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**Negotiating the liberalization of migration –
Is GATS a vehicle or a model for global migration governance?**

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Migration should be firmly incorporated into the economic, social and foreign policy agendas, thereby doing justice to its diverse aspects and using the strongest policy instruments to tackle this truly global issue at the appropriate levels. This paper looks at a particular aspect of the foreign policy agenda, namely trade in services, and explores whether GATS (the General Agreement on Trade in Services) is actually an international migration management vehicle, or could become a model for global migration governance. Bearing the overall GATS agenda in mind, migration should in both cases be considered a subject of negotiations aiming to progressively liberalize the cross-border movements of persons and to establish a rule-based migration regime. The paper first describes GATS' relevance for the management of international migration by summarising the current state of affairs regarding the liberalisation of the movement of persons. It concludes that on this matter GATS has made little progress and argues that a change in the way migration is valued in Europe may have a positive effect on the negotiations once they are resumed. The second part of the paper attempts to make the case for using GATS as a model for global migration governance by looking at some of its guiding principles and working methods and projecting them on international co-operation on migration.

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Introduction

Migration is a global phenomenon. Around 175 million persons, or 3 % of the world population, currently reside in a country other than where they were born. However, migration does not affect all regions of the world equally: the magnitude, direction and make-up of migratory flows vary, as do the policy responses developed by governments. In Europe, the migrant population increased by 8 million or 16% during the 1990s. During this period, net immigrants represented 89% of population increase on the continent.² In the Americas, migration to the United States and Canada and intra-regional migration in Central and South America create a complex picture of flows, marked by the volatile political and economic situation in many states. Africa has a high volume of refugees as well as skilled professionals moving to find better opportunities either on the continent (often in South Africa) or elsewhere. In Asia, there is significant intra-regional migration as well as rural-urban migration: by the late 1990s, China had a ‘floating population’ of internal migrants that numbered some 70 to 80 million persons. Overall, most migration takes place within regional settings.³

Regions face different migration challenges related not only to the number and distribution of international migrants but also to their diverse characteristics: migrants can be male or female, high- or low-skilled, temporary or permanent, documented or undocumented, forced or voluntary. As a result, there is no global agreement on the issues that need to be tackled when talking about migration, and states have not so far come together to create strong global frameworks in this area. Instead, the acceleration of regional economic integration during the 1990s and the presence of specific migration issues of regional concern have encouraged the development of regional treaties, agreements and consultative processes regarding migration.⁴ Involving governments and at times civil society, they range from far-reaching free movement regimes⁵ to informal dialogue. Some structures, such as the Budapest or Manila processes, mainly concentrate on irregular migration, whereas others such as the Regional Conference on Migration (Puebla Process) address a range of issues including human rights, migrant children, and migration and development. All regional processes start from a limited number of topics in which there is a shared interest. Governments succeed in identifying these common challenges because their environment confronts them with

² United Nations Population Division, International Migration Report 2002, New York 2002, p. 2.

³ IOM, World Migration 2003, Geneva 2003.

⁴ See IOM, Managing migration at the regional level: strategies for regional consultation. www.iom.int/en/PDF_Files/mrp/Roundtable/Roundtable_E.PDF

⁵ See OECD, Working Party of the Trade Committee, “Labour mobility in regional trade agreements”, OECD 2002.

specific migration trends and management issues. Even so, there is not always agreement on the agenda, and years of dialogue are often needed to prepare the ground for further cooperation.

At the global level, the Cairo Programme of Action was adopted at the 1994 International Conference on Population and Development, but this was not followed by the adoption of a common agenda or the creation of a global migration agency. A number of UN agencies deal with various aspects of migration from protecting the rights of migrants, refugees and displaced persons to addressing causes of forced migration. Various pleas are made for increasing inter-agency co-operation and designating a lead bureau, but also for creating a new UN agency for migration or bringing the existing International Organisation for Migration into the UN system. Yet another idea is to create a Commission, which would mobilise the international policy community and raise public awareness of migration issues. The UN General Secretary acknowledges that the prospect for developing a comprehensive response to migration, for instance through a Global Conference, remains uncertain. The UN now sees itself as playing a limited role concentrating on 'data collection, research, coordination of activities among concerned organizations, the provision of advisory services and technical assistance, advocacy, and the promotion of the ratification of existing international instruments related to international migration'.⁶ Indeed, the ratification and promotion of international legal instruments has been a focus of 'global' activity on migration, and advances have included the entry into force of the 1990 UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families on 1 July 2003.

