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Marion Panizzon

**Trade and Labor Migration**

GATS Mode 4 and Migration Agreements

## Dialogue on Globalization

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## Preface

Human history has always also been a history of migration. Individuals, but also entire tribes or even nations have left their homelands in search for better living conditions. Today's migration is globalized in the sense that it is an integral part of the process of global economic, social and political integration. It is often perceived as a "one way move" from developing to developed countries, but as the UNDP Human Development Report 2009 states, two thirds of the actual 200 million international migrants move from developing countries to developing countries and from developed countries to other developed countries.

Contemporary migration has not gone beyond 3% of the world population for the last couple of decades, and yet it confronts the international community with a host of policy challenges on the national, regional and international levels. It is all too often perceived in the developed world as a burden on labor markets and social systems while the demand for migrant workers is as strong as ever – 50 million migrants who live and work in irregular status are a living proof of this.

Many actors are involved in the steering of migration, first and foremost the nation states that regard the control of entry and stay of foreigners in their territory as a core responsibility and sovereign right. But the complexities of globalization render it more and more difficult to address the challenges on bilateral levels exclusively and as a result, many more actors on supranational or regional and global levels have joined in. Yet, each one of these is dealing with different aspects of this phenomenon while a comprehensive migration management strategy, which could deliver a "win-win-win" situation, is still missing. What would be the ingredients of a comprehensive strategy that would benefit, apart from the individual migrant, the sending and host societies as well?

The author of the Occasional Paper at hand, Marion Panizzon, addresses some of the main challenges in today's endeavors to steer international migration. She looks into the potential of the General Agreement on Trade in Services (GATS) of the World Trade Organization (WTO) which provide a regulatory framework for the liberalization of services, including of labor mobility ("Mode 4"). She analyses how GATS Mode 4 works technically, a much appreciated endeavor since very few people understand the scope and impact of commitments made in this mode. Finally, she calls for more openings through GATS Mode 4 that would allow not only skilled professionals to temporarily seek employment abroad but also the unskilled – these not only have the most to gain in terms of income, educational opportunities and better prospects for their children but also create broader tangible developmental effects, in particular for their home countries.

Whether GATS could play a more distinct role depends very much on the readiness of WTO Members to commit themselves on the multilateral level – it would mean that they would have to give up, to a certain extent, some of their sovereign rights to adapt their migration policy to changing realities, e.g. to open and close their labor markets solely with view to national interest. The continuing controversy between developing and mainly industrialized countries over Mode 4 commitments and the question, whether more unskilled labor could be included, does not hint into this direction.

Presently, it is rather the bilateral migration agreements that fill in for the missing regime in international migration. They at least partially deliver market access to the pool of surplus labor from developing countries and LDCs and address concerns of the receiving countries at the same time. This does not mean that the regulations at the WTO are negligible; Ms. Panizzon even sees encouraging potential in the ongoing negotiations of the “Doha Development Round”. Her analysis is showing in which direction these might go and by doing this, she is providing some food for thought concerning yet unexplored fields of global governance.

*Türkan Karakurt*

Director, Geneva Office  
Friedrich-Ebert-Stiftung

# 1 Executive Summary

While trade during the last decade has grown more quickly than international migration, both have “globalized” in the sense that no country in the world today is unaffected by migration.<sup>1</sup> Migration has become one of the key distributional issues in globalization, driven by the asymmetric allocation of labor and capital as factors of production around the globe.<sup>2</sup> In OECD countries alone, the foreign-born population has grown by about 18% since 2000, even though the old guest worker programs in Europe came to an end with the oil crises in the 1970s.<sup>3</sup> Nonetheless, in terms of stock, South-South migration is more significant, given that the largest share of migrants from developing countries, an estimated 74 million (47%), reside in other developing countries.<sup>4</sup> Even though there is still less migration movement than at the end of 19<sup>th</sup> century,<sup>5</sup> “labor migration lies at the heart of migration management today”.<sup>6</sup>

Half the world’s 200 million international migrants are economically active.<sup>7</sup> While 20-50% of the immigrants leave the destination countries within five years after arrival,<sup>8</sup> close to 5 million or 10% of Europe’s 56.1 million migrants had an irregular status in 2000.<sup>9</sup> In reaction to these challenges, migrant destination countries such as France, Spain or Switzerland in the first decade of the new millennium initiated wide-ranging immigration law reforms. These sought to shift the *ratio* of family reunification and asylum towards attracting the highly-skilled in view for countries in Europe to more effectively compete in the “global hunt for talent” alongside Australia, Canada or the US.<sup>10</sup> For managing irregular migratory flows, bilateral migration agreements were re-designed and became a contested key migration steering tool.

At the international level, frameworks for managing the accelerating, globalizing and diversifying migratory flows are few and remain highly fragmented, despite calls for more coherence.<sup>11</sup> Only a handful of international treaties govern economic migration. Those which do, for the most part, address issue areas at the fringes of economic migration, namely refugee protection in the Geneva Conven-

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1 Castles, Stephen and Mark J. Miller *The Age of Migration* (3<sup>rd</sup> edn, 2003) pp. 7-8.

2 See amongst many, Lucas, Robert E. B. “International Labor Migration in a Globalizing Economy”, Carnegie Papers, No. 92 (July 2008).

3 OECD, *International Migration Outlook 2008*, p. 24, available at: <http://www.oecd.org/dataoecd/8/55/41272281.pdf> (last accessed 10 January 2009); foreign-born population in 2006 accounted for about 12% of the total population in OECD countries an increase of 18% to 2000.

4 Ratha, Dilip and Shaw, William, ‘South-South Migration and Remittances’, World Bank Working Paper No. 102 (2007).

5 Solimano, Andres ‘International Migration and the Global Economic Order’ World Bank, Policy Research Working Paper 2720 (2001) pp. 22-23.

6 Cholewinsky, Ryszard, ‘Formulation and Management of Foreign Employment Policies in Countries of Destination’, in *IOM World Migration Report* (2008) p. 286.

7 Global Commission on International Migration (GCIM) *Migration at a Glance* (2005) p. 4; numbers for 2005.

8 OECD, *International Migration Outlook 2008*, p. 18, available at: <http://www.oecd.org/dataoecd/8/53/41272221.pdf> (last accessed 10 January 2009).

9 GCIM, 2005, op. cit.

10 See generally, Kapur, Devesh and McHale, John *Give us Your Best and Your Brightest, The Global Hunt for Talent and Its Impact on the Developing World* (2005).

11 Betts, Alexander, ‘Global Migration Governance’, Global Economic Governance (GEG) Working Paper, WP 2008/43, University College, Oxford (2008).

tions<sup>12</sup>, standardization of air travel procedures by the International Civil Aviation Organization (ICAO)<sup>13</sup> and, yet slightly more topical, human trafficking and the smuggling by land, air and sea in two protocols to the United Nations Convention against Transnational Organized Crime of 15 November 2001.<sup>14</sup>

Migration for employment is the focus of only two multilateral treaties: the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 18 December 1990, which so far has not been ratified by a single industrialized country<sup>15</sup> and WTO's General Agreement on Trade in Services (GATS). The GATS liberalizes trade in services including the temporary movement of natural persons as service suppliers. Although temporary migration under its fourth channel, called "Mode 4", has until this day remained limited in scope and impact, as it targets the skilled service supplying, temporary migrant only, its growing significance in the Doha Round of WTO trade negotiations suggests that it will play a more prominent role in the management of international migration in the future.

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12 Geneva Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150; Protocol Relating to the Status of Refugees, 4 October 1967, 606 U.N.T.S. 267, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984.

13 International Civil Aviation Organization, available at: <http://www.icao.int/>.

14 United Nations Convention against Transnational Organized Crime of 15 November 2001, UN Document A/RES/55/25 (2001), Annexes I, II and III; see also Bravo, Karen 'Free Labor! A Labor Liberalization Solution to the Modern Traffic in Humans', *Transnational Law & Contemporary Problems* (forthcoming 2009).

15 International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families of 18 December 1990 UN Doc. A/RES/45/158 (1990), ratified so far by Azerbaijan, Belize, Bolivia, Bosnia and Herzegovina, Cape Verde, Colombia, Ecuador, Egypt, El Salvador, Ghana, Guatemala, Guinea, Mali, Mexico, Morocco, Philippines, Senegal, Seychelles, Sri Lanka, Tajikistan, Uganda and Uruguay.

## 2. The “Missing Regime” for International Labor Migration

Generally speaking, most of the efforts to regulate labor migration on the global level remain in the domain of international soft law. The principles for actions and recommendations of the *Global Commission on International Migration* (GCIM) which ended its work in 2005<sup>16</sup>, the common understandings of the *International Agenda for Migration Management* (IAMM) which concluded in 2005<sup>17</sup> and the resolutions of the *UN High Level Dialogue on Migration and Development*<sup>18</sup> consolidate national and regional best practices on recruiting, admitting, integrating and readmitting migrant workers. Their contribution is to propagate a *global approach* to migration, which calls on governments to increase regional and national coherence between migration and related issue areas, such as trade, employment, development and security.

Yet, neither of these efforts has paved the way for a binding international obligation to liberalize temporary labor migration. The GCIM found in its Final Report of 2005 that international responsibility for managing migration is “diffuse” in the sense that different UN agencies and organizations each manage another aspect of migration, such as refugee protection (UNHCR) the rights of migrants (UNHCHR) and labor standards (ILO).<sup>19</sup> Only the International Organization for Migration (IOM) has a somewhat broader mandate, but as an intergovernmental agency outside the UN system, it remains captured by its member states’ interests and lacks independent enforcement mechanisms. It has gained profile by providing information and consultation to assist governments in the selection and hiring process of low-skilled migrant workers, but has no mandate beyond its technical role in steering global migration.<sup>20</sup>

In light of this situation, bilateral migration agreements are gaining an increasingly important profile among efforts to substitute for migration’s “missing international regime”.<sup>21</sup> Most migrant worker receiving countries seem to prefer such tailor-made bilateral solutions over the multilateral framework for reasons that will be explored in this paper, but only half or less of them do in fact open labor markets to foreign workers.<sup>22</sup> Their advantage is that they lend themselves to asymmetric, rather than multilateral issue linkage and that they can accommodate

**As a trade agreement bilateral migration agreements are gaining an increasingly important profile among efforts to substitute for migration’s “missing international regime”.**

16 Global Commission on International Migration, *Final Report*, Geneva (2005) p. 20.

17 IOM Geneva and Swiss Federal Office for Migration, *International Agenda for Migration Management of 2005*; the IAMM is an international reference system for migration management, reflecting common understandings, evolving international principles and national and regional best practices and summarizing the results of the inter-governmental consultative process on migration management launched in 2001 and known as the Berne Initiative.

18 UN Resolution 61/208 International Migration and Development, adopted by the 61. UN General Assembly on 20 December 2006, UN Doc. A/RES/61/208 of 6 March 2007.

19 GCIM, *Final Report* (October 2005) p. 63.

20 Nonnenmacher, Sophie, ‘Achieving Best Outcomes from Global, Regional and Bilateral Cooperation’, in *IOM World Migration Report*, IOM Geneva (2008) pp. 355-385; IOM manages migration on a “demand”-driven basis through its wide-cast network of regional offices.

21 Hollifield, James, F. ‘Migration and the ‘new’ international order: the missing regime’, in: Bismal Ghosh (ed.) *Managing Migration, Time for a New International Regime*, Oxford University Press (2003) pp. 100-101; similarly, Pritchett, Lant, Let their People Come, Breaking the Gridlock on International Labor Mobility (2006).

22 Abella, Manolo, ‘Policies and Best Practices for Management of Temporary Migration’, UN Document UN/POP/MIG/SYMP/2006/03, 9 June 2006.

both sending and receiving countries' *regulatory* concerns: labor market access can be conditioned on source country cooperation in migration prevention and control.<sup>23</sup>

Unlike bilateral migration agreements, the GATS has not been designed to regulate international migration.<sup>24</sup> As a trade agreement, its role is limited to *progressively liberalizing* the temporary movement of persons within the limited segment of service suppliers from "another" WTO Member.<sup>25</sup> Therefore, the role of GATS among the fragmented international institutions tasked with managing labor migration remains little acknowledged, despite its Mode 4 being the only *collective effort* at liberalizing skill flows at the multilateral level. In fact, as the paper will show, the potential impact of GATS in managing migration may become more significant in the future. Some degree of policy space for tailoring GATS to unleash certain development dividends associated with temporary economic migration is provided for in its scheduling structure.

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The unique opportunity for cross-modal and cross-sectoral trade-offs which WTO Members can exchange within GATS, but also the fact that openings in GATS can be conditioned on deeper or broader liberalization in other WTO agreements, lays the basis for more movement in Mode 4. Creative thinking and in-depth research on the optimal level of regulation and the target groups of migrant workers are required, if the *rule-oriented* WTO agreements should also regulate against migratory risks. Considering the potentially unrecorded Mode 4 flows, the overall impact of liberalizing labor migration under the GATS may not be so insignificant.<sup>26</sup>

23 Nielsen, Anne-Grethe, 'Cooperation Mechanisms', in Ryszard Cholewinski, Richard Perruchoud and Euan MacDonald, (eds.) *International Migration Law: Developing Paradigms and Key Challenges* (2007) pp. 405–436.

24 Amin, Mohammed and Mattoo, Aaditya, 'Does Temporary Migration have to be permanent?' World Bank Policy Research Working Paper (March 2005).

25 WTO, Council for Trade in Services, Presence of Natural Persons (Mode 4), Background Note by the Secretariat, WTO Document S/C/W/301, 15 September 2009, p. 2, a service supplier of „any other“ Member (Art. XVII) may not not be a Member's own suppliers or those of a non-Member [hereinafter WTO Document S/C/W/301].

26 Magdeleine, Joscelyn and Maurer, Andreas, 'Measuring GATS Mode 4 Trade Flows', WTO Staff Working Paper ERSD-2008-05, Geneva (2008).

# 3. Multilateralism versus Bilateralism

Although commitments under Mode 4 of GATS have doubled from 2000 to 2005, its scope in the framework of multilateral trade negotiations has generally remained limited. Attention towards Mode 4 increased when a group of developing countries and Least Developed Countries (LDCs) tabled a plurilateral request in July 2003 to call on industrialized countries to offer more development-friendly openings in Mode 4 by including also unskilled labor.<sup>27</sup> Eventually, WTO Members' in the Doha Round's July 2004 decision made a call to deliver more meaningful commitments to developing countries and LDCs in services trade including in Mode 4.

To developing countries and LDCs facing a *large pool of surplus low-skilled labor*, Mode 4 is an important issue in what is supposed to be a Development Round. Economically speaking, the development implications of more Mode 4 openings are potentially tangible, but destination countries have remained slow to deliver. One reason lies in the GATS scheduling structure, which is inadequately prepared for managing the risks associated with more cross-border movement of persons, in particular of unskilled labor. Also, the lack of clear definition of the service provider categories and the placing of the modalities for this type of labor migration under "services trade" have created incoherence with national immigration laws that are difficult to overcome. Finally, the *binding* of market access commitments on a multilateral, MFN-basis (Most-Favored-Nation clause, see p. 14) does not allow for "flexibility nor possibility for control".<sup>28</sup> Therefore, the role of GATS for managing labor migration remains narrow. Most migrant worker receiving countries prefer tailor-made bilateral solutions over the multilateral framework, but only half or less such bilateral agreements do in fact open labor markets to foreign workers.<sup>29</sup> If the GATS is to embrace its responsibility for managing the segment of labor migration it has been liberalizing, developing and industrialized countries have to gain a common understanding of its potentials to deliver gains for both sending and receiving countries. Additionally, Mode 4 has to be designed in a way that host countries' major concerns with regard to irregular entries and stays are addressed and both source and transit countries cooperate in return and readmission policies.

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27 WTO Council for Trade in Services Special Session Communication from Argentina, Bolivia, Chile, The People's Republic of China, Colombia, Dominican Republic, Egypt, Guatemala, India, Mexico, Pakistan, Peru, Philippines and Thailand, Proposed Liberalization of Mode 4 Under GATS Negotiations, WTO Document TN/S/W/14, 3 July 2003 [hereinafter WTO Document TN/S/W/14].

28 Persin, Daniela, 'Free Movement of Labour: UK Responses to the Eastern Enlargement and GATS mode 4', (2008) 42(5) *Journal of World Trade* 857.

29 Abella, Manolo, 'Policies and Best Practices for Management of Temporary Migration', UN Document UN/POP/MIG/SYMP/2006/03 9 June 2006, p. 36, finds that out of the 92 countries responding, 68 had some sort of bilateral migration agreement in place, but only 19 such agreements contained actual labor market access. For the majority of agreements, the rights of migrant workers, housing and workplace safety are the more dominant features, than liberalizing access itself.

**In terms of liberalization, however, bilateral agreements have been overrated, even if most have valuably contributed to the steering tools for migration by experimenting with a host of flanking measures to facilitate the process of migrant selection, hiring, integration, return und reintegration.**

With the exception of the non-refoulement principle in refugee law, the duty to admit those whose life and health are threatened in their home country<sup>30</sup> the WTO Members' commitments in Mode 4 of the GATS are the only binding international obligation in place to limit national sovereignty over the admission of foreigners.<sup>31</sup> At the same time, this very obligation deters typical destination countries from liberalizing temporary migration in low- and non-formally trained services occupations in the WTO.

Spearheaded by France and Spain, non-trade migration agreements have stepped into this gap. This emerging treaty law of migration manages the temporary movement of low-skilled workers. In terms of liberalization, however, bilateral agreements have been *overrated*, even if most have valuably contributed to the steering tools for migration by experimenting with a host of flanking measures to facilitate the process of migrant selection, hiring, integration, return und reintegration. In a turnaround from the *one-dimensional* focus of the old guest worker agreements, which had not addressed integration, return and reintegration, today's bilateral migration agreements are more comprehensive, as will be shown in chapter 8 below.

