

LIBERALIZATION OF THE TEMPORARY MOVEMENT OF NATURAL PERSONS
AND THE GULF BETWEEN UNSKILLED AND SKILLED SERVICE SUPPLIERS;
SUGGESTIONS FOR FURTHER LIBERALIZATION OF GATS MODE 4

*Aaron A. Ostrovsky*¹

Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tossed, to me:
I lift my lamp beside the golden door.

- *The New Colossus* – Emma Lazarus

¶1 The above strophe described an earlier era, a time when people moved at extraordinary costs to their families and countries. Today, as barriers to trade have fallen and national boundaries have blurred, workers move between countries with amazing speed and efficiency. Yet a disjunction between the legitimate movement of labor within the confines of international agreements and domestic laws, and illegal migration remains.

¶2 This paper seeks to explore the movement of labor in connection with the services provision and the World Trade Organization's (WTO) General Agreement on Trade in Services (GATS).² This paper addresses how further liberalizing the service trade, specifically the movement of natural persons, will benefit skilled, unskilled, and semi-skilled workers in developing countries.

¶3 Developing countries have long had the comparative advantage of large quantities of inexpensive labor. But it is not necessarily clear whether the comparative advantage is maintained when this labor force emigrates. The GATS regime may be useful in solving some of the problems traditionally associated with the movement of skilled and semi-skilled labor from developing to developed countries, but it cannot solve the

¹ J.D., *cum laude*, University of Michigan Law School. The author would like to thank Elisabeth Tuerk at UNCTAD, Verona Collantes at the WTO, and Gale Raj at the South Centre for extended discussions on this topic. The author would also like to thank Christopher McCrudden for helpful input in the initial stages of this inquiry, and Andrea Delgadillo Ostrovsky for inspiration. Any mistakes belong solely to the author.

² General Agreement on Trade in Services, Apr. 15 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 116781 (1994) [hereinafter "GATS"].

problems associated with the movement of unskilled workers. Indeed, in some situations it would exacerbate such problems.

¶4 This paper will outline issues that WTO members should consider when negotiating new commitments in Mode 4. Specifically, that developing countries can benefit from the liberalization of the movement of skilled workers, but they cannot necessarily benefit from the movement of unskilled workers. This paper will also provide policy considerations for the further liberalization of Mode 4.³

¶5 Part I will provide an overview of GATS and the current climate of global trade in labor services. Parts II and III will discuss the current GATS commitments under Mode 4, as well as proposed future negotiations in Mode 4. Part IV will identify and discuss some trends in the negotiation proposals. Part V will provide some conclusions, as well as suggestions for the further liberalizing of Mode 4.

GATS AND THE WORLD TRADE IN LABOR SERVICES

AN OVERVIEW OF GATS

¶6 GATS, an international agreement that is part of the WTO legal framework, became effective in 1995 as part of the Uruguay Round of negotiations. It prescribes the rules for the international trade of services. The GATS aims to increase trade in services by providing transparency in, and the progressive liberalization of, service markets.

¶7 GATS governs “measures...affecting trade in services.”⁴ These include regulatory measures taken by federal, state, and local administrations, as well as non-governmental bodies exercising delegated governmental authority.⁵ Member states must ensure that any domestic measures that “affect trade in services” are consistent with the rules (termed “disciplines”) under GATS.

¶8 The most important principles in GATS are its provisions on Most Favored Nation (MFN) treatment,⁶ transparency,⁷ national treatment,⁸ and market access.⁹ GATS does not impose national treatment

³ It should be pointed out that while this paper deals with economic concepts regarding liberalization of trade in services and the transboundary movement of labor, there is little empirical evidence available. Thus, this paper is by no means a comprehensive analysis but instead seeks to outline some potential complications for developing countries in liberalizing Mode 4.

⁴ GATS, Art. I, 1.

⁵ GATS, Art. I, 3(a)

⁶ GATS, Art. II

⁷ GATS, Art. III

⁸ *Id. at* GATS, Art. XVII. Note that the GATS national treatment obligation includes a prohibition on both *de jure* and *de facto* discrimination. This means that even measures which on their face do not discriminate between foreign and domestic service suppliers (*de jure* discrimination), but which in *effect* create disadvantages for foreign suppliers (even if that is not the intention) (*de facto*

or market access obligations in a service sector on a member unless the member voluntarily chooses to list that service in its schedule.¹⁰

¶9 GATS provides a framework for negotiations between members over what services must comply with these specific obligations. This system allows governments to decide, on a case-by-case basis, in which services sectors (or sub-sectors) and for which modes of supply they wish to be bound. This “bottom-up” approach to making commitments grants, in theory, flexibility to WTO member states in defining their own services trade regimes.¹¹

¶10 Once a country commits itself in a specific service sector, it is effectively prevented from rescinding that commitment. Technically, GATS includes provisions allowing a party to withdraw a commitment, there are compensation requirements (in terms of granting market access in another area) which are attached to such a withdrawal. In practice, however, member countries are unlikely to frequently use this mechanism.¹²