Advocates of a legal codification of rights seek to extend the strong normative force of the 1951 Geneva Convention on Refugees to other migrant populations. However, these debates often neglect the differences between migrants and refugees and tend to apply a narrow legal and protection approach to an area where economic, social and political dynamics interact in different ways. While protection is the overriding concern for refugees (and such groups as the internally displaced persons), migration issues in their diversity and complexity cannot be subsumed under this concept. In the absence of a comprehensive agenda and a global governance strategy on migration, then, the challenge for Europe, when addressing this truly global issue, is the incorporation of migration into the economic, social and foreign policy agendas. This would do justice to its diverse aspects and would enable the use of the strongest policy instruments to tackle migration at the appropriate levels. Including migration in the external relations agenda means taking that agenda as a starting point and subsequently exploring how migration can best be

⁶ United Nations, Report of the Secretary-General on Migration and Development pursuant to General Assembly Resolution A/RES/56/203 of 21 February 2002, p. 17.

addressed within existing policy mechanisms. Three foreign policy areas come to mind most readily: human rights, development and trade. While migration is regularly discussed in international human rights, population and development forums, it is rarely a key topic in trade forums.

Mobility and temporary migration under GATS

To date GATS has not attracted much attention from the migration policy community, which is not surprising given the fact that GATS is a comprehensive treaty on trade in services and is only in one area explicitly and in another area indirectly dealing with just one possible form of migration: the temporary movement of ‘natural persons providing services’. A topic of lengthy and prolonged debates in the Uruguay Round⁷, it was primarily the concern of trade ministries and not so much of ministries responsible for migration. Non-governmental actors and academics were more engaged in general debates on the pros and cons of the new trade system than in making assessments of the Agreement’s consequences for migratory movements and migration policies. This situation is changing now that GATS’ relative importance for migration becomes apparent.

In the context of GATS, labour mobility refers to the movement of service providers and can take place within either mode 3 or Mode 4 of the agreement. Mode 4 within GATS refers to the mobility of *natural persons* – that is, individuals, as opposed to juridical persons such as companies and organisations, whose movement is provided for in mode 3 by way of commercial presence. These provisions for the movement of persons are qualified by the “Annex on Movement of Natural Persons Supplying Services under the Agreement”, which guarantees the autonomy of national immigration controls from GATS, specifying that the agreement does not apply to measures affecting individuals seeking access to the employment market of a member, or to measures regarding citizenship, residence, or permanent employment. The annex also clarifies that, regardless of their obligations under the agreement, members are free to regulate the entry and stay of people in their territory, including through measures necessary to protect the integrity of, and ensure the orderly movement of natural persons across, their borders. However, the measures may not be “applied in such a manner as to nullify or impair the benefits accruing to any member under the terms of a specific commitment.”⁸

⁷ GATS is negotiated by governments. As far as the European Union is concerned there is mixed competency between the individual Member States and the European institutions (article 133 of the EC Treaty).

⁸ Antonia Carzaniga, “The GATS, Mode 4, and patterns of commitment”, in: Aaditya Matto and Antonia Carzaniga (eds.), *Moving People to Deliver Services*, World Bank 2003, p. 23.

Liberalisation of the movement of service providers has so far been limited, and today Mode 4 accounts for less than 2 percent of the total value of services trade.⁹ The reluctance to make significant commitments in this area is common to both developed and developing countries. No developed country has scheduled a “None” entry – signifying full liberalization - for its Mode 4 commitments, and only 1% of market-access commitments undertaken by developing countries are fully liberal.¹⁰ In so far as commitments have been made, they privilege high-skilled personnel and especially service providers associated with a multinational company, which has an international commercial presence. These intra-company transferees are the group targeted by about 42% of all current horizontal commitments (those commitments which apply to all sectors). Another 28% of commitments relate to executives, managers, and specialists, 13% to visitors for sales negotiations and ten percent to other business visitors. The remaining 7% relate to independent contractors and others.

Therefore, the liberalisation achieved to date has been of limited significance for developing countries whose comparative advantage lies in the export of medium- and low-skilled, labour-intensive services. Only about 17% of the commitments apply to low-skilled personnel, and these are often limited by an economic needs test that excludes applicants if it has not been shown that no qualified domestic workers are available. An example is the current EC schedule, which addresses the mobility of the following categories of service supplier: intra-corporate transferees, executives, managers, specialists, and contract-service suppliers.¹¹ Intra-corporate transferees are the only category of persons exempt from economic needs tests in its horizontal commitments to GATS.