This paper will thus discuss the *advantages and shortcomings of GATS Mode 4* against the background of bilateral migration agreements. The goal of the analysis at hand is to suggest ways and means to overcome the fragmentation of the treaty tools for migration which today still split into bilateral agreements regulating and trade agreements, in particular Mode 4 of GATS, *liberalizing* the temporary movement of workers. Only if the regulation and liberalization of migration are integrated within a single regime will it be possible for migrant source and destination countries to truly share responsibility for migration and its root causes.

At first, the paper will situate GATS Mode 4 within the context of international institutions and norms for managing migration and seek to clarify some of the misunderstandings linked to the complex conceptualization of Mode 4 of the GATS within the WTO. Light will be shed on the *definitional ambiguities*, the structural particularities and system-inherent limitations of GATS Mode 4. An overview of Mode 4 scheduling practice will highlight the specificities surrounding WTO Members' commitments in Mode 4 and address the question of why Mode 4, in its current degree of liberalization, has failed to deliver commitments which are "meaningful" to developing countries and LDCs.

After describing the negotiating requests and statements which developing countries and LDCs have tabled in the first negotiating round of the *GATS 2000* and in the Doha negotiations on Mode 4, the paper will offer a few proposals on how, within the architectural limitations of the WTO, Mode 4 of the GATS could be

30 Art. 33:1 of the Geneva Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 150; Protocol Relating to the Status of Refugees, 4 October 1967, 606 U.N.T.S. 267 and Art. 3:1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 U.N.T.S. 85; see Chetail, Vincent, 'Freedom of Movement and Transnational Migrations: A Human Rights Perspective', in: Alexander Aleinikoff and Vincent Chetail (eds.), *Migration and International Legal Norms*, Cambridge University Press (2003) pp. 48-60.

31 Koslowski, Rey, 'Global Mobility and the Quest for an International Migration Regime', in: Joseph Chamie and Luca Dall'Oglio (eds.) *International Migration and Development Continuing the Dialogue: Legal and Policy Perspectives*, Center for Migration Studies (CMS) and International Organization for Migration (IOM) (2008) pp. 103-144.

designed to deliver for development. In this context, the paper will argue that it is strategically necessary for concluding the Doha Round to substantively interlink Mode 4 offers made by destination countries in low skills to Mode 3 offers by migrant source countries. Such a trade-off would mobilize the private sector as an actor within the broader context of temporary movement of workers.

Last, the paper will situate GATS Mode 4 within the broader context of treaties incidental to migration. Generally speaking, free trade agreements and, even more significantly, economic partnership agreements have advantages over Mode 4 of GATS, not only in terms of market access, but more importantly on migration prevention and control, which this contribution will also briefly describe. These elements can serve as regulatory and institutional “lessons” for GATS Mode 4. The *renaissance of bilateral migration agreements*, led by France’s new pacts on concerted migration management and Spain’s cooperation agreements on migration shows that the treaty tools for managing economic migration have split up along a *skills divide*. Trade agreements liberalize economic migration of the highly-skilled while bilateral migration agreements regulate labor migration of low-skilled workers in shortage occupations. There is certainly a contradiction between trade liberalization, which, in the WTO logic, is to be achieved through the MFN, and attempts at organizing migratory flows in a way that they deliver to both destination and sending countries, which usually include instruments that go against the spirit of the MFN.

To overcome this deadlock, it will be necessary to look for new regulatory solutions to interlink the multilateral, regional and bilateral levels of migration governance so as to bring about a more coherent, multilayered treaty structure. A key challenge running throughout all three layers of treaty law on migration will be to achieve an appropriate balance between migration regulation and liberalization. Not only will the scheduling structure of GATS have to be redesigned to embed regulatory obligations, but bilateral non-trade migration agreements must be structured in ways that these *complement* rather than compete with the types of labor mobility which GATS Mode 4 liberalizes and to avoid conflicts with the MFN of GATS. While trade negotiators back in 1994 had not expected extensive commitments on Mode 4 to be made, the impact of GATS in managing migration may become more significant in the future.<sup>32</sup>

**Generally speaking, free trade agreements and, even more significantly, economic partnership agreements have advantages over Mode 4 of GATS, not only in terms of market access, but more importantly on migration prevention and control.**

<sup>32</sup> Trachtman, Joel, P., *The International Law of Economic Migration: Toward the Fourth Freedom* (2009) p. 246.

# 4. How does GATS Mode 4 work?

**To the extent to which WTO Members have made commitments in Mode 4, the GATS liberalizes the temporary movement of services-related migrant labor. In terms of scope, GATS applies only to natural persons who move abroad to supply a service.**

GATS is one of the pillars of the WTO, alongside with the General Agreement on Tariffs and Trade (GATT) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Among the four modes of service supply defined by Article 1 § 2 lit. a–d of GATS, replicated in Table 1 below, the temporary movement of natural persons figures as the fourth mode (Art. 1 § 2 lit. d GATS), therefore the label “GATS Mode 4”. To the extent to which WTO Members have made commitments in Mode 4, the GATS liberalizes the temporary movement of services-related migrant labor. In terms of *scope*, GATS applies only to natural persons who move abroad to supply a service, as shown in Table 1 below. They can be either *self-employed or employees* of a foreign employer. Persons seeking employment and labor associated with the production of goods, such as manufacturing or agricultural work are excluded. Only the *temporary*, but not the permanent movement of service suppliers is liberalized in GATS. Neither the text of GATS nor of its Annex on the Temporary Movement of Natural Persons (Annex MONP) defines the duration of stay.<sup>33</sup> The Scheduling Guidelines of 2001 specify however, that each Member should identify in its schedule of commitments the permitted length of stay for the categories of persons included therein and WTO Members in July 2008 signaled their preparedness to agree on a common definition of the duration of stay.<sup>34</sup> Under the *positive listing* approach of GATS, market access is liberalized and national treatment granted only to the extent to which WTO Members have entered commitments into their Schedule.<sup>35</sup> Unlike for trade in goods, market access (Art. XVI) and national treatment (Art. XVII) are conditional in GATS, but commitments are binding upon WTO Members (Art. XX GATS).<sup>36</sup>

Levels of liberalization obtained for Mode 4 of the GATS are quite low and account for only 0–4% of all GATS commitments to date. Mode 4 flows stand at less than 5% of world services trade<sup>37</sup>, compared to 55–60% of worldwide services delivered by Mode 3 (commercial presence), 25–30% by Mode 1 (cross-border supply) and 10–15% by Mode 2 (consumption abroad).<sup>38</sup> Hufbauer and Stephenson, who apply

33 Paragraph 2 of the Annex MONP.

34 WTO Document S/L/92, Scheduling Guidelines, of 28 March 2001, para. 34; see also WTO Document S/C/W/301 5, 23-24; ICTs usually have a permission to stay for 2-5 years; EMS between 1-4 years; BVs, CSS and IPs usually 90 days per year with possibility of renewal; for IPs duration of stay is very variable and can be up to 3-5 years in certain WTO Members. Those WTO Members using the category of „others“, have usually not specified the permitted length of stay.

35 Trachtman (2009) p. 246 describes the liberalization of mode 4 flows through GATS commitments as: “unless a Member has committed to liberalizing the temporary movement of services-related migrant labor there is no market access for service supplying persons.”

36 Molinuevo, Martin, ‘Article XX GATS’, in Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäggle (eds.) *WTO – Trade in Services, Max Plank Commentary on WTO Law* (2008) pp. 445-463; if a WTO Member decides to modify, i.e. to re-introduce a barrier to market access or to retract the commitment, it must compensate on an MFN-basis to all other WTO Members by offering to take a commitment in another sector or mode of supply (Art. XXI GATS), unless the modification has a trade-neutral or more favorable effect on trade.

37 Magdeleine, Joscelyn and Maurer, Andreas, ‘Measuring GATS Mode 4 Trade Flows’, WTO Staff Working Paper ERSD-2008-05 (2008) p. 18.

38 Maurer, Andreas and Chauvet, Philippe, ‘The Magnitude of flows of global trade in services’, in: Bernard Hoekman, Aaditya Mattoo and Philipp English (eds.) *Development, Trade and the WTO, A Handbook* (2002) pp. 235–246.

this figure to the trade data for 2008, find that Mode 4 trade would amount to US\$ 70–150 billion annually.<sup>39</sup> The WTO Secretariat’s “very rough estimate” is to indicate Mode 4 trade at “around US\$ 150–200 billion.<sup>40</sup> Sauvé gives somewhat higher numbers by calculating that in 2006 total world trade in goods and services was at US\$14,470 billion of which services supplied by natural persons moving across borders accounted for US\$ 2.710 billion that same year.<sup>41</sup>

Within the multilateral trading regime of the WTO, GATS strives to reduce barriers to cross-border trade in services. In contrast to GATT which prohibits the use of quotas and calls on tariff reductions, GATS progressively achieves higher levels of liberalization through “commitments”. Technically this occurs by each of the 153 WTO Members entering into a commitment for each of the four different modes of service supply defined in Art. 1 into its own “schedule of commitments”, which are, structurally, an integral element of the GATS of 24 April 1994.<sup>42</sup> In their commitments, WTO Members pledge to eliminate certain market access barriers for foreign services and service providers.

Typical border barriers in Mode 4 are visas, while common behind-the-border regulations are *qualification* requirements, licenses or *limitations on foreign ownership*. Commitments thus provide for the actual level of access to another WTO Member’s services markets and determine to which degree that foreign national will be treated equally or more favorably to a domestic worker in services. A “market access” commitment indicates the type of services sectors a Member is opening to foreign competition (banks, insurance, tourism, construction) and how much market access it is offering. Art. XVI of GATS states that a market access commitment can be conditioned on authorization requirements or quantitative restrictions.<sup>43</sup> A “national treatment” commitment defines how equally a foreign service-supplier will be treated in comparison to a national provider of the “same” services. Commitments can be made for individual services sectors (*specific* commitments) or across the board for all sectors (*horizontal* commitments).

In most WTO Members’ schedules of GATS commitments, Mode 4 openings are scheduled horizontally, meaning that they apply to all services sectors. Commitments are binding upon WTO Members pursuant to Art. XX GATS.<sup>44</sup> If a WTO Member decides to modify, i.e. to re-introduce a barrier to market access or to retract the commitment, it must compensate on a most favored nation-basis all other WTO Members by offering to take a commitment in another sector or mode of supply (Art. XXI GATS), unless the modification has a trade-neutral or more favorable effect on trade.

**Within the multilateral trading regime of the WTO, GATS strives to reduce barriers to cross-border trade in services. In contrast to GATT which prohibits the use of quotas and calls on tariff reductions, GATS progressively achieves higher levels of liberalization through “commitments”.**

39 Hufbauer, Gary and Stephenson, Shiry, ‘Increasing Labor Mobility: Options for Developing Countries’ (forthcoming, World Bank, 2010) p. 7.

40 WTO Document S/C/W/301, p. 9.

41 Sauvé, Pierre, ‘Fostering Trade through Public-Private Dialogue, Moving Goods, Services and People across Borders, Part II-Temporary Labor Mobility,’ International Trade Center UNCTAD/WTO (2008) p. 6.

42 Roy, Martin, ‘Endowments, Power and Democracy: Political Economy of Multilateral Commitments on Trade in Services’, WTO Staff Working Paper ERSD-2009-07 (September 2009)

43 Delimatsis, Panagiotis and Molinuevo, Martin, ‘Article XVI GATS’, in: Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds.) *WTO – Trade in Services, Max Planck Commentary on WTO Law, Vol. 6* (2008) pp. 367–395.

44 Molinuevo, Martin, ‘Article XX GATS’, in: Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds.) *WTO – Trade in Services, Max Planck Commentary on WTO Law, Vol. 6* (2008) pp. 445–463.

**To the detriment of developing countries, labor receiving WTO Members have used this in-built flexibility to protect their domestic workforce from competition through foreign workers.**

While WTO Members are required by Art. XIX and XX of GATS to liberalize access to their services markets, they retain the *flexibility* not to open certain services sectors or to limit, qualify and condition such access. To the detriment of developing countries, labor receiving WTO Members have used this in-built flexibility to protect their domestic workforce from competition through foreign workers. Inversely, developing countries and LDCs benefit from the flexibility not to open certain sectors, to protect their *infant services* industries, such as investment banking. The principle of most favored nation (MFN) treatment requires that any market access or national treatment offered to another Member must be “immediately” extended to all other WTO Members. True to its foundational nature, the MFN obligation applies “*unconditionally*”, i.e. regardless of whether a WTO Member has listed market access or national treatment in its schedule of GATS commitments or whether it has offered such favorable treatment in the context of a bilateral agreement or elsewhere.

Consequently, if France or Spain offer access quotas for citizens from West African countries to supply services in France and Spain and fail to extend this treatment to the entire WTO Membership, such preferential treatment runs the risk of violating the MFN clause of GATS. Only if an original WTO Member scheduled an exemption from the MFN obligation in 1994, can it justify deviating from this fundamental WTO principle of non-discrimination. Despite having run out “in principle” by the year 2004, the exemptions continue to be validated.<sup>43</sup> As MFN treatment must be “unconditionally” granted, no Member is allowed to *qualify* its Mode 4 opening by requiring another WTO Member to sign onto a bilateral migration agreement in return. It is also questionable whether a WTO Member hosting Mode 4 service providers could require the sending WTO Member to guarantee that its providers will return home voluntarily by the end of their services contract.

**Economically speaking, the low levels of GATS Mode 4 are a paradox, as ageing populations in Europe and the US in the future will come to rely even more on migrant labor in non-outsourcable services.**

Economically speaking, the low levels of GATS Mode 4 are a paradox, as ageing populations in Europe and the US in the future will come to rely even more on migrant labor in non-outsourcable services.<sup>46</sup> In addition, forecasted welfare gains from liberalizing temporary migration may significantly exceed those accruing from completing the liberalization of cross-border trade in goods and services. Recent figures reveal that if industrialized countries increase entry quotas for workers from developing countries by 3%, annual *welfare gains* would reach USD 156 billion that is 0.6% of world income.<sup>47</sup> There is some movement on the Mode 4 front, as a near *doubling of the share of Mode 4* in world services trade has been observed in recent years,<sup>48</sup> which quasi ‘matches’ the forecasted doubling of welfare gains (USD 356 billion) predicted to arise by 2025, if develop-

45 Adlung, Rudolf and Carzaniga, Antonia, ‘MFN Exemptions Under the General Agreement on Trade in Services: Grandfathers Striving for Immortality?’ 12(2) *Journal of International Economic Law* (2009) pp. 357–392.

46 Commission of the European Communities, COM (2005) 330 final, Communication from the Commission to the Council and the European Parliament Common Actions for Growth and Employment: The Community Lisbon Programme, Brussels, 20.7.2005, OJ C/2005/236/10 of 24.9.2005.

47 Winters et al. (2003) pp. 1137–1162; World Bank, *Global Economic Prospects* (2006): If temporary workers admitted for work in developed economies were increased by 3%, gains forecasted by Winters et al., in 2003 were put at \$156 billion of world income, while the World Bank in 2006 estimated gains in the height of \$356 billion.

48 Cali, Massimiliano, ‘Liberalizing Mode 4 Trade: What impact on exporting countries’, presentation at the WTO Symposium, Mode 4 of the GATS: Taking stock and moving forward, WTO, Geneva 22–23 September 2008.

ing country migration equals 3% of industrialized country labor force.<sup>49</sup> The trend towards deeper and broader openings in Mode 4 could, theoretically, be expected to continue, not only in light of the ongoing demographic transitions, but also as a result of the ‘global hunt’ for talents in OECD and emerging countries.<sup>50</sup>

In its current format, however, the scheduling structure of GATS commitments is too technical, the scope of application for Mode 4 exceedingly *ambiguous* and the limitations and exemptions therein insufficiently defined, as Table 1 exemplifies. Due to such *technicalities* and definitional shortcomings, domestic immigration authorities have often misunderstood GATS Mode 4, so that in consequence GATS Mode 4 remains an underused channel for liberalizing temporary mobility. For the Doha Round in services to conclude on a win-win situation in Mode 4, it will be necessary to tailor the GATS scheduling structure so that regulatory obligations to reduce the risk of skill depletion to migrant source countries can be accommodated as well as a principle of shared responsibility with respect to migrant overstays. For stepping up the profile of Mode 4 governments will first have to increase the internal policy coherence among trade, development and immigration policies, pursuant to the whole-of-government approach.<sup>51</sup>

**In its current format, however, the scheduling structure of GATS commitments is too technical, the scope of application for Mode 4 exceedingly ambiguous and the limitations and exemptions therein insufficiently defined.**

Table 1:

**GATS Article 1:2(d) and Annex on the Temporary Movement of Service Suppliers**

<p><b>Article I Scope and Definition</b></p> <ol style="list-style-type: none"> <li>1. This Agreement applies to measures by Members affecting trade in services.</li> <li>2. For the purpose of this Agreement, trade in services is defined as the supply of a service:             <ol style="list-style-type: none"> <li>(a) from the territory of one Member into the territory of any other Member;</li> <li>(b) in the territory of one Member to the service consumer of any other Member;</li> <li>(c) by a service supplier of one Member, through commercial presence in the territory of any other Member;</li> <li>(d) by a service supplier of one Member, through the presence of natural persons of a Member in the territory of any other Member.</li> </ol> </li> </ol> <p><b>Annex on Movement of Natural Persons Supplying Services under the Agreement</b></p> <ol style="list-style-type: none"> <li>1. This Annex applies to measures affecting natural persons who are service suppliers of a Member, and natural persons of a Member who are employed by a service supplier of a Member, in respect of the supply of a service.</li> <li>2. The Agreement 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.</li> <li>3. In accordance with Parts III and IV of the Agreement, Members may negotiate specific commitments applying to the movement of all categories of natural persons supplying services under the Agreement. Natural persons covered by a specific commitment shall be allowed to supply the service in accordance with the terms of that commitment.</li> <li>4. The Agreement shall not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment.</li> </ol>
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49 The World Bank, *Global Economic Prospects* (2006).