¶11 GATS commitments are based on four delivery of services “modes”: Cross-Border Supply (Mode 1), Consumption Abroad (Mode 2), Commercial Presence (Mode 3) and the Presence/Movement of Natural Persons (Mode 4).¹³ Mode 4 is the smallest mode of delivery in terms of the amount of trade flows and volume of commitments. Mode 3 and Mode 4 are usually linked by the fact that the commercial presence of a foreign service supplier often requires intra-corporate transferees. To date, commitments in Mode 4 have emphasized this relationship, and have focused primarily on intra-corporate transferees. The current commitments under Mode 4 are less significant for developing countries because their comparative advantage lies in low to medium skilled workers.

¶12 Mode 4 is unique from the other modes of delivery because it is the only one that directly regulates people. In addition, it is the only one that parallels an already existing structure outside of GATS;

discrimination) are inconsistent with the national treatment provision. *See also* Werner Zdouc, *WTO Dispute Settlement Practice Relating to the GATS*, J. INT'L ECON. IEL 295, 346 (1999); *see also* Peter Fuchs and Elisabeth Tuerk, *The General Agreement on Trade in Services (GATS) and future GATS-Negotiations -- Implications for Environmental Policy Makers*, Paper prepared for the German Federal Environment Agency (2001). Available at <http://www.umweltbundesamt.de>.

⁹ GATS, Art. XVI. *GATS: The Case for Open Services Markets* 59, OECD (2002).

¹⁰ *Id.*

¹¹ Recently, this theoretical flexibility has increasingly been questioned. *See* Peter Hardstaff, *The “Flexibility” Myth: Why GATS is a Bad model for a New WTO investment agreement*, paper to seminar on WTO Investment Agreement, Geneva, March 29th, 2003. Available at www.wdm.org.uk/campaigns/cambriefs/flexmyth.pdf.

¹² To date no WTO Member has successfully invoked this process. The WTO Secretariat points to the flexibility granted by this mechanism. *See* WTO, *GATS – Facts and Fiction*, available at 15. Available at: http://www.wto.org/english/tratop_e/serv_e/gats_factfiction_e.htm; http://www.wto.org/english/tratop_e/serv_e/gats_factfiction_e.htm), but *see* J. Woodroffe and C. Joy, *Out of Service: The development dangers to the General Agreement on Trade in Services*, March 2002 at page 13.

¹³ GATS, Art. I, 2

namely, immigration regulations. For this reason, it is always important to recognize the sometimes subtle, sometimes overt differences between services provided by the temporary movement of workers and the services provided by permanent or emigrating workers. It is important to remember that for the purposes of Mode 4, a service provider can only stay in the country temporarily.

¶13 Currently, Mode 4 has the least commitments of any of the four modalities. In 2001, various developed and developing nations made requests for further negotiations in Mode 4; Developed countries' requests focused on further refining current commitments in the movement of highly skilled workers, often as part of intra-company transfers. This conservative approach to the movement of workers is significantly different than most of the other commitments made by the developed countries. Developing countries have focused on creating more commitments in specific sectors, as well as making commitments regarding less-skilled occupations.

¶14 There are three scenarios for the economic impact of the movement of natural persons between sectors and economic activities.¹⁴ The first involves situations where the only feasible mode of supplying a given service is through the movement of natural persons, such as medicine or construction.¹⁵ This scenario most likely involves unskilled labor.¹⁶ The second scenario involves service sectors where movement is only one among several possible modes of delivery.¹⁷ In this situation, labor is feasible but it may be replaced, (for instance, by transboundary communication).¹⁸ Finally, the third scenario involves sectors where labor simply complements, or facilitates trade under other modes (such as Mode 3).¹⁹ In this scenario, direct personal contacts may help promote a company's reputation. But they are not, strictly speaking, necessary.²⁰

¶15 To date, GATS has had only a limited legal effect because it has mainly applied through its general obligations and a relatively limited number of specific commitments. In addition, many of the specific commitments only represent so-called "stand-still commitments," essentially inscribing the then existing level of openness into a schedule, rather than providing "new" market access. But WTO Members are currently negotiating to increase the number of specific commitments, which will expand the application of the GATS'

¹⁴ WTO Council for Trade in Services, *Presence of Natural Persons (Mode 4)*, Background Note by the Secretariat, S/C/W/75 at ¶ 4 (Dec. 8, 1998/1996)(hereinafter "Secretariat Background Note").

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Secretariat Background Note, *supra* note 14 at ¶ 4*Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

specific obligations to more sectors and modes of supply.²¹

GLOBAL LABOR MARKETS AND THE MOVEMENT OF NATURAL PERSONS

¶16 The movement of semi-skilled labor is beneficial to both developed and developing countries. However unskilled labor, although minimally, only benefits developed countries. In fact, in some instances the movement of unskilled labor can actually be *detrimental* to developing countries. This distinction will be important in assessing which trends in the international movement of labor should be addressed within the scope of GATS and which should be left to the domestic immigration policies of member States.