Many developing countries have called for more commitments in sectors where they have a capacity to export services. Above all, these are the sectors of professional services (such as computers and information processing), health services, tourism, construction, audiovisual and transport services.¹² A high-profile proposal – specifically addressing GATS Mode 4 - was tabled in November 2000 by the Indian government.¹³ Its main demands have since been echoed by the

⁹ World Bank, “Labour Mobility and the WTO: Liberalising Temporary Movement”, in: *Global Economic Prospects 2004*, p. 144.

¹⁰ OECD, Working Party of the Trade Committee, “Service Providers on the Move: the Economic Impact of Mode 4”, OECD 2003, p. 13.

¹¹ Contract service suppliers supply a service in another Member’s territory in their capacity as employees of a company not established (i.e. without commercial presence) in that Member’s territory.

¹² OECD, Working Party of the Trade Committee, “Service Providers on the Move: the Economic Impact of Mode 4”, OECD 2003, p. 22.

¹³ “Communication from India: Proposed Liberalisation of Movement of Professionals Under General Agreement on Trade in Services (GATS)”. S/CSS/W/12: WTO, 24 November 2000.

communications of other developing countries, such as Colombia¹⁴, Chile¹⁵ and Mercosur¹⁶. The main points of the Indian proposal can be summarised as follows:

- Uniformity and clarity of definitions within Mode 4 and clearer procedural and administrative norms.
- Horizontal commitments should cover an expanded range of categories, including middle and lower level professionals, and should delink Mode 4 from mode 3 with the inclusion of “individual professionals”.
- Detailed and specific sectoral/sub-sectoral commitments, with limitations and conditions clearly stated in the sectoral schedules.
- Disaggregated categories of service providers by superimposing the International Standard Classification of Occupations (ISCO-88) of the ILO on the WTO classification list.
- Economic Needs Tests should be subject to multinational norms, made clearer and more transparent, and professions covered under ISCO-88 should be excluded.
- The introduction of a ‘GATS Visa’ to distinguish Mode 4 service suppliers from permanent labour migrants, thereby streamlining immigration procedures. Such a GATS Visa would be issued rapidly, be time-limited, and be backed up by a bond, with sanctions for abuse.
- Mutual Recognition Agreements (MRAs) should be established to harmonise norms and disciplines in the qualifications and standards required of service personnel. Provision is already made for the negotiation of MRAs in Article VII of GATS, but so far they have not been used.
- Social security arrangements between developing and developed countries should be made through Bilateral Totalisation Agreements, with exemption from social security payments for developing country professionals.

¹⁴ “Communication from Colombia: Proposal for the Negotiations on the Provision of Services Through Movement of Natural Persons”. S/CSS/W/97: WTO, 9 July 2001.

¹⁵ “Communication from Chile: The Negotiations on Trade in Services”. S/CSS/W/88: WTO, 14 May 2001.

¹⁶ “Communication from MERCOSUR: Computer and Related Services”. S/CSS/W/95: WTO, 9 July 2001.

More recently, on 3 July 2003, a paper on "Proposed liberalisation of Mode 4 under GATS Negotiations" was submitted by Argentina, Bolivia, Chile, China, Colombia, Dominican Republic, Egypt, Guatemala, India, Mexico, Pakistan, Peru, Philippines and Thailand.¹⁷ It highlights issues arising from previous discussions at the Services Council special sessions as well as from the bilateral request-offer meetings. While maintaining that there is a now greater convergence of interests in Mode 4 between developed and developing countries than during the Uruguay Round, the signatories regret that so far most offers do not include substantial improvements to existing Mode 4 commitments. The paper suggests that deeper liberalisation could be achieved through sector specific commitments, which could complement the current blanket treatment across all sectors. It also reiterates demands for a separate visa or sub-set of procedures for temporary movement, for an elimination of economic needs tests, and for a better recognition of qualifications.

While the strongest voices for a liberalisation of Mode 4 have come from countries with a comparatively high level of development, the Least Developed Countries (LDCs) have also expressed their demands, arguing that they depend on the export opportunities of Mode 4 and have little else to gain from the GATS agreement as a whole. In response, the Special Council has recently adopted a paper on their special situation.¹⁸ In it, Members declare that they 'take into account the economic and social challenges faced by LDCs, in combination with a lack of institutional and human capacities to analyse and respond to offers and requests' and agree to 'exercise restraint when seeking commitments from LDCs'. The paper recognises that Mode 4 is particularly important to LDCs and suggests that 'Members shall to the extent possible [...] consider undertaking commitments to provide access in Mode 4, taking into account all categories of natural persons identified by LDCs in their requests.'