50 Delimatsis, Panagiotis, Diebold, Nicolas F., Molinuevo, Martin, Panizzon, Marion and Sauv e, Pierre, ‘Developing Trade Rules for Services: A Case of Fragmented Coherence?’, NCCR Trade Regulation Working Paper No. 38.

51 Global Commission on International Migration, *Final Report* (2005) pp. 65–73.

# 5. GATS Mode 4 in practice: the preference for skilled labor in services

To the disadvantage of developing countries and LDCs, which are facing poverty challenges linked with surplus labor in low skills, statistics show that Mode 4 commitments are upwardly biased in terms of skill levels. They predominantly target highly-skilled professionals: Intra-corporate transferees account for the largest share (43%) of commitments in Mode 4, followed closely by business visitors (24%) and the category of executives, managers and specialists (“E, M, S”) setting up commercial presence (Mode 3) accounting for 25% of commitments made. The rest is divided up between contractual service suppliers (4%) and the “other” category of Mode 4 commitments,<sup>52</sup> comprising service providers, who can range from anything like skilled, but non-formally trained persons, such as fashion models, sportspersons and artists, to non-formally trained, low-skilled employees in low-paid “Mc Jobs”.<sup>53</sup>

**WTO Members are encouraged pursuant to paragraph 3 of the Annex MONP to offer openings in all four modes of service supply.**

WTO Members are encouraged pursuant to paragraph 3 of the Annex MONP to offer openings in all four modes of service supply. Nonetheless, Mode 4 of GATS is the only mode where WTO Members have “avoided comprehensive commitments”.<sup>54</sup> Firstly, only 121 out of the 153 WTO Members have entered horizontal commitments in Mode 4, a fact to which the frequent use of the wording “*unbound*”, which stands for “no opening” testifies. Secondly, *partial commitments* (“unbound, except for”) abound in most WTO Members’ Mode 4 schedules. Thirdly, WTO Members have offered commitments at “lower levels of liberalization than those applied in practice”.<sup>55</sup> Fourthly, most WTO Members have preferred horizontal over specific scheduling in Mode 4, so as to avoid having to be “specific with regards to sectoral needs and requirements”.<sup>56</sup>

The advantage of partial commitments is to start out from a closed market. The non-opening is then “qualified” by the formula “except for” which indicates that partial market access is granted to select categories of natural persons.<sup>57</sup> Blanket referencing, often comes with partial commitments. It is indicated by formulas

52 Mamdouh, Hamid, ‘Mode 4 –Definition, commitments, state of play in the negotiations,’ presentation prepared for the WTO Symposium *Mode 4 of the GATS, Taking stock and moving forward*, WTO, 22–23 September 2008.

53 US Bureau of Labor Statistics, *Occupational Outlook Handbook (2008-09): services occupations* are defined as: food service workers; security guards; janitors, cleaners and gardeners; home health and nursing aides, dental assistants child care workers; (non-farm) animal caretakers, personal appearance and recreation occupations, baggage porters, concierges, laundry and dry cleaning workers, bartenders, cooks, hairdressers and cosmetologists and motion picture projectionists.

54 WTO Document S/C/W/75.

55 Self, Richard and Zutschi, BK ‘Mode 4: Negotiating Challenges and Opportunities’, in: Aaditya Mattoo and Antonia Carzaniga (eds) *Moving People to Deliver Services*, World Bank (2003) pp. 53-54.

56 WTO Document S/C/W/301, pp. 20, 22; Chanda, Rupa, ‘Mobility of Less-Skilled Workers under Bilateral Agreements: Lessons for the GATS’, 43(3) *Journal of World Trade* (2009) p. 480; Roy (2009) p. 4; Trachtman (2009) pp. 247; 250 often quoted is the example of the US 65’000 H1-B visa entries per year, the only mode 4 entry the US grants. The US does so under its *horizontal commitment* in mode 4, while its sector specific mode 4 commitments only but reduces this market access.

57 Carzaniga, Antonia, ‘The GATS Mode 4, and Patterns of Commitments’, in: Aaditya Mattoo and Antonia Carzaniga (eds), *Moving People to Deliver Services*, World Bank (2003) p. 24; since partial commitments depart from a non-opening rather than the assumption of full liberalization, they turn the positive listing of GATS upside down and bring Mode 4 scheduling closer to negative listing.

like: “as provided in ... law” or “pursuant to the laws and regulations” and serves to obfuscate the actual value of an opening, as reference to national law is so general that it fails to inform the foreign supplier about the actual level of market access.<sup>58</sup>

To further reduce the number of low-skilled persons moving under Mode 4, most WTO Members have introduced four types of barriers in their scheduling practices described below in more detail<sup>59</sup>: linking Mode 4 commitments to Mode 3, using the flexibility to attach conditions, qualifications and limitations to market access (Art. XVI), requiring *wage parity* in national treatment (Art. XVII) and excluding developing countries and LDCs from mutual recognition agreements (Art. VII).

## 5.1 Linking Mode 4 to Mode 3: Foreign Capital as Collateral

Over 60% of all commitments in Mode 4 are “adjunct to foreign direct investment”,<sup>60</sup> meaning that they are conditioned to the commercial presence of a foreign service supplier (usually a juridical person) under Mode 3. This linkage ensures that the temporary movement of labor is complemented by the parallel inflow of foreign capital. The taxes a foreign investor pays or the employment it creates in the host country acts as “collateral”—the capital offsets for what a Mode 4 service supplier may cost the host country’s public welfare system. A further advantage of the Mode 4-Mode 3 linkage is that the foreign service supplier will monitor its foreign employees against overstaying their visas. Incidentally most Mode 4 commitments concentrate on such “immigration risk-free” categories, which come with a link to Mode 3, such as intra-corporate transferees, business visitors, executives, managers and specialists.

The Mode 3–Mode 4 linkage *de facto* discriminates against service-supplying persons from developing countries and LDCs, since only but a handful of companies domiciled in developing countries are globally active enough to benefit from a Mode 4 commitment to transfer employees. As Trachtman (2009) notes, “the requirement of a mode 3 linkage limits availability to developing countries, which are generally capital importing rather than exporting countries.”<sup>61</sup> Incidentally, the plurilateral request in Mode 4 has criticized this “asymmetrical absence of commitments for categories of personnel de-linked from commercial presence”.<sup>62</sup> After Hong Kong, it seems that some industrialized WTO Members agreed to grant more openings for CSS and IPs, which are categories *de-linked* from commercial presence.<sup>63</sup> A less frequently used but emerging cross-modal linkage is being es-

**A further advantage of the Mode 4-Mode 3 linkage is that the foreign service supplier will monitor its foreign employees against overstaying their visas.**

58 Mamdouh (2008); see also WTO Document S/C/W/75, p. 12.

59 Chanda, Rupa, ‘Low-skilled workers and bilateral, regional, and unilateral initiatives: Lessons for the GATS Mode 4 negotiations and other agreements’, in: United Nations Development Programme (UNDP) Report (2008) p. 6.

60 Sands, Oonagh, ‘Temporary Movement of Labor Fuels GATS Debate’, Migration Policy Institute (June 2004).

61 Trachtman (2009) p. 243.

62 WTO Document TN/S/W/14.

63 WTO, Council for Trade in Services Special Session, Report by the Chairman, Elements required for the Completion of the Services Negotiations, WTO Document TN/S/33 of 26 May 2008 6, 22 [hereinafter WTO Document TN/S/33].

tablished between Mode 4 and Mode 2 (consumption abroad). To protect domestic tour operators, Switzerland is considering granting market access to foreign tour guides only if they cater to tourist groups from their own country, such as Indian tourist guides guiding Indian tourist groups in Switzerland.

## 5.2 National Treatment: Preventing Social Dumping or Minimizing Competitive Wages?

**GATS provides for certain flexibility to treat foreign services or service suppliers differently than a domestic one (Art. XVII). To the detriment of developing countries, labor receiving WTO Members have used this in-built flexibility to protect their domestic workforce from competition in terms of wages.**

Limiting the comparative advantage of a developing country's workforce in terms of wages is another recurrent scheduling pattern. GATS provides for certain *flexibility* to treat foreign services or service suppliers differently than a domestic one (Art. XVII).<sup>64</sup> To the detriment of developing countries, labor receiving WTO Members have used this in-built flexibility to protect their domestic workforce from competition in terms of wages. 50 WTO Members have qualified their national treatment obligations by introducing such *wage parity* requirements and requiring qualifications of professional or *linguistic proficiency*.<sup>65</sup> Like any trade remedy, wage parity, guards against unfair trade in labor services,<sup>66</sup> in this case, "face-to-face social dumping".<sup>67</sup> However, wage parity is often driven by the protectionist motive to curb adjustment costs of globalization to the domestic workforce.<sup>68</sup> In that case, they minimize the "key ability of developing countries to tap a competitive advantage in WTO services" trade.<sup>69</sup> Qualification requirements do not have to be scheduled as limitations on market access or national treatment under GATS law, unless they are "intended to implement restrictions affecting market access or national treatment". Nonetheless they must pass the test of due process, transparency and good regulation under Art. VII GATS.

Other frequent national treatment limitations in Mode 4 pertain to: geographical mobility, employer-switching and social security portability, eligibility for welfare benefits (e.g. social security, unemployment insurance and pension funds) and for educational grants, discriminatory linguistic requirements, recognition of diplomas, professional qualifications, training requirements, subsidies and other fiscal measures, prohibitions on land/property ownership, nationality and residency requirements (Mode 3). The requirement for executives, managers and specialists moving under Mode 4 to *train local staff* is a condition, which predominantly figures in the Mode 4 entries of African and Latin American WTO Members. It is perhaps the single most important contribution Mode 4 can make to development cooperation.<sup>70</sup>

64 In GATT, unlike in GATS, the national treatment obligation is unconditional. "like products" imported from another WTO Member must be treated "no less favourably" than domestic ones; see Krajewski, Markus and Engelke, Maika, „Article XVII“, in: in R. Wolfrum, P.-T. Stoll and C. Feinäugle (eds.), *WTO-Trade in Services: Max-Planck Commentaries on World Trade Law*, Vol. 6, Brill Publishers (2008) pp. 396–420.

65 WTO, Committee on Trade and Development. Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions, Note by Secretariat, Revision, WTO Document WT/COMTD/W/77/Rev.121, September 2001, p. 91.

66 Trachtman (2009) p. 250.

67 Betts, Alexander and Kalypso Nicolaidis, "The Trade and Migration Linkage: GATS Mode IV", memo prepared for the Global Trade Ethics Conference, presented at Princeton University, 19 February 2009

68 Martin, Philipp, 'Managing Labor Migration: Temporary Worker Programs for the 21st Century', International Institute for Labor Studies (2003); see also WTO Document S/C/W/301, p. 14.

69 Sands (2004) op. cit.

70 WTO Document S/C/W/75, pp. 12-15; other frequent national treatment limitations in Mode 4 pertain to: geographical mobility, employer-switching and social security portability, eligibility for welfare benefits (e.g. social security, unemployment insurance and pension funds) and for educational grants, discriminatory linguistic requirements, recognition of diplomas, professional qualifications, training requirements, subsidies and other fiscal measures, prohibitions on land/property ownership, nationality and residency requirements (Mode 3).

### 5.3 Market Access Limitations: Border measures protecting the domestic workforce

Currently there are 100 cases of *authorization* requirements, including visa and work permits, biometric assessments, but also pre-employment requirements (whereby a potential Mode 4 worker must demonstrate previous work experience in a home country company for a minimum duration) in GATS schedules. 80 market access limitations (Art. XVI) evaluate case-by-case the domestic labor market needs in relation to the individual applicant's profession, skill or occupation, so-called economic necessity tests (ENTs).<sup>71</sup> India suggested that fewer occupational categories should be controlled by such tests. At the Hong Kong Ministerial, WTO Members agreed that non-discriminatory and objective criteria ought to be scheduled indicating why an ENT is justified.<sup>72</sup> Members also agreed that longer periods of stay and visa renewal procedures should be offered, while *excessive formalities* relating to visas or renewals should be eliminated. It was equally proposed to reduce the requirement of pre-employment training to a minimum period, which ought to be specified in the schedule.<sup>73</sup>

### 5.4 Club Mentality of Mutual Recognition Agreements: Implicit barrier to Mode 4

WTO Members are encouraged (Art. VII GATS) but not required to mutually recognize each other's systems of education, vocational and professional training nor to accredit each other's licenses, certifications and professional qualifications.<sup>74</sup> In practice, similarly situated WTO Members, mostly industrialized countries conclude *mutual recognition agreements* (MRAs), which, for the most part, exclude developing countries. Because they cannot get their qualifications *accredited*, lower-skilled service suppliers run the risk of being either excluded from market access under Mode 4 all together or are prevented to practice their learned professions. Developing countries, which rely on economic migration for development gains are most negatively affected by this club attitude. "Brain waste" has negative effects on human capital development, not least because countries of origin are discouraged to spend more on education. For example, doctors in the Philippines retrain to become nurses, for whom there is more demand on industrialized countries' labor markets than there is for doctors.<sup>75</sup> A difficulty inherent in liberalizing low-skilled labor, which also MRAs cannot remedy is that most often, the paperwork to document non-formal, artisanal training is usually unavailable in LDCs. For these jobs an "actual demonstration of work quality" may be the only means of judging competence,<sup>76</sup> even if skill-testing is more costly than concluding an MRA.<sup>77</sup>

**In practice, similarly situated WTO Members, mostly industrialized countries conclude mutual recognition agreements (MRAs), which, for the most part, exclude developing countries.**

71 WTO Document S/C/W/75 pp. 14.

72 WTO, Council for Trade in Services, Special Session, Communication from India, Proposed Liberalisation of Movement of Professionals under General Agreement on Trade in Services (GATS) WTO Document S/CSS/W/12, 24 November 2000 [hereinafter WTO Document S/CSS/W/12], a "Reference Paper on Use of ENT" was proposed.

73 WTO, Council for Trade in Services, Special Session, Report by the Chairman to the Trade Negotiations Committee, WTO Document TN/S/23, 28 November 2005 23 [hereinafter WTO Document TN/S/23].

74 WTO Document S/C/W/301 p. 19, „MRAs mostly involve neighbouring (developed) countries, partners of broader integration initiatives, or countries with former colonial or linguistic ties.“

75 UNCTAD, The Least Developed Countries Report (2007) p. 143.

76 Varma, Sabrina, 'Facilitating temporary labor mobility in African LDCs' ICTSD Programme on Trade and Services and Sustainable Development Series, Issue Paper 10 (2009).

77 Chanda (2004) p. 12.

Bilateral migration agreements have been experimenting with *skill-testing* as an alternative to mutual recognition. Spain's cooperation agreement on migration with Ecuador has set up a Technical Unit for the Selection of Migrant Workers (UTSTM), run jointly with the government of Ecuador and the regional IOM office in Ecuador.<sup>78</sup> Similarly, the Migration Information and Management Centre in Mali (CIGEM), co-funded by the EU, should provide for such skill testing, training and pre-departure information in view to facilitate the movement of workers within African countries and to the EU.<sup>79</sup> Alternatively to individualized, *ad hoc* skill-testing, the abovementioned EU ROAME project requires (West) African countries to standardize their nomenclature for professions. This repertory, the ROAME (Répertoire Opérationnel Africain des Métiers et des Emplois) may eventually be approximated to EU job descriptions and thus become the nucleus of a future MRA.<sup>80</sup> In the GATS 2000 negotiations, India was joined by the plurilateral request of 2003 lodged by Argentina, Bolivia, Chile, China, Colombia, Dominican Republic, Egypt, Guatemala, India, Mexico, Pakistan, Peru, the Philippines and Thailand,<sup>81</sup> which suggested making better use of domestic regulation (Art. VI) and transparency requirements (Art. III) to ensure that potentially interested countries obtain in-advance information about a projected MRA. In preparation for the Hong Kong Ministerial, Members made a further step towards agreeing to schedule mutual recognition as a "regulatory obligation" under the heading of "additional commitments".<sup>82</sup>

## 5.5 Doha negotiations for more "meaningful" Mode 4

**Developing countries, in contrast, have a higher interest in exporting and less so in importing low-skilled labor, so that reciprocal trade liberalization is difficult to achieve in Mode 4.**

Global demand is not equal for all types of labor; while it is acute for the "best and the brightest", the same is not true for low-skill labor for which there is a buoyant offer, but less demand.<sup>83</sup> Developing countries, in contrast, have a higher interest in exporting and less so in importing low-skilled labor, so that reciprocal trade liberalization is difficult to achieve in Mode 4. Given this "*dual policy paradox*" between trade in goods and services on the one hand and labor migration on the other hand, countries are more reluctant to open their labor and services markets, at least for the unskilled on a reciprocal basis, than they are when trade in goods is at stake.<sup>84</sup> This equation unfortunately still holds true despite welfare gains forecasted from liberalizing temporary migration predicted to significantly exceed those from completing the liberalization of cross-border trade in goods and services.<sup>85</sup> In consequence, when Mode 4 is on the negotiation table, WTO Members should be prepared to offer a wider bargaining ground, so as to increase the possibility for cross-modal and cross-sectoral trade-offs in GATS. Tariff reductions

78 Friedman, Uri and David Zafar Ahmed, 'Ensuring Temporariness: Mechanisms to Incentivise Return Migration in the context of GATS mode 4 and least developed country interests', Global Economic Issues Publication, Quaker United Nations (June 2008) pp. 8-12; Chanda (2008) pp. 9-11.

79 Migration Information and Management Center (CIGEM), available at: [http://ec.europa.eu/europeaid/where/acp/country-cooperation/mali/documents/cigem\\_press\\_pack\\_en.pdf](http://ec.europa.eu/europeaid/where/acp/country-cooperation/mali/documents/cigem_press_pack_en.pdf).

80 Partnership for Managing Professional Migration EU-Benin, Cameroon, Mali, Senegal: <http://www.migrationsprofessionnelles.net/spip.php?rubrique67>.