¶17 In the context of developing countries and the movement of unskilled labor, two key observations must be made. First, the movement of unskilled labor internationally is most commonly permanent and illegal migration. This mass abuse of the legal system is generally tolerated, and a great proportion of these entrants are unskilled, poorly educated, and often do not speak the native language.²² Second, developing countries are actively participating in the global trade of labor services. Some two to three million new migrants leave developing countries each year. Of those, half go to industrialized countries.²³ In 1992, low to middle income countries had half of the world's work force.²⁴

¶18 There are two main reasons for labor movement: compulsion and economic gain.²⁵ When a person moves temporarily, however, it is not always clear whether a person is moving specifically to provide a service or moving for familial reasons, and then taking a temporary job in the new country.²⁶ If they are moving because of compulsion, (political persecution, war, etc.) they are more likely to move through legal channels. But if they are moving for economic reasons, especially if they are unskilled, it may be more beneficial for them not to participate in the legal labor market.²⁷

¶19 It is unclear how much of the unskilled, uneducated labor market is genuinely interested in attaining temporary work abroad, versus simply intending to migrate. The answer to this question will greatly inform us as to whether unskilled temporary workers belong in GATS commitments.

²¹ In that context, Members are also negotiating the elimination of many of the above described conditions and limitations.

²² Vernon M. Briggs, Jr., *International Migration and Labour Mobility: The Receiving Countries* in THE ECONOMICS OF LABOUR MIGRATION 115, 138 (Julien van den Broeck ed., 1996).

²³ Neela Mukherjee, *Exporting Labour Services and Market Access Commitments under GATS in the World Trade Organization*, 30 J. OF WORLD TRADE 21, 38 (October 1996).

²⁴ *Id.* See also World Bank, *World Bank Development Report* 51 (1995).

²⁵ Bimal Ghosh, *Economic Migration and the Sending Countries* in THE ECONOMICS OF LABOUR MIGRATION 77, 80-81 (Julien van den Broeck ed., 1996).

²⁶ *Id.*

²⁷ *Id.* at 81-82

Receiving Countries.

¶20 The economic situations which unskilled workers face in receiving countries can be as important, if not more important, than the conditions in their home country that led them to leave in the first place. Historically, countries receiving labor migration, whether temporary or as immigration, have been developed and industrialized. This is no longer the case because of the diversification of industry and economies in developing countries,. Many traditionally “receiving countries,” now also send their workers abroad. .28 Nevertheless, as developing countries are more likely to receive unskilled workers as they become more developed, the economic conditions for temporary unskilled service providers will likely be the same whether the receiving country is a developed country or a developing country.

¶21 The traditional understanding of the effects of immigration of unskilled service providers on receiving countries was that immigration was useful in times of fast growth because incoming labor could fill job openings.²⁹ This belief depends on the assumption that economic growth encourages development of labor intensive industries.³⁰ But growth in the latter part of this century, in developed countries as well as developing countries, has centered around the “services revolution” that has not included a rise in manufacturing.³¹ This is primarily due to technology, which is replacing the need for domestic workers at lower levels.³² This has created a mismatch between the types of skilled workers needed and the supply of unskilled workers which are coming into a country.³³ Therefore, even if a country is experiencing an economic boom, those service providers who do not have the necessary skill level to participate in the growing economy may find themselves no better off in the receiving country.

¶22 Another traditionally held belief is that the influx of labor in periods of slow growth is detrimental to receiving countries because the new labor pool creates job competition with the established domestic labor force.³⁴ A comprehensive Organization for Economic Co-Operation and Development (OECD) study shows that in the last two decades, such influxes in labor migration, even a doubling rate within five years, has

²⁸ Ghosh, *supra* note 2526 at 78.

²⁹ PETER STALKER, WORKERS WITHOUT FRONTIERS, THE IMPACT OF GLOBALIZATION ON INTERNATIONAL MIGRATION 83 (ILO 2000).

³⁰ BIMAL GHOSH, GAINS FROM GLOBAL LINKAGES 11 (1997).

³¹ *Id.*

³² Briggs, *supra* note 2223 at 150.

³³ *Id.*

³⁴ *Id.*

negligible effects on unemployment rates.^{35 36} This can be explained, at least partially, by the fact that the relationship between foreign and native workers is complementary, not substitutive –when foreign workers come into a host country, they are taking jobs domestic workers would not otherwise occupy.³⁷ Often, immigrant work is simply something no one in the host country is willing to do.³⁸ If there is a displacement of domestic workers, it is often those domestic workers who are most marginalized (i.e. youth, women, and minorities).³⁹

¶23 While there are certainly some distinct disadvantages for unskilled service providers working abroad, it is unclear why they continue to come. Besides the misconception of enjoying a better life in richer countries, many developed countries maintain permeable borders. Receiving countries often overlook gross abuses of their immigration laws because illegal workers are cheaper. Illegal workers enjoy few or none of the social benefits domestic workers do, such as welfare or healthcare. This in turn means they also cost the host countries very little compared to domestic labor. In addition, in developed countries, there are often large interest groups (i.e. U.S. Agriculture) who want to continue an influx of illegal, cheap labor.⁴⁰ While these interests do employ people, the people they employ are paid the lowest wages and again, receive little or no benefits. In addition, working conditions are often very poor, and sometimes even dangerous.