The interest of many developing countries in Mode 4 is also expressed in their contributions to the request-offer process of the current Doha round of negotiations. For instance, the EU has indicated that Mode 4 was the only area really addressed by over half of the requests it received from developing countries. Of the 26 requests addressed to the EU on Mode 4, 24 came from developing countries. Over the past years, the EU has shown itself to be cautious, but not principally closed towards the idea of expanding market access commitments beyond current levels. In an earlier

¹⁷ Communication from the delegations of Argentina, Bolivia, Chile, The People's Republic of China, Colombia, Dominican Republic, Egypt, Guatemala, India, Mexico, Pakistan, Peru, Philippines and Thailand: "Proposed liberalisation of Mode 4 under GATS Negotiations". TN/S/W/14: WTO, 3 July 2003

¹⁸ Modalities for the special treatment for least-developed country (LDC) Members in the negotiations on trade in services, adopted by the Special Session of the Council for Trade in Services on 3 September 2003.

position, it stressed the need for clearer definitions regarding categories of service providers, reducing economic needs tests and greater overall transparency rather than expanding commitments.¹⁹ However, the EU initial offer of 29 April 2003, submitted somewhat after the deadline of 30 March 2003, includes the following potential commitments:

- Corporate managers and specialists will be allowed to stay for an extended period of three years. Graduate corporate trainees will be allowed to stay a maximum period of 12 months. In either case, an economic needs test will not be required.
- Foreign companies with a contract to provide services to a client in the EU will be allowed to send highly skilled corporate employees to the EU for a maximum period of six months (within a period of 12 months). This period was previously limited to three months. The offer does not, however, apply to important services sectors such as research and development, construction, higher education and entertainment.
- A new category of contractual services is offered: self-employed, highly skilled people will be allowed to enter the EU for up to six months. This applies only to architectural, engineering and integrated engineering services, computer, management consulting and translation services. The entry of individual service suppliers is subject to a numerical ceiling, for which the modalities and levels are still to be determined.²⁰

The reservations expressed in the Annex on the Movement of Natural Persons are reiterated in the current offer, which stresses that it is 'compatible with the application of all Member States' laws and requirements with regard to residence, labour law, welfare law, collective agreements and the minimum wage'. The EU offer, its bilateral requests and its comments on the initial offers of developing countries also express its 'considerable offensive interests' in the area of temporary movement of service providers. For instance, in its outgoing requests the EU asks India, Ecuador, Peru, Philippines, Malaysia, Morocco, and other developing countries to extend their commitments under Mode 4. The requests typically ask that economic needs tests be eliminated for intra-corporate transferees including those who are not executives or specialists. They also seek to obtain access for contractual service suppliers in sectors such as

¹⁹ "Communication from the European Communities and their Member States. GATS 2000: Temporary Movement of Service Suppliers". S/CSS/W/45: WTO, 14 March 2001.

²⁰ EC, Trade in Services, Conditional Offer from the EC and its Member States, 29 April 2003, summary in ICTSD, Bridges Weekly Trade Digest, 7:16, 7 May 2003.

legal services, accounting and bookkeeping services, architectural services, advertising, and management consulting services.

The approximately 30 initial offers received so far also include that of the United States, which places little emphasis on Mode 4 and, rather than indicating additional commitments, contains an assurance that the offer 'does not require changes to federal and sub-federal assistance programs that are available only to U.S. citizens or U.S.-owned companies'.²¹ Despite the hesitant position of the US in the negotiations, however, in practice temporary workers already form a large percentage of its annual intake. Moreover, citizens of middle- and low-income economies account for a significant share of this group, particularly in the specialty occupation alien category (H1B visas), where India and China are the largest providers of entrants. The majority of H1B occupations are related to services supply (engineering, computer-related occupations, accountants, occupations in college and university education, etc.) and could therefore fall under Mode 4 of GATS.²² Indeed, the US initial offer, like its existing commitment, is essentially a codification of the H1B visa category, and the schedule reproduces the rules valid for the entry of specialised personnel in this visa class. These rules include labour certification requirements, a skill threshold of a four-year university degree or equivalent experience, and a numerical limit. The US is an example for the fact that actual trade under Mode 4 – and numbers of temporary entrants – is sometimes greater than a country's commitments would suggest. Members frequently 'bind' less than the access granted in practice, because they want to retain flexibility in withdrawing access in the event of a worsening economic situation.²³

Overall, liberalisation under GATS Mode 4 has so far been limited, both by developed and developing countries. WTO Members have been especially slow to expand commitments to lower-skilled categories of service providers moving outside the framework of commercial presence. As a result, Mode 3 and Mode 4 are still linked to a great extent, and considerable barriers to movement remain. Quantitative restrictions can constitute a direct ceiling on numbers admitted through Mode 4, although a variety of other methods are also used to link the situation of the domestic market with the regulation of foreign labour. They include measures to ensure that minimum working conditions and consumer safety standards are enforced, but generally they serve to establish the absence of a suitably qualified national for the job concerned. Their discretionary

²¹ United States initial offer, 31 March 2003, and USTR press release.

