A different approach to GATS mode 4 negotiations on the movement of low-skilled workers”

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A different approach to GATS mode 4 negotiations on the movement of low-skilled workers

Summary

This paper focuses on the question if a different approach taken towards GATS mode 4 negotiations could generate more liberal commitments within the multilateral trading system that would benefit low-skilled workers. Mode 4 is in principle meant to facilitate cross-border movement of all types of professions, regardless of the required skill level. However, in practice WTO Members have to a great extent refrained from making commitments aimed at 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 is proposed that a different approach to negotiations at the multilateral level should be taken allowing for discussion on the regulation of the entry, stay and return of a temporary migrant. Such an approach could be controversial because it would require WTO Members to discuss to a certain extent the labour standards to which migrant workers would be subjected. Still, this paper finds there are legally and politically feasible opportunities offered by the current composition of the GATS that allow for the adoption of such a different approach. It proposes some legal changes that could be made to better facilitate negotiations on mode 4 movement of low-skilled workers. A number of examples are given of reasons why the adoption of this different approach might be feasible in the current political climate. The interests of stakeholders are discussed as well as certain trends found to exist in the international trading regime. The paper does not present a comprehensive research from which explicit conclusions can be drawn. Its aim is to provide WTO Members with some tools to more efficiently negotiate further commitments benefitting the group of low-skilled workers within the multilateral trading system.
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<td>Annex MONP</td>
<td>Annex to the GATS on the Movement of Natural Persons</td>
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<td>Supplying Services</td>
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<td>WTO Secretariat Background Note on the Presence of Natural Persons</td>
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<td>BV</td>
<td>Business Visitor</td>
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<td>CSS</td>
<td>Contractual Service Supplier</td>
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<td>Doha Round</td>
<td>Doha Development Round</td>
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<td>EU</td>
<td>European Union</td>
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<tr>
<td>ESCAP</td>
<td>Economic and Social Commission for Asia and the Pacific</td>
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<tr>
<td>FPE</td>
<td>Factor Price Equalization</td>
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<td>FTAA</td>
<td>Free Trade Area of the America's</td>
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<td>GATS</td>
<td>General Agreement of Trade in Services</td>
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<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
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<td>GDP</td>
<td>Gross Domestic Product</td>
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<tr>
<td>GCIM</td>
<td>Global Commission on International Migration</td>
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<td>GSP</td>
<td>General System of Preferences</td>
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<tr>
<td>ILO</td>
<td>International Labour Organization</td>
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<tr>
<td>LDC(s)</td>
<td>Least-developed Countrie(s)</td>
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<tr>
<td>MRA</td>
<td>Mutual Recognition Agreement</td>
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<tr>
<td>NAFTA</td>
<td>North Atlantic Free Trade Agreement</td>
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<tr>
<td>OECD</td>
<td>Organization for Economic Co-Operation and Development</td>
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<tr>
<td>PTA</td>
<td>Preferential Trade Agreement</td>
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<tr>
<td>RGF</td>
<td>Group of Real Good Friends</td>
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<td>SDT</td>
<td>Special and Differential Treatment</td>
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<td>TMNP</td>
<td>Temporary Movement of Natural Persons</td>
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<tr>
<td>UNCTAD</td>
<td>United Nations Committee for Trade and Development</td>
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<td>UNDHR</td>
<td>Universal Declaration of Human Rights</td>
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<tr>
<td>UNDP</td>
<td>United Nations Development Programme</td>
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<tr>
<td>US</td>
<td>United States</td>
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<td>WTO</td>
<td>World Trade Organization</td>
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Introduction

The multilateral trading system provides for natural persons to temporary move abroad for the purpose of delivering a service. Such “mode 4” supply is covered by the obligations found in the General Agreement on Trade in Services (hereinafter GATS) read in conjunction with its Annex on the Movement of Natural Persons (hereinafter MNOP). The Members of the World Trade Organization (hereinafter WTO) until today in general made little market opening commitments in mode 4. Where there are commitments, these show a firm bias towards highly skilled professionals such as managers and doctors.

Although not excluded in principle, low-skilled workers are not or barely covered by mode 4 commitments. This is troublesome because of several reasons. It is estimated that further liberalization of GATS mode 4 for low-skilled workers will have a great positive impact on economic growth for both sending and receiving countries. The lack of liberalization at the multilateral level hinders WTO Member in maximizing the economic potential of mode 4 trade. Second, there is limited progress in the discussion on further liberalization of GATS Mode 4 commitments. Simultaneously there is an increase in regional trade agreements and free trade agreements that include commitments on temporary labour migration of low-skilled workers. This divergence in terms of progress may undermine the legitimacy of the WTO.

This paper focuses on the question if a different approach taken towards GATS mode 4 negotiations could generate more liberal commitments within the multilateral trading system that would benefit low-skilled workers. The hypothesis upon which this paper is based, is that further liberalization in those sectors important for low-skilled workers could be realized if WTO negotiations would allow for a discussion on not only the entry, but also the stay and return of a temporary service supplier. The aim of this study is to provide some thoughts on what this different approach should entail to benefit low-skilled workers. The objective pursued is to present a different approach that could feasibly be adopted by the WTO
membership which would in a more optimal way support liberalization of mode 4 commitments beneficial for low-skilled workers.

The first chapter of this paper will identify the economic, legal and political implications of GATS mode 4, as it exists in its current form. The second chapter explores a different approach to mode 4 negotiations, in which the possibility exists to adopt “migration tools” similar to those found in bilateral migration agreements. The third chapter discusses the legal and political feasibility of adopting such a different approach in WTO negotiations.
Chapter 1

The economic, legal and political implications of GATS mode 4

Members of the WTO have generally made little commitments to GATS mode 4 supply. Currently, trade through mode 4 of the GATS is measured at five percent of total services trade as opposed to mode 3 trade which accounts for 55 to 60 percent.\(^1\) Where commitments are made these are biased towards highly skilled professionals.\(^2\) This is in spite of the fact that GATS and the Annex MONP provide a legal framework under which such development-friendly commitments can be taken.\(^3\) Furthermore, continued skill shortages in receiving countries suggest that regular migration at present is insufficient to meet labour market demands.\(^4\) There seems to be a certain contradiction between the economic reality, the supportive legal framework of the GATS and the lack of further mode 4 liberalization. To better understand this seeming contradiction, the purpose of this Chapter is to provide an overview of the main concerns that exist in relation to the movement of unskilled labourers within the scope of GATS mode 4.