¶24 An influx of cheap, illegal, and unskilled labor can be beneficial for receiving countries, which are more often than not developed countries. Nevertheless this kind of labor movement is not beneficial for the illegal unskilled workers themselves. Nor is it beneficial for their country of origin, as will be discussed below.

Sending Countries.

¶25 Generally, trade is advantageous for countries that have large amounts of unskilled labor because that labor can produce manufactured goods at lower prices.⁴¹ But in the case of the trade-related movement of

³⁵ STALKER *supra* note 29 at 86.

³⁶ STALKER *supra* note 30 at 86.

³⁷ Secretariat Background Note, *supra* note 14 at ¶ 19.15. *See also* STALKER, *supra* note 2930 at 83. *But see*, K.F. Zimmerman, *European Migration: Push and Pull*, The World Bank, Annual Bank Conference on Development Economics, Washington D.C. (1995) (finding that an influx of foreign workers had a negative effect on blue collar workers in Germany).

³⁸ STALKER *supra* note 30 at 83.

³⁹ *See* Briggs, *supra* note 2223 at 139-41, 150 (discussing the displacement of Black workers in the United States as a result of influxes in immigrant workers).

⁴⁰ *Id.* at 51

⁴¹ Secretariat Background Note, *supra* note 14 at ¶ 13.15.

service providers, other considerations come into play.⁴²

¶26 While the implications for receiving countries of the movement of service providers was discussed above primarily in the context of unskilled labor, it is important to look at the impact on sending countries of the movement of both unskilled and semi-skilled labor. Usually, countries that send unskilled and semi-skilled labor are developing countries, while those countries that send highly skilled labor are developed and industrialized. The goal for sending countries should be to maximize the benefits of migration, or temporary movement, while minimizing costs – labor migration can be beneficial but it is not a panacea, nor is it a proven path to development.⁴³

¶27 One of the biggest concerns for countries sending semi-skilled or skilled labor is the so-called “brain drain.”⁴⁴ Brain drain occurs when skilled and semi-skilled laborers in developing countries migrate to developed countries with higher wages at their skill levels.⁴⁵ This, in turn, denies the developing country any return on the investment of educating that person, which could lead to disincentives for public education, and can be detrimental to the production capabilities of a society.⁴⁶ For instance, it is estimated that between 1960 and 1987, Africa lost nearly 70,000 of its highly skilled workers (30 percent) to jobs abroad, mostly in the European Union.⁴⁷ In addition, for the almost 90,000 skilled workers who left developing countries for the United States in 1990, there was a loss in tertiary education of almost \$642 million.⁴⁸

¶28 But under GATS, the brain drain problem of depleting human capital is less severe, as most skilled and semi-skilled workers would be moving only for specific transactions.⁴⁹ Because these workers are only employed abroad temporarily (usually six months or less), they may have jobs in their home country as well, which allows them to contribute to the domestic GDP.

¶29 The picture is different for the movement of unskilled labor. Brain drain is less problematic for unskilled labor, as developing countries rarely invest in the education of unskilled workers, and there is usually a surplus of unskilled labor. While GATS can solve some of the problems traditionally associated with the movement of skilled workers from developing to developed countries, many of the problems associated

⁴² *Id.*

⁴³ Ghosh, *supra* note 2526 at 106.

⁴⁴ See STALKER, *supra* note 30 at 107.

⁴⁵ *Id.*

⁴⁶ STALKER, *supra* note 2930 at 79.

⁴⁷ *Id.* at 107, Ghana alone lost almost 60 percent of its doctors trained in the early 1980s. *Id.*

⁴⁸ *Id.* at 78.

⁴⁹ Ghosh, *supra* note 26 at 97.

with unskilled workers would remain, or become exacerbated.

¶30 The conditions for unskilled workers in receiving countries, whether they are permanent or temporary, is often grim, sometimes just as bad as the conditions in their home country.⁵⁰ Those leaving for economic reasons rarely find the prosperity they were seeking. Two reasons have often been given for unskilled workers going abroad: remittance (workers sending money home) and alleviating unemployment in the domestic market. But neither of these reasons appears substantially beneficial when looked at either absolutely or in the context of the GATS.

