THINKING DIFFERENTLY ABOUT GATS MODE 4
NEGOTIATIONS ON THE MOVEMENT OF LOW
SKILLED WORKERS

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Abstract: In principle, mode 4 is meant to facilitate cross-border movement of all professions. However, in practice WTO Members have often refrained from making commitments orientated to benefitting low skilled workers. This paper looks at the economic, political and legal concerns that exist due to the current composition of GATS mode 4. It proposes a different approach to negotiations at the multilateral level which allows for discussion on the regulation of the entry, stay and return of a service supplier. Such an approach is might be considered controversial. It would require WTO Members to discuss to a certain extent the labour standards to which temporary migrant workers would be subjected. Still, this paper finds that the current composition of the GATS allows for the adoption of such a different approach. Changes to the law are discussed that could better facilitate negotiations on mode 4 movement beneficial to low skilled workers. Suggestions are made why the adoption of this different approach might be feasible in the current political climate. This paper’s objective is to suggest tools to further negotiate commitments more efficiently benefitting the subset of low skilled workers within the multilateral trading system.

Keywords: GATS mode 4, low-skilled workers, negotiations, WTO.

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I. INTRODUCTION

The multilateral trading system provides for natural persons to move abroad temporarily for the purpose of providing a service. Such mode 4 supply is covered by the obligations found in the General Agreement on Trade in Services (GATS) read in conjunction with its Annex on the Movement of Natural Persons (Annex MNOP). The Members of the World Trade Organization (WTO) have
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generally made few commitments with respect to mode 4. Where commitments are made, these favour highly skilled professionals.\(^1\) Although not excluded in principle, low skilled workers are not or barely covered by mode 4 commitments. This is troublesome for several reasons. First, it is estimated that further liberalization of GATS mode 4 for low skilled workers will have a significant positive impact on economic growth for both home and host countries.\(^2\) Second, there appears to be a contradiction between commitments made at the multilateral level compared to the bilateral level. There is almost no liberalization of GATS mode 4 commitments at the multilateral level.\(^3\) Simultaneously, there is an increase in regional trade agreements and free trade agreements which do include such commitments. This divergence in terms of progress is worrisome as it may affect the perceived importance of the WTO.

Despite the fact that discussion on GATS mode 4 has been on the agenda of the WTO for a while, recent events have shown it is still highly relevant to WTO Members.\(^4\) Therefore, this paper will discuss whether a different approach taken towards GATS mode 4 negotiations could generate more liberal commitments within the multilateral trading system which would benefit low skilled workers. The

hypothesis is that further liberalization could be realized were WTO negotiations to allow for a discussion on the entry, stay and return of a temporary service supplier.

II. THE ECONOMIC, LEGAL AND POLITICAL IMPLICATIONS OF LIMITED COMMITMENTS ON GATS MODE 4

There are very few commitments made by WTO Members to GATS mode 4, is in spite of the fact that GATS and the Annex MONP provide a legal framework under which such commitments can be taken. At the same time, continued skill shortages in host countries suggest that regular migration at present is insufficient to meet labour market demands, which suggests that there is also an economic need for increased mode 4 movement. To better understand this apparent contradiction, the following section discusses the main concerns that exist in relation to the movement of low skilled workers and GATS mode 4.

A. THE ECONOMIC IMPLICATIONS

The importance of liberalising GATS mode 4 is best seen when looked at the potential economic benefits. It has been suggested that 40 percent liberalization in trade in services would generate 300 billion dollar annual increase in global welfare, which is equal to the same level of liberalization in agriculture and manufacturing combined. This figure has been supported by later studies, suggesting that approximately 150 billion dollar annually can be gained if developed countries allowed a lifting of restrictions on movement of people.

9 Ibid., 119, 125.
A first economic issue identified in this context, is that trade in services is assumed to be subject to the same economic principles as trade in goods. In economic theory, labour is seen as a factor of production equal to capital and land. From a pure economic perspective, the output of labour mobility would be the same as the output of trade in goods. Thus, trade in goods and movement of labour as a factor of production would be substitutes. The Factor Price Equalisation theory (FPE theory) has been the main motivator for Free Trade Agreements (FTAs) such as the North American Free Trade Agreement (NAFTA), the EU - Mediterranean FTA and the EU-Central Europe Agreements. However, this is not a fully accurate reflection of reality. Service supply falling within the scope of GATS mode 4 concerns the movement of people. Although mode 4 is not meant to facilitate migration, the cross-border movement of persons under mode 4 cannot be looked at solely from an economic point of view. GATS mode 4 trade is better reflected in dual labour market theories where the consequences of movement are taken into account. Such an exercise generally requires a more complicated analysis compared to trade in goods. Sending states will look at advantages of labour movement such as increased specialisation, increased national welfare generated by remittances and foreign experience flowing back into the domestic economy when workers return. The receiving state will assess the advantage depending on the amount by which productivity costs are lowered, the intensity of productivity increases and the extent to which foreign and domestic workers are complementary. These are gains not easily reflected in one single number. Gains from increased cross-border movement of


12 Supra note 9, p. 117.


14 In the period between 2002 and 2011, the flow of remittance around the globe has been reported to have increased from 170 billion to $468 billion. Seventy-five percent of remittance came from developing countries. Dowlah, C., “Cross-Border Labor Mobility, A Critical Assessment of WTO’s GATS Mode 4 vis-à-vis Regional Trade Agreements”, Journal of International Trade Law and Policy, Vol.13(1) (2014), p. 4.

people spread through almost all sectors of society and are difficult to capture. This equally applies to
the drawbacks. For sending states this could mean the loss of skills, brain drain, loss of domestic
resources and the breaking up of families. Receiving states will be concerned with social security costs,
national security considerations, increased competition for domestic workers and the reaction of their
domestic constituency.