81 WTO Document TN/S/W/14 (plurilateral request); WTO Document S/CSS/W/12 (Communication by India).

82 WTO Document TN/S/23, p. 23.

83 See generally, Kapur, Devesh, and John McHale, *Give us Your Best and Your Brightest, The Global Hunt for Talent and Its Impact on the Developing World* (2005).

84 Hatton, Timothy J. and Williamson, Jeffrey G., 'A Dual Policy Paradox: Why Have Trade and Immigration Policies Always Differed in Labor-Scarce Economies', NBER Working Paper No. 11866 (2005).

85 Winters et al. (2003) pp. 1137-1162; World Bank, *Global Economic Prospects* (2006).

for goods in GATT or higher levels of intellectual property protection in TRIPS could also contribute to striking a meaningful deal in Mode 4.

The GATS calls on WTO Members to *progressively achieve higher levels of liberalization* (Art. XIX:1 GATS). This in-built negotiating mandate commits WTO Members to enter into successive rounds of negotiations. The first such round, the GATS 2000 negotiations, began in January 2000 and became operational once the Guidelines and Procedures for the Negotiations for Trade in Services were adopted in March 2001. The Doha Ministerial Declaration of 14 November 2001 in § 15 integrated the GATS 2000 negotiations into the Doha Round.<sup>86</sup> It was not until the Hong Kong Ministerial, by the end of which the July 2004 Package was adopted, that initial offers in GATS were substantially revised and the services negotiations “resuscitated”. Up to that point, India had been the main sponsor of proposals on Mode 4.<sup>87</sup> In 2006, a *plurilateral request / offer process* was started for Mode 4 through the submission in 2003 of the collective request lodged by Argentina, Bolivia, Chile, China, Colombia, Dominican Republic, Egypt, Guatemala, India, Mexico, Pakistan, Peru, the Philippines and Thailand.<sup>88</sup> Two rounds of plurilateral negotiations were conducted in early 2006, based on 21 collective requests that were formulated mostly along sector lines.

Most developing countries and LDCs have articulated an *offensive agenda* in Mode 4 negotiations under the Doha Round. In parallel, only but few labor receiving WTO Members have reciprocated by tabling matching offers. The *Special and Differential Treatment (SDT)* obligation of GATS (Articles IV and XIX:2 GATS) offers flexibility to developing countries and LDCs to open fewer sectors and to liberalize fewer types of transactions. It thus asymmetrically relaxes the obligation to reach progressively higher levels of market access in services for these countries. Inversely, developing countries and LDCs are not asked to reciprocate offers in Mode 4 by taking commitments in sectors or modes of interest to industrialized countries. In the Doha Agenda’s July 2004 work program decision WTO Membership formalized such *asymmetric liberalization strategy*<sup>89</sup> by stating that “Members shall aim to achieve progressively higher levels of liberalization with no *a priori* exclusion of any service sector or mode of supply and shall give special attention to sectors and modes of supply of export interest to developing countries. Members note the interest of developing countries as well as other Members in Mode 4”.

Under the terms of the July 2004 Package’s recommendation on services trade, industrialized countries are not entitled to expect reciprocation by developing countries and LDCs. Neither could they count on labor sending WTO Members to guarantee the timely and orderly return of these workers, since GATS lacks a regulatory mandate on this issue. The Special and Differential Treatment provisions are partially to blame for this asymmetric stand-off.<sup>90</sup> As a result, instead of

**Under the terms of the July 2004 Package’s recommendation on services trade, industrialized countries are not entitled to expect reciprocation by developing countries and LDCs.**

<sup>86</sup> WTO, Ministerial Declaration adopted on 14 November 2001, WTO Document WT/MIN(01)/DEC/1 20 November 2001.

<sup>87</sup> WTO Document S/CSS/W/12

<sup>88</sup> WTO Document TN/S/W/14.

<sup>89</sup> Annex C, Recommendations of the Special Session of the Council for Trade in Services, Doha Work Programme, Decision adopted by the General Council on 1 August 2004 (“July 2004 Package”) WTO Document, WT/L/579, 2 August 2004.

<sup>90</sup> Winters, L.Allan, ‘Developing Country Proposals for the Liberalization of Movements of Natural Service Suppliers’, Working Paper T8, Sussex Centre for Migration Research (2005); WTO Committee on Trade and Development, Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions, Note by Secretariat, WTO Document WT/COMTD/W/77, 25 October 2000.

unblocking Mode 4 negotiations, the July Package's recommendations thus came to deadlock progressive liberalization in all modes of service supply or what was supposed to be Doha's key contribution towards a development-friendly Round for services trade.<sup>91</sup>

In May 2008, it was still unclear whether services would be included in the mini-Ministerial of July 2008.<sup>92</sup> On the table were offers creating a "framework" or "model" horizontal commitment for Mode 4.<sup>93</sup> Out of the 70 offers proposing improvements in Mode 4, 30 are on horizontal commitments.<sup>94</sup> Horizontal improvements were usually limited to "*technical improvements*", such as providing for automatic visa renewals or multiple entry visas, to extend durations of stay and to eliminate limitations on geographic mobility. A new type of "*institutional commitment*", however, was introduced, which replicates the lessons of bilateral migration agreements. In this context, some WTO Members facilitate cross-border movement through skill-testing institutions, pre-employment training facilities and joint labor market commissions and observatories and thus make a GATS-extra advance over a "classic" GATS market access commitment.<sup>95</sup> Ideally, such flanking measures would cater to industrialized countries' concerns over irregular migration or mitigate the risk of brain drain to developing countries and LDCs.

**Very few proposals  
pledge transparent  
application procedures  
for visas and work  
permits.**

Very few proposals pledge transparent application procedures for visas and work permits. In terms of levels of liberalization, some WTO Members have added new service provider categories, such as Switzerland with plumbers. Others, like the EU, have defined new (*sub-*)categories, such as graduate trainees for CSS. Another recurring improvement has been to expand market access for ICTs.<sup>96</sup> Beyond widening the categories of workers, WTO Members have signaled deeper levels of market access by their preparedness to eliminate ENTs, to expand the scope of activities which natural persons are allowed to undertake during their temporary stay abroad or to de-link Mode 4 service supply from Mode 3. For the first time since the Uruguay Round WTO Members have tabled offers on specific commitments, particularly in the skill-intensive services sectors of health and education. The Chairman of the Trade Negotiations Committee nonetheless found that "more needs to be done", since some WTO Members, like the US, have not improved market access in Mode 4 at all since the first schedule of commitments in 1995.<sup>97</sup>

91 Kategekwa, Joy, 'Unlocking the mode 4 deadlock: creative approaches to enhancing mode 4-type temporary labor mobility commitments in free trade and migration agreements with lessons from the GATS', paper prepared for the workshop on Swiss Migration and EU Mobility Partnerships: Unveiling the Promise, World Trade Institute Berne, 12–13 December 2008; see also Friedman and Zafar (2008) op. cit.

92 WTO Document TN/S/33.

93 WTO Document S/CSS/W/12.

94 Mamdouh (2008).

95 Horn, Henrik, Mavroidis, Petros and Sapir, André, 'Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements', 7 Bruegel Blueprint Series (February 2009).

96 WTO, Council for Trade in Services, Special Session, Report by the Chairman to the Trade Negotiations Committee, WTO Document TN/S/23, p. 23.

97 Crosby, Daniel 'Advancing Services Export Interests of Least Developed Countries-Towards GATS Commitments on the Temporary Movement of Natural Persons for the Supply of Low-skilled and Semi-skilled Services', ICTSD Programme on Trade and Services and Sustainable Development Series Issue Paper No. 9 (2009) p. 16

In July 2008, Pascal Lamy, the Director General of the WTO, together with like-minded WTO Members decided to postpone services negotiations in order not to threaten the conclusion of the Doha Round for agriculture and non-agricultural market access (NAMA). To compensate for putting services on the backburner, Pascal Lamy, in his capacity as the Chair of the Trade Negotiations Committee (TNC) and at the request of WTO Members, convened a “services signaling conference” at Ministerial level as part of the “July 2008” package. The “Signaling conference” of July 2008 served WTO Members to “exchange indications on their own new and improved commitments as well as contributions expected from others”, without “precluding the submission of revised offers”, nor “presenting the final outcome of the negotiations”, nor “prejudicing the positions of non-participating WTO Members”.<sup>98</sup>

All in all, WTO Members at this conference had given “positive indications” on market access commitments across all major services sectors and modes of supply. In a turn away from horizontal scheduling, some WTO Members indicated their preparedness to open services sectors, such as tourism and travel-related services, private hospital services, services incidental to mining and agriculture and to expand existing sectors to include spa, wellness and traditional Chinese medicine particularly for liberalizing the delivery of services through Mode 4 workers.<sup>99</sup> During the signaling conference, industrialized countries indicated their preparedness to include technicians like plumbers, graduate trainees, persons of recognized reputation, artists, athletes and fashion models as well as personnel of public or private enterprises with a State contract to the categories of service providers.

Members also agreed to hold a preparatory workshop on scheduling of services commitments in early 2009 to assist with formulating final offers and to exchange scheduling and classification issues relevant to all Members.<sup>100</sup> The *LDC “waiver” or special priority mechanism* is another important proposal tabled on Mode 4. It seeks to justify the preferential labor market access obtained through bilateral migration agreements as an exemption from the MFN obligation of Art. II GATS. Thus, the LDC waiver calls for an acknowledgement by WTO Members that some bilateral migration agreements or preferential trade agreements may offer preferential labor market access quotas in categories of persons of interest to LDCs, despite the conditionality these agreements attach to combating irregular migration.<sup>101</sup>

<sup>98</sup> WTO Document, JOB(08)/93, Services Signalling Conference, Report by the Chairman of the TNC, 30 July 2008, paras. 1–4.

<sup>99</sup> *Id.*

<sup>100</sup> Kategekwa, 2008, *op. cit.*

<sup>101</sup> LDC Group Request on Mode 4, informal WTO document JOB(06)/155, 24 May 2006, WTO (2006a), Communication from the delegation of Zambia on behalf of the LDC Group – LDC Group Request on Mode 4, JOB(06)/155, 24 May 2006, based on Art. IV and XIX:2 GATS.

## 5.6 Re-designing GATS Mode 4 horizontal scheduling

**Another reason for the absence of “development-friendly” commitments, for instance for low-skilled professions, is the absence of a regulatory mandate in GATS on issues of migration control and prevention.**

The request-driven approach to Mode 4 openings remains a key reason for the lack of negotiating momentum. Industrialized countries refused to table meaningful offers in Mode 4, because labor sending countries were not required to reciprocate. Another reason for the absence of “development-friendly” commitments, for instance for low-skilled professions, is the *absence of a regulatory mandate* in GATS on issues of migration control and prevention. As long as the principle of shared responsibility between labor sending country is not operationalized in GATS, broader and wider openings for low-skilled service supplying persons will be scarce. To resuscitate the Mode 4 negotiations, Amin and Mattoo (2005),<sup>102</sup> Chanda, 2008, 2009 and Puri (2008)<sup>103</sup> have launched the idea of inscribing “regulatory” source country obligations into the additional commitments section of a host country’s GATS schedule (Art. XVIII GATS).<sup>104</sup> Their proposals mark a real turnaround from the typically one-dimensional, because request-driven approach that has so far characterized negotiations on Mode 4 offers in Doha. Firstly, they suggest that countries sending Mode 4 workers would have to take on some “regulatory” obligations, including the duty to ensure the timely and voluntary return of workers. In exchange, these would obtain market access for their low-skilled workers from destination countries. In a spirit of *shared responsibility*, the destination country could offer to improve the skill levels of the source country’s workforce so as to prepare the potential migrant workers for global labor market demands. Such training and testing could be *co-financed* by private companies setting up commercial presence in the labor sending country under a Mode 3 commitment.

In addition, host countries could make more creative use of the controversial “unbound, except for” scheduling formula, as shown below in the model schedule for a horizontal GATS commitment Table 2. In this sense, market access commitments could circumvent the immediate and unconditional treatment which the MFN requires. Market access would not be directly conditioned to a return obligation for Mode 4 workers, since this would create a situation contrary to the unconditionality of the MFN principle. Instead, by inscribing a blanket reference to national immigration laws, the commitment would thus only indirectly refer to the regulatory source country obligation requiring migrant return.<sup>105</sup>

In these authors’ view, destination countries need to obtain sufficient “levels of comfort”, before they are willing to open their labor markets to low-skilled suppliers. Thus, WTO Members sending Mode 4 workers could reciprocate by taking up “regulatory” obligations, including the duty to ensure the timely and voluntary return of workers. In its current design, however, the scheduling structure of GATS

<sup>102</sup> Amin and Mattoo (2005).

<sup>103</sup> Puri, Lakshmi, ‘Assuring development gains and poverty reduction from trade: the labor mobility and skills trade dimension’, UNCTAD Document UNCTAD/DITC/TNCD/2007/8, UN Publications (2008) 73-74.

<sup>104</sup> GATS Article XVIII.

<sup>105</sup> As unauthorized migrants are “unlike” the temporarily moved service-supplying natural persons falling under the purview of the GATS, this potential deviation from MFN does directly affect the market access of temporary movement of natural persons.

commitments does not provide for obligations other than those to “liberalize”. Such systemic limitations have kept labor mobility from gaining a larger profile in GATS and have diminished the potential for the WTO to emerge as an organization for managing migration. In preparation for the Hong Kong Ministerial some WTO Members took up some of these academic suggestions on inscribing “regulatory” issues into the “additional commitments” section of their schedules.

## 5.7 Proposals for creating development-friendly GATS commitments

Temporary labor migration or, even better, circular labor mobility can “accelerate” development by enabling skill flows. However, if left unregulated, labor migration, even if temporary, depletes the human resources of migrant source countries.<sup>106</sup> Numerous case studies have shown how labor recruitment policies of host countries and Mode 4 have put at risk the supply and quality of essential services in vital sectors of education and health. Moreover, tax revenue lost due to the emigration of the highly-skilled can only partially be compensated by remittances transfers. Sub-Saharan Africa is most affected by the migration of skilled workers, with over 20% of its tertiary-educated population living in OECD countries; in some small countries the outflow reaches up to 80%.<sup>107</sup>

Inconsistent trade liberalization, migration and development policies can set source countries back economically and financially, since under-servicing increases poverty and importing foreign workers to fill in for the *skill gap* is costly. For these reasons, Mode 4 commitments should be tailored to include *skill retention* strategies to counterbalance brain drain. Firstly, a tripartite migrant selection committee composed of representatives of the destination and the source country together with one representative of an immigrant association could screen the potential Mode 4 migrant against the risk of skill depletion to his or her country of origin as shown in Table 2 below. Secondly, a developing WTO Member could qualify its commitments in mode 3 by requiring the foreign investor to employ a percentage of domestic service suppliers and to ensure that these obtain the possibility for subsidiary-to-headquarter intra-corporate transfer.<sup>108</sup>

A fringe benefit of more generous mode 3 commitments, such as to foreign retail banks, would amount to exposing traditional money sending institutions like Western Union and Money Gram, currently holding monopolies over remittances transfers, to stiffer competition, which in turn would lower the services fees charged for remittances transfers. Foreign investors in financial services would thus indirectly contribute to amplifying the volume of remittances by reducing the transfer costs. Developing countries and LDCs may be reluctant to open their financial or tourist sectors, which still are, in many cases, infant industries. However, if Mode

**Inconsistent trade liberalization, migration and development policies can set source countries back economically and financially, since under-servicing increases poverty and importing foreign workers to fill in for the skill gap is costly.**

106 Martin, Philipp and Abella, Manolo, ‘Migration and Development: The Elusive Link at the GFMD,’ 43(2) IMR (2009) p. 432.

107 OECD ‘Effects of migration on sending countries: what do we know?’ (2006), Report of the Secretary-General of the United Nations entitled ‘International migration and development’ (A/60/871).

108 Chanda (2004) p. 48.

3 commitments would require the foreign investor to also train the local employees for global labor market demands, such private-sector led intra-corporate labor mobility would realize development gains for the developing country or LDC hosting that foreign firm, since a better educated domestic workforce will render the host country even more attractive to foreign direct investment and the incentive to migrate would be reduced.<sup>109</sup> For the Doha round to successfully conclude in services, the only sensible trade-off is a cross-modal one between Mode 3 openings (offered by developing countries and LDCs) and Mode 4 commitments (granted by industrialized countries). For such a “win-win-win” strategy to concretize in the WTO, developing countries would have to offer deeper openings in Mode 3 in the first place and to qualify these for obtaining training and intra-corporate subsidiary to headquarter movements.<sup>110</sup>

Table 2: **Model schedule of a horizontal GATS Mode 4 commitment including development-friendly recruitment and guarantees of return**

Sector or Sub-Sector	Limitations on market access	Limitations on national treatment	Additional commitments
All sectors included in this schedule, all modes	<p>4) Unbound, except for measures concerning the entry, temporary stay and return of natural persons, who fall under one of the following categories and on the condition that foreign service suppliers in country X are subject to authorizations (work and residency permit), subject to measures fixing overall number of work permits allocated based on the conclusion of a bilateral migration agreement.</p> <p>For professions set out below, a tri-partite committee (host, source country and immigration association) will consult on scarcity of labor in host country and risk of skill depletion in source country before approving temporary stay abroad.</p>	<p>4) Unbound, except for measures concerning the categories of natural persons referred to in the market access column, subject to limitations of national immigration laws (this immigration law then provides that for foreign service providers a bilateral agreement must be signed).</p> <p>[Alternative: <b>subject to the following limitations and conditions:</b></p> <ol style="list-style-type: none"> <li>1. Firm employing foreign service provider must sign a Memorandum of Understanding on labor mobility and cooperate with authorities of country X [host country] in guaranteeing return.</li> <li>2. <b>Foreign service providers</b> in following sectors (construction, tourism, catering) must be part of a co-development or voluntary and assisted return program in force between country X and country Y].</li> </ol>	<p>4) The right to temporary entry of foreign service suppliers in the professions set out below and for the categories set out below is granted on the basis that the foreign service provider is part of a co-development program, or an assisted and voluntary return scheme is in force between country X and Y or <b>will be negotiated</b> between country X and Y.</p>

109 Docquier, Frédéric and Abdeslam Marfouk, 'International Migration by Educational Attainment,' in: Maurice Schiff and Çağlar Özden (eds.), *International Migration, Remittances, and the Brain Drain*, World Bank, Washington DC (2006).