A. The economic implications of GATS mode 4

Trade in services is the fastest growing form of trade. Services are estimated to account for sixty percent of global output, thirty percent of global employment and twenty percent of total global trade.\(^5\) A part of trade in services consists of mode 4 supply: cross-border movement of natural persons. As much as fifteen years ago, data already suggested there were around 41 million temporary workers in the world. Seven million thereof consisted of skilled labourers,

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as opposed to 34 million less skilled.6

The importance of liberalising temporary labour migration is best seen in comparison to other areas of trade covered by the World Trade Organization. A study conducted by Hertel suggests 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.7 This number has been supported by a later study published by Winters and Walmsley.8 Winters further states that approximately 150 billion dollar annually can be gained if developed countries lifted quotas on labour migration by three percent.9

A first economic issue identified in this context, is that mode 4 trade is often hindered by the fact that trade in services - including mode 4 trade - is assumed to be subject to the same economic principles as trade in goods.10 As predicted by the Factor Price Equalization theory (hereinafter FPE) developed by Samuelsson, labour mobility as factor of production would equal the output of trade in goods. Thus, trade in goods and movement of labour as one factor of production would be substitutes. The FPE theory has been the main motivator for Free Trade Agreements (hereinafter FTAs) such as the North Atlantic Free Trade Agreement (hereinafter NAFTA), the EU - Mediterranean FTA and the EU-Central Europe Agreements.11 However, this is not a complete correct reflection of reality. The flow of trade in services is determined by more factors than just the factor of production. Within the scope of mode 4 trade flow migration takes place. Even when it is temporary and responding to the needs of the receiving and the sending country, States do not look at migration solely from an

9 Supra note 6 p. 119, 125.
11 Supra note 6, p. 117.
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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 countries will look at advantages of labour movement such as increased specialization, 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.\textsuperscript{12} Gains from labour mobility spread through almost all sectors of society and so are difficult to capture. This equally applies to the drawbacks of labour mobility. For sending countries this could mean the loss of skills, brain drain, loss of domestic resources and the breaking up of families. Receiving countries will be concerned with social security costs, national security considerations, increased competition for domestic workers and the reaction of their domestic constituency to the inflow of temporary migrants.

In line with the above, a second economic issue is that the value of GATS mode 4 liberalization depends on the conditions applied to temporary labour migration in both the sending and the receiving country.\textsuperscript{13} Thus, an appropriate response addressing the mode 4 movement, would be for the receiving and the sending country to cooperate and develop a joint policy and so maximize the gains from temporary labour migration.\textsuperscript{14} Unfortunately, WTO Members thus far have mostly reacted to temporary labour migration with unilateral measures and have shied away from making meaningful commitments related to the movement of unskilled worker under GATS mode 4. The absence of multilateral coordinated labour migration prevents WTO Members from fully realizing the economic potential of mode 4 trade.

B. The legal implications of GATS mode 4

\textsuperscript{13} Supra note 3, p. 14.
\textsuperscript{14} Supra note 6, p. 116.
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Article I:2 (d) GATS defines the temporary movement of natural persons (hereinafter 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."\(^{15}\) Such supply can be undertaken by any natural or juridical person, but always through the movement of a natural person.\(^{16}\) In principle, no migrant worker is \textit{a priori} excluded from the scope of GATS mode 4, provided that they fall within the legal definition of service supplier. Still, the current legal framework seems not optimally equipped to support the movement of unskilled workers.

1. Interpretative issues

The definition of “service supplier” poses certain interpretative questions which currently have been solved to the disadvantage of unskilled workers. According to the WTO Secretariat Background Note on the Presence of Natural Persons (hereinafter Background Note), a service supplier necessarily must be a firm or self-employed supplier who receives remuneration directly from customers.\(^{17}\) This interpretation excludes individuals providing labour services offering themselves for employment at a domestic firm of the host country.\(^{18}\) 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.\(^{19}\) 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.\(^{20}\) The current interpretation of “service supplier” leads potentially to a \textit{de facto} exclusion of unskilled


\(^{16}\) 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.

\(^{17}\) \textit{Ibid.}, p. 3.

\(^{18}\) WTO Secretariat, “Presence of natural persons (mode 4), Background Note by the Secretariat”, S/C/W/75, December 1998, para. 56.

\(^{19}\) \textit{Supra} note 6, p. 145.

workers from the scope of GATS mode 4. A further problem arising from the current interpretation is that a situation might emerge where the same service supplier is treated differently, depending on whether the supplier is under contract with a domestic or a foreign firm. Such a situation is inconsistent with economic reality. It would be 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.  

2. 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 qualification and exemption of national treatment of foreign workers.  

Even though Article VII GATS allows Members to recognize the qualifications and experiences of each other’s suppliers, in practice only similarly situated Member States have concluded such Mutual Recognition Agreements (hereinafter MRA). Consequently, developing countries and LDCs do not generally benefit from such agreements. Being excluded from MRAs, migrant 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.

Another barrier to movement for unskilled workers is the imposition of an Economic Needs Test (hereinafter ENT) adopted by many receiving countries. Receiving States often make market access conditional on the demands of the domestic labour market. ENTs are
unilaterally imposed without considering the labour market in the sending country and so could hinder optimal economic development.

Requiring wage parity, a departure from the National Treatment disciplines under Article XVII GATS, is another common way to stop movement of unskilled workers. It undermines their main comparative advantage: an abundance of cheap labour force.  

3. Immigration measures

The GATS allows Members to take MFN- inconsistent measures in relation to visa requirements. The freedom Member States 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 harmonization 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 market. This practice of (permitted) discriminatory use of visa and work permit requirements does 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 trade since foreign service suppliers do not know, or it will be difficult for them to know, all existing regulatory barriers to movement.  

C. The political implications of GATS mode 4

1. Commitments

In spite of expected economic gains from increased labour migration of low-skilled workers,

27 Supra note 18 pp. 11-12.
28 Ibid.
29 Article XXXIII:2 GATS.
Members have not reached political synergy to reach progress in negotiations. Most Members have preferred to schedule horizontal commitments, instead of drafting sector-specific offers that may respond to economic needs of both receiving and sending states. In 2003, the WTO Secretariat observed that WTO Members had undertaken commitments at very aggregate levels with very little sectoral specificity. This perceived hesitation to liberalize mode 4 commitments still exists. In 2008, only 17 percent of all horizontal entries had the potential to cover low-skilled personnel. 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 (hereinafter BVs) making up for 24 percent. Of the commitments actually made, only Contractual Service Suppliers (hereinafter CSS), BVs and the 'other' category could potentially cover lower-skilled workers. Until today, no mode 4 commitments have been made for seasonal and temporary workers in for low-skilled workers economically important areas such as hotel and catering services and construction.

Moreover, mode 4 commitments are generally connected to mode 3 commitments so ensuring resources possibly drawn from the public welfare system because of labour migration are offset by benefits coming from increased capital. This practice is discriminatory with respect to developing countries and its mostly low-skilled labour force, since poorer state’s often do not have sufficient resources at their disposal to invest abroad.

31 Supra note 30, pp. 20, 22.
32 Informal Note by the Secretariat, Categories of Natural Persons subject to Commitments under Mode 4, JOB(03)195, 3 October 2003.
34 Supra note 25, p. 16.
35 Supra note 16, para. 96.
36 Supra note 6 p. 146.
38 Supra note 5, p. 15.
2. Reasons for lack of negotiating momentum

(a) Administrative formalities

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 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.\(^{39}\) A harmonized visa procedure goes at the core of the sovereignty of WTO Members, which probably explains the lack of enthusiasm with which this proposal has been received. A less drastic approach would be to introduce a more detailed sector classification in GATS negotiations. A readily available possible new sector classification is available by adopting the International Labour Organization (hereinafter ILO) ISCO-88, which identifies different skills groups.\(^{40}\) However, those Members that are traditionally labour receiving countries 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.\(^{41}\) This list does not have legal standing.\(^{42}\) 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.\(^{43}\)

(b) Transparency

Often, additional formal requirements conditional to market access are not made known 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.\(^{44}\) During the July 2008

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\(^{39}\) Council for Trade in Services, Negotiating Proposals of WTO Members, India, S/CSS/W/12, 21 November 2000.