A second economic issue is that the value of GATS mode 4 liberalization depends on the conditions
applied to the cross-border movement of persons in both the sending and the receiving state.\(^6\) An
appropriate response addressing mode 4 movement, would be for the receiving and the sending state
to cooperate and develop a joint policy.\(^7\) However, WTO Members thus far have reacted to cross-
border movement of persons with unilateral measures.

B. THE LEGAL IMPLICATIONS

Article I:2 (d) GATS defines the temporary movement of natural persons (TMNP) as “the supply of a
service by a service supplier of one Member, through presence of natural persons of a Member in the
territory of any other Member.”\(^8\) Such supply can be undertaken by any natural or juridical person,
but always through the movement of a natural person.\(^9\) In principle, no professional is \textit{a priori} excluded
from the scope of GATS mode 4, provided that they fall within the legal definition of service supplier.
However, the current legal framework seems not optimally equipped to support the movement of low
skilled workers.

1. \textit{Interpretation of the term ‘service supplier’}

The definition of “service supplier” poses certain interpretative questions which are incidentally
unfavourable to low skilled workers. According to the WTO Secretariat Background Note on the

\(^6\) \textit{Supra} note 6, p. 14.

\(^7\) \textit{Supra} note 9, p. 116.

\(^8\) General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade
Organization, Annex 1B, The Legal Texts: the Results of the Uruguay Round of Multilateral Trade Negotiations

\(^9\) Article XXVIII(j) and Article XXVIII(g) GATS, read together with Background Note WTO Secretariat,
Presence of Natural Persons (Mode 4), S/C/W/301, 15 September 2009, p. 2.
Presence of Natural Persons (Background Note), a service supplier necessarily must be a firm or self-employed supplier who receives remuneration directly from customers.\textsuperscript{20} This interpretation excludes individuals providing labour services offering themselves for employment at a domestic firm of the host country.\textsuperscript{21} The interpretative question that remains is whether a service is held to be provided and if an international transaction has taken place, when a domestic firm employs a foreigner to provide a service locally.\textsuperscript{22} This interpretation poses an obstacle for those professions that are usually deemed low skilled; such as domestic workers, construction workers or carers. Traditionally, these professions are more often exercised in the form of employment with a domestic company. Such an employment relationship is classified as domestic employment which is regarded labour migration and so excluded from GATS coverage.\textsuperscript{23} The current interpretation of service supplier leads potentially to a \textit{de facto} exclusion of low skilled workers from the scope of GATS mode 4.

Another issue arising in relation to the current interpretation of service supplier is that the same service supplier is treated differently, depending on whether the supplier is under contract with a domestic or a foreign firm. This is inconsistent with the economic reality. It is preferable to divide services movement based on their nature, length and nature of the contract of the supply and duration of the stay of the worker.\textsuperscript{24}

2. \textit{Conditional liberalization}

The commitments filed by WTO Members under mode 4 of the GATS do not provide for unconditional liberalization. Barriers to movement range from requirements relating to immigration, entry and stay, non-recognition of qualifications and exemption of national treatment of foreign workers.\textsuperscript{25}

\textsuperscript{20} \textit{Ibid.}, p. 3.
\textsuperscript{21} WTO Secretariat, “Presence of natural persons (mode 4), Background Note by the Secretariat”, S/C/W/75, December 1998, para. 56.
\textsuperscript{22} \textit{Supra} note 9 p. 145.
\textsuperscript{24} \textit{Supra} note 9, p. 146.
\textsuperscript{25} \textit{Supra} note 6, p. 14.
Even though Article VII GATS allows Members to recognise the qualifications and experiences of each other’s suppliers, in practice only similarly situated Members have concluded such Mutual Recognition Agreements (MRAs). Consequentially, developing countries and Least Developed Countries (LDCs) do not generally benefit from such agreements. Being excluded from MRAs, workers from poorer countries are required to undergo lengthy and burdensome processes to prove they have a sufficient skill or education level. Such a high administrative burden poses a barrier to movement especially for this group of –typically– low skilled workers.

Low skilled workers are also hindered by the imposition of an Economic Needs Test (ENT) adopted by many receiving states. Receiving states condition market access on the demands of the domestic labour market. ENTs are unilaterally imposed without taking into account the composition of the labour market in the sending state.

Finally, requiring wage parity, a departure from the National Treatment (NT) disciplines under Article XVII GATS, is another common way to discourage movement of low skilled workers. Without commenting on the reasonableness of such a policy measure, it is a fact that this prevents the main comparative advantage of sending state: an abundant and relatively cheap labour force.