¶31 There is no question that remittances have been a boon for some countries.⁵¹ Yet it remains uncertain if the wages that laborers are bringing, or sending, home in any way help the economy of their home country. Much of the time, remittances are used for consumption of non-durable goods rather than purchase of durable goods or investment.⁵² This type of consumption is a private transfer and should not be confused with, nor relied upon as capital imports.⁵³ In addition, there are also opportunity costs of possible earnings in the home country that would exceed those in the receiving country.⁵⁴

¶32 There are often significant transaction costs associated with sending remittances home through official channels.⁵⁵ Thus, workers usually avoid such methods.⁵⁶ For instance, in Sudan, a mere 11% of remittances went through official channels.⁵⁷ Placing the movement of unskilled labor under a GATS regime would thereby legitimize what is, in many ways, an underground market. Further transaction costs will be incurred by those individuals who, up to this point, have survived on non-traditional methods of sending remittances home.

¶33 Sending unskilled workers abroad has also been touted as a means for developing countries to alleviate domestic unemployment caused by labor surpluses. But it is important to consider that if a sending country's structural and economic problems remain unresolved, migration's contribution to lowering

⁵⁰ See *infra* I.B.i.

⁵¹ STALKER, *supra* note 2930 at 81.

⁵² *Id.* This is due primarily to the fact that unskilled workers and their families tend to be impoverished, necessitating spending on food and shelter.

⁵³ Ghosh, *supra* note 2526 at 107.

⁵⁴ *Id.* at 99.

⁵⁵ STALKER, *supra* note 2930 at 80.

⁵⁶ *Id.* There are various reasons for this including a weak or inefficient banking system in the home country or immigrants wanting to avoid changing money at an official, often overvalued rate. Sometimes migrants will simply cross borders with large amounts of cash or with expensive consumer goods but the most common way is to use parallel foreign exchange markets.

⁵⁷ Ghosh, *supra* note 2526 at 99.

unemployment in the aggregate level is likely to be small.⁵⁸ In addition, movement of workers abroad, even unskilled workers, is a selective process. Recruitment naturally takes the best a society has at any skill level, which can mean stymied future growth for the sending country.⁵⁹ In addition, if women move into jobs vacated by men, there can be an erosion of traditional roles and culture if women are traditionally in charge of domestic duties.⁶⁰

¶34 There are obvious problems with migration in terms of unemployment, which are compounded in the context of GATS and the temporary movement of labor. Generally, repatriation of workers can be devastating to a society if it means that the families which were relying on remittance stop receiving it.⁶¹ If the migrants return home with new skills relevant to the needs of the home country, a temporary movement of workers can be beneficial.⁶² However, the more highly skilled workers are usually the ones who have an opportunity to gain new skills.⁶³ Indeed, when unskilled workers travel abroad, they often accept jobs requiring less skill, leading to downward mobility.⁶⁴ In addition, because the structures, technology and work environment differ so much between countries the skills obtained in one country are at times not transferable to another.⁶⁵ This is particularly true with semi-skilled or highly skilled workers. But because unskilled workers rarely take positions which involve learning new skills, it is not as relevant a problem for them.

THE CURRENT GATS COMMITMENTS⁶⁶

INTRODUCTION

¶35 Of all four modes of delivery included in Art. 1.2 GATS, Mode 4 has the least amount of commitments.⁶⁷ Horizontal commitments in Mode 4 are subject to limitations in at least 100 members' schedules, while only four members have limitations in horizontal commitments for Mode 2. In addition, the categories of commitments under Mode 4 are limited to areas linked to commercial presence (Mode 3), such

⁵⁸ *Id.* at 89.

⁵⁹ *Id.* at 90.

⁶⁰ *Id.* at 102.

⁶¹ *Id.* at 101.

⁶² *Id.* at 103.

⁶³ *Id.* at 104.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ For simplicities sake, I will focus on the six countries who submitted requests for negotiations on Mode 4 in 2000/2001, specifically Columbia, the United States, India, the EC, Japan and Canada.

⁶⁷ India, *Schedule of Specific Commitments Supplement 2*, GATS/SC/42/Suppl.2 (July 28, 1995)(hereinafter "India Schedule").

as intra-corporate transferees, and executives, managers and specialists.⁶⁸ Only 12 member countries have made commitments in the category of independent professionals, including those who work under a service contract.⁶⁹

HORIZONTAL COMMITMENTS

¶36 Horizontal commitments for the US, the EC and Japan (all developed countries) reveals a uniformity that is not surprising considering the reluctance of developed country members to enter into commitments under Mode 4. All three countries are unbound in National Treatment (or unbound except for those areas with commitments under Market Access), make limited commitments in Market Access, and make no additional commitments.

¶37 Under the Market Access column, the United States lists a specific group of natural persons for which it is bound, Service Sales Persons, Intra-Corporate Transferees (defined as managers, Executives, and Specialists), “Personnel Engaged in Establishment,” and persons with specialty occupations (such as fashion models).⁷⁰ Conspicuously absent from this list is any occupation that either does not require some association with a juridical person (corporation) or a highly specialized skill or talent.