²² OECD, Working Party of the Trade Committee, "Current Regimes for Temporary Movement of Service Providers. Case Study: the United States of America", OECD 2002, p. 29.

²³ Aaditya Mattoo, "Introduction and Overview", in: Aaditya Mattoo and Antonia Carzaniga (eds.), *Moving People to Deliver Services*, World Bank 2003, p. 9.

nature, ambiguity, and non-transparency have attracted considerable criticism, and some improvements have been made, of which the EU initial offer is an example.

The impact of visa regulations

Visa regulations continue to constitute another main barrier, since existing visa systems are not designed to facilitate the movement of service suppliers who face the same restrictions, delays, and - for the company - increased costs as other categories of temporary migrant. Alternative suggestions such as the idea of a 'GATS visa' are still being discussed, but the concept has not gained significant support especially among developed countries. Although service industry bodies in the EU and the US have backed the idea, immigration authorities in particular are sceptical since a special visa would necessitate separate procedures for a group of migrants that is relatively small compared to the overall flows. A similar endeavour which was attempted in a regional context, the 'APEC business card,' has suffered from the reluctance of three key APEC members (Canada, Japan, and the United States) to implement the scheme. Heightened security considerations have further strengthened the influence of those parts of government, which prioritise border control over facilitating trade flows.

Extending Mutual Recognition Agreements (MRAs)

The mobility of service personnel, and the effectiveness of commitments under Mode 4, is also often reduced by difficulties in the recognition of qualifications. Regulations to ensure that qualification requirements are met, and that technical and licensing standards are in place, are often enforced restrictively by professional associations. Mutual Recognition Agreements (MRAs) are a function within GATS that provide scope for the negotiation of professional standards. However, currently existing MRAs are mostly between developed countries, with few agreements either amongst developing countries or between developing and developed countries, and many limited to those at a higher level of development. On the other hand, there are few MRAs even between developed countries and many have made limited progress.²⁴ These difficulties are paralleled by the situation in the field of permanent immigration, where recognition of qualifications is a similarly complex and difficult issue which is the subject of long-standing negotiations.

Solving outstanding ambiguities

Some progress has been made on the definitional ambiguities, e.g. regarding categories of service providers, which have been the subject of

²⁴ OECD, Working Party of the Trade Committee, "Service Providers on the Move: Mutual Recognition Agreements", OECD 2002, p. 21

sustained EU and US criticism. However, some of the shortcomings in this area are due to the lack of capacity of many WTO member countries, which leads to inconsistencies and gaps in their scheduled commitments. Support for capacity building in developing countries has been pledged – for instance, by the US – and model schedules are also being discussed as ways of making the negotiating process easier for smaller WTO members.

This brief overview suggests that GATS Mode 4 is subject to limitations as a *vehicle* of liberalisation of international migration. One of the factors holding it back is the limited willingness of developed countries to make significant additional commitments. The next section will look at the reasons for this lack of interest and suggest that various developments may combine to change European attitudes in the near future.

European concerns about liberalisation

All studies on Mode 4 point out that its economic impact is difficult to assess, due to a lack of statistical data and overlaps with other categories of temporary workers and of traded services. In the absence of clear evaluations, then, the reservations towards Mode 4 in many countries including European ones may well be a case of “fear of the unknown”.²⁵ However, two main concerns can be identified: first, that the temporary entry of foreign service providers will constitute a competitive challenge to local, especially less skilled, workers, and second, that temporary movement could turn into permanent immigration.

The first concern builds on the assumption that the entry of foreign service providers will exert a downward pressure on wages and erode working conditions. However, the visa regimes in operation for GATS Mode 4 usually require that the foreign worker be hired under the same conditions as national workers. More often than not, temporary migrants under Mode 4 are therefore subject to social security contributions and suffer the disadvantages of double taxation burdens and the non-portability of pension and other social contributions. Insecurity of working conditions does exist in certain service sectors, but in such cases the insecurity depends not on the worker’s status but rather on the nature of the job itself, regardless of nationality.