3. Immigration measures

The GATS allows Members to take MFN inconsistent measures in relation to visa requirements. The freedom Members enjoy in choosing their own migration policy, although their sovereign right, is posing a practical challenge of ensuring convergence between different immigration procedures of Member States. The lack of harmonisation and/or convergence increases the difficulty for mode 4 service suppliers to understand and comply with all the immigration requirements permitting them to enter the

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26 Supra note 8, p. 15.
27 Supra note 6, p. 33-34.
market. These practices of (permitted) discriminatory use of visa and work permit requirements do not have to be scheduled as market access limitations. Furthermore, general immigration measures do not have to be made known to the WTO Membership. Due to the “immigration caveat” in the Annex MNOP, immigration requirements can only be addressed under the scope of the GATS if visa requirements “nullify or impair a benefit” under a specific commitment. This could diminish the predictability of mode 4 commitments as it will be difficult for foreign service suppliers to know all existing regulatory barriers to movement. Often, additional formal requirements conditional to market access are not communicated to other WTO Members. In 2005, Members debated inscribing a transparency commitment in their additional commitments section so that information relevant to entry of the market, duration of the stay and work authorization would be scheduled. During the July 2008 negotiations interest was expressed to standardize the possibility for visa renewal. However, these proposals have not yet been adopted.

C. THE POLITICAL IMPLICATIONS

1. Commitments

Most Members have preferred to schedule horizontal commitments, instead of drafting sector-specific offers that respond to economic needs of both host and home states. In 2003, the WTO Secretariat observed that WTO Members had undertaken commitments at very aggregate levels with very little sectoral specificity. In 2008, only 17 percent of all horizontal entries had the potential to cover low

30 Supra note 24, pp. 11-12.
31 Ibid.
32 Article XXXIII:2 GATS.
34 Ibid., pp. 16, 29, 23.
35 Services Signaling Conference, Report by the Chairman of the TNC, JOB(08)/93, 30 July 2008, paras. 1–4.
36 Supra note 31, pp. 20, 22.
37 Informal Note by the Secretariat, Categories of Natural Persons subject to Commitments under Mode 4, JOB(03)/195, 3 October 2003.
skilled workers. Data from 2010 shows that commitments were still heavily biased towards intra-corporate transferees, accounting for 43 percent of all commitments made. A distant second were Business Visitors (BV), making up for 24 percent. Of the commitments actually made, only Contractual Service Suppliers (CSS), BVs and the 'other' category could potentially cover lower skilled workers. No mode 4 commitments have been made for areas such as hotel and catering services and construction, which are specifically important sectors for low skilled workers. Mode 4 commitments are generally connected to mode 3 commitments so as to ensure that the potential loss of resources drawn from the public welfare system due to the cross-border movement of persons are offset by benefits stemming from increased capital. This practice disfavours developing countries (and its mostly low skilled labour force) as companies from these countries usually do not have sufficient resources to make significant foreign investments.

2. Lack of momentum in the negotiations

Discussions on mode 4 service supply are a key issue in the Doha Development Round (DDR). An important reason for the lack of negotiating momentum with respect to mode 4 commitments is the absence of shared responsibility between the labour home and the host country regarding the entry, stay and return of the migrant worker. As contradictory as it might seem, the exemption from the obligation to draft reciprocal offers goes against the needs of developing countries and LDCs. Cross-border movement of persons falling within the scope of GATS mode 4 poses risks, or at least is perceived as

39 Supra note 29, p. 16.
40 Supra note 22, para. 96.
41 Supra note 9, p. 146.
43 Supra note 8, p. 15.
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risky for host countries. Reciprocity and shared responsibility will help in creating political trust and will of host states to open their markets.\textsuperscript{46}

The absence of a regulatory mandate in GATS on issues of migration control and prevention has contributed to the lack of offers that respond to an actual development need of low skilled workers. In an attempt to solve this issue, India has in 2000 proposed the introduction of a “GATS visa”. This would entail all Members to adopt a fast-track visa application procedure solely for mode 4 workers.\textsuperscript{47} A harmonised visa procedure goes to the core of the sovereignty of WTO Members, which explains the lack of enthusiasm with which this proposal has been received. A less drastic approach would be to introduce more standardized procedures and a more detailed sector classification in GATS negotiations.\textsuperscript{48} A readily available possible new sector classification is available by adopting the International Labour Organization (ILO) ISCO-88, which identifies different skills groups.\textsuperscript{49} However, those Members that are traditionally receiving states have not looked favourably at the use of such a classification. A list of objectives that should be discussed when negotiating modes and services sectors was adopted in 2005.\textsuperscript{50} This list does not have legal standing.\textsuperscript{51} Thus far, Members have shown their willingness to agree that excessive formalities for obtaining a visa should be eliminated, but have not reached a formal agreement in that respect.\textsuperscript{52}


\textsuperscript{47} Council for Trade in Services, Negotiating Proposals of WTO Members, India, S/CSS/W/12, 21 November 2000. In 2006, a revised collective request was tabled by the Group of LDCs, in which they also called for a wider coverage of sectors and inclusion of service provider categories that are of specifically of importance to LDCs. The LDCs also called for alternative means of proofing competence, which included demonstrated experience and non-formal qualifications. Council for Trade in Services, Communication from the Delegation of Zambia on Behalf of the LDC Group, LDC Group Request on Mode 4, JOB(06)/155, 24 May 2006.


\textsuperscript{49} 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, TN/S/W/31, 18 February 2005.