\(^{40}\) 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.


\(^{42}\) Supra note 16, para. 63.

\(^{43}\) Report by the Chairman to the Trade Negotiations Committee, TN/S/23, 28 November 2005, p. 23.

\(^{44}\) Ibid., pp. 16, 29, 23.
negotiations interest was expressed to standardize the possibility for visa renewal.\textsuperscript{45} However, to date these proposals have not been adopted yet.

(c) Request-driven approach to mode 4

Apart from a general stalemate in the Doha Development Round (hereinafter Doha Round) negotiations, a key reason for the lack of negotiating momentum with respect to mode 4 commitments is the absence of shared responsibility between the labour sending and the receiving 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 works against the needs of developing countries and Least Developed Countries (hereinafter LDCs). Labour migration under mode 4 poses risks or at least is perceived as risky for receiving countries. Reciprocity and shared responsibility might create political trust and will of receiving states to open their markets to temporary migration.\textsuperscript{46}

(d) The legal definition of service supplier in GATS mode 4

The current legal definition of service supplier in mode 4, which does not recognize foreign individuals employed by domestic companies as service suppliers, poses a great obstacle in the facilitation of labour migration of unskilled labourers and politically splits the WTO Membership. Typically, companies that recruit low-skilled workers, caretakers or domestic workers do not expand beyond the national market. Thus, in practice it is not likely that an opportunity exists where low-skilled workers can organize themselves in such a way that their movement falls within the scope of mode 4.\textsuperscript{47}

\textsuperscript{45} Services Signalling Conference, Report by the Chairman of the TNC, JOB(08)/93, 30 July 2008, paras. 1–4.
Chapter 2
A different approach to GATS mode 4 negotiations

The idea introduced in this section is that a different approach should be taken towards GATS mode 4 movement by Members, in order to enable further liberalization on the multilateral level. 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 proper and effective functioning of mode 4, the WTO will most likely need to adopt migration instruments. 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 States should consider discussing mode 4 movement from a “migration-like” perspective, in addition to an economic perspective.

A. The appropriate forum to discuss temporary migration of unskilled workers

GATS mode 4 is not ideally equipped to facilitate temporary migration and so it can be questioned if the WTO is the appropriate forum to discuss such temporary service supply. 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. Negotiations might be concluded quicker and can be used to promote cooperation between the countries involved. They further provide the possibility to facilitate labour recruitment, the selection and admission process. Therefore, they might be better equipped to protect the migrant worker against exploitation and work against irregular migration. Another argument in favour of discussing work-related

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48 Supra note 25, p. 48.
49 Supra note 20, p.4.
52 Supra note 25, p.42.
temporary cross-border movement in bilateral/regional context is the type of work that is mostly carried out by foreigners. Several countries use temporary labour movement to fulfil seasonal work. Governments wish to have some flexibility to adapt quota and program rules in correlation with the labour demand at a particular moment. The current GATS framework is not optimal to provide such flexibility which would meet these needs. The current legal structure of the GATS has in practice seem to led Member States adopting regulations that either liberate or fully deny their market, rather than regulating the market so as to come to a win-win solution that serves the interests of the receiving and sending Member. Finally, mode 4 is not equipped to address issues that are connected to temporary migration; such as the threat of overstay, ensure return, the prevention of exploitation and irregular migration.

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 has the potential to undermine the main objective of the WTO to be an integrated, sustainable multilateral trading system. Additionally, different agreements existing next to each other reduce transparency, raise transaction costs and create extra administrative costs. Furthermore, the WTO as negotiating platform offers the unique possibility to negotiate trade-offs on a broad set of issues. For example, mode 4 liberalization could be traded off in return for stronger intellectual property protection. Bilateral agreements offer limited possibility to allow for similar quid-pro-quos.

A strong, practical argument in favour of discussing mode 4 labour movement at the

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54 Supra note 25, p. 36.
58 Supra note 25, p. 48.
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 supplying a service. 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. In the European Union (hereinafter EU), workers from non-EU States are well-represented in the domestic labour market; the value generated by foreign workers was estimated at 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. Another 14 percent was accounted for by workers from Eastern Europe and the former Soviet Union. Finally, 17 percent came from developing regions of sub-Saharan Africa, South Asia and Latin America.

The above examples show that migrant workers are found across the world and are mostly employed at the lower end of the labour market. The type of labour performed is often similar to that intended by mode 4 of the GATS. 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 liberalization of mode 4 movement within the multilateral trading system. The next sections of this paper will try to explore possibilities to further mode 4 liberalization, while respecting

62 Ibid., p. 13.
the interests of both sending and receiving countries.

B. National strategies towards temporary labour migration

Currently, entry to a number of countries and regions for the purpose to work is facilitated mostly by the existence of bilateral or regional agreements. These agreements are negotiated on the basis of a national strategy on temporary migration. The following section will discuss several of those national policies and their implementation through bilateral and regional agreements. Certain key-aspects of these agreements will be identified so as to better understand which possible changes could be adopted at the multilateral level to better facilitate temporary service supply of low-skilled workers.

1. Spain

Spain has developed an approach to temporary migration balancing the interests of destination and source countries. The agreements are based on the involvement of non-state actors such as private agencies, Non-Governmental Organizations (hereinafter 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 and so this type of movement falls outside of the scope of GATS mode 4.

An example of a bilateral agreement in which Spain’s national policy has been put into practice is a bilateral agreement between Spain and Ecuador. A bilateral commission is set up by the government of Ecuador and the International Organization for Migration (hereinafter IOM). This commission, under auspices of the Ecuadorian ministry of foreign affairs, selects and screens workers who apply to work in Spain. The process is executed by officials from both Spain and Ecuador. Spain does not have an obligation to allow entry to every screened worker; it maintains the flexibility to refuse entry on limited grounds. Monitoring of workers

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65 Supra note 60, p. 63.
66 Supra note 25, p. 43.
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and employers is done via the social security system.67

2. Germany

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 sending country and Germany to jointly coordinate the process of temporary migration.68

3. South Africa

South Africa has developed an innovative system of migration control based on a work permit, solely established to facilitate temporary work-related migration. The permit is granted when two requirements are fulfilled. First, an accountant must certify that the foreign employee will work under conditions that are not inferior to the national applicable law. Second, a licensing fee has to be paid of which the revenue will go into a fund meant to train South Africans. The height of the fee depends on the demand of the national labour market.69

4. The EU

Although the EU is not one country, as a region it has adopted a semi-harmonized policy towards work-related temporary migration. The European Commission in 2005 has stated that it aims to promote migration as a positive factor for development.70 Building on this intent, the 2005 Policy Plan on Legal Migration has 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.71 An effective policy should establish incentives to “pull” migrants away from the informal

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67 Supra note 34, p. 10.
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sector as well as protect temporary migrant workers against exploitation.\textsuperscript{72} To reach this objective, a general framework is to be created which would guarantee a common framework of the rights of all third-country nationals.\textsuperscript{73} Specifically for seasonal workers, fast-track procedures are put in place that use pre-set criteria with a specified salary allowing for a stay of three to four months per year.\textsuperscript{74}