110 Heinrich Böll Stiftung, Humboldt Universität zu Berlin, Entwicklungspolitische Diskussionstage 2007, "Win-win-win"; Paradigmenwechsel in der Migrationspolitik? – Die aktuelle Debatte um Migration und Entwicklung, Publication Series by Centre for Advanced Training in Rural Development, 2007.

## 5.8 Should Domestic Employment of Non-Nationals be covered by Mode 4?

The Annex MONP of GATS indicates that the GATS liberalizes two types of temporary movement of natural persons: *self-employed* service suppliers or employees of a service supplying firm. What is confusing about the definition is that the Annex “makes a distinction between the natural person and the service supplier.”<sup>111</sup> Self-employed suppliers are natural persons, who are directly remunerated by the consumer. Less straightforward is the second type of movement, which Art. 1:2(d) GATS defines as “persons of a Member who are employed by a service supplier of a Member in respect of the supply of a service”. It targets the sensitive issue of entry into a host country’s labor market. In this category, the natural person is different from the service supplier.<sup>112</sup> For the category of employees of a service supplying natural or juridical person, GATS operates an “artificial” distinction between “foreign” and “domestic” employment. The distinction is nothing but an attempt to keep the temporary movement of persons covered by GATS as limited as possible. While foreign employment forms part of “trade” in services under GATS, domestic employment, which is qualified as “labor migration” is not covered by GATS. As the WTO Secretariat maintains, it would be illogical if host country firms could bring a claim against their own government requiring GATS treatment for foreign nationals they desire to employ.<sup>113</sup> *Domestic employment* thus remains under the sovereignty of national immigration authorities.<sup>114</sup>

**While foreign employment forms part of “trade” in services under GATS, domestic employment, which is qualified as “labor migration” is not covered by GATS.**

Yet, the distinction is contested and splits WTO Membership into at least three camps, even if a majority holds that the employment contract must remain “foreign”.<sup>115</sup> Faced with (unemployed) surplus labor and lacking the capacity to dispatch workers abroad, LDCs advocate in favor of domestic employment.<sup>116</sup> Labor receiving countries, inversely are opposed to expand the scope of GATS and include domestic employment. They argue that the likelihood that a migrant overstays is usually higher for migrants hired as employees of domestic employers than for those who remain under foreign employment contracts.<sup>117</sup> Countries with a government policy of dispatching citizens overseas, like India, are pre-occupied with losing tax revenue to the host country and, like industrialized countries, argue against domestic employment. Under the majority opinion, the coverage of GATS is thus limited to:

111 WTO Document S/C/W/301 p. 3.

112 Chanda, Rupa, ‘Movement and Presence of Natural Persons and Developing Countries: Issues and Proposals for the GATS Negotiations’, South Centre, Working Paper 19 (2004) pp. 15-17; see also Carzaniga, A., ‘A warmer welcome? Access for natural persons under preferential trade agreements’ in Juan Marchetti and Martin Roy (eds.) *Opening Markets for Trade in Services Countries and Sectors in Bilateral and WTO Negotiations* (2009) pp. 476–479.

113 WTO Document S/C/W/301 4.

114 Bast, Jürgen, ‘Annex on the Movement of Natural Persons’, in Rüdiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds.) *WTO-Trade in Services: Max-Planck Commentaries on World Trade Law* (2008) pp. 580–582.

115 Carzaniga (2009) pp. 476–478, 580.

116 See generally, Varma, Sabrina, ‘Facilitating temporary labor mobility in African LDCs’ ICTSD Programme on Trade and Services and Sustainable Development Series, Issue Paper 10 (2009).

117 Chanda (2004) p. 26.

- Employees of a foreign firm residing in the territory of a WTO Member, but without commercial presence in the host country, who enter the territory of another WTO Member to supply a service; usually known as contractual service suppliers (CSS)
- Employees of a foreign services company with a commercial presence in the host country, who are transferred to that establishment, known as intra-corporate transferees (ICTs), but also short-term business visitors and graduate trainees.

**For the individual service supplier, however domestic employment would often be the better deal, as employment under local labor law usually pays out in higher wages and offers better protection against exploitation.**

For the individual service supplier, however domestic employment would often be the better deal, as employment under local labor law usually pays out in higher wages and offers better protection against exploitation. Trade unions, human rights lawyers and domestic workers coalitions, therefore subscribe to including domestic employment under Mode 4 of GATS.<sup>118</sup>

## 5.9 „Unfinished“ GATS Regulatory Mandate

The GATS lacks an operational emergency *safeguard* mechanism, which would allow WTO Members to temporarily close markets to unexpected surges of services and service suppliers, including natural persons. Art. X GATS, a regulatory left-over from the Uruguay Round, provides for a negotiating mandate for WTO Members to negotiate a safeguard mechanism. Industrialized countries so far have refused opening negotiations on the issue, with the argument that the flexibility to tailor market access and national treatment in GATS, if tailored well, offers sufficient scope for protecting services sectors from foreign competition. Free trade agreements, such as the bilateral agreement on *free movement* between Switzerland and the EU however, show that additional, ad hoc flexibility may be necessary when natural persons are at stake. Art. 10 of the Swiss-EU agreement on free movement, which only Switzerland (but not the EU) can invoke, if there is a sudden influx of migrant labor from the EU,<sup>119</sup> demonstrates that without this safety valve to adjust the supply to the cyclicalities of demands, destination countries lack the comfort that temporary migrants will not come to burden their social welfare.

## 5.10 Missing Mandate to “Regulate” Migration

The temporary movement of persons liberalized in GATS reflects a compromise between preserving national sovereignty over borders on the one hand and ensuring the least trade restrictive exercise of national immigration laws on the other hand. The “immigration law caveat” of § 4 of the Annex MONP, concretizes this balance. As the term “caveat” indicates, visa relaxations or eliminations, resi-

<sup>118</sup> Martin, Philipp, Abella, Manolo and Christiane Kuptsch Managing Labor Migration in the Twenty-first Century (2006) pp. 76–82.

<sup>119</sup> Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons - Final Act - Joint Declarations - Information relating to the entry into force of the seven Agreements with the Swiss Confederation in the sectors free movement of persons, air and land transport, public procurement, scientific and technological cooperation, mutual recognition in relation to conformity assessment, and trade in agricultural products, OJ L 114, 30.4.2002, p. 6–72, the safeguard can be invoked if the number of new residency permits for employees and self-employed during a year exceeds by the average of the last three years by at least 10%. The new quota must be at least 5% above the average of the last three years and the measure can be upheld for a maximum of two years, after which the situation is evaluated. The safeguard can be invoked a consecutive, second time again for a maximum period of two years.

dency permits, passport and border controls, readmission and repatriation of migrants and “related enforcement measures” fall *outside* the scope of GATS. In contrast to the non-discrimination obligation for both goods (Art. III GATT) and services (Art. XVII GATS), WTO Members can treat certain WTO Members more favorably than others in terms of visa policy and the other immigration issues, because these are exempted from the scope of most-favored nation clause (MFN).<sup>120</sup>

Discriminatory use of the visa and work permit requirements, i.e. requiring it for some WTO Members but not for others, need not be scheduled as market access limitations.<sup>121</sup> Visa and work permits, together with the other immigration law barriers, do not have to respond to the transparency obligation of GATS Art. III either.<sup>122</sup> Only if the visa requirement is so prohibitive as to *nullify or impair* a benefit under a specific commitment should it be considered for a non-violation complaint and thus as an undue market access limitation.<sup>123</sup> For example, if a country like Japan were to require linguistic proficiency from Filipino nurses as a condition for these to supply health services in Japan, such a request would possibly constitute an overly prohibitive barrier to service supply, since basic knowledge of Japanese would probably be sufficient for this type of work.

**Only if the visa requirement is so prohibitive as to nullify or impair a benefit under a specific commitment should it be considered for a non-violation complaint and thus as an undue market access limitation.**

Given that the MFN obligation of Art. II GATS applies unconditionally, visa policy is the only *quid-pro-quo*, aside from development aid or labor market openings for non-services workers, which WTO Members can offer. This is also the case in the EU-context, where sending countries can be rewarded for readmissions with EU-wide visa relaxation and elimination agreements.<sup>124</sup> The EC—CARIFORUM economic partnership agreement of 2008 or the EU—ACP Cotonou partnership agreement of 2000, revised in 2005 do not grant Schengen-visa relaxations in exchange for cooperation on readmissions. However, given that migration control and prevention has become an EU-wide competency under Art 63 ECT, it may only be a question of time before Schengen-visa relaxations are used to fast-track entry for selected professions under an economic partnership agreement (EPA). Whether EPAs will condition such visa relaxations to readmission is an open question, which the ongoing revision of Art. 13 CPA may possibly answer.

The lack of multilaterally harmonized visa requirements and the current mismatch between visa and service provider categories has chilled the legal security and the predictability of scheduled commitments. To eliminate what is a considerable *de facto* barrier to the provision of services through Mode 4, India proposed a “special GATS Visa” whereby WTO Members would be required to operate a two-speed

120 Bast (2008) p. 594.

121 WTO Document S/C/W/75, pp. 11-12.

122 Delimatsis, Panagiotis, ‘Due Process and “Good” Regulation Embedded in the GATS – Disciplining Regulatory Behaviour in Services through Article VI of the GATS’, 10(1) *Journal of International Economic Law* (2007) p. 35.

123 Bast (2008) pp. 590-593.

124 Peers, Steve ‘EU migration law and association agreements’, in: Bernd Martenczuk and Servaas Van Thiel (eds.) *Justice Liberty, Security: New Challenges for EU External Relations* (2008) pp. 53-88; to buy off the goodwill of EU neighboring countries, the EU interlinks its readmission agreements to visa relaxation agreements, as done with Russia (19 April 2007), Albania (3 March 2005) and the Western Balkan (8 November 2007). Schengen associate countries like Switzerland or Norway, must be autonomously implement the EU visa relaxation agreements.

visa application procedure with a fast-track for Mode 4-type workers.<sup>125</sup> In support of India, the plurilateral request of 2003 stressed the desirability of using additional commitments to ensure transparency and to harmonize procedures affecting temporary entry and stay,<sup>126</sup> even if certain LDCs have criticized India's version of the proposed "Service Provider Visa" for its restrictive coverage which excludes unskilled workers.<sup>127</sup> Australia is operating a two-track entry procedure with its "e-visa" reserved for skilled key personnel (executives, managers and specialists) and distinct from its regular immigration system.<sup>128</sup> During the July 2008 negotiations, WTO Members expressed an interest to standardize the possibility for visa renewal.

This small step may go a long way towards establishing a multilateral visa regime. For the time being, however, the caveat is yet another expression of the fact that GATS disassociates itself from any responsibility for steering global migration. It underlines that GATS is about *liberalizing*, rather than regulating trade in services or creating a multilateral standard on visa and work permits or mitigating migratory risks multilaterally.<sup>129</sup> Whether intended or not, the caveat has exacerbated the mismatch between national visa categories and service provider categories. The GATS has no mandate to require WTO Members to approximate their visa types, far less to mandate Members to align visa categories to service provider classifications. Even if not a market access limitation *per se*, this mismatch constitutes a considerable de facto barrier to the provision of services through Mode 4, chilling the legal security and the predictability of scheduled commitments, as will be shown in the next section.<sup>130</sup>

### 5.11 Mismatch of service provider categories and visa coverage

**The lack of a common nomenclature for service providers makes it difficult to assess whether a service provider is covered by a commitment in Mode 4 or not.**

Uruguay Round negotiators failed to agree on a multilateral set of criteria to classify service providers according to skill levels, occupations, professions or commercial activities. The GATS Sectoral Classification (GNS/W/120) offers unified classifications only for the 12 services sectors.<sup>131</sup> The lack of a common nomenclature for service providers makes it difficult to assess whether a service provider is covered by a commitment in Mode 4 or not. Some developing WTO Members, led by India, in 2003 defined a *sui generis* common nomenclature for categories of natural persons under Mode 4.<sup>132</sup> A plurilateral communication by Argentina, Bolivia, Brazil, Chile, Colombia, India, Mexico, Pakistan, Peru, the

125 WTO Document S/CSS/W/12.

126 WTO Document TN/S/W/14.

127 Chanda (2004) pp. 24–30.

128 WTO Council for Trade in Services Special Session Communication from Australia, Administrative Procedures for Mode 4 Temporary Entry in Australia: the eVisa System, WTO Document TN/S/W/25 26 November 2004.

129 Lavenex, Sandra, 'The competition state', in: Michael Peter Smith and Adrian Favell (eds), *The Human Face of Global Mobility: International Highly Skilled Migration in Europe, North America and the Asia-Pacific* (2006) p. 47.

130 Grynberg, Roman and Qalo, Veniana, 'Migration and the WTO', Commonwealth Working Paper (2007) pp. 751–782.

131 Services Sectoral Classification List, Note by the Secretariat, WTO Document GNS/W/120 July 1991 is an abbreviated version of the UN Central Product Classification (CPC), the Uruguay Round negotiators could not agree on using the UN CPC itself or the Balance of Payments Classification of International Transactions in Services (BOP) or the ILO International Standard Classification of Occupation (ISCO-88) for classifying service providers.

132 WTO Document S/CSS/W/12; the ILO ISCO-88 divides occupations into nine major groups, disaggregated by skill levels, including a common nomenclature for non-formally trained workers, but excludes the self-employed.

Philippines, Thailand and Uruguay in 2005 advocated superimposing onto the GATS Sectoral Classification (GNS/W/120) the ILO ISCO-88 for classifying service providers.<sup>133</sup> The EC together with Canada, Bulgaria and Romania circulated a similar communication propagating a “common approach to scheduling”.<sup>134</sup> Labor receiving countries, however, have made clear that they will not, in the foreseeable future, adopt the ILO ISCO-88. Instead, they expect labor sending countries to submit lists with categories and occupations in which these have an export interest or are already supplying Mode 4 services internationally.<sup>135</sup> In the absence of a mandatory legal definition of service providers in the text of the GATS agreement, the mainstay of WTO Members’ scheduling practices commonly define the following seven service provider categories:<sup>136</sup>

- 1) Independent professionals are self-employed persons entering the territory of another WTO Member to provide a service based on a services contract; their activity abroad may not extend beyond the one defined in the services contract.
- 2) Intra-corporate transferees (ICT) are employees of a foreign company providing services through establishing commercial presence, such as a branch, a subsidiary, an affiliate or even headquarters in another WTO Member State and who are transferred to that establishment. They can also be called “essential persons transferred within a specific business or company.”<sup>137</sup> ICT are usually confined to executives, specialists and managers, but out of the 70 Members having opened markets to ICT, only 9 operate quotas and few use ENTs to steer movement.<sup>138</sup>
- 3) Contractual service suppliers (CSS) are employees of a foreign-based company without commercial presence in the host country, who are entering another WTO Member to supply a service pursuant to a services contract between their employer and the consumer of the service in the host country. During their time abroad, CSS remain remunerated by their employer and thus remain under the jurisdiction of their source country. Since CSS do not enter the other WTO Members’ labor market, their movement is usually not limited by quotas. However, because CSS may supply services at below host country minimal wage, they pose the highest risk of direct competition to the local workforce. Thus, it is the category with fewest entries scheduled and where the range of activity of the CSS is narrowly defined in the services contract.<sup>139</sup> Much like IPs, CSS are usually persons delivering “professional services”, which are traditionally heavily regulated industries.<sup>140</sup>

133 WTO, Council for Trade in Services, Special Session, Communication from Argentina, Bolivia, Brazil, Chile, Colombia, India, Mexico, Pakistan, Peru, Philippines, Thailand and Uruguay, Categories of Natural Persons for Commitments under Mode 4 of GATS, WTO Document TN/S/W/31, 18 February 2005; China, the Dominican Republic, Egypt, and Guatemala, even though they were Members of the 2003 plurilateral request, did not join this communication of 2005.

134 WTO Council for Trade in Services, Special Session, Communication from Bulgaria, Canada, the European Communities and Romania, Mode 4—A Common Approach to Scheduling, WTO, TN/S/W/32, 18 February, 2005.

135 Crosby, p. 16; developing countries and LDCs are to be offered technical assistance for conducting commercial talent shortage surveys to improve the matching of offers and demand.

136 WTO Document S/C/W/301 p. 7.

137 Switzerland, Draft consolidated Schedule of Specific Commitments, 24 January 2003, WTO Document, S/DCS/W/CHE 4.

138 WTO Document S/C/W/301 22.

139 Mamdouh (2008).

140 WTO Document S/C/W/301 24.

- 4) Business visitors (BV) and services salespersons do not supply a service themselves. They do not receive remuneration from a source based in the host country but are sent abroad by a foreign firm to negotiate a services contract with a would-be host country services consumer (“sales BV”) also called services salespersons/sellers.<sup>141</sup> A “set-up BV” is a business visitor mandated by an employer to establish a commercial presence in the host country so as to facilitate intra-corporate temporary movement of personnel in the future. This is one of the category with the fewest restrictions in terms of quotas or ENTs. Some Members have a single entry for both the “sales” and “set-up” BV categories and some combine elements that are inherent in both definitions.<sup>142</sup>
- 5) “Managers, executives and specialists” (“EMS category”) can be a stand-alone category (also termed “essential personnel”) or a sub-category cutting across the other service provider categories, for instance within the ICT category EMS distinguishes skill levels. Over 80% of the “EMS” commitments are restricted by either a quota or an ENT.<sup>143</sup>
- 6) “Other” is a category used for scheduling entries for lower-skilled services occupations, for non-formally trained persons, but also for persons of distinguished merit and ability (for example, sportsmen or artists) who “do not easily fall under any of the main categories”.<sup>144</sup> Within the US category of “other” fall, for instance, fashion models and specialty occupations for which the US grants an annual worldwide 65,000 H-1B visas annually.<sup>145</sup> It is the only Mode 4 category sub-Saharan African countries use. It accounted for 27% of services exports by LDCs in 2008 and has a growth potential.<sup>146</sup>
- 7) Short-term employees is a category used by the US to recruit foreign employees for domestic, i.e. US domiciled firms. It is contested under the Mode 4 definition, since this type of service supply constitutes domestic, as opposed to foreign employment.