\textsuperscript{50} Doha Work Program, Ministerial Declaration: Annexes, WT/MIN(05)/Dec, 22 December 2005, Annex C, para. 2.

\textsuperscript{51} \textit{Supra} note 22, para. 63.

\textsuperscript{52} Report by the Chairman to the Trade Negotiations Committee, TN/S/23, 28 November 2005, p. 23.
III. THINKING DIFFERENTLY ABOUT GATS MODE 4 NEGOTIATIONS

The idea introduced in this section is that negotiations about GATS mode 4 commitments would more easily result in liberal commitments beneficial to low skilled workers when a different approach is adopted by Members. Currently, the WTO membership views mode 4 service supply from an economic perspective and applies the same approach in negotiations as towards trade in goods. The paradox posed by GATS mode 4 is that it is not intended to facilitate migration but does govern movement of people across borders and so faces similar challenges as actual migration. Therefore, for the effective functioning of GATS mode 4, WTO Members will need to incorporate “migration-like” instruments in GATS mode 4 negotiations. This approach should not be confused with the idea that GATS will be used as a global standard-setting system. It merely means that Member should consider discussing mode 4 movement from a “migration-like” perspective, in addition to an economic perspective.

A. REGULATING THE TEMPORARY MOVEMENT OF NATURAL PERSONS OUTSIDE GATS MODE 4

The temporary movement of natural persons has been discussed more in-depth on a bilateral and regional level. Some states have adopted national strategies to facilitate the temporary movement of labour, approaching such international movement as temporary migration.

Spain has developed an approach to temporary migration balancing the interests of host and home countries. Agreements between Spain and the sending state are based on the involvement of non-state actors such as private agencies, Non-Governmental Organisations (NGOs), trade unions and industry associations. Only non-services categories of seasonal agricultural and fishery workers are covered by these agreements. Furthermore, foreign workers need to be sponsored by a national employer before they are eligible to be admitted. Equally, Germany has developed a scheme for seasonal workers to work for six months per year in agriculture and hospitality sectors. The scheme is only allowing temporary stay of low skilled workers; the time spend working is not counted in the process of obtaining permanent residency and access to social welfare is excluded. The policy requires the home country

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53 Supra note 29, p. 48.
54 Supra note 30, p. 43.
and Germany to jointly coordinate the process of temporary migration. South Africa, the Netherlands, Sweden, Canada, New Zealand have all adopted national strategies ensuring circular mobility in which cooperation between the sending and the receiving state is central. Likewise, the European Commission stated in 2005 that it aimed to promote migration as a positive factor for development. The 2005 Policy Plan on Legal Migration (Policy Plan) was adopted which established minimum conditions for third-country seasonal workers entering the EU. The Policy Plan operates on the assumption that an effective migration policy cannot be limited to governing the admission of migrants, but should also include protection against exploitation.

Entry to a number of countries and regions for the purpose of work is facilitated mostly by the existence of bilateral or regional agreements. Interestingly, these agreements do accommodate access for semi-skilled and low skilled workers. These types of agreements take a comprehensive approach towards labour migration and so better accommodate the concerns linked to temporary labour

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59 See www.rhdc-crsdc.gc.ca → Temporary Foreign Worker Program → Lower Skilled Occupations [accessed at 22 October 2016].
60 See www.dol.govt.nz → Key Projects → Recognised Seasonal Employer [accessed at 22 October 2016].
migration.\textsuperscript{65} That being said, there is no evidence to suggest that bilateral and regional agreements always include more liberal mode 4 commitments.\textsuperscript{66}

From analysing the national strategies as well as bilateral and regional agreements which include provisions on the temporary movement of natural persons, a number of key aspects can be identified. The different schemes have in common that incentives are put in place to encourage voluntary return and re-admission. Often the recruitment of low skilled workers is arranged in these agreements and specific regulations are aimed at facilitating the selection, training and hiring of workers. Where this is needed, such migrations tools are put in place with the help of the International Organization for Migration (IOM).\textsuperscript{67} Private stakeholders are relied upon to ensure timely return and safe working conditions of foreign workers. Finally, a legal framework is put in place which encourages circular migration, voluntary return and prevents local labourers to be pushed out of the market.\textsuperscript{68}

**B. CONSIDERING LABOUR STANDARDS WITHIN THE SCOPE OF GATS MODE 4**

A common aspect of these national and regional strategies enabling circular mobility is a focus on working conditions. Requiring wage equity and working conditions similar to those to which domestic labourers are subjected are measures that in fact set a certain labour standard for temporary migrant workers. Extrapolating this element to the multilateral level could be challenging as discussing labour standards within the context of the WTO has been a controversial topic. When the possibility to discuss labour standards within the context of the WTO was first envisaged, several developing countries and private stakeholders protested against this idea.\textsuperscript{69} At the conclusion of the Singapore Ministerial it was decided that using trade policies to force countries to adopt core labour standards is counterproductive


\textsuperscript{67} Supra note 29, p. 37.