With regard to wages, there are strong indications that foreign temporary workers are generally used more as a supplement to than as a substitute for

²⁵ This section relies on the analysis of ‘some preconceived ideas about the economic impact of Mode 4’ in OECD, Working Party of the Trade Committee, “Service Providers on the Move: the Economic Impact of Mode 4”, OECD 2003, pp. 31–40 and on L. Alan Winters, “The Economic Implications of Liberalising Mode 4 Trade”, in Aaditya Mattoo and Antonia Carzaniga (eds.), *Moving People to Deliver Services*, World Bank 2003, pp. 59–91.

local labour. Migrants – especially temporary ones – tend to concentrate in sectors and regions characterised by labour shortages at both the high- and low-end of the skills spectrum, for instance in certain parts of the health, education, IT, catering and agricultural sectors. Direct competition, and thus downward pressure on wages, may therefore be limited.

Moreover, Mode 4 is not the principal channel through which foreign service providers can exert pressure on local wages. Services out-sourced offshore and provided by lower-cost labour can equally be a source of competition to local, higher cost, suppliers. Experiences with the import of labour-intensive goods from the developing world suggest that the consequences of such imports, namely losses for the low-skilled, should be met with policies designed to ease adjustment among local unskilled workers. It can also be argued that the trend towards outsourcing, which has led to significant unemployment in many European countries, could also be slowed through greater liberalization under Mode 4, which would ‘keep the jobs at home.’

The fear that foreign service providers entering under Mode 4 will represent a threatening competition to domestic workers is likely to be somewhat alleviated by the demographic developments in Europe, which are characterized by rapidly ageing populations and a decrease in the relative share of working people. As life expectancy grows, birth rates fall and average levels of training and education rise, there are likely to be more and more labour shortages. These shortages may involve high or low skilled labour and this will vary according to the development of individual economies. Many of the affected sectors, however, are likely to be service sectors in which the ageing populations are likely to prompt increased demand (e.g. health or domestic work) and in which there is no real substitute for human labour. The shortages will also have the effect of raising the relative wages of unskilled labour in the absence of migration. Since projections predict considerable demographic change, scope may therefore exist for increased flows of unskilled labour in an environment of relative wage stability.²⁶

The second main fear is that workers moving under Mode 4 will use their authorised temporary stay as a stepping-stone to permanent migration. It is true that there is no specified timeframe in the GATS of what constitutes “temporary” movement: this is defined negatively, through the explicit exclusion of permanent presence. On the other hand, overstaying is a risk with all forms of temporary entry, including tourist traffic. The decisive factors are a worker’s, or a tourist’s, real intentions, and these are impossible to determine. While opinions vary widely on this question, a

²⁶ World Bank, *Global Economic Prospects 2004*, p. 162. See also Herbert Bruecker, Can international migration solve the problems of European labour markets. In the UN Economic Commission for Europe’s *Economic Survey of Europe* (2002, no2).

recent World Bank study comes to the conclusion that “available data shows little evidence of large scale transfer of workers from temporary to permanent status.”²⁷

The idea that temporary migration may be attractive to migrants as well as to host (and sending) countries represents a major departure from a way of thinking about migration that was deeply marked by the ‘Gastarbeiter’ experience of the sixties and seventies. Calling into question the paradigm of the permanent migrant, research on transnational communities, diasporas and networks²⁸ now suggests that migrants sustain strong links to their home communities and welcome opportunities to return temporarily and contribute to business or development projects in their country of origin. Such evidence implies that if movement under Mode 4 is made easier, it will encourage people to seek a short-term experience, rather than a permanent job and immigrant status, especially if such moves can be repeated frequently.

As well as reassuring developed countries which fear that Mode 4 migrants may become a long-term burden on their social welfare systems, the notion of a modern temporary migration regime also relativises fears of brain drain. Where migrants are likely to return with additional experience and skills, sending countries will be less reluctant to see them leave. At the same time, European policy debates will shift from the concept of brain drain, which has often been used to justify restrictive policies, to the notion of ‘brain circulation’. Here, the main challenge is that of devising policies that will assist migrants in contributing to the development of their countries of origin. Already, arguments that equate the movement of service providers under Mode 4 with brain drain fall short, since the flow of service providers between developed countries, between developing countries, and from developed to developing countries is also considerable.

To conclude, current fears that have kept European and other developed countries from making extended commitments under GATS Mode 4 may well fade away over time. Demographic changes will lead to a shift in climate and a more relaxed attitude towards immigration in Europe. A more modern and inclusive concept of migration, which also takes into account the possibility that temporary migration could be a valid option for migrants and their home communities, may also help to further the liberalisation of Mode 4. These developments should be reinforced through the involvement of stakeholders in the debates on GATS. Observers of the previous Uruguay Round have commented that few stakeholders pressed their interests regarding Mode 4 on their own

²⁷ World Bank, *Global Economic Prospects 2004*, p. 165.