5. The Netherlands

The Netherlands launched a pilot on circular migration in 2009 with as its objective to develop a win-win situation in which migrants, the Dutch labour market and countries of origin would gain from temporary migration.\textsuperscript{75} The pilot was stopped prematurely, but still provided some insights to the Dutch government. A few conclusions from the pilot were: to tailor labour migration around the supply and demand of the market, to also include low-skilled workers in a new strategy on temporary migration and to design policies in cooperation with employers, intermediaries and labour unions.\textsuperscript{76}

6. Sweden

Sweden adopted a new goal for migration policy in 2009 to promote needs-governed labour migration.\textsuperscript{77} The main idea behind the new approach is that circular migration takes places naturally, without interference of the government. Temporary labour migration is encouraged by a legal framework that facilitates spontaneous circular migration.\textsuperscript{78} Sweden has adopted the Labour Migration Act which makes it easier for companies to recruit the workers from abroad that are needed. The Swedish Migration Board is in charge of granting work permits for employees. It reviews the conditions of employment offered, which should be similar to the Swedish collective agreements. Trade unions are asked to give their opinion on the offer,
which ensures adequate protection of the foreign worker. Apart from ensuring humane working conditions, the Swedish government also made sure that other practical matters connected with temporary migration, such as housing, were known beforehand by the worker. Sweden has purposely not entered into bilateral labour agreements with any country; it bases its circular migration policy on the needs of its national labour market.

7. Canada

Canada has put in place a system where home countries and employers are given the responsibility to ensure a smooth process. The governments of home countries are responsible for the recruitment of workers. The employer in Canada ensures equal wages, a safe stay during the time the migrant workers is employed and pays for part of the transport costs. Separate application processes exists for seasonal and agricultural workers, but the substantial requirements to obtain a permit are similar to those applied to other low-skilled workers.

8. New Zealand

Between New Zealand and the Pacific Islands the Recognised Seasonal Employers (hereinafter RSE) scheme is employed. Workers from the Pacific Islands are allowed to enter New Zealand to fill seasonal jobs in the agricultural sector. The visa is valid for seven months per time and is handed out to a maximum of 8000 workers per year. This scheme counts on the support of governments and the private sector; employers have to pay half of the travel costs and ask permission to recruit a migrant worker, so to guarantee that there is no competition with the local labour market. The home countries’ governments are responsible for health checks and pre-departure orientation and recruitment.

9. Summary of national strategies towards temporary labour migration

79 Ibid., p. 16.
80 Ibid., p. 18.
81 Ibid., p. 20.
82 See www.rhdcck-hrsdc.gc.ca → Temporary Foreign Worker Program → Lower Skilled Occupations [accessed at 2 September 2013].
83 Ibid.
84 See www.dol.govt.nz → Key Projects → Recognised Seasonal Employer [accessed at 2 September 2013].
The above examples of different national strategies to temporary labour migration show that there are several common traits found among different national policies. First, several bilateral labour schemes focus on low-skilled workers including those who are employed in the agricultural sector and seasonal workers. Second, incentives are put in place to encourage voluntary return and re-admission. Third, often the recruitment of low-skilled migrants is arranged in these agreements facilitating the selection, training and hiring. Where this is needed, such migrations tools are put in place with the help of the IOM. Fourth, private stakeholders are often 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. The latter objective seems to be ensured by requiring wage equity, similar working conditions as domestic labourers and adopting a quota on the amount of foreign workers so as to prevent competition which cannot be matched by the domestic labour force.

There might be a good reason to adopt this type of approach to temporary labour migration in GATS mode 4 negotiations. It seems that aforementioned national schemes governing foreign workers assure both sending and receiving countries that risks connected with temporary movement are reduced while the benefits of working abroad are upheld. Seeing liberalization at the multilateral level is lacking, while progress is made in bilateral and regional agreement, it seems reasonable to consider this as an example for a different approach to GATS mode 4 negotiations.

C. Considering Labour Standards within the scope of GATS mode 4

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. Such requirements add to the costs of labour. Thus, the proposed different approach might amount to protectionism because it undermines the comparative advantage of low-wage countries.

85 Supra note 25, p. 37.
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.\(^86\) At the conclusion of the Singapore Ministerial it was decided that using trade policies to force countries to adopt core labour standards is counterproductive 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.\(^87\) This position was reiterated at the Doha Ministerial 2001.\(^88\) Today, any discussion about labour standards is excluded from multilateral negotiations.

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.\(^89\) 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.\(^90\) These core labour standards are of a different order than the standards discussed in national policies on temporary migration. 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 in the destination country. Its primary intent is not to protect migrant workers against abuse or exploitation. Still, without meaning to do so per se, by subjecting temporary workers from third-countries to local labour standards, such national policies do establish a certain link between trade and labour standards. Seeing the reserved stance the


\(^{87}\) Singapore Ministerial Declaration, WT/MIN 96/DEC/W, 13 December1996, para.4.


\(^{89}\) *Supra* note 87, para.4.

WTO membership has taken towards linking issues, perhaps a certain shift of perception has to take place before a different approach to GATS mode 4 can be adopted.

There are several arguments why discussing labour standards in the context of mode 4 movement would be useful. First, a different approach to GATS mode 4 is likely to work against exploitation of migrant workers. Destination countries 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. One well-known extreme example of such abuse has been found in the Gulf countries, were Asian women employed as live-in domestic workers endured living conditions sometimes reflecting those of slave or bonded labour. Furthermore, migrant workers are probably less likely to complain about their working conditions against their employer since this might endanger their jobs and so their right to stay in the country. The United Nations Development Programme (hereinafter UNDP) has noted that discrimination and abuse is more likely to be present when there is little government control over temporary migration. Closely related to the problem of exploitation is irregular migration. In response to strict immigration rules of receiving countries, migrant workers fall back on irregular channels to be able to work abroad. When temporary migration takes place out of formal system, the lack of control may lead to dangerous or inhuman situations. It is understood that the best way to reduce illegal migration is to work towards liberalized, regulated entry of temporary workers. Thus, a different approach to mode 4 movement might support better working and living conditions of temporary migrant workers and help to reduce the amount of illegal migration.

92 Supra note 34, p. 29.
93 Supra note 53, p. 7.
94 Supra note 34, p. 31.
97 Supra note 50, p. 110.
Indirectly, discussing labour standards is the context of GATS mode 4 might have several positive side-effects. It has been seen in practice that the labour standards to which migrant workers are subjected to in the destination country positively influence labour standards in the country of origin. An example hereof was seen in the Philippines, where wages rose in the manufacturing sector to almost equal to the wages overseas workers earned. The same trend occurred in Pakistan; construction wages increased in response to migration of workers to the Persian Gulf.\footnote{Supra note 61, p. 31.} Thus, enabling mode 4 service supply for low-skilled workers in such a way that labour standards are considered might spur convergence between wages of receiving and sending countries. This would contribute to global development, going beyond the economic growth generated by increased remittances, in line with one of the main objectives of the WTO.\footnote{WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, The Legal Texts: the Results of the Uruguay Round of Multilateral Trade Negotiations 4 (1999), 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994) [WTO Agreement], Preamble, para. 1.}

It is not the purpose of the international trading system to impose any kind of political, economic or social regime upon a sovereign State.\footnote{Granger, Clotilde and Stroen, Jean-Marc, “Core Labour Standards in Trade Agreements from Multilateralism to Bilateralism”, Journal of World Trade, Vol. 40(5) (2006), p. 825.} 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 side-effect of adopting a more economically beneficial and efficient approach to GATS mode 4 movement. Moreover, trade does not solely have an economic aspect. Other concerns than those of efficiency play a role during decision-making and policy development. Howse and Trebilcock give an example of such “non-trade” considerations in relation to forced labour. Even though slavery would be more efficient, it is universally rejected as a legitimate form of labour because it violates a
fundamental principle of humanity.\textsuperscript{101} Following this line of reasoning it might not be unreasonable to attribute attention to the labour circumstances of those workers who make use of the possibilities offered by mode 4 liberalization.