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and distorts the comparative advantage of many developing countries. It was agreed that international labour standards were to be discussed within the framework of the ILO and not the WTO.\(^{70}\) This position was reiterated at the Doha Ministerial 2001.\(^{71}\)

It should be noted that the concern shown by national policies for labour standards are different than those discussed by the WTO Membership. At the latter forum, trade in relation to core labour standards was discussed. Core labour standards are identified by the ILO as freedom of association and the right to collective bargaining, freedom from forced or compulsory labour, the abolition of child labour and the elimination of discrimination.\(^{72}\)

These core labour standards are of a different order than the standards discussed in national policies on temporary migration and the existing bilateral and regional agreements mentioned above. The former aims to uphold a certain minimum of domestic labour standards within the territory of the country of origin of the product or service that is being traded by Members. The latter aims to create a level playing field between foreign and domestic workers within the destination country. Still, without meaning to do so per se, by subjecting temporary service suppliers from third-countries to local labour standards, a link would be established between trade and labour standards. Seeing the reserved stance the WTO Membership has taken towards linking trade and labour standards, a shift in perception is likely needed before a different approach to GATS mode 4 negotiations as envisaged here could have a chance of succeeding.

A different approach to GATS mode 4 is likely to work against exploitation of migrant workers. Receiving often do not cover temporary workers under local labour law and so their employment is often not covered by any formal control. This situation leaves temporary migrants vulnerable to abuse.\(^{73}\)

\(^{70}\) Singapore Ministerial Declaration, WT/MIN 96/DEC/W, 13 December1996, para.4.
Closely related to the problem of exploitation is irregular migration. In the absence of formalized schemes allowing for temporary migration, migrant workers fall back on irregular channels to be able to work abroad.\(^74\) It is understood that the best way to reduce illegal migration is to work towards liberalised, regulated entry of temporary workers.\(^75\) It is not the purpose of the international trading system to impose any kind of political, economic or social regime upon a sovereign State.\(^76\) It might be argued that working against exploitation and irregular migration is not strictly speaking a “trade” concern and so should not be discussed within the international trade forum of the WTO. However, as discussed above, the core argument here is that the entire WTO membership will likely gain from adopting a different approach to GATS mode 4 movement. The debate about labour standards should be seen in light of the usefulness of such a different approach.

A counter-argument against including labour conditions within GATS Mode 4 commitments is that low labour costs are a cost advantage which should be accepted as part of the comparative advantage of a country. Demanding temporary service suppliers to be subjected to national labour standards would amount to the same kind of protectionism as linking trade to international labour standards. However, there is no empirical evidence suggesting that labour force from countries with low labour costs are competing in countries were higher costs prevail due to the difference in labour standards.\(^77\) A contrario reasoning hereof means that higher labour standards would not affect the competitive position of low-wage countries. This is supported by a survey conducted by the Organisation for Economic Co-


Operation and Development (OECD), in which it was shown that investment decisions of companies to invest abroad were not primarily based on the costs of labour.\textsuperscript{78}

C. THE APPROPRIATE FORUM TO DISCUSS TEMPORARY MOVEMENT OF LOW-SKILLED WORKERS

As movement falling within the scope of GATS mode 4 shares certain features of temporary migration, it can be questioned whether the WTO is the appropriate forum to discuss such temporary service supply.\textsuperscript{79} Regional and bilateral trade agreements might be better equipped to consider the specificities of the national economies of the countries involved and so provide a more effective means to steer the process of temporary service supply.\textsuperscript{80} Negotiations might be concluded quicker and can be used to promote cooperation between the states involved.\textsuperscript{81} Bilateral agreements provide for the possibility to facilitate labour recruitment, the selection and admission process.\textsuperscript{82} Additionally, the GATS does not allow for sufficiently flexible regulations.\textsuperscript{83} The legal structure of the GATS has in practice led to Members adopting regulations that either liberate or fully deny market access, rather than regulating the market so as to come to a win-win solution that serves the interests of the receiving and sending Member.\textsuperscript{84} Finally, mode 4 is not equipped to address issues such as the threat of overstay, ensure return, the prevention of exploitation and irregular migration.\textsuperscript{85}


\textsuperscript{79} Supra note 24, p.4.

\textsuperscript{80} Economic and Social Commission for Asia and the Pacific (ESCAP), “How Do People in Asia and the Pacific Migrate Legally for Work? An Overview of Legal Frameworks: GATS Mode 4, PTAs and Bilateral Labour Agreements”, Trade and Investment Division, Staff Working Paper 03/11, p. 11.


\textsuperscript{82} Supra note 69, p. 76.


\textsuperscript{84} Supra note 30, p. 36.

An important argument against the use of bilateral and/or regional trade agreements to manage temporary movement of persons is that such negotiations are inherently discriminatory. They provoke unilateralism, which potentially undermine the main objective of the WTO to be an integrated, sustainable multilateral trading system.\textsuperscript{86} Additionally, different agreements existing next to each other reduce transparency, raise transaction costs and create extra administrative costs.\textsuperscript{87} Furthermore, the WTO as negotiating platform offers the unique possibility to negotiate trade-offs on a broad set of issues. For example, mode 4 liberalisation could be traded off in return for stronger intellectual property protection. Bilateral agreements offer limited possibility to allow for similar quid-pro-quo.\textsuperscript{88} This is not to say that greater involvement in bilateral and regional agreements covering the temporary movement of natural persons is not beneficial. Existing commitments in bilateral and regional agreements can be used as a strategy to obtain more far-reaching commitments at the multilateral level.\textsuperscript{89}