WTO Members are free to use relatively “vague” categories.<sup>147</sup> Even if not widespread, some 43 WTO Members, consisting of nearly all LDCs and some developing countries, mostly for lack of technical capacity, classify service providers “hierarchically”, i.e. along the lines of a “functional” categorization based on the “EMS” and “other” category.<sup>148</sup>

**Foreign service suppliers find it difficult to obtain a full picture about actual market access.**

A further challenge is that there is no specific duty in GATS to match service provider categories to visa or work permit application procedures. In consequence, most WTO Members have neither taken time nor care to align their visa categories to their GATS service provider categories. Foreign service suppliers find it difficult to obtain a full picture about actual market access.<sup>149</sup> The Annex on MONP has to take some of the blame for this mismatch. Its immigration law caveat has a con-

141 Carzaniga (2003) pp. 22-24.

142 Chanda (2004) 17-18.

143 WTO Document S/C/W/301 23.

144 Id. 24.

145 Matsuzawa, Kotaro, ‘Movement of Natural Person and the United States: Probability of the Mode 4 Offer Improvement by the United States’ 42(4) *Journal of World Trade* (2008) p. 656.

146 WTO Document WT/COMTD/LDC/W/46, Market Access for Products and Services of Export Interest to Least-Developed Countries, 23 October 2009 9.

147 WTO Document S/C/W/301 25.

148 WTO Document S/C/W/301 7.

149 Nielson, Julia and Oliver Cattaneo, ‘Current Regimes for the Temporary Movement of Service Providers: Case Studies of Australia and the United States’, in Aaditya Mattoo and Antonia Carzaniga (eds) *Moving People to Deliver Services* (2003) p. 137.

siderable chilling effect on any attempts to better align service provider categories to national visa/work permit categories. The GATS Art. III transparency obligation is framed too broadly to derive a specific duty for WTO Members to ensure the permeability between service provider categories and visa/work permit requirements. Since the Doha Round Signaling Conference of July 2008 WTO Members are debating on inscribing a transparency commitment in their additional commitments section requiring “information relevant to entry, temporary stay and work authorization” to be provided for each category of service providers. Such information over visa categories could help minimize the mismatch to service provider definitions.<sup>150</sup>

## 5.12 A Better Match?

### Pro-mobility visas in free trade agreements

It turns out to be easier to approximate national visa/work permit categories to service provider classifications in a bilateral relationship outside the WTO multilateral setting. In the ideal case, a free trade or bilateral migration agreement creates a *common nomenclature of occupations* which is matched by *corresponding visa categories*. Select FTAs, but not EPAs, provide for “pro-mobility visas”: the North American Free Trade Agreement (NAFTA) has a one-year and renewable “Trade-NAFTA” or “TN” visa for professionals (uncapped in 1994 for Canadians and in 2004 for Mexicans)<sup>151</sup> the Asia-Pacific Economic Cooperation (APEC) operates a Business Travel Card for temporary business visitors, and in the FTAs with Singapore and Chile, the US fast-tracks the entry of professionals occupied in listed specialty jobs by offering the tailor-made H1-B1, capped at 5’400 professionals for Singapore and at 1’800 professionals for Chile.<sup>152</sup> Because the US Congress re-asserted its competencies over the liberalization of the labor market in 2004, the United States Trade Representative (USTR) now launches FTA-specific visa categories outside, rather than within an FTA, even if such special visa categories, as seen in the FTA with Australia, remain reserved for persons whose movement is liberalized under that FTA.<sup>153</sup>

**In the ideal case, a free trade or bilateral migration agreement creates a common nomenclature of occupations which is matched by corresponding visa categories.**

Unlike the special US-Chile/Singapore FTA H1-B1 visa, the 90-day per 6 month Schengen-visa does not facilitate procedures for obtaining a work permit for acceding to EU Member States’ labor markets.<sup>154</sup> The EU still lacks the power to offer, on behalf of its Member States, market access to service providers from third countries beyond its EU-27 GATS Mode 4 commitments. If the EU and Schengen-associated countries, like Norway and Switzerland relax the price of the 90-day per 6 month Schengen-visa to 35 € (down from the regular 60 € fee) or eliminate the visa requirement all together, they do so for reasons of migration control and

150 WTO, Council for Trade in Services, Special Session, Report by the Chairman to the Trade Negotiations Committee, WTO Document TN/S/23, 28 November 2005, p. 23.

151 Huffbauer, Gary and Stephenson, Shiry, ‘Increasing Labor Mobility: Options for Developing Countries’, World Bank, forthcoming (2010) 9.

152 Matsuzawa (2008) p. 665.

153 Carzaniga (2009) pp. 489, 487; in addition, all US FTAs concluded since 2004, namely those with Morocco and Australia, now include a side letter, which exempts immigration law from the scope of the FTA and thus takes on a similar function to that of the Annex on MONP of GATS.

154 The Schengen-visa was created by the Schengen agreement of 14 June 1985 and incorporated into the ECT with the Treaty of Amsterdam of 1999 to harmonize entry into the EU/EFTA countries for third country nationals.

prevention.<sup>155</sup> A relaxed Schengen-visa *rewards* third countries at the EU borders for readmitting their nationals in irregular stays in the EU/EFTA. Favorable visa treatment also acts as a *quid-pro-quo* for obtaining assurances from third countries that these will secure the EU borders through participating in FRONTEX patrols. For this reason, Schengen-visa relaxations are granted in self-standing so-called *EU-visa relaxation or elimination* agreements on the basis of Art. 63 ECT, rather than in free trade agreements or economic partnership agreement under Art. 133 ECT. What's more, such EU-visa relaxation/elimination agreements are almost never concluded concomitantly to trade agreements. Instead, they are conditionally linked to the simultaneous or subsequent conclusion of an EU-readmission agreement.<sup>156</sup>

### 5.13 Occupational Shortage Lists in Bilateral Migration Agreements

**Such lists grant preferential labor market access, because they eliminate the individual case-by-case assessment of the labor market situation, the so-called economic necessity test (ENT).**

In certain bilateral migration agreements, labor market needs are identified ex ante through a quasi-legislative process by *occupational shortage lists*. In the context of its new immigration law of 24 July 2006, France since 2009 operates two such lists for citizens from countries outside the EU in 30 professions and in 150 professions for EU Member States and Switzerland,<sup>157</sup> who fall into the work permit categories of salaried professionals (staying 12 months and longer in France) or temporary workers (less than 12 months stay).<sup>158</sup> Mauritius is reported to use a similar government-approved occupational shortage list in its bilateral migration agreement with China.<sup>159</sup> Such lists grant preferential labor market access, because they eliminate the individual case-by-case assessment of the labor market situation, the so-called economic necessity test (ENT).

Insofar, as the lists *fast-track entry* for certain categories of workers from select labor sending countries, they introduce a second, parallel track to the regular entry proceedings, much in line with certain WTO Members' suggestions for GATS Mode 4 visa. In addition, occupational shortage lists rely on a certain amount of *standardization* of the nomenclature for occupations. Insofar, such lists have a trade-promoting effect of approximating qualifications, even if they fall short of mutually recognizing qualifications. France's first attempts at setting up the lists created confusion because the narrower categories of professions was mixed up with the broader one of occupations and the latter had been insufficiently disaggregated. The latest list used in the agreement with Tunisia shows improvement.<sup>160</sup> Drawing on France's experience, the EU project "Partnership for Manag-

155 Pursuant to the Treaty of Amsterdam of 1 May 1999, which incorporated the Schengen agreement of 14 June 1985, the rationale of the Schengen-visa is to harmonize entry for third country citizens into the EU and Schengen-associated countries like Switzerland Norway.

156 Trauner, Florian and Kruse, Imke 'EC visa facilitation and readmission agreements: a new standard EU foreign policy tool' 10(4) *European Journal of Migration and Law* (2008) 411–438.

157 Cholewinski (2009) p. 296 for a general overview on occupational shortage lists.

158 France, Decree of 18 January 2008 on the delivery, regardless of the labor market situation, authorization of work to foreigners who are not from an EU Member State, a country party to the European Economic Space or Switzerland

159 Hufbauer and Stephenson (forthcoming 2010) p. 20.

160 Annexe I, 'List of Occupations open to persons from Tunisia', pact on concerted migration management between France and Tunisia, signed at Tunis on 28 April 2008 available at : <http://www.gisti.org/spip.php?article1273> (last accessed 7 January 2010).

ing Professional Migration EU-Benin, Cameroon, Mali, Senegal”, facilitates the establishment of a common nomenclature for African professions and occupations, the ROAME (Répertoire Opérationnel Africain des Métiers et des Emplois).<sup>161</sup> Even if such lists are a first step towards a common nomenclature of service providers and mutual recognition of qualifications, listing shortage occupations is a time-consuming endeavor, which bears the risk of being outdated by the time the list enters into force.

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161 Partnership for Managing Professional Migration EU-Benin, Cameroon, Mali, Senegal: <http://www.migrationsprofessionnelles.net/spip.php?rubrique67>.

# 6 Advantages and Shortcomings of GATS Mode 4

The GATS falls short of offering tangible answers to the regulatory challenges posed by the risks associated with labor migration.<sup>162</sup> This is hardly surprising, since generally speaking, the weak regulation of migratory flows in the international framework is rather the rule than the exception. The GATS scheduling structure is institutionally inapt for regulating the risks associated with migration, be these overstaying workers, levels of employability but also skill depletion and brain waste. This is so, because GATS uses a closed list of categories, divided into “market access”, “national treatment” and “additional” commitments, which are biased towards liberalizing and against regulating markets. While it tolerates that domestic workers are protected against the risk of wage downward pressure and job displacement, the GATS is inadequately equipped to mitigate the risk of *skill depletion*. It equally fails to accommodate regulatory obligations to ensure the timely return of service providers.

Furthermore, the GATS lacks an *emergency safeguard mechanism*, which would allow WTO Members to temporarily close markets to unexpected surges of service providing persons. Furthermore, WTO Members are only willing to bind in multilateral GATS commitments a high-skilled labor mobility, which is driven by multinational companies.<sup>163</sup> For recruiting low-skilled foreign labor, WTO Members seem to rely rather on bilateral non-trade, migration agreements. It is no coincidence that legal toolkits for steering labor migration evolve in the *parallel tracks* of trade and non-trade agreements.

162 Castles, Stephen, ‘Guestworkers in Europe: A Resurrection?’ in: 40(4) *International Migration Review* (2006) pp. 741–766.

163 Betts and Nicolaidis, op. cit.; Castles, Stephen, ‘The factors that make and unmake migration policies’ 38(3) *International Migration Review* (2004) pp. 852–884.

# 7 Why go preferential? Benefits and Limitations of Trade and Non-Trade Agreements in Global Migration Management

The abovementioned *missed regulatory* opportunities of GATS have led to a rise of bilateral migration agreements. As Carzaniga has noted, “when it comes to natural persons, WTO Members want to retain the flexibility “to be more open towards certain nationalities than others”.<sup>164</sup> Unlike the GATS, these dispose of the structural flexibility to require source countries to cooperate. They allow for tailor-made trade-offs and tactical issue linkages, including border security, visa policy, (dual) citizenship, residence, development, remittances; issue areas which the immigration caveat of GATS excludes. As a result, bilateral migration agreements have seen a renaissance in the past couple of years, even if they are asymmetrically tilted towards the interests of labor receiving countries.<sup>165</sup>

**As a result, bilateral migration agreements have seen a renaissance in the past couple of years, even if they are asymmetrically tilted towards the interests of labor receiving countries.**

Central to trade agreements is the desire to *open* markets to the temporary movement of the highly skilled workers, while non-trade bilateral migration agreements seek to *contain* and prevent irregular migration. Bilateral migration agreements are the avenue used when it comes to migration control and prevention. Voluntary return and readmission are thus key regulatory features of bilateral migration agreements. Even if bilateral migration agreements facilitate the recruitment of migrant labor, they do so only to offer a valid alternative to migrating irregularly.<sup>166</sup>

Bilateral agreements have revolutionized the way the temporary movement of natural persons can be managed institutionally. They argue that these agreements break new ground over GATS because of institutional advances.

In terms of monitoring migratory flows through *joint labor market observatories and oversight commissions*, but also because these formalize the process of matching the offer for migrant labor to the demand in the host country by setting up manpower agencies. Because bilateral migration agreements recruit low-skilled migrants, for which but few private sector-based, *transnational recruitment mechanisms* exist, the agreements themselves need to facilitate the process of selection, training and hiring. Without these flanking measures, which are often technically assisted by the IOM or an NGO, low-skilled workers would not be able to benefit from the opportunities of liberalized labor markets and would risk exploitation. In terms of migration management, bilateral migration agreements are thus more comprehensive than their counterparts in trade, as shown in Table 3 below. In contrast to their precursors, but also to trade agreements, the new migration agreements offer *comprehensive package deals*, organized around the three pillars of development, security and labor migration. In addition to border securitization and labor migration, a typical bilateral migration agreement seeks

164 Carzaniga (2009) p. 484.

165 Chanda (2009) pp. 480-481.

166 Heilbronner, Kay, *Rückübernahme eigener und fremder Staatsangehöriger, völkerrechtliche Verpflichtungen der Staaten*, C.F. Müller Verlag, Heidelberg (1996).

to unleash the positive aspects of migration by stimulating development in the migrants' countries of origin. France's pacts on concerted migration management, for example co-fund migrant collectivities' investments or de-fiscalize migrant savings.

Other Mode 4 experts, namely, Carzaniga<sup>167</sup> and Nielson<sup>168</sup>, value the complementarities of bilateral agreements over GATS. However, they warn against adopting the bilateral template as a model for Mode 4. In their view, the rationale for concluding bilateral migration agreements is too different from the one driving the progressive elimination of barriers to the temporary movement of service supplying persons in Mode 4 of GATS and trade agreements.<sup>169</sup> A recent IOM publication finds too, that bilateral migration agreements are only a *second-best solution* in the absence of a global regime for governing migration.<sup>170</sup> An OECD report of 2007 nonetheless recommends policymakers to “establish bilateral agreements for recruiting low-skilled migrants and multiannual fixed contracts for migrant professionals” for the reason that unlike Mode 4 “these arrangements would promote circular migration, build skills and enable remittances without crippling social services in sending countries.”<sup>171</sup>

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167 Carzaniga (2009) pp. 496–497.

168 Nielson, Julia, 'Labor Mobility in Regional Trade Agreements', in: Aaditya Mattoo and Antonia Carzaniga (eds) *Moving People to Deliver Services*, World Bank (2003) pp. 93-95.

169 Carzaniga (2009) p. 500.

170 Baruah, Nilim and Cholewinski, Ryszard (eds.), *OSCE, IOM and ILO Handbook on Establishing Effective Labor Migration Policies in Countries of Origin and Destination*, Vienna and Geneva (2006) p. 8: “While some disadvantages have been identified with bilateral migration agreements, in the absence of a global regime for international labor migration they remain an important mechanism for inter-state cooperation in protecting migrant workers, matching labor demand and supply, managing irregular migration, and regulating recruitment.”

171 Dayton-Johnson, Jeff, Katseli, Louka T., Maniatis, Gregory, Münz, Rainer and Papademetriou, Demetrios “Gaining from Migration, Towards a New Mobility System, OECD Development Center (2007), available at: [http://www.migrationpolicy.org/pubs/Gaining\\_from\\_Migration.pdf](http://www.migrationpolicy.org/pubs/Gaining_from_Migration.pdf).

## 8 Spain's "cooperation agreements" and France's "pacts on concerted migration management": A model template?

Spain and France have been pioneering the renaissance of bilateralism in migration management.<sup>172</sup> Shouldering the main burden of the 500,000 undocumented migrants estimated to reach Europe each year, Spain and France have concluded their own versions of bilateral agreements with the same set of countries, but there are differences.<sup>173</sup>

France's new pacts are a poster-child of the newly created Ministry of Immigration, Integration, National Identity and Development Partnership. Targeted are the 28 countries of France's Priority Solidarity Zone (ZSP) with priority given to those migrant source countries which have a representative number of citizens residing temporarily or permanently in France, primarily Western and Northern Africa, but one with the Western Balkans is currently foreseen. France has signed 9 such pacts, but so far only the one with Gabon, an atypical migrant source country has entered into force on 5 July 2007. Undergoing ratification are those with Congo (25 October 2007 in Brazzaville), Benin (28 November 2007 in Cotonou), Senegal (23 September 2006 in Dakar and expanded by the covenant-agreement of 2008 signed on 25 February 2008 in Dakar), Burkina Faso (10 January 2008 Ouagadougou), Tunisia (28 April 2008 in Tunis) and Mauritius (23 September 2008 in Paris), Cap Verde (25 November 2008 in Paris), Cameroon (21 May 2009 Yaoundé). Under negotiation are further pacts with Algeria and Morocco. No agreement could be reached with Mali due to a clash over the number of Malians to be repatriated from France.<sup>174</sup>

Spain has concluded bilateral migration agreements as part of its "migratory diplomacy" with countries in Latin America and Western Africa, accounting for the highest number of migrants into Spain: in 2006, 800,000 foreigners moved to Spain, an increase of 17% over the previous year, of which 110,000 were from Romania followed by 69,000 from Bolivia and 60,000 from Morocco.<sup>175</sup> Spain's "cooperation agreements on migration" form part of the Ministry of the Exterior's Action Plan for sub-Saharan Africa 2006–2008 (Plan Africa). Spain concluded agreements with Guinea Bissau and the Gambia on 9 October 2006, followed by one with Senegal on 10 October 2006, with Mali on 23 January 2007, with Cape Verde on 20 March 2007 and with Niger on 10 June 2008. Further agreements are anticipated with priority countries such as Ghana, Cameroon, Côte d'Ivoire and Guinea-Conakry.<sup>176</sup>

**Spain and France have concluded their own versions of bilateral agreements with the same set of countries, but there are differences.**

172 White, Gregory, W. 'Sovereignty and international labor migration: "The Security Mentality" in Spanish-Moroccan relations as an assertion of sovereignty' 14(4) *Review of International Political Economy* (2007) pp. 690-718.