On the other hand, low labour costs are a cost advantage which should be accepted as part of the comparative advantage of a country, also when migrants from these countries offer their services abroad. Demanding foreign workers to be subjected to national labour standards such as wage parity or other national 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 where higher costs prevail due to the difference in labour standards.\textsuperscript{102} \textit{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 OECD, in which it was shown that investment decisions of companies to invest abroad were not primarily based on the existences of a certain labour standard.\textsuperscript{103} It cannot be simply concluded on the basis of this data that a different approach to GATS mode 4 would not affect the competitiveness of low-wage countries; more comprehensive research would be needed. Still, it might offer a perspective suggesting that a different approach to GATS mode 4 would lead to a triple win situation; respecting rights of migrant workers as well as the interests of receiving and sending countries.


\textsuperscript{103} \textit{Supra} note 86, p. 43.
Chapter 3  
The legal and political feasibility of adopting a different approach

A. Legal possibilities to realize a different approach to GATS mode 4  
The following section will explore legal opportunities within the WTO framework that could support WTO Members in their efforts to further liberalize 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 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.

1. Domestic employment  
An optimum solution, maximizing the benefit for low-skilled workers, would be when the definition of “service supplier” is re-interpreted to also include domestic employment. A further argument in favour of incorporating domestic employment is practical in nature. The existing interpretation distinguishes between a contractual service supplier and domestic employment, the former falling within the scope of mode 4 and the latter being excluded. However, there is up to date no conclusive test to distinguish a contract of employment from a contract for the supply a service.\(^\text{104}\) Thus, it might be difficult to know in certain cases which employee falls under the mode 4 obligations and which is not. Finally, a re-interpretation would extend domestic labour law protection to mode 4-type workers and so better protect them from exploitation.\(^\text{105}\)

2. Domestic Regulations  
A possible solution diminishing the barriers to mode 4 movement of unskilled labourers is to

\(^{104}\) Supra note 16, para. 21.  
\(^{105}\) Supra note 20, p. 6.
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further negotiate disciplines under the mandate of Article VI:4 GATS. Members could negotiate to insert into mode 4 commitments an obligation for the source country to ensure return of the service supplier in national immigration law; building on the trend as started by countries such as Spain as discussed in Chapter 2(B) of this paper. 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 that arises when the proposed approach is followed is that it would probably 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 receiving Members conditional upon obligations undertaken by sending Members. This challenge could be overcome by the WTO Membership adopting a waiver. Article IX(3) of the WTO Agreement authorized the Ministerial Conference to waive an obligation from the WTO Agreement or any of the other Multilateral Trade Agreements. Since 1995, waivers are adopted only by consensus and so require the support of the entire WTO Membership. A waiver might not be the most optimal solution, since waivers are inherently limited in duration. Furthermore, it is commonly accepted that waivers are used in exceptional circumstances for measures taken by individual members in urgent and concrete situations in which compliance seems not possible. The proposed approach would require a waiver for a measure that should be taken by several Members. However, practice has shown that

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106 Supra note 56, p. 4.
107 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).
108 Article IX:3 WTO Agreement read together with the Understanding in Respect of Waivers of Obligations under the General Agreement on Tariffs and Trade 1994. Available at: http://www.wto.org/english/docs_e/legal_e/11-25_e.htm [accessed at 08-10-2013].
110 This was decided within the context of the GATT, Appellate Body Report, EC — Bananas III (Article 21.5 — Ecuador III) [EC— Bananas III (Article 21.5 — US) para. 380 [EC— Bananas III].
Members are more willing to adopt waivers as compared to adopting an authoritative interpretation or an amendment to the covered agreements.\textsuperscript{112} Thus, for the time being a waiver seems to be the most feasible legal action that could amend a breach of Article II GATS.

Another potential legal conflict could arise because inserting a return obligation in national immigration law might be seen as an unnecessary restriction to trade, which is prohibited by Article VI:4 GATS. To prevent conflict, Delimatis has proposed that the WTO membership should adopt a horizontal necessity test.\textsuperscript{113} Such a test should reflect concepts similar to those of Article XX of the General Agreement on Tariffs and Trade (hereinafter GATT); 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.\textsuperscript{114} A “necessity” test could ensure adequate policy room 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.\textsuperscript{115} 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 national court, an arbitral tribunal or administrative review in line with Article VI:2(a) GATS.\textsuperscript{116} Several WTO Members have now put forward proposals on the language of a possible “necessity test”.\textsuperscript{117}

\textsuperscript{112} Supra note 111, p. 618.

\textsuperscript{113} Ibid., p. 17.

\textsuperscript{114} Ibid., p. 9.

\textsuperscript{115} Supra note 37, p. 444.


\textsuperscript{117} Report by the Chairman, Ambassador Fernando de Mateo, to the Trade Negotiations Committee, TN/S/36, 21 April 2011, pp. 30, 56.
3. Additional commitments

Another possibility 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.118 Additional commitments could also focus on describing “best practices” on transparency and predictability.119

Requiring the establishment of such institutions and best practices might overly burden poor developing countries and LDCs, due to a lack of resources. To these countries technical assistance should be offered, possibly in cooperation with the ILO and IOM.

4. National Treatment

Another option Member States have is to inscribe NT limitations in their schedules which could meet the concerns of receiving 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.120 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 compared to domestic 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 certain conditions to NT commitments. So, for example, if Members are concerned that workers will rely on the national social security system this could potentially be prevented by scheduling such a limitation regarding Members’ NT obligations.

118 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.
120 Article XVII:1 GATS.
If members are 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 foreign workers could not rely on benefits from the social security system. Preferably, contributions made would be refunded when the foreign service supplier return 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. Moreover, is has been estimated that temporary migrant workers have a stronger incentive to work in the informal sector, when their wages in the formal sector are being deducted due to social security contributions while they cannot benefit from this system.\textsuperscript{121}

5. Reference Paper

A further possibility that could potentially provide some relief to the perceived deadlock in negotiations on mode 4 commitments benefitting low-skilled workers, could be for the members to adopt a Reference Paper similar to the one on telecommunications.\textsuperscript{122}

To clarify definitions and principles on the regulatory framework for telecommunications services, a Reference Paper was adopted by several WTO members.\textsuperscript{123} The paper is only legally binding upon those members who have explicitly referred to it in their schedule, and only to the extent indicated therein.\textsuperscript{124} This paper includes a harmonized set of regulations.\textsuperscript{125}

The adoption of the Reference Paper brought about substantial regulatory reform in several Members; often supported by regulator assistance programs or development agencies.\textsuperscript{126}