A strong, practical argument in favour of discussing mode 4 labour movement at the multilateral level is that work-related temporary migration is global in form. Mode 4 type of movement is not limited to certain regions or countries, as can be seen when looked at the number of foreigners present in different countries. For example, in 2004 in Saudi Arabia, Kuwait, Oman and Bahrain about 3.4 million foreign workers were employed, of which 80 per cent were supplying a service.\textsuperscript{90} In this region, the majority of foreign workers are employed in jobs qualified as low skilled. Presently, recruitment of these workers occurs mostly through irregular channels.\textsuperscript{91} In the EU, workers from non-EU States are well-represented in the domestic labour market; the value generated by foreign workers was estimated at

\textsuperscript{86} Cho, S., “A bridge too far: the fall of the fifth WTO ministerial conference in Cancun and the future of the trade constitutions”, \textit{Journal of International Economic Law}, Vol. 7(2) (2004), p. 239.


\textsuperscript{89} Supra note 46, p. 17.


about 5.5 billion dollar in 2006. An appreciable amount of temporary workers in Europe were considered to be low skilled. Of these migrant workers, a third came from countries within the EU, another third was from Middle East and North Africa. In 2014, eighty-five percent of global migrants were economic migrants. In the US and the EU an increase in the number of economic migrants was noted, although in other regions this number was decreasing. The majority of these economic migrants came from developed countries, less developed countries and LDCs accounted for 33 percent and 7 percent of the total number. It is clear from these statistics that movement of natural persons has become global in effect.

The above examples show that migrant workers are found across the world and are mostly employed at the lower end of the labour market. It is not unreasonable to expect this kind of temporary migration to continue in the foreseeable future. In addition to the legal and political arguments named above, there seem to be enough reasons to further pursue liberalisation of mode 4 movement within the multilateral trading system.

IV. THE LEGAL AND POLITICAL FEASIBILITY OF ADOPTING A DIFFERENT APPROACH

The following section will explore legal opportunities within the WTO framework that could support WTO Members in their efforts to further liberalise mode 4 commitments for low skilled workers. All the options discussed below focus on creating a similar approach to GATS mode 4 movement as found

93 Ibid., p. 13.
in national policies aimed at regulating temporary migration. The aim of the proposed changes is to find a balance between concerns of WTO Members regarding temporary labour migration with their economic needs. These changes might provide (to a certain extent) an alternative to current barriers to mode 4 movement such as ENTs, quotas, conditioning mode 4 commitments to mode 3 and the need for MRAs.

A. LEGAL POSSIBILITIES TO REALIZE A DIFFERENT APPROACH TO GATS MODE

A feasible solution diminishing the barriers to mode 4 movement of unskilled labourers is to further negotiate disciplines under the mandate of Article VI:4 GATS. Members could negotiate to insert into mode 4 commitments an obligation for the sending state to ensure return of the service supplier in national immigration law; building on best practices derived from bilateral and regional agreements. This would fall outside the scope of the ‘immigration caveat’ of the Annex MONP, since such regulations do not control the entry of a service supplier. An important legal conflict which arises when the proposed approach is followed is that it would be considered a breach of the “unconditionally” requirement of the MFN obligation as stated in Article II GATS. The proposed approach would make commitments of host Members conditional upon obligations undertaken by home Members. This challenge could be overcome by the WTO Membership adopting a waiver under Article IX(3) of the WTO Agreement. Such a waiver has been adopted in 2013 for the group of LDCs, aiming to increase the participation of LDCs in the global trade in services. The waiver encourages Members of the WTO to extend preferences to LDCs services and service suppliers which have commercial value specifically to this

98 Supra note 86, p. 4.
99 Supra note 14, p. 492.
100 Article II(1) GATS: “...each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country” (emphasis added).
102 World Trade Organization, Operationalization of the Waiver Concerning Preferential Treatment to Services and Service Suppliers of Least-Developed Countries, WT/MIN(13)/43WT/L/19, Ministerial Decision of 7 December 2013, Ministerial Conference Ninth Session Bali 3-6 December, 11 December 2013.
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group. This even though waivers are limited in duration and don’t provide a permanent solution, this is still an important step towards further liberalization of GATS mode 4 commitments. It is to be seen if the lack of reciprocity that is inherent to a waiver will influence the willingness of WTO Members to indeed grant preferential access.

An obligation to return might be seen as an unnecessary restriction to trade, prohibited by Article VI:4 GATS. To prevent conflict, it has been proposed that the WTO membership should adopt a horizontal necessity test. Such a test should reflect concepts similar to those of Article XX of the General Agreement on Tariffs and Trade 1994 (GATT 1994); meaning that measures should not be a disguised restriction to trade and that measures should be relevant to the supply of the services to which they apply. A “necessity” test could ensure adequate policy space to allow Members to adopt national immigration rules regulating return. If this idea is accepted, negotiations could go even beyond an obligation to ensure return and focus on pre-movement screening, selection and commitments to combat illegal migration. Members could discuss taking on such obligations by setting up cooperation schemes, similar to those in bilateral migration agreements. They could further arrange timely review of those additional obligations, to create room for flexibility to adapt the agreement in correlation with the demands of the labour market. In case a conflict arises on the level of stringency of national immigration rules negotiating under Article VI: 4 GATS, foreign service suppliers could submit their complaint to a