¶38 Similarly, the EC and Japan are only bound in terms of persons generally associated with juridical persons. The EC is only bound in intra-corporate transferees working “in a senior position within a juridical person” or “working within a juridical person who possess uncommon knowledge essential to the establishment’s service” or natural persons “not residing in the territory of a Member...who are representatives of a service supplier...negotiating for the sale of services”.^{71 72} Managing directors of “industrial, commercial or artisanal activity” need specific authorization.⁷³ This would limit those persons who may sometimes act as independent contractors.

¶39 Japan limits its commitments under Market Access only to Natural Persons who are an employee of a juridical person who has been an employee for more than a year and is being transferred to a branch office

⁶⁸ Ironically, bindings in Mode 3 tend to be at a higher level than Mode 4. As well, “entry with restrictions” is generally the rule for Mode 3, while “entry denied” is generally the rule for Mode 4. See Neela Mukherjee, *Non-Tariff Barriers and Trade in Services – A Comparative Assessment of Capital and Labour Mobility in the GATS and under the World Trade Organization*, 21 WORLD COMPETITION 79 (Spring 1998)(for a comprehensive study of Members’ commitments under Mode 4).

⁶⁹ India Schedule, *supra* note 66.67.

⁷⁰ The United States of America, *Schedule of Specific Commitments*, GATS/SC/90 (April 15, 1994)(hereinafter US Schedule). “Personnel Engaged in Establishment” are those persons entering in the United States with the purpose of establishing an entity described in the sectoral commitments.

⁷¹ European Communities and their Member States, *Schedule of Specific Commitments*, GATS/SC/31 (April 15, 1994).

⁷² European Communities and their Member States, *Schedule of Specific Commitments*, GATS/SC/31 (April 15, 1994).

⁷³ Examples of “commercial, industrial or artisanal activities” include construction, distribution and tourism services. *Id.*

as its head board member, auditor, director, or to activities in the juridical person which require advanced “technology and/or knowledge”, as well as high level accountants and lawyers with legally recognized degrees from Japan.⁷⁴

¶40 Unlike the US, EC, and Japan, Canada is not bound in National Treatment except with regards to its binding under Market Access commitments.⁷⁵ Unlike the other three developed countries however, Canada is bound in Market Access not only in terms of intra-corporate transferees, and business visitors, but also in natural persons providing services on a contractual basis independent of any commercial presence. But despite the fact that Canada’s is one of the only countries to make commitments for intra-corporate transferees, business visitors, and professionals providing services on a contractual basis, the actual language of Canada’s Market Access commitment for Professionals suggests that despite the fact that Professionals may cross borders free of commercial presence, it does not necessarily mean they may be free of a connection to a juridical person. The pertinent language defines professional as:

Natural persons seeking to engage, as part of a services contract obtained by a *juridical* person of another Member ... in the activity at a professional level...provided that the person possesses the necessary academic credentials and professional qualifications, which have been duly recognized, where appropriate, by the professional association in Canada.(emphasis added)⁷⁶

The fact that Canada requires the professional, or natural person engaged in activities “at a professional level” to be a part of a contract “obtained by a *juridical* person” indicates that independent contractors may still be required to have some corporate connection. While this approach certainly gives more access than commitments requiring a corporate presence, or corporate infrastructure, it is still limiting to those professionals who are truly independent.

¶41 Columbia and India’s schedules are similar to those of the developed countries in that they are also unbound in National Treatment (except where bound in Market Access). But Columbia’s schedule differs from that of the developed nations in that it is unbound in Market access except for “[m]anagers, legal representatives and technical specialists.”⁷⁷ The fact that Columbia’s schedule does not indicate whether these natural persons must be associated with a juridical person or not suggests that, for instance, a “technical specialist” could be an independent contractor providing a service free of any corporate association.

⁷⁴ Japan, *Schedule of Specific Commitments*, GATS/SC/46 (April 15, 1994).

⁷⁵ Canada, *Schedule of Specific Commitments*, GATS/SC/16 (April 15, 1994).

⁷⁶ *Id.*

⁷⁷ Columbia, *Schedule of Specific Commitments*, GATS/SC/20 (April 15, 1994).

¶42 India's horizontal commitments under Mode 4 are more similar to the developed countries' than to Columbia.⁷⁸ Under its schedule, India is unbound in Market Access except for Business Visitors,⁷⁹ Intra-Corporate Transferees, and Professionals.⁸⁰ Like the US, EC, and Japanese schedules, India conditions each of its bound segments on the natural person being associated in some way with a juridical person. This, in turn, limits the opportunities for those workers who are independent contractors.