WTO Members proposed at the Hong Kong Ministerial to draft a Reference Paper clarifying

\begin{flushright}
\textsuperscript{121} Supra note 64, p. 18. \\
\textsuperscript{123} “Decision on negotiations on basic telecommunications”. Available at: www.wto.org \(\rightarrow\) Trade Topics \(\rightarrow\) Services [accessed at 4 September 2013]. \\
\textsuperscript{124} Panel Report, Mexico – Measures Affecting Telecommunications Services, WT/DS204/R, adopted 1 June 2004 [Mexico- Telecoms], para. 7.331. \\
\textsuperscript{125} Guermazi, B., “Exploring the Reference Paper on Regulatory principles”, p. 1. Available at www.wto.org \(\rightarrow\) Telecommunications \(\rightarrow\) Guermazi_referencepaper [accessed at 4 September 2013]. \\
\textsuperscript{126} Ibid., p. 22.
\end{flushright}
objective and non-discriminatory criteria on the use of ENTs.\footnote{Supra note 34, p. 49.} This exercise could be extended to discussing a definition of “temporary”. Furthermore, it could recognize regulatory principles that allow for unhindered mode 4 movement of low-skilled workers, similar to those contained in bilateral agreements on migration. It could even address the interpretation of service supplier in mode 4. As suggested by Mattoo, WTO Members could for example accept that a foreign farm worker picking apples is defined as a “provider of fruit-picking services”.\footnote{Supra note 53, p. 4.} Because the draft of a Reference Paper doesn’t require the consent of all members to be adopted. Therefore, it might prove a useful tool to realize progress within a short period.

6. Safeguard mechanism

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.\footnote{Supra note 25, p. 28.} 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.\footnote{Report by the Chairman, Ambassador Fernando de Mateo, to the Trade Negotiations Committee for the purpose of the TNC stocktaking exercise, TN/S/35, 22 March 2010, p. 3, para. 11.} Further inspiration might be provided by a newly adopted regulation in the context of the General System of Preferences (hereinafter 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.\footnote{WTO Secretariat, Trade Policy Review European Union, WT/TPR/S/284, p. 31-32, para. 2.28.} As discussed in this paper, agreements within the context of the GSP often incorporate a “social clause” which includes a reference to sufficient labour standards. Thus, the EU emergency safeguard mechanism might provide some examples of how a similar mechanism to be adopted at the multilateral level.
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. To gather some understanding about the political feasibility to adopt the proposed different approach to GATS mode 4, the following part will look at developments that could influence the willingness of States to further liberalize mode 4 commitments. A similar exercise will follow, focusing on the willingness to discuss a form of labour standards at the multilateral level.

1. Developments within the WTO

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 workers. Furthermore, industrialized countries indicated they would expand the coverage of certain professions.

However, since 2008, no substantial progress on mode 4 liberalization was made. 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. This group of “Real Good Friends” (hereinafter RGF) showed its intention to develop a hybrid approach to service negotiations, which would involve scheduling market access on a positive list basis, and national treatment on a negative list basis. Furthermore, parties to this

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132 Supra note 119, p. 46.
133 Supra note 45, paras. 46.
134 Supra note 117, p. 9, paras. 63-66.
135 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.
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agreement would include a stand-still clause committing to not create new obstacles to services trade. These negotiations are not set in a specific timeframe, so it is difficult to predict when an agreement will be reached. Moreover, not all Members are taking part in these RGF talks, among whom Brazil, Russia, India and China.136

If adopted, this proposal might not per se be beneficial for low-skilled workers. It has been argued that a negative list approach encourages more liberal commitments compared to positive listing. Thus, adapting the approach to national treatment from positive to negative listing might proof a positive incentive to liberalize mode 4. The standstill-clause preventing the adoption of further barriers to trade might also be seen a positive sign, showing the intention to further liberalization of commitments.

2. Developments in the EU

It is expected that the demographic composition of the EU labour markets will in the nearby future affect the well-being of its citizens.137 It is estimated that the number of economically active people could decrease from 240 million to 207 million in 2050.138 In order to still be able to maintain economic growth, measures have to be taken to prevent a loss of productivity. One possible way to solve the emerging demographic deficit would be to allow for increased labour immigrations.139

In the EU, there exists a historic tradition of encouraging temporary migration to fill gaps in the labour market. Between World War II (hereinafter WWII) and the 1980s, countries such as West Germany, Austria, the Netherlands and Belgium concluded several guest worker agreements with Mediterranean countries. These agreements were based enabled short term migration, often seasonal or manufacturing work, from the Mediterranean to Europe. In

137 Supra note 68, p. 18.
139 Supra note 68, p. 15.
hindsight, these guest worker agreements were not ideally equipped to facilitate the type of circular migration that was initially envisaged. No specific measures were taken to encourage the return of workers. Furthermore, when the policies of receiving countries became less open towards migrant workers many foreigners permanently migrated. Migrant workers understood that because of more stringent visa requirements it would be difficult to enter the territory once they left.\textsuperscript{140} The transition from guest worker to permanent members of society did not always go smoothly. The tensions brought about by this transition have probably contributed to the anti-migration sentiments that can be felt in certain European countries existing presently. Temporary migration usually causes less friction in a society compared to permanent migration. Thus, mode 4 movement might provide a balance between the fears of national politicians and their constituency on the one hand, and the economic need for migrant workers to fill the gaps in national labour markets.

Another observation of the EU labour market signals the need for low-skilled workers. According to the ILO there exist two kinds of labour needs: absolute need and relative need.\textsuperscript{141} An absolute labour need exists when a country has a temporary deficit of labour in certain professions because there are not enough people with sufficient qualification. Such a deficit can in time be diminished through education and training. A relative labour need exists were certain jobs are unfilled because nationals do not want to work in these sectors, for example because wages are too low or jobs are only available in poor and insecure regions.\textsuperscript{142} The European Commission has recognized that the category of work usually taken on by foreign workers is not the type of work EU residents involve in, even when unemployment is high.\textsuperscript{143} This highlights the need for low-skilled workers, since it is likely that this group will take on the so called “relative need” type of professions. It should immediately be remarked that since relative labour need is presumed to be permanent, or at least as long as a society

\textsuperscript{140} Lucassen, Leo, Lucassen, Jan, Winnaar en Verliezers, Een nuchtere balans van vijfhonderd jaar immigratie, Amsterdam: Bert Bakker (2011), p.134.
does not drastically change, the labour deficit regarding these professions might be better solved by permanent migration. Yet, in light of the perceived anti-immigration sentiments this might currently not be the preferred solution.