103 Ministerial Decision of 7 December 2013, Ministerial Conference Ninth Session Bali 3-6 December, Operationalization of the Waiver Concerning Preferential Treatment to Services and Service Suppliers of Least-Developed Countries, WT/MIN(13)/43WT/L/19, 11 December 2013, paragraph 1.3. The decision on operationalization is building on an earlier decision on preferential treatment to services and service suppliers of LDCs: Ministerial Conference, Preferential Treatment to Services and Service Suppliers of Least-Developed Countries, WT/L/847, 19 December 2011.
105 Supra note 86, p. 17.
national court, an arbitral tribunal or administrative review in line with Article VI:2(a) GATS.107

Proposals regarding language of a possible “necessity test” have been put forward.108

An easier solution would be for WTO Members to use the additional commitments column to
inscribe an “institutional commitment”, as mandated by Article XVIII GATS. Through such
commitments, WTO Members would facilitate cross-border movement by implementing skill-testing
institutions, pre-employment training facilities and joint labour market commissions.109 Additional
commitments could also focus on describing “best practices” on transparency and predictability.110

Furthermore, Members could inscribe NT limitations in their schedules, which would meet the
corns of host counties that temporary service suppliers claim benefits under the national social
security system. The NT obligation in GATS is conditional: it only applies when Members have
undertaken commitments in a specific sector.111 A problem that might arise from this practice is that it
could breach Article XVII:2 GATS. This provision states that “no less favourable” treatment may be
accorded to like foreign service suppliers. Carving out the possibility to use the social security system,
while domestic service suppliers can do so, could potentially breach this requirement. Still, this should
not pose a problem in this case since Article XVII GATS does not prohibit Members to attach conditions
to NT commitments. So, for example, if Members are concerned that workers will rely on the national
social security system this could be prevented by scheduling such a limitation regarding Members’ NT
obligations.

Were Members to consider this option, one remark has to be made. When access to national social
security is denied, a system has to be put in place to prevent foreign workers from contributing to the
national welfare of the host country. This would not seem just, since temporary service suppliers could

107 Supra note 86, p. 10.
109 This was one of the proposals circulated before the 2008 Ministerial. Report of the Meeting Held on 28 September 2007, TN/S/M/27, 14 November 2007.
111 Article XVII:1 GATS.
not rely on benefits from the social security system. Preferably, contributions made would be refunded when the foreign service supplier returns to his or her home country. Waiving the obligation to contribute to the social security system while the supplier is in the host country would lower the labour costs of foreign workers and so give rise to issues of competitiveness in relation to domestic suppliers.

A final legal possibility to be discussed here is the adoption of a safeguard mechanism. This should allow WTO Members to temporarily close their labour markets when there is an unexpected surge of temporary service suppliers which threatens to harm or harms the national labour market.112 A mandate to negotiate a safeguard is provided for by Article X of the GATS. Efforts have been undertaken by Members to clarify concepts and concerns that should be considered when drafting a provision on emergency safeguard measures.113 Further inspiration might be provided by a newly adopted regulation in the context of the General System of Preferences (GSP) of the EU. EU producers are provided with the possibility to request a safeguard investigation on trade volumes emerging from a free trade agreement, falling within the scope of the GSP. If volumes and/or prices cause or threaten to cause serious deterioration of the economic situation of EU producers, safeguard measures may be taken.114 Agreements within the context of the GSP often incorporate a “social clause” which includes a reference to sufficient labour standards.

B. POLITICAL WILLINGNESS OF ADOPTING A DIFFERENT APPROACH TO GATS MODE 4

The likelihood of success for a different approach to GATS mode 4 is not solely dependent on possibilities to adapt the legal framework. A political incentive has to exist before governments will pursue change at the multilateral level. This incentive has to come from stakeholders such as employers, civil society and the domestic labour force pressing new ideas to their government, or at least not opposing them.115 The following section will look at developments that could influence the willingness of States to further liberalize mode 4 commitments.

112 Supra note 29, p. 28.
113 Supra note 109, p. 3, para. 11.
115 Supra note 111, p. 46.
From the start of the services negotiations in 2000 until 2008, WTO members have on several occasions shown their intention to further mode 4 liberalization. During the “Service Signalling” conference, many WTO Members indicated that they might be willing to open sectors significant for the delivery of services through mode 4. Furthermore, industrialized countries indicated they would expand the coverage of certain professions.\textsuperscript{116} However, since 2008, no substantial progress on mode 4 liberalization was made.\textsuperscript{117} This does not mean that WTO Members have not concerned themselves with potential improvements. In 2012 several States, among whom Australia, the EU, the US, Canada and New Zealand have started discussions about a plurilateral agreement on trade in services. These talks include new ways to schedule commitments and a work plan for 2013.\textsuperscript{118} This group of “Real Good Friends” (RGF) showed its intention to develop a hybrid approach to service negotiations, involving scheduling market access on a positive list basis and national treatment on a negative list basis. Furthermore, parties to this agreement would include a stand-still clause committing to not create new obstacles to services trade.\textsuperscript{119}