²⁸ See, for instance, Steven Vertovec and Robin Cohen (eds) “Introduction”, in: *Migration, Diasporas and Transnationalism*, Aldershot: Edward Elgar 1999.

governments as well as others.²⁹ By contrast, Mode 3 (commercial presence) stakeholders were widespread and well organized. That Mode 3 commitments were broader and deeper than those for Mode 4, then, may have had much to do with the stakeholders who convinced governments of their needs. In the current round of negotiations, a change in attitudes promoted by the contributions of stakeholders from all fields and including migration specialists could make the difference for progress on Mode 4 commitments.

GATS as a model for global migration governance?

While GATS may not be, or even become, a vehicle for the management or liberalisation of international migration, it could nevertheless be looked at as a possible *model* for the global governance of migration. As topics of national and international policy-making, trade and migration compare in terms of the complexity and sensitivity of issues involved. They also compare in the sense that they occur in environments of competition and conflicting interests which are to be moderated by negotiations and consultations. However, they do not compare in one immensely important respect. Trade is about goods, services and capital, but migration is about people. Both can be the subject of negotiations, but the fundamental human rights of migrants are non-negotiable and for this reason migration policies must be human-rights-based. Consequently, not all principles underpinning trade policies and not all methods of international trade treaties can be transposed to migration. There are nevertheless principles and methods that *mutatis mutandis* apply to both.

European trade policy is based on the belief that the liberalization of trade, accompanied by appropriate measures to protect the integrity of the European social model, will ‘work’ for Europe as an actor in the global economy. The Union’s trade policies are thus designed to make the most of the deepening integration of global markets and the growing mobility of goods and services. This should benefit not only the European Union, but since the Doha Development Agenda also developing countries, at least in theory. In the Union’s own history the freedom of movement of goods, of capital and of services was completed by the fourth freedom, namely the freedom of movement of persons. That made and still makes a good deal of sense. People also move and they often move together with capital, goods and services. Therefore, migration - freedom of movement - was integrated into the Union’s policies to establish the Common Market. It

²⁹ Exceptions were India, where the National Association of Software and Service Companies (NASSCOM) advocated commitments relating to software engineers, and the United States, where a diverse lobby generated a U.S. binding of the H1B visa provision. See Richard J. Self and B. K. Zutshi, “Mode 4: Negotiating Challenges and Opportunities”, in Aaditya Mattoo and Antonia Carzaniga (eds.), *Moving People to Deliver Services*, World Bank 2003, p. 44.

will become increasingly difficult to argue that this should not apply to the EU's foreign policies. Is a position ideologically tenable which seeks to liberalise the movement of goods, capital and services but not that of persons? Inversely: can one plead for freedom of movement of persons and oppose the freedom of movement of goods, services and capital? ³⁰ Apart from ideology and, for that matter, policy consistency, is it really possible to open borders for goods, capital and services and, at the same time, close them for people?

As is the case with trade, migration is most beneficial when it is managed in an orderly process. The need for a rule-based migration regime does not mean that all countries should simply open their borders or that governments should not have scope for limiting and shaping flows. However, migration can only 'work' to the advantage of both source and destination countries where it is not hampered by excessive restrictions and barriers which run counter to the economic, demographic and social interests of these countries. The philosophy of both trade and migration, then, consists of developing a framework that can strike a balance between liberalisation and regulation. Not only the extent of liberalisation but also its timing is important here. This becomes most apparent when looking at the situation of developing countries: progressive liberalisation can lead to lasting successes, but sudden liberalisation without safety nets, institutions and legal structures will mean failure in most cases.³¹ If trade policies take into account the diverse stages of development and particular needs of all partners, they can play a crucial role for the economic growth of developing countries. Similarly, migration can contribute to development if the comparative advantages and the requirements of both sending and receiving countries are taken seriously.

GATS as a methodological example

What kind of system can meet the challenge of achieving the right degree and timing of liberalisation? The GATS, as a rule based trade regime and regulatory framework, can serve as a methodological example here: while it may not lead to success in its current form, it does contain several elements which can form the basis of a new system of governance. Most important here are the non-discrimination provisions, the market access principle and the request-offer process of negotiation.

³⁰ There are striking similarities in the arguments used by free trade opponents and anti-immigrant groups of all eras. For historical and modern objections against free trade see Michael J. Trebilcock and Robert Howse, *The regulation of international trade*, Routledge 1995, p. 11.

³¹ See, for instance, Joseph Stiglitz, *Globalisation and its Discontents*, Penguin 2002, p. 73.