It would take beyond the scope of this paper to attempt a similar analytical exercise for each regional or national labour market of the members of the WTO. Thus, the above considerations cannot form the basis of an overly optimistic conclusion. Nevertheless, as an important receiving region the observations of the EU labour market positively supports the view there might exist a political will among similarly situated countries to pursue further mode 4 liberalization.144

3. Employers

Employers are an important stakeholder 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. Employers are facing difficulties to invite temporary workers from abroad and so reside to alternative strategies to ensure sufficient labourers.145 This can be transferring all or part of their enterprises, or sub-contracting to small enterprises that are prepared to employ illegal migrant workers. The willingness of employers to allow such unauthorized work is a sign that employers would support more liberalization of mode 4. According to the IOM, these alternative strategies might even be seen as a de facto liberalization of the global labour market.146 Such an alternative approach is not without flaws. Illegal immigration gives way to social problems such as the exploitation of foreign workers and unfair competition with the domestic labour force. In 2005, the OECD estimated that 10 to 15 percent of the 56 million migrants in Europe stayed illegally. In the US, there were around 10 million illegal immigrants, accounting for a third of the foreign born

144 For example, Canada’s labour market also has an aging population and low birthrates and faces skills shortages in the labour market. See Page, Pierre E., “The Temporary Inflow of Natural Persons for the Swiss IT Market”, p. 214. In: Mattoo, Aaditya, Carzaniga, Antonia (eds.), Moving People to Deliver Services, Oxford: Oxford University Press (2003).
145 Supra note 64, p. 16.
146 Ibid.
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population.\textsuperscript{147} As already noted, temporary migration as envisaged by GATS mode 4 is an effective way to reduce illegal immigration and the negative side-effects such irregular movement might entail.

\textbf{C. Political willingness to consider labour standards in GATS mode 4 negotiations}

\textit{1. International organizations}

International organizations have explicitly communicated their concern for labour standards. It was proposed by the Multilateral Agreement on Investment (hereinafter MAI), negotiated by the Organization for Economic Co-operation and Development (hereinafter OECD), that parties should refrain from relaxing core labour standards as a strategy to attract foreign investment.\textsuperscript{148} The agreement establishing NAFTA urges parties to ensure that labour laws and regulations provide a high quality, although it is emphasized that States have the independence to develop their own domestic labour standards.\textsuperscript{149} Labour standards are not enforceable by dispute settlement, nor can it be used to coerce the granting of temporary entry.\textsuperscript{150} In relation to international trade in commodities, the International Coffee Agreement of 2001 commits members to duly consider the improvement of the standard of living and working conditions of persons engaged in the coffee-sector.\textsuperscript{151}

In a recently published report the former Director-General of the WTO, Pascal Lamy, notices a trend in international trade that countries are increasingly pursuing public policy objectives within the multilateral trade regime and that this practice is often accepted as legitimate.\textsuperscript{152} It is to be seen whether including a consideration for labour standards will be accepted as a

\begin{flushleft}
\textsuperscript{147} Ibid., p. 32-33.
\textsuperscript{148} The Preamble of the MAI refers to the ILO to set and deal with core labour standards worldwide. The MAI was not adopted. Negotiating Group on the Multilateral Agreement on Investment, The Multilateral Agreement on Investment, DAFFE/MAI(98)/REV1, 22 April 1998. Available at: www.oecd.org \rightarrow Investment \rightarrow International Investment Agreements \rightarrow Multilateral Agreement on Investment [accessed at 5 September 2013].
\textsuperscript{149} North American Free Trade Agreement, Chapter One: Objectives, Article 2. Available at: www.nafta-sec-alena.org \rightarrow Legal Texts \rightarrow NAFTA [accessed at 5 September 2013].
\end{flushleft}
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legitimate policy objective and so can be accepted as part of negotiations on GATS mode 4.

2. Bilateral and Regional Agreements

Any reference to labour standards currently is excluded from WTO negotiations. However, they are often mentioned in bilateral and regional trade agreements, including in Preferential Trade Agreements (hereinafter PTAs). A “social clause” is incorporated in those agreements referring to standards as established by the ILO. Countries such as the US and EU promote higher labour standards via trade agreement. The EU tries to influence labour standards outside its own territory by offering supplementary reductions under the GSP in case the trade partner complies with certain social and environmental standards. Recent EU trade agreements all recognize the importance of social rights and the promotion hereof, by the inclusion of a social clause. This social clause is excluded from dispute settlement.

The US Trade Act of 2002 encourages the promotion to respect for worker rights and the rights of children consistent with core labour standards of the ILO and the promotion of the ratification of the ILO Convention to tackle child labour. These objectives are realized in the US-Morocco FTA. Chapter 16 of this agreement explicitly recognizes the obligations of parties as members of the ILO and their obligation to adopt or modify its labour laws and standards. Parties commit to strive to uphold international labour standards. It should be noted that dispute settlement and investigatory powers remain with the parties, while simultaneously committing to upholding a non-discriminatory, transparent and timely judiciary. Cooperation between the domestic labour ministries is recognized as enhancing
opportunities to promote respect for core labour standards. The well-known H2B visa enabling low skilled workers to work temporary in the US, also protects working conditions of migrant workers. Workers are guaranteed basic wages and working conditions, although migrant workers cannot apply for social security. The Euro-Mediterranean Association Agreements (Morocco and Tunisia), incorporates a chapter titled “Dialogue on social matters”, in which the parties agree to pursue ways to achieve progress on the movement of workers. Temporary workers are guaranteed acceptable working conditions, non-discriminatory treatment and social security. Illegal workers are excluded from these protections.

Such unilateral action is not universally supported. For example, the Free Trade Area of the America’s (hereinafter FTAA), which is currently being negotiated, rejects the use of standards for protectionist purposes.

3. Consumers/citizens perspective

Increasingly consumers in more developed regions concern themselves with social standards upheld by producers from whom they sell their products, despite the fact that higher standards cause the product price to rise. Consumer concerns have led to a response by the private sector and resulted in corporate self-regulation and private Codes of Conduct. In the absence of government rules, this development might be a significant signal communicating the interests of the constituency to politicians. From these private actions, it might be concluded that violations of core labour standards are perceived as unfair by firms and civil society. According to Langilie, the absence of any discussion about labour standards at the multilateral trading level could jeopardize its legitimacy and support the adoption of unilateral

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159 Supra note 34, pp. 22- 23.
161 Ibid., Article 64, Article 65.
162 Ibid., Article 66.
163 Free Trade Area of the Americas Seventh Meeting of Ministers of Trade, Ministerial Declaration, Quito, Ecuador, 1 November 2002, para. 11. Available at: http://www.ftaaleca.org/ministerials/quito/quito_e.asp [accessed at 31 August 2013].
164 Supra note 100, p.12.
165 Supra note 11, p. 60.
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protectionist instruments.\textsuperscript{166}

\textsuperscript{166} Supra note 87, p. 43-44.
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. Mode 4 is in principle meant to facilitate services trade through cross-border movement of all types of professions, regardless of the required skill level. However, in practice WTO Members have to a great extent refrained from making commitments aimed at low-skilled workers. A certain bias towards high skilled level professions is found in mode 4 commitments. This is in spite of the substantial economic benefits further liberalization of those sectors of importance for low-skilled workers could bring, for both the receiving and the sending countries. This paper has researched the question if a different approach to GATS mode 4 negotiations could benefit the substantial group of low-skilled workers willing to work abroad. The proposed approach would allow WTO Members to discuss at the multilateral level regulations on not only the entry, but also the stay and return of a temporary service supplier.

First, this paper has looked at the economic, political and legal concerns that exist due to the current composition of GATS mode 4. It was found that WTO Members consider mode 4 flows from an economic perspective, assuming that traditional economic principles apply. However, governments do not solely look at mode 4 flows from an economic perspective. It was established that cooperation between the receiving and the sending country is needed to develop conditions that would maximize the gains from temporary labour migration. Furthermore, it was found that movement of low-skilled workers is not optimally supported by the existing legal framework. The legal interpretation of service supplier is quite narrow, so making it difficult for low-skilled workers to organize themselves in such a way that their movement falls within the scope of mode 4. Moreover, WTO Members generally do not provide for unconditional market access in mode 4 commitments. Finally, national immigration measures usually hinder the free movement of foreign workers.

