Article VI of the GATS which mandates that "each Member shall maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services".
[32] See 6.5.1 of the White Paper.

persons of a Member in the territory of any other Member". This provision applies to situations where foreign nationals or permanent residents seek temporary employment on the basis of an offer of employment in the territory of another member or on the basis of self-employment in the territory of that member. However, paragraph 2 of the Annex states that "the Agreement shall not apply to measures affecting natural persons seeking access to the employment market as a member …" Realistically, the two provisions are in conflict with each other. In terms of South African immigration policy, if a foreign national wishes to supply a service in South Africa, not through a commercial presence but independently, then that individual would have to apply for a work permit.[33] Work permits, such as the one applicable here, are not addressed in South Africa's existing horizontal commitments to the GATS.

Forthcoming GATS negotiations should therefor widen the scope of coverage of South Africa's GATS commitments to include work permits falling within the scope of Article I(2)(b) of the GATS.

Another critical shortfall in South Africa's existing GATS commitments is the absence of sectoral specificity in respect of commitments on market access for certain types of service suppliers, including IT specialists, professionals, engineers across the sector spectrum. There exist significant skill shortages in specific sub-sectors of the South African labour market, and these sectors have remained unbound in terms of GATS commitments.

From a policy perspective, it is paramount that the Department of Labour, Home Affairs, Trade and Industry and any other relevant Department of government, should co-ordinate a programme to identify these skill shortages and to modify policy accordingly. However, it is well-known in South Africa within the relevant sub-

[33] See Section 26(1)(b)(ii) of the Aliens Control Act.

sectors that specific skill-sets are rare and that "push factors such as emigration are exacerbating the reduction of existing skills levels. South Africa's international commitments to market access may act as an encouragement for the replacement of lost skills.

For all practical purposes therefore the existing legislative provisions dealing with business permits and work permits, interpreted and applied in isolation of the GATS, are disturbingly difficult to reconcile. Nothing in the domestic regulatory regime of South Africa clearly distinguishes between business and work within this legislative context. The status quo has therefore given rise from time to time to criminal and exclusionary sanctions applied to business permit holders who are perceived to have crossed the line into work, even where no reward for such activity has been earned for such service. It is also not self-evident as to the maximum period a foreign national may sojourn in South Africa while being in possession of a business permit. This also gives rise to a great deal of confusion on the part of immigration officials and results in a range of arbitrary decisions.

South Africa's specific GATS commitments do not to apply to skills-based employment "requiring compliance with an economic needs test." Neither have the texts of South Africa's GATS commitments nor of the provisions of the GATS itself ever been incorporated into South Africa's domestic legislation.[34] For these reasons, the domestic provisions dealing with business and study permits are not read side by side with those GATS-related provisions dealing with the same subject-matter. In other words, it seems to be the case that the domestic application of migratory

[34] In terms of section 231(4) of the Constitution of the Republic of South Africa, which states that "any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament." See, for instance, Canada, section 20(5)(b)(I) of the Immigration Regulations; Greenberg, H D, A comparative Analysis of Temporary Entry Procedures under Canadian Immigration Law: The General Agreement on Trade in Services, 1998, presented at Committee 14 Seminar, IBA, London April 1998.

controls has no correlation in any practical way with South Africa's executive commitments at the international level.

The Department of Home Affairs, vested as it is with the implementation and application of South Africa's immigration regulatory regime based on legislation, should apply the provisions of that legislation consistently with South Africa's GATS commitments. If it did then the business permit provision of South Africa's domestic legislation could be interpreted and applied precisely. In other words, a business permit would be required for

"***any foreign person ordinarily resident outside of South Africa and acquiring no remuneration from a source located within South Africa, who is engaged in activities related to representing a business enterprise, whether a provider of services or…, for the purpose of negotiating for the sale of such services or …, without engaging in making direct sales to the general public or supplying services or … directly. The temporary residence of such persons is limited to ninety days***."

Indeed, any re-draft of the current Aliens Control Act should contain the above provision.

VI ***Conclusion***