The non-discrimination provisions in GATS consist of the Most Favoured Nation (MFN) and the national treatment principles. The MFN states that all foreign services and service suppliers have to be treated alike. This obligation guarantees that every time a member state improves the benefits that it gives to one trading partner, it has to give the same "best" treatment to all other trading partners as well, so that they remain equal. This obligation covers all liberalization steps, whether they are negotiated bilaterally or applied unilaterally. Exemptions must be listed specifically and are limited in time. While the MFN covers access, the national treatment principle means that once foreign companies have been permitted to enter a country, they must be treated in the same way as domestic ones. Measures who put a foreign supplier at a disadvantage are not allowed.

The GATS non-discrimination principles have meaningful analogies in the migration domain: following the logic of the MFN, immigration policies based on national, racial and ethnic preferences would not be allowed (these were and still are practiced). The national treatment principle would imply that once in the country, foreigners would enjoy the same rights as nationals. Equal treatment is a goal of immigrant advocates in Europe and elsewhere, but is still far from being achieved across the board with regard to access to employment, services, civic rights and freedom of movement amongst others.

A second important element of the GATS model is the market access principle, which allows foreign companies to provide cross-border services in a country. An important aspect here is that a country can restrict such access by limiting the number of suppliers, operations or employees in a specific sector; the value of transactions or assets; the legal form of the supplier (for instance, limiting it to a branch or joint venture); or the participation of foreign capital. Translated to the migration domain, 'market access' gives governments scope to shape their admissions policies according to the development of the economy, the number and profile of workers needed, and the socio-economic priorities they set in consultation with stakeholders. In the migration field this is know as a quota system.³²

While it is important that a government has the possibility to express its trade or migration interests, a final balanced outcome should also take into account the interests of other affected parties. Under GATS, this process takes place through the request-offer method of negotiation. Within the overall framework agreement, parties engage in ongoing negotiations to moderate their conflicts of interest. Requests can be addressed to a group

³² The recent proposal of the Italian Presidency to study the feasibility of a European quota system did not refer to a possible GATS type of quota established by a request and offer procedure.

of countries or to an individual country. Once the requests are received participants start consulting with each other. Countries then submit an offer in response to all the requests received. This offer is circulated multilaterally and is then open to consultations and negotiation by all partners. The final objective is to arrive at one clean revised schedule for each country.³³

The ‘lesson’ for migration here is that where interests conflict, negotiations are in order, and that the most constructive way of arriving at a compromise is by putting concerns on the table and expressing them in a clear and unambiguous fashion (through requests and negotiating papers). On migration, as on trade, countries often have diverse interests. However, governmental as well as non-governmental actors in the migration field have not yet learned that many of these interests are negotiable. Socio-economic goals are open to question and preferences should be subject to discussion and compromise: for instance, the categories of migrants that are admitted, the mechanisms for selection, the duration of work permits and the timelines for liberalisation. Negotiations on this issue are likely to be controversial, but communities of interest will evolve according to shared characteristics and may well cut across ‘traditional’ divisions between developed and developing countries. In trade as in migration, the negotiating process should be as transparent as possible. While the GATS system of requests and offers lends itself to transparent policy-making, in practice not all relevant documents have been made public and there are concerns that the negotiations are exclusive and impenetrable. If the process was applied to migration, improvements would have to be made on transparency and consultation in particular would have to be given a higher standing.

Concluding remarks

For various reasons, it is unlikely that the GATS in its current form will represent a major breakthrough for migration governance at the global level. While modest progress is being made that may be reinforced by the demographic and labour market changes in developed countries, conclusive solutions to the migration management challenges facing Europe and other countries will not be found in this framework. This is partly because the GATS as a whole is a multi-package agreement covering many aspects of service trade that is at once too broad and too narrow for the migration agenda: on the one hand, it covers many services in widely differing sectors and is too complex to allow for a clear focus on migration. On the other hand, it only covers services provided commercially, whereas labour migrants can also find work in other sectors or in public services. As a vehicle, then, GATS may not take us very far.

³³ WTO, Technical Aspects of Requests and Offers, Presentation by the Secretariat at WTO Seminar on GATS, 20 February 2002.

As a model, however, it contains many elements that could be taken as stepping-stones towards a global governance of migration. These elements will have to be modified, grounded in a rights-based framework, and perhaps taken into a separate institution. It may well be that a global system will emerge from a regional approach of concluding association and co-operation treaties between regional blocs and individual countries, as practised by the European Union. Therefore, migration specialists seeking to design a global migration regime could do worse than looking at GATS for inspiration.