Since the current mode 4 commitments have so far not lead to substantial liberalization
benefitting the group of low-skilled workers, a different approach to negotiations at the multilateral level was discussed. Such an approach would allow for WTO Members to incorporate “migration tools” in relation to commitments made. This would reflect a practice taken up by several countries in national migration strategies. Bilateral migration agreements are established that rely on cooperation between the sending and the receiving country to regulate the entry, stay and return of a temporary migrant. In contrast to negotiations at the WTO, these agreements specifically focus on enabling the movement of low-skilled workers.

Adopting a similar approach at the multilateral level would allow WTO Members to discuss the conditions of temporary migration more in depth and potentially lead to more mode 4 liberalization for low-skilled workers. This would not be without controversy, since it might require mode 4 negotiations to deliberate on labour standards to which migrant workers would be subjected to. Although any substantial consideration on labour standards has in the past been rejected by WTO Members, a number of arguments were can be put forward why discussing labour standards in the context of mode 4 would be useful. Extending control over the stay of temporary workers might better protect migrant workers against exploitation and abuse. In addition, subjecting migrant workers to local labour laws might lead to more convergence of wages of the sending and receiving country so supporting one of the main objectives of the WTO.

The existing legal framework supporting mode 4 services supply could be adapted in several ways to facilitate the proposed different approach. A first possibility would be to adopt a re-interpretation of “service supplier” so that the definition would include domestic employment. WTO Members could also further negotiate under the mandate of Article VI:4 GATS and include into mode 4 commitments obligations to be taken on by the source country. A harmonized “necessity test” would have to be adopted to ensure that such obligations are not “unnecessary restrictions to trade”. Further legal possibilities are to include an “institutional commitment” in the additional commitments column of the schedules of WTO Members, to limit NT commitments and drafting a Reference Paper on mode 4. Finally, an
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emergency safeguard mechanism could be debated which would provide flexibility to WTO Members to secure their labour market against excessive supply.

Even though there are feasible possibilities to adapt the legal framework supporting mode 4 trade, these would be without value in the absence of political support. Therefore, a number of developments have been discussed which might signal the political feasibility that a different approach to GATS mode 4 negotiations will be taken up by the WTO membership. Despite the lack of actual progressive liberalization, WTO Members have shown some intention to further improve commitments on mode 4. Furthermore, important receiving countries of temporary migrants such as the EU are threatened with labour deficits especially in low-skilled professions. To prevent a loss of productivity that would affect the well-being of the EU population, temporary foreign service suppliers might provide a politically acceptable solution. Finally, a trend is noticed where employers employ irregular migrants and so de facto liberalize the global labour market. Some positive signals were distilled, showing that adopting a different approach to mode 4 including discussion on certain labour standards might also be political feasibility. Multiple recent regional and bilateral agreements incorporate a “social clause” which obligates parties to consider social and environmental standards in their trade conduct. Simultaneously, consumers and citizens in mostly industrialized counties are increasingly interested in social standards upheld by producers. In response, the private sector has adopted non-binding Codes of Conducts that also include labour standards. These developments signal that the absence of a discussion about labour standards at the multilateral level might negatively affect the perceived legitimacy of the WTO.

In principle, it can be concluded that legally and politically feasible possibilities exists to adopt a different approach and that this has the potential to better support progress of mode 4 negotiations than the current regime. However, it has to be noted that this paper did not aim to present a comprehensive research from which explicit conclusions can be drawn. Further research would be needed to obtain a better understanding of the demands and needs of the
labour market of different WTO Members. The legal 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 if a different approach to GATS mode 4 negotiations were to succeed. This paper has merely put forward a possible different approach to mode 4 negotiations, which might provide WTO Members with some tools to more efficiently work towards further commitments benefitting low-skilled workers within the multilateral trading system.
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Ius Commune Conference 28-29 November 2013
Workshop Constitutional Processes in the Global Legal Order

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Overview

- Problem-setting: current economic, legal and political implications of GATS mode 4
- A different approach to GATS mode 4 negotiations
- A brief consideration of the legal and political feasibility of adopting a different approach to GATS mode 4
Introduction to GATS mode 4

• Article I:2 of the General Agreement on Trade in Services (GATS)

• Four modes of supply
  - Mode 1: cross-border trade
  - Mode 2: consumption abroad
  - Mode 3: commercial presence

• Mode 4: presence of natural persons
  “By a service supplier of one Member, through the presence of natural persons of a Member in the territory of any other Member”

+ the Annex on the Movement of Natural Persons (MNOP)
The economic implications of GATS mode 4

• Current situation: little commitments made to GATS mode 4 supply & biased towards highly skilled professionals

• Economic thinking about mode 4:
  Factor Price Equalization theory versus Dual labour market theory

• Maximizing the value of mode 4:
  Unilateral immigration measures versus Cooperation
The legal implications of GATS mode 4

• Interpretative issues:
  WTO Secretariat Background Note on the Presence of Natural Persons (Mode 4), S/C/W/301, 15 September 2009: “A service supplier must be a firm or self-employed supplier who receives remuneration directly from customers”

• Conditional liberalization

• The Immigration caveat in the Annex MONP
The political implications of GATS mode 4

- Commitments

- Reasons for lack of negotiating momentum
  - Administrative formalities
  - Transparency
  - Request – driven approach to mode 4
  - The legal definition of service supplier in GATS mode 4
A different approach to GATS mode 4 negotiations

• The appropriate forum to discuss temporary migration of low-skilled workers:

  Liberalization via bilateral and regional agreements versus Multilateral liberalization
National strategies towards temporary labour migration

• Several examples:
  – Spain - the EU
  – Germany - the Netherlands
  – South Africa - Sweden
  – Canada - New Zealand

• Lessons learned:
  - Ensure voluntary return and readmission
  - Use of migration tools
  - Reliance on private stakeholders
  - Prevent competition with local labourers through requiring wage equity, equal working conditions → Need to discuss labour standards of migrant workers in the context of mode 4
Considering labour standards within the scope of GATS mode 4

• Arguments in favour
  – Working against exploitation of migrant workers
  – Working against illegal migration
  – Working towards wage convergence of receiving and sending countries

• Arguments against
  – Labour standards are a non-trade concern
  – Low labour costs should be seen as a legitimate comparative advantage

A different approach to GATS mode 4 negotiations
The legal possibilities to realize a different approach to GATS mode 4

- Include domestic employment in the definition of “service supplier”
- Insert certain domestic regulatory obligations into mode 4 commitments
- National Treatment limitations
- Drafting a Reference Paper on mode 4 service supply
- Adoption of a special Safeguard Mechanism
The political willingness of adopting a different approach to GATS mode 4

• Political willingness to further liberalize mode 4 commitments
  – Developments within the WTO
  – Developments in the European Union
  – Employers’ perspective

• Political willingness to discuss labour standards at the multilateral level
  – Approach of international organizations
  – Developments in bilateral and regional trade agreements
  – Civil societies’ perspective
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Thank you for your time and attention