SECTORAL COMMITMENTS IN CONSTRUCTION SERVICES (FOR EXAMPLE)

¶43 There are many different service sectors and sub-sectors. It becomes cumbersome to analyze all of them, especially considering that in many of them, outside of telecommunications and financial services, have similar commitments.⁸¹ However, analyzing the construction services sector is useful because it is representative of the other sectors, in that it combines physical services in conjunction with investment, and because construction projects bring together labor, materials, and equipment, as well as requiring engineering, managing skills and unskilled labor.⁸²

¶44 All the countries in this examination are unbound in Construction Services for Market Access (except as specified in their horizontal commitments). This illustrates that while most members make some horizontal commitments in Mode 4, it is rare for a country to make further sectoral commitments. Indeed, the only two sectors which have any substantial commitments are Financial Services and Telecommunications, both of which are of more interest to developed than to developing countries. Even in these sectors, members still remain unbound with regard to Mode 4.

¶45 One interesting item to note is that for National Treatment, the US actually has no reservations in its schedule under Mode 4. The US is unbound in terms of Market Access, which means that it can impose limitations on foreign service suppliers which are inconsistent with market access requirement under Art. XVI GATS. However, the US is fully bound to the national treatment obligations set forth in Art. XVII GATS. While in terms of the movement of natural persons, market access limitations are important, the fact that the

⁷⁸ India Schedule, *supra* note 67.

⁷⁹ For business negotiations or for preparatory work establishing a commercial presence in India. *Id.*

⁸⁰ Natural persons to be engaged by a juridical person in India as part of a service contract for rendering professional services for which he/she possesses the necessary academic credentials and professional qualifications with three years experience in the field of physical sciences, engineering or other natural sciences. *Id.*

⁸¹ This of course, is due largely in part to the fact that the only sectors which have had intense negotiations are Financial Services, Telecom and Maritime Transport. These three sectors were supposed to have been negotiated in the Uruguay Round with the rest of the sectors but due to time constraints, were negotiated later, leading to more focus on concessions from individual countries.

⁸² Yehia Soubra, *Construction and Engineering Design Services: Issues Relevant to Multilateral Negotiations on Trade in Services in TRADES IN SERVICES: SECTORAL ISSUES* (United Nations 1989).

US is fully bound in terms of national treatment means that it potentially could not impose extra licensing or qualification requirements on service providers which it did not impose on its own citizens. This then could limit the US' ability to limit market access with licensing regimes, even though it is unbound in that area.

PROPOSED NEGOTIATIONS FOR FUTURE COMMITMENTS IN MODE 4

INTRODUCTION⁸³

¶46 For developed countries, the main objectives are the clarification of the disciplines in which commitments have already been made and to further deepen commitments with respect to intra-corporate transferees.⁸⁴ For developing countries, the main objective is to deepen sectoral commitments and include middle and lower skilled service providers.⁸⁵

THE EC, USA, AND JAPANESE REQUESTS FOR NEGOTIATIONS

¶47 The United States, in its request for negotiations, points out that by its nature, Mode 4 is “made up of individuals, rather than companies” and therefore advocates for more clearly defined terms, access to information, and procedural transparency, such that individuals may access these procedures in a less costly manner.⁸⁶ In terms of access to information, the US cites that laws dealing with the, “entry, stay and work authorization of natural persons” are of primary concern.⁸⁷ Procedural transparency includes timely responses to applications by governments, as well as transparency in the process by which approval or denial of applications is made.⁸⁸ Recommendations for the expansion of sectoral commitments are conspicuously absent in the US request. In addition, the US does not offer any solutions for the problem of workers having to repeatedly renew visas.⁸⁹

¶48 The EC frames its request for negotiations in Mode 4 with the idea that post-industrial economies have an increased demand for “highly skilled service suppliers”.⁹⁰ Within this is the need to “transfer

⁸³ This section will discuss proposals for new negotiations in Mode 4 submitted to the WTO from 1999 to 2001.

⁸⁴ L. Alan Winters, et. al., *Negotiating the Liberalisation of the Temporary Movement of Natural Persons*, Discussion Paper 87, Discussion Papers in Economics, University of Sussex at Brighton 39 (October 2002).

⁸⁵ *Id.*

⁸⁶ Communication from the United States, *Movement of Natural Persons*, World Trade Organization Document S/CSS/W/29 at ¶ 3 (Dec. 18, 2000).

⁸⁷ *Id.* at ¶ 5

⁸⁸ *Id.*

⁸⁹ Winters, *supra* note 82 at 40.

⁹⁰ Communication from the European Communities and their Member States, *GATS 2000: Temporary Movement of Service Suppliers*, S/CSS/W/45 at ¶ 2 (March 14, 2001) (hereinafter “EC Proposal”).

expertise internationally through the temporary relocation of specialists, professionals, and contractual service suppliers.”⁹¹ While the EC recognizes the importance of expanding the sectoral approach, it considers it a “logical first to build and improve on the existing horizontal approach.”⁹² Therefore the EC request focuses primarily on ways to improve horizontal commitments in Mode 4.