173 Pinyol, Gemma Labor Agreements for Managing Migration: The Spanish Experience CIDOB Foundation Workshop on Establishing Labor Migration Policies in Countries of Origin and Destination and Inter-State collaboration in the Western Balkans, OIM 9-10 February, 2009 Tirana.

174 ILO, The Co-development Programme, The Partnership France/Mali: available at: [http://www.ilo.org/dyn/migpractice/migmain.showPractice?p\\_lang=en&p\\_practice\\_id=4](http://www.ilo.org/dyn/migpractice/migmain.showPractice?p_lang=en&p_practice_id=4).

175 OECD, International Migration Outlook 2008, Country Report, Spain.

176 Pinyol (2009) op. cit.

**Consequently, the labor market access quota granted in these new generation agreements are often but the aggregate sum of recruitment quotas scattered about in the different precursor agreements.**

Both France's pacts on concerted migration management and Spain's cooperation agreements on migration have in common that they count as two path-breaking models for bilateral migration management. Yet, they are not as revolutionary as it may seem at first sight. Firstly, both integrate market access quotas from precursor agreements, for example from the old guest worker and student exchange agreements. France's new pacts on concerted migration management in addition adopt voluntary and assisted return programs from its old co-development conventions. Consequently, the labor market access quota granted in these new generation agreements are often but the *aggregate sum* of recruitment quotas scattered about in the different precursor agreements. For example, the bilateral migration agreements between Spain and Senegal of 10 October 2006 integrated the admission quotas from its old fishery agreements of 1982 between the countries.<sup>177</sup> The EU–Senegal fisheries agreement of 2002 with Senegal, which superseded Spain's agreement of 1982, foresaw a 50% quota of Senegalese personnel employed on EU fishing boats operating in Senegalese waters.<sup>178</sup>

The new templates emerged in response to the high-skill bias of immigration law reforms in Spain (2004)<sup>179</sup> and France (2006).<sup>180</sup> As such, both have an ex-post corrective function. France's and Spain's immigration law reform had disproportionately affected former colonies faced with large pools of unemployed or low-skilled labor, because the new points-based immigration ("immigration choisie") had been selectively biased towards the high-skills and had tightened family reunification. In reaction to criticisms from these countries, France had to backtrack from its two-tiered labor market admission scheme and re-introduced a quota-based recruitment scheme in its new pacts, albeit limited to shortage occupations in France.

Even if this return to the unpopular *quota-based recruitment* system of the post-war period risks infringing upon the most-favored nation clause of GATS Art. II, if service suppliers are targeted, the preferential labor market openings substitute for the missing political will to open labor markets on a multilateral MFN-basis at the WTO. In addition, the quota-based labor market opening serves as an alternative to the unpopular regularization programmes of overstaying migrant workers.<sup>181</sup>

177 Spain and Senegal, Agreement on maritime fishing (with annexes), signed at Dakar on 16 February 1982, UNTS 23011, Annex

C. "Senegalese personnel serving on Spanish vessels":

- a. Vessels authorized to fish in Senegalese waters under the terms of the Agreement on maritime fishing shall be required to take on registered Senegalese seamen comprising up to 33 per cent of their crews. Senegalese personnel with the following professional ranks are currently available: (a) First mate of a vessel of up to 300 GRT; (b) Second engineer of a vessel of up to 800 horsepower; (c) Navigating officer in charge of a watch of a vessel of up to 500 GRT; (d) Engineer officer in charge of a watch of a vessel of up to 3,500 horsepower; (e) Boatswain of a vessel of up to 300 GRT; (f) Seaman; (g) Greaser; (h) Galley boy and cook. In the case of freezer and wet fish tuna boats, the requirement to take on seamen shall be applied in the aggregate, taking into account how intensively the vessels fish in the fishing zone of Senegal and how many personnel they employ who are nationals of other countries whose grounds are frequented by the tuna fleet;
- b. Observers. One of the Senegalese crew members shall be designated to act as an observer on board each shrimp boat and each wet fish trawler. The master of the vessel shall be required to authorize him, in that capacity, to consult the ship's papers and allow him to perform his work as an observer.

178 Council Regulation (EC) No 2323/2002 of 16 December 2002 on the conclusion of the Protocol setting out the fishing opportunities and the financial contribution provided for by the Agreement between the European Economic Community and the Government of the Republic of Senegal on fishing off the coast of Senegal for the period from 1 July 2002 to 30 June 2006, OJ L 349, 24.12.2002, p. 4–5.

179 Spain's Law 4/2000 (Ley orgánica or Ley de extranjería) and Law on Aliens 14/2003.

180 France's Law of 24 July 2006 (Loi n°2006-911 du 24 juillet 2006 relative à l'immigration et à l'intégration).

181 Martin, Philip, Manolo Abella, and Christiane Kuptsch (eds.) *Managing Labor Migration in the Twenty-first Century* (2006) p. 91.

Predominantly, the agreements are thus concluded with countries whose citizens have a record of irregular entries and overstays in France and Spain, namely countries in Latin America, North and West Africa.

Overall France's and Spain's agreements have achieved a more equitable balancing of destination and source countries interests. Thus the new agreements implement the partnership approach to migration and can legitimately be qualified as precedent-setters in a couple ways. Firstly, they respond to criticism brought by immigration associations and NGOs against the "old" guest worker agreements, which had done but little to unleash the positive forces of migration for source country development. Secondly, these partnership agreements move away from the defensive, one-dimensional focus of readmission agreements. Thirdly, the agreements break new ground by using a policy mix of formalizing and informalizing the treaty-making process. On the one hand, the agreements *formalize the role of non-state actors*, such as private manpower agencies, NGOs, employer unions and industry associations. On the other hand, the government delegates its power to conclude such understandings to an individual government ministry or even agencies and thus "*informalizes*" *treaty-making*, in order to save resources and time. For instance, France's pact on concerted migration management of 28 April 2008 with Tunisia is such a framework agreement. It empowers employers unions, industry associations and research institutes to conclude ad hoc, *tripartite understandings* with an individual government ministry or agency. In doing so, it formalizes the role of such private-public partnerships.

**Overall France's and Spain's agreements have achieved a more equitable balancing of destination and source countries interests.**

Nonetheless the positive and negative conditionalities, which operationalize this partnership approach, primarily strive to obtain readmission quotas from the source country. If France and Spain have set a first example on how to comply with the international soft law principle of shared responsibility, their agreements remain *de facto* tilted towards migration control. Source countries' response has been to stifle competition between France and Spain over the volume of readmission and labor market admission quotas. In consequence, a race-to-the-top over admission quotas paralleled by a race-to-the-bottom over readmission quotas has been unleashed, which heightens the urgency for a common European solution. To argue that France and Spain have been pioneering the renaissance of bilateralism in managing migration may be accurate. Yet to find that they are at the forefront of this increasingly *multilayered administration of migratory flows* may be overrated. Rather, source country governments provoked a competitive environment among EU Member States, which in turn prepared the grounds for the *plurilateral EU mobility partnerships* to emerge in reaction. France's and Spain's treaty-based approach to global migration governance may still be a step ahead of communitarized, EU-wide migrant worker admission schemes, yet more competition between the bilateral, regional and multilateral levels of migration management is only a question of time. At minimum, France's pacts and Spain's cooperation agreements have to some extent overcome the fragmentation within formal systems for migration management.

# 9. The role of temporary labor mobility: Centerpiece or quid-pro-quo?

Bilateral migration management agreements are motivated by the *push factors* of migration, including unemployment and poverty, rather than by pull factors such as labor shortages in host countries. A cursory overview of labor market access in France's and Spain's agreements on cooperation in migration thus reveals an *ancillary* function for labor mobility. Compared to unilateral immigration schemes or multilateral GATS Mode 4 commitments, they do not add a substantial layer of liberalization.

**In most cases, labor market admission quotas to the host country labor market are the only type of quid-pro-quos which most migrant source countries accept in return for agreeing to readmit citizens in irregular stays in the host country.**

Admission quotas for the movement of workers are phased in or stepped up in parallel with the progress made on readmitting irregular migrants.<sup>182</sup> In most cases, labor market admission quotas to the host country labor market are the only type of *quid-pro-quos* which most migrant source countries accept in return for agreeing to readmit citizens in irregular stays in the host country.<sup>183</sup>

According to an ILO survey of 2003, out of the 92 countries responding, 68 had some sort of bilateral migration agreement in place, but only 19 such agreements contained actual labor market access.<sup>184</sup> For the majority of bilateral migration agreements, the rights of migrant workers, housing and workplace safety are the more dominant features, than liberalizing access itself. More often than not, however, such flanking measures inversely discriminate against the domestic workforce. For example, in the Canada-Caribbean and Mexico Seasonal Agricultural Workers Program (CCMSAWP) of 1966, the employer bears the costs of housing the migrant worker, pays for travel costs and for ENT to be conducted, including for the necessary advertisement of the post.<sup>185</sup> If the host country employers bear more costs when employing foreign workers than domestic ones and face *inverse discrimination*, they are discouraged from hiring foreign employees altogether.

**This facilitation has important human rights implications, as it prevents migrant workers from having to pay recruitment or smuggler fees and to otherwise be exploited.**

The main advance which these new generation bilateral migration agreements make over GATS Mode 4 is to facilitate the labor recruitment, selection and admission process. This facilitation has important *human rights implications*, as it prevents migrant workers from having to pay recruitment or smuggler fees and to otherwise be exploited. Moreover, such technical facilitation of migration-for-

182 Panizzon, Marion, 'Labor mobility: A win-win-win model for trade and development: The case of Senegal', NCCR Working Paper No. 7 (2008).

183 Groff, Alberto, 'Migration partnerships: new tools in the international migration debate', GCIM Global Migration Perspectives, No. 21 (2005).

184 Abella (2006) p. 36.

185 Guide to the Commonwealth Caribbean and Mexican Seasonal Agricultural Worker Programme (CCMSAWP), available at: [http://www.naalc.org/migrant/english/pdf/mgcansaw\\_en.pdf](http://www.naalc.org/migrant/english/pdf/mgcansaw_en.pdf); see also Tanya Basok, Canada's Temporary Migration Programme: A Model Despite Flaws, in: Migration Information source, Migration Policy Institute, 12 November 2007, [www.migrationinformation.org](http://www.migrationinformation.org). Hiring Foreign Workers in Canada, [http://www.hrsdc.gc.ca/en/workplaceskills/foreign\\_workers/temp\\_workers.shtml](http://www.hrsdc.gc.ca/en/workplaceskills/foreign_workers/temp_workers.shtml); Personal Notes, ICTSD and NCCR-Trade Workshop on Best Practices Facilitating Labor Mobility, Jongny, April 20-22, 2007.

employment processes generates important development gains for migrant source countries, since “even the poorest of Mexican and Caribbean workers can gain employment through this program.”<sup>186</sup> In terms of preferential labor market admissions, the French and Spanish models liberalize the movement of low-skilled workers as a way to target the pool of possible irregular migrants and to offer these an alternative to clandestine migration. Also, both agreements seek to comply with the MFN Art. II obligation of GATS and to recruit preferentially either outside the scope of GATS (Spain) or to conclude agreements with countries towards which an Art. II GATS MFN exemption was listed back in 1994. Nonetheless, both models slightly diverge as will be discussed below:

France’s “*pacts on concerted migration management*” have two ways of granting preferential admissions to persons from the partner country. A first one is to allow the country signing onto the pact with France to *add further professions* to the 30 *occupational shortage professions* listed in the Decree of 18 January 2008 for non-EU countries and which eliminates ENTs.<sup>187</sup> The pact with Senegal added 18; the one with Benin 16; the one with Congo 15; the one with Gabon 9 and the one with Tunisia 17 professions.<sup>188</sup> In addition France’s pacts introduce *annual minimum* recruitment quotas for certain categories of work permits. Only non-EU countries in France’s Priority Solidarity Zone (ZSP) can sign onto a new such pact and in result, obtain quota-based access within the work permit categories France introduced in its immigration law of 24 July 2006 for temporary stay. A quota capped at 1000 entries per year is reserved for Senegalese citizens hired by French employers (Art. 2 of the Senegal and France covenant-agreement of 2008). France’s competencies and talent admission card was capped at 150 for eligible citizens of Benin and Congo. France’s agreement with *Tunisia will have higher quotas* than those foreseen for Western African countries: 1500 for competencies and talents, 3500 annual entries for employees in one of the 80 professions which France lists in the Annex to the France-Tunisia agreement; and 2500 annual entries for seasonal workers.<sup>189</sup>

Spain’s “*cooperation agreements on migration*” rely more heavily than France on the private sector. Spanish companies are encouraged to go on prospecting missions into the partner countries to recruit workers. Multinationals such as Acciona, Carrefour and McDonald’s have been recruiting in Senegal within the annual recruitment quota of roughly 4000 Senegalese on a temporary one-year visa.<sup>190</sup> Another difference to France’s pacts is that Spain trains potential migrant workers prior to their departure abroad. A Technical Unit for the Selection of Migrant Workers (UTSTM) in Spain’s agreement on cooperation for migration with Ecuador, matches job offers to the qualifications of Ecuadorian workers and screens these applicants to find the most suitable candidate for a job.<sup>191</sup> Spain pledged to

186 Basok, Tanya Canada’s Temporary Migration Programme: A Model Despite Flaws’, Migration Information Source, Migration Policy Institute (12 November 2007).

187 Decree of 18 January 2008 on the delivery, regardless of the labor market situation, authorization of work to foreigners who are not from an EU Member State, a country party to the European Economic Space or Switzerland.

188 France, National Assembly, Report by Michel Terrot of 17 February 2009, p. 31.

189 France, National Assembly, Report by M. Jean-Claude Guibal, 17 February 2009, p. 27.

190 Spain to issue 2,700 work permits for Senegal migrants, 12 November 2007, available at: <http://www.workpermit.com/news/2007-11-12/spain/2700-spanish-work-permits-senegalese-migrants.htm> (last accessed 10 January 2010).

191 Chanda (2008) pp. 9–11; Friedman and Zafar (2008) pp. 8–12.

install similar training facilities, “escuelas talleres” for Senegal and two of these facilities will offer training for potential employees of heavy-duty baggage loading and call centres processing reservations for Air Europa.<sup>192</sup> Spain’s preferential recruitment circumvents the MFN of GATS by a two-fold strategy: firstly, the agreements only admit in *non-services categories* of seasonal agricultural and fishery workers. For instance, in its agreement with Senegal of 9 November 2007, Spain admitted 2700 Senegalese to work on strawberry farms (700) and in the fishery sector (2000).<sup>193</sup> Secondly, employment of foreign workers is limited to sponsorship by *employers domiciled or residing in Spain*, the type of cross-border movement which Mode 4 of GATS excludes.

**Whatever the type of agreement, compliance with the MFN obligation of Article II GATS is at stake as soon as a preferential recruitment of foreign workers targets service suppliers.**

Whatever the type of agreement, compliance with the *MFN* obligation of Article II GATS is at stake as soon as a preferential recruitment of foreign workers targets service suppliers. There are at least five options for ensuring WTO-consistency of a preferential recruitment scheme: Firstly, the preferential labor market access scheme can be *generalized* to all WTO Members. Since most destination countries have no interest to eliminate all visa and work permit requirements in view to justify the MFN deviation, the *labor market integration* exception of Art. V<sup>bis</sup> GATS, secondly will be scarcely invoked. Most countries will have no other choice, but to go for the third type of MFN-compliance and liberalize the temporary movement of persons under the regionalism *exception* of Art. V GATS, which requires that “substantially all services trade” (in all four modes of service supply and in all service sectors) be liberalized at a *deeper degree* than the current level of GATS commitments. Therefore, in a North-South context, EPAs are emerging as the comprehensive solution to trade and migration.

If LDCs are involved, a fourth suggestion, brought forth by the LDC group, proposes that such a bilateral agreement could be waived under Art. XI of the WTO Marrakech Agreement from the MFN requirement under the *Special and Differential Treatment* provisions of GATS Art. XVI and XIX. While it is still possible in principle to justify preferential labor market access under the one-time MFN Art. II exemptions, these exemptions, and thus the fifth possibility for exempting a preferential liberalization of service suppliers from the MFN Art. II obligation was in principle phased-out in a generalized manner by year-end 2004.<sup>194</sup> Thirty-six original WTO Members have listed such preferential admission schemes for service suppliers from select partner countries in their exemptions.<sup>195</sup> France, for instance, could invoke its “10-year in principle”, Art. II MFN exemption towards Francophone Africa, Algeria, Switzerland and Romania to justify the preferential quotas of its new pacts.<sup>196</sup>

192 Nash, Elizabeth and Claire Soares, ‘Spain offers jobs and visas to fight illegal migration’, *The Independent*, Tuesday, 26 June 2007.

193 Pinyol (2009).

194 See generally, Adlung, Rudolf and Carzaniga, Antonia, ‘MFN Exemptions Under the General Agreement on Trade in Services: Grandfathers Striving for Immortality?’ in (2009) 12(2) *Journal of International Economic Law* 357–392.