The adoption of a reference paper similar to the Reference Paper on Telecommunications, would be a helpful and perhaps a politically more feasible alternative to further negotiations on GATS mode 4.\textsuperscript{120} WTO Members proposed at the Hong Kong Ministerial to draft a Reference Paper clarifying objective and non-discriminatory criteria on the use of ENTs.\textsuperscript{121} This exercise could be extended to discussing a definition of “temporary”. Furthermore, it could recognise regulatory principles that allow for unhindered mode 4 movement of low skilled workers, similar to those contained in bilateral

\textsuperscript{116} Supra note 38, paras. 46.
\textsuperscript{117} Supra note 109, p. 9, paras. 63-66.
\textsuperscript{118} The group consists of 21 Members: Australia, Canada, Colombia, Costa Rica, the EU, Hong Kong, Iceland, Israel, Japan, Mexico, New Zealand, Chile, Norway, Peru, South Korea, Switzerland, Taiwan, Turkey, Pakistan, Peru, and the US.
\textsuperscript{119} Not all Members are involved in these talks. Brazil, Russia, India and China are absent. “Services Talks Within WTO Member Group Advance, Eyeing Launch of Formal Negotiations”, Bridges Weekly Trade News Digest, Vol. 17(4), 6th February 2013. Available at: \url{http://ictsd.org/t/nws/bridgesweekly/153441/#sthash.EBSvSE.dpt#} [last accessed 26 October 2016].
\textsuperscript{121} Supra note 39, p. 49.
agreements on temporary migration and discuss the interpretation of ‘service supplier’.\textsuperscript{122} As discussed, the exclusion of domestic employment provides a substantial barrier in the further liberalization of mode 4 beneficial to low skilled workers. Not only is the current interpretation \textit{de facto} to the disadvantage of low skilled workers, the existing interpretation poses a practical issue as well. There is at present no conclusive test to distinguish a contract of employment from a contract for the supply of a service.\textsuperscript{123} It is difficult to know in certain cases which employees fall under the mode 4 obligations and which do not.

The interpretation of the term “service supplier” has been one of the issues discussed during negotiations on the Trade in Services Agreement (TiSA). In this context, it has been argued that defining a low skilled worker as independent service supplier could undermine the labour protection which such a worker would normally enjoy within an employer-employee relationship.\textsuperscript{124} In general, developments relating to mode 4 service supply have been central to the debate on TiSA. Although service supply covered by this agreement does not per se target the group of low skilled workers discussed in this paper,\textsuperscript{125} there are still a couple of noteworthy developments to be seen. The European Commission has reported that “significant progress” had been made in relation to mode 4. The establishment of

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{122} A call for greater predictability and transparency, as well as a call for granting more market access for a wider range of service providers categories was attached to the Hong Kong Declaration. Doha Work Program, Ministerial Declaration: Annexes, WT/MIN(05)/Dec, 22 December 2005, Annex C. Available at \url{https://www.wto.org/english/tratop_e/minist_e/min05_e/final_annex_e.htm} [last accessed 28 October 2016].
\item \textsuperscript{123}\textit{Supra} note 20, para. 21.
\end{enumerate}
\end{footnotesize}
contact points was agreed upon, as well as guidelines for mode 4 commitments. The facilitation of visa procedures has also been discussed.

Employers are important stakeholders in mode 4 negotiations. This group communicates demand to the national labour market and are directly affected by the regulatory framework governing the entry and stay of foreign workers. It is clear that employers have been facing difficulties when inviting temporary workers from abroad which has led them to reside to alternative strategies. These range from transferring all or part of their enterprises abroad, or sub-contracting to small enterprises that are prepared to employ illegal migrant workers. According to the IOM, these alternative strategies could be seen as a de facto liberalization of the global labour market. Acknowledgment of the mutual benefits of greater liberalization of GATS mode 4 can also be derived from the fact that national industrial representatives such as the Confederation of Swedish Enterprise, Indian National Association of Software and Service Companies (NASSCOM), the US Coalition of Service Industries and the European Services Forum have in the past supported proposals to that extent. However, it should be noted that industrial support has not led to greater commitments on the multilateral level. On the contrary, certain schemes that have facilitated temporary movement of natural persons are becoming stricter.

128 Supra note 95, p. 16.
129 Ibid.
131 Supra note 46, p. 13.
V. CONCLUSION

The GATS provides WTO Members with a legal framework under which natural persons can temporarily reside in the territory of another Member for the purpose of providing a service. Although mode 4 is in principle meant to facilitate services trade through cross-border movement of all types of professions, in practice WTO Members have to a great extent refrained from making commitments aimed at low skilled workers. This paper has aimed to assess if allowing for the inclusion of commitments on entry, stay and return of a temporary service suppliers could lead towards more liberal mode 4 commitments beneficial to low skilled workers. It is clear that the temporary movement of natural persons is not the same as labour migration. However, in order to allow for low skilled workers to benefit from mode 4 commitments the multilateral negotiations should allow for inclusion of “migration-like” considerations, such as the conditions under which the entry, stay and return of a low skilled temporary service supplier takes place. This would not be without controversy, since it requires mode 4 negotiations to deliberate on labour standards to which temporary service suppliers would be subjected to. Here, some considerations have been presented with respect to the legal possibilities and the political feasibility of adapting a different approach to GATS mode 4 negotiations. The possibilities suggested in this paper do not represent an exhaustive list of proposals, nor are they to be seen in isolation. A comprehensive approach is needed for a different approach to GATS mode 4 negotiations to succeed.