¶49 Like the US, the EC advocates for a harmonization of terms, especially in terms of intra-corporate transferees, executives, and managers. Common definitions of these terms would make drafting schedules easier for members. The EC also suggests this harmonization could take into account work already carried out by other international organizations. While the EC does not explicitly mention the International Labour Organization (ILO), it could likely be referring to its list of occupational definitions.⁹³

¶50 The EC also advocates for more transparency in the processing of applications for working visas and permits, as well as objective and verifiable criteria with “clear, simple, and predictable” procedures for those applications.⁹⁴ Common codes of practice for economic needs tests (ENTs) would make them less discriminatory, and would help ensure effective application of mode 4 liberalization. In this vein, the EC advocates for the necessary mobility of workers on a temporary basis without compromising its immigration policy.

¶51 The Japanese request for negotiations focuses almost entirely on the movement of highly skilled workers.⁹⁵ The Japanese request emphasizes the relationship between Mode 3 (Commercial Presence) and Mode 4, requesting deeper commitments in Mode 4 with regard to intra-corporate transferees as a means of making Mode 3 a more useful mode of delivery. In addition, Japan points out that it may be more useful to pursue sectoral commitments where horizontal commitments prove difficult to make. Like the EC, Japan advocates for more transparency in ENTs, pointing out that the desired end would be an elimination of ENTs entirely, as specified in GATS.⁹⁶

CANADIAN REQUEST FOR NEGOTIATIONS

¶52 As illustrated above, Canada has made more commitments in terms of individual service

⁹¹ *Id.*

⁹² *Id.* at ¶ 6

⁹³ Winters, *supra* note 82 at 40.

⁹⁴ EC Proposal, *supra* note 88 at ¶ 12.

⁹⁵ Communication from Japan, *Movement of Natural Persons Supplement*, S/CSS/W/42/Suppl.2 (July 6, 2001)(hereinafter “Japanese Proposal”).

⁹⁶ GATS Art. XVI, 2 (b).

providers than other developed members.⁹⁷ According to the Canadian request for negotiations, small and medium sized enterprises and individuals providing services “make up the vast majority of service suppliers actively exporting in various sectors.”⁹⁸ Lack of transparency in procedures for individuals providing transboundary services is a major hindrance to market access, particularly for developing countries.⁹⁹

¶53 Canada advocates across the board improvements in Mode 4 commitments, both horizontal and sectoral, in its request for negotiations.¹⁰⁰ In addition, Canada argues that more commitments for workers “entering on a contractual basis, and not linked to commercial presence” are necessary.¹⁰¹ Canada also indicates that it is necessary for Members to focus on their domestic immigration laws and regulations, as a means of increasing transparency and, thereby, more efficient provision of transboundary service. Among the focuses are “procedural information on temporary movement, ... applicable conditions for economic needs tests (ENTs); field instructions or operational guidelines for immigration officers; maximum duration of stay and market access limitations cited in commitments.”¹⁰²

COLUMBIAN AND INDIAN REQUESTS FOR NEGOTIATIONS

¶54 In its proposal for new negotiations on Mode 4, Columbia advocates primarily for more sector specific commitments in areas which are of interest to developing countries.¹⁰³ In addition, Columbia cites differences in standards for qualifications and licensing as one of the primary obstacles to the movement of individuals, and advocates for mutual recognition agreements (MRAs) on licensing of professionals.¹⁰⁴

¶55 Like Columbia, India expresses concerns about the fact that commitments under Mode 4 are primarily horizontal, and that the present commitments are very limited.¹⁰⁵ In terms of sectoral commitments, usually they are so restricted by horizontal commitments that they do not allow any predictable market access,

⁹⁷ Communication from Canada, *Initial Negotiating Proposal on Temporary Movement of Natural Persons Supplying Services under the GATS (Mode 4)*, S/CSS/W/48 (March 14, 2001). See *infra* II.B.

⁹⁸ *Id.* at ¶ 3.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at ¶ 4.

¹⁰¹ *Id.*

¹⁰² *Id.* at ¶ 5.

¹⁰³ Communication from Columbia, *Proposal for the Negotiations on the Provision of Services Through Movement of Natural Persons*, S/CSS/W/97 at ¶ 6 (July 9, 2001)(hereinafter “Columbia Proposal”). Columbia’s priority sectors include professional services, construction and related engineering services, computer services, social services, services incidental to agriculture, hunting and forestry, health-related services, tourism and travel-related services, recreational, cultural and sporting services, cleaning services and personnel placement and supply services.

¹⁰⁴ *Id.* at ¶ 7

¹⁰⁵ Communication from India, *Proposed Liberalisation of Movement of Professionals under General Agreement on Trade in Services (GATS)*, S/CSS/W/12 at ¶ 2 (Nov. 24, 2000)(hereinafter “India Proposal”).

particularly in service sectors of interest to developing countries.¹⁰⁶

¶56 In addition, the bindings which do exist rarely concern the movement of independent labor but instead involve “a small subset of service personnel related to commercial presence.”