195 WTO Document S/C/W/301 26.

196 European Communities and their Member States, List of Article II:2 Annex of GATS (MFN exemptions); for other examples of Art. II MFN exemptions facilitating the preferential admission of service supplying persons see Annex, WTO Document S/C/W/301: New Zealand vis-à-vis Kiribati (capped at 20 nationals per year) and Tuvalu (capped at 80 nationals annually); Jordan, waiving annual work permit fees towards nationals of Arab countries, Jamaica towards CARICOM Members, waiving work permits, Italy, guaranteeing work permits to countries of Central and Southern Eastern Europe and of the Mediterranean basin; Switzerland granting preferential entry, stay and work permits to persons other than the essential persons of the its GATS commitments from EU/EFTA countries; the UK waiving work permit requirements for Commonwealth member countries, if these persons had a grandparent born in the UK; the US automatic issuance of a treaty trader or treaty investor immigrant visa for all countries with whom the US has a treaty of friendship, commerce or navigation, a bilateral investment agreement or for countries described in Sect. 204 of the Immigration Act of 1990.

Table 3: **Advances of regional trade agreements, bilateral migration agreements and EU mobility partnerships over Mode 4 of GATS**

	Regional trade agreements	France's pacts on concerted migration management and other bilateral migration agreements	EU mobility partnerships <sup>197</sup>
<b>Visa standardization/ quotas/preferential elimination of ENTs</b>	<ul style="list-style-type: none"> <li>• H1-B1 FTA-visa in the US-FTA with Singapore and Chile (2004)</li> <li>• E-3 visa in the context of the US-Australia FTA 2006</li> <li>• EFTA / EU Schengen visa</li> <li>• NAFTA business visitor visa</li> <li>• APEC business travel card</li> </ul> <p>NAFTA TN visa (originally capped at 5'500 professionals from Mexico annually, uncapped in 2004; never capped for Canadians)</p> <p>H1-B1 FTA-visa in the US-FTA with Singapore (5400 annual cap) and Chile (1800 annual cap)</p>	<p>France's pacts eliminate ENTs based on occupational shortage list of 30 professions for non-EU countries to which each pact adds</p> <ul style="list-style-type: none"> <li>• Senegal 18</li> <li>• Benin 16</li> <li>• Congo 15</li> <li>• Gabon 9</li> <li>• Tunisia 17 professions</li> </ul> <p>France's pacts operate quotas for the following admission categories defined by France's 2006 immigration law</p> <ul style="list-style-type: none"> <li>• "skills and competencies"</li> <li>• "young professionals"</li> <li>• "professional"</li> <li>• "temporary worker"</li> <li>• "salaried workers and salaried workers on mission"</li> <li>• "seasonal workers"</li> </ul>	"develop a dialogue on short-stay visa issues to facilitate the mobility of certain categories of persons"
<b>Circular migration and visa renewal</b>		<p>France's pacts add preferential renewal to:</p> <ul style="list-style-type: none"> <li>• "skills and competencies" (3 yrs; renewable once)</li> <li>• "salaried worker" (12 mnths; renewable once)</li> <li>• circular migration for persons involved in co-development projects, retired persons or those seeking medical care in France (2 yrs. or more)</li> <li>• seasonal worker visa (only pact France-Tunisia, 3 yrs; renewable once)</li> </ul>	"encourage circular migration of workers"
<b>Common service provider categories definition</b>	<ul style="list-style-type: none"> <li>• Art. II of Annex VIII to Japan-Switzerland FTA (2009)</li> <li>• Annex VIII to JPEPA (2006)</li> </ul>	List of professions and occupations jointly established by France and partner countries in France's "pacts on concerted migration management"	
<b>Mutual recognition of qualifications</b>	<ul style="list-style-type: none"> <li>• EU-Switzerland agreement on free movement of persons (2001)</li> <li>• Japan-Switzerland FTA (2009)</li> <li>• EC—CARIFORUM EPA (2008)—only a mandate to conclude in the future an MRA</li> </ul>	ROAME (Répertoire Opérationnel Africain des Métiers et des Emplois) in the context of the EU Partnership for Managing Professional Migration with Benin, Cameroon, Mali, Senegal	
<b>Job offer / demand matching or shortage lists</b>		<ul style="list-style-type: none"> <li>• IMIS / IDOM in Egypt-Italy (2005)</li> <li>• UTSTM in Ecuador-Spain (2001)</li> <li>• EU-CIGEM Center in Mali since 2008;</li> <li>• Canada / FERME-Guatemala-IOM (2003)</li> </ul>	
<b>Worker selection, pre-employment training / skill-testing</b>	Art. 10, Agreement Implementing the JPEPA (2006)	<ul style="list-style-type: none"> <li>• "escuelas talleres" in Art. 3 (2) of Spain's framework agreement for West Africa</li> <li>• UTSTM in Ecuador-Spain (2001)</li> <li>• Canada / FERME-Guatemala-IOM (2003)</li> <li>• projects for professional training listed in Annex I of Tunisia-France pact (2008)</li> </ul>	"promote pre-departure training and support measures for temporary workers"
<b>Joint information-sharing / oversight</b>	<ul style="list-style-type: none"> <li>• US-Singapore FTA (2004)</li> <li>• US-Chile FTA (2004) "commission on temporary entry"</li> <li>• JPEPA (2006)</li> <li>• ACP migration facility (2009)</li> </ul>	<p>Migration observatories in France's pacts for regular information exchange on:</p> <ul style="list-style-type: none"> <li>• the development of labor markets</li> <li>• possibilities for foreign employment</li> <li>• professions with sustained recruitment difficulties in France (Benin, Senegal)</li> </ul>	"provide information about the labor market situation"; "strengthen institutional and administrative capacity to manage migration"
<b>Return/readmission</b>	<ul style="list-style-type: none"> <li>• Art. 10 Agreement Implementing the JPEPA (2006) "return of Filipino nurses and care workers to the Philippines"</li> <li>• Art. 13 para 5 lit. c CPA (2005)</li> </ul>	<p>All of France's pacts on concerted migration management</p> <p>All of Spain's agreements on migratory co-operation and readmission</p>	"develop a dialogue on the question of readmission"
<b>Labor standards</b>	<ul style="list-style-type: none"> <li>• All US FTAs</li> <li>• Art. 9 and 96 CPA (2008)</li> <li>• Art. 44 EC-Chile FTA (2002)<sup>198</sup></li> </ul>		"improve the social protection of legal migrants"



197 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on circular migration and mobility partnerships between the European Union and third countries, COM/2007/0248 final, 16 May 2007, OJ C/2007/191/17 of 17.8.2007 [hereinafter Migration and mobility partnerships between the European Union and third countries, OJ C/2007/191/17 of 17.8.2007]; see also Council of the European Union Joint Declaration on a Mobility Partnership between the European Union and the Republic of Cape Verde Brussels, 21 May 2008, [http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/en/ec/101346.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/101346.pdf) (last accessed 10 January 2010).

198 Grynberg, Roman and Qalo, Veniana 'Labor Standards in US and EU Preferential Trading Agreements' (2006) 40(4) *Journal of World Trade* pp. 647ff; interestingly, the EC-Mexico and EC-South Africa TDCA do not refer to labor standards.



	Regional trade agreements	France’s pacts on concerted migration management and other bilateral migration agreements	EU mobility partnerships <sup>197</sup>
<b>Fundamental human rights</b>	All Euro-Med Association Agreements <sup>199</sup> refer to the Universal Declaration on Human Rights	<ul style="list-style-type: none"> <li>• France’s pacts have blanket reference to “fundamental rights” in relation to readmission procedures</li> <li>• only Art. 4 Senegal-France pact (2006) expressly lists human rights instruments<sup>200</sup></li> </ul>	
<b>Information campaigns</b>		Information campaign with audiovisual material on risks of irregular migration: Art. 65 France-Senegal pact (2006)	“Information and warning campaigns on risks of illegal immigration and on the dangers of exploitation and trafficking in human beings”
<b>Joint border control</b>		Spain’s agreements on cooperation in migration; France’s pacts	FRONTEX agency

199 Art. 74 EU–Algeria; Art. 71 EU–Morocco, EU–Tunisia; Art. 65 EU–Egypt, EU–Lebanon and Art. 62 EU–Jordan association agreements.

200 Senegal-France pact of 2006 refers to the Geneva Convention on the Status of Refugees of 28 July 1951; the New York Convention of 31 January 1967 on the status of stateless persons; for France to the European Convention on Human Rights of 4 November 1950 and for Senegal to the African Charter of Human Rights of 27 June 1981.

# 10. Conclusions and Recommendations

Trade liberalization in goods and services complements the movement of human and financial capital and contributes to the rise of international migration. The development dividend for developing countries arising from labor migration cannot be contested in general, but the degree to which the gains are shared by the whole society depends very much on whether the regulatory framework that both sending and receiving countries manage to set up creates a “win-win-win” situation for the migrant and the respective countries involved.

The paper has given an analysis of the shortcomings of Mode 4. As a whole, while the multilateral trading system managed by the WTO provides for the liberalization of temporary labor mobility, it is institutionally unequipped to manage the increasingly complex regulatory issues, which the cross-border movement of persons unleashes. As they currently stand, commitments in Mode 4 are lowest, where development gains would be highest, for low-skilled service suppliers.

In the absence of a coherent architecture of multilateral norms and disciplines, a “spaghetti bowl” of overlapping provisions on migration has arisen in the international arena. The diffuse exercise of international responsibility for migratory flows assigns a particularly important role to bilateral and regional arrangements in managing the complex challenges of labor mobility.<sup>201</sup> A new interface emerges in this context between trade agreements (GATS Mode 4), labor mobility provisions found in PTAs and non-trade migration agreements.

Trade and non-trade agreements diverge over what type of risk associated with migration is to be prioritized and to what degree such risks ought to be “managed” and by whom. *Flexibility* in the national treatment obligation of GATS and most FTAs allow WTO Members to protect their domestic workforce against the risk of wage downward pressure, job displacement and deterioration of working conditions. Such flexibilities have been criticized by developing and least developed WTO Members as incompatible with the principle of comparative advantage underlying multilateral trade liberalization. In their view, GATS leaves an overbroad policy space to national immigration authorities which want to protect domestic workers in inefficient sunset industries. WTO Members further reduce the “*meaningfulness*” of GATS Mode 4 commitments by failing to agree on multilaterally defined criteria for the recognition of non-formal qualifications (job experience, artisanal training in the informal sector). This prevents service supplying persons from gaining access to foreign services markets or leads to brain waste. Purposely mismatched service provider classification and visa categories impinge on

**The diffuse exercise of international responsibility for migratory flows assigns a particularly important role to bilateral and regional arrangements in managing the complex challenges of labor mobility.**

201 Delimatsis, Panagiotis, Diebold, Nicolas F., Molinuevo, Martin, Panizzon, Marion and Sauv e, Pierre, “Developing Trade Rules for Services: A Case of Fragmented Coherence?”, NCCR Trade Regulation Working Paper No. 38, available at SSRN: <http://ssrn.com/abstract=1472053>; see also Global Commission on International Migration (GCIM), *Final Report*, October 2005, p. 63.

the predictability of channels available to access markets via Mode 4. The absence of a mandatory fast-track visa application procedure for Mode 4 workers, the lack of a multilateral mandate to harmonize visa policies, but also the multilateral caveat over national immigration law and finally the ineffective transparency obligations are further instances testifying to the missing regime in GATS for managing migration.

**The advantage of trade agreements, including GATS, is that trade-offs can be made on a broader set of issues, ranging from agriculture over services to intellectual property protection.**

Yet, the paper has argued that Mode 4 can potentially deliver for development in the future. Contrary to widely held critic, it is possible to *maximize* the development potential of labor migration through trade agreements, including the ones at the WTO. The advantage of trade agreements, including GATS, is that trade-offs can be made on a *broader set of issues*, ranging from agriculture over services to intellectual property protection. In bilateral migration agreements, *quid-pro-quo*s are limited to visa relaxation, labor market openings and development aid, but also include border securitization and cooperation on readmission. Within GATS, developing countries can use a cross-modal linkage between Mode 3 and Mode 4 which, if tailored well, can qualify the right to establish commercial presence in a typical migrant source country to the requirement that this investor employ and train a minimum number of domestic workers. The *MFN clause of GATS* ensures some level of global coherence as it *prevents preferential labor market* openings.

The strength of the WTO lies in the fact that it encourages states, for the benefit of mutual gains from liberalization, to be less restrictive with regard to allowing access to their markets. In contrast to bilateral agreements, commitments under the WTO are binding for its Members, are applied in a non-discriminatory manner and most importantly, can be disputed over if differences emerge under the WTO dispute settlement mechanism.

For Mode 4 to provide a meaningful framework for the management of international migration WTO Members need to agree on the following:

1. To inscribe regulatory obligations into Mode 4 commitments: voluntary return and readmission guarantees as well as anti-brain drain recruitment policies, which can be part of the additional commitments section of a WTO Member's GATS schedule.
2. To effectuate cross-modal trade-offs involving Mode 4 on a larger scale, in particular with Mode 3 and thus mobilize also the private sector as an actor.

**With only but few tangible answers to the regulatory challenges of migration, posed by brain drain, overstays, un-enforced returns, exploitation, smuggling and human trafficking, the WTO will necessarily need to integrate instruments that the migration agreements provide for.**

But GATS cannot serve as a global regulator or *standard-setting agency*. With only but few tangible answers to the regulatory challenges of migration, posed by brain drain, overstays, un-enforced returns, exploitation, smuggling and human trafficking, the WTO will necessarily need to integrate instruments that the migration agreements provide for. These have been specifically designed for regulating the risks associated with the migration of lower skilled workers and offer valuable advances in terms of regulation migratory flows and institution-building.

Given the limitations of GATS on the one hand and the security rationale of bilateral migration agreements on the other hand, only the managed interplay between the multilateral, regional and bilateral levels will provide the solution to the miss-

ing regime for migration. It will be necessary to look for new regulatory solutions to interlink the multilateral, regional and bilateral levels of migration governance so as to bring about a more coherent, multilayered treaty structure. A key challenge running throughout all three layers of migration treaty law will be to achieve an appropriate balance between migration regulation and liberalization. Not only will the scheduling structure of GATS have to be redesigned to embed regulatory obligations, but bilateral non-trade migration agreements must be structured in ways that these complement rather than compete with the types of labor mobility which GATS Mode 4 liberalizes, so as to avoid conflicts with the MFN of GATS. Only if the regulation and liberalization of migration are integrated within a coherent global regime will it be possible for migrant source and destination countries to truly share responsibility for migration and its root causes.

The paper has shown that there is policy space for tailoring the WTO multilateral trading system to unleash the development dividends associated with temporary economic migration. Creative thinking and detailed research on the optimal level of regulation, the target groups of migrant workers and risk reduction or mitigation mechanisms are required, but there is ample evidence that the GATS Mode 4 can play even if only indirectly a greater role in providing access to foreign labor markets. Research is necessary to learn how to reform the scheduling structure of GATS commitments, which currently is too technical, the scope of application ambiguous and the limitations and exemptions therein insufficiently defined for GATS Mode 4 to be applied on a broader scale.

**The paper has shown that there is policy space for tailoring the WTO multilateral trading system to unleash the development dividends associated with temporary economic migration.**

## List of Acronyms

CARIFORUM:	15 CARICOM countries less Guyana and Haiti
CSS:	Contractual Service Supplier
EFTA:	European Free Trade Area
ENT:	Economic Necessity Test
EPA:	Economic Partnership Agreement
EU:	European Union
FRONTEX:	(from French: Frontières extérieures for ‘external borders’) European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
FTA:	Free Trade Agreement
GATS:	General Agreement on Trade in Services
GCIM:	Global Commission on International Migration
IAMM:	International Agenda for Migration Management
ICAO:	International Civil Aviation Organization
ICT:	Intra-Corporate Transferee
IOM:	International Organization for Migration
ILO:	International Labor Organization
IP:	Independent Professional
JPEPA:	Japan-Philippines Economic Partnership Agreement
MFN:	Most-favored Nation
MONP:	Movement of Natural Persons
MRA:	Mutual Recognition Agreement
OECD:	Organization for Economic Cooperation and Development
PTA:	Preferential Trade Agreement
ROAME:	Répertoire Opérationnel Africain des Métiers et des Emplois
SDT:	Special and Differential Treatment
UNHCR:	Office of the United Nations High Commissioner for Refugees
UNOHCHR:	Office of the High Commissioner for Human Rights
WTO:	World Trade Organization

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About the Author:

**Marion Panizzon** is an assistant professor in international law at the University of Bern. She holds a PhD in international economic law from the University of Bern, a Masters in Law of the University of Fribourg, Switzerland and an LL.M. from Duke University School of Law. Marion is a member of the faculty of the World Trade Institute, Bern and of the Trade Policy Center in Africa (TRAPCA) Arusha, Tanzania Since 2005, Marion has co-lead various research projects at the World Trade Institute on different aspects of WTO law, including on intellectual property rights protection and services trade. She has been a visiting scholar both at Georgewotun University Law Center and COMPAS, Oxford University. At present, she leads a research group on regulating economic migration, which is financed by the National Center of Competence in Research (NCCR-Trade Regulation). Having written and co-authored on a range of WTO topics, her main area of current interest is the relationship between labor migration and trade law. Relevant publications include *GATS and the Regulation of International Trade in Services*, Cambridge University Press, 2008 (co-edited with Pierre Sauvé and Nicole Pohl) and *Good Faith in the Jurisprudence of the WTO*, Hart Publishing, Oxford, 2006.

*For further information on Dialogue on Globalization, please contact:*

Friedrich-Ebert-Stiftung Berlin  
Hiroshimastrasse 28  
D-10785 Berlin  
Tel.: ++49-30-26-935-7407  
Fax: ++49-30-26-935-9246  
Roswitha.Kiewitt@fes.de  
www.fes.de  
www.fes-globalization.org

Friedrich-Ebert-Stiftung  
Geneva Office  
Chemin du Point-du-Jour 6 bis  
CH-1202, Geneva  
Tel.: ++41-22-733-3450  
Fax: ++41-22-733-3545  
fes.geneva@econophone.ch  
www.fes-globalization.org/geneva/

Friedrich-Ebert-Stiftung  
New York Office  
747 Third Avenue, 22b  
New York, N.Y. 10017  
Tel.: ++1-212-687-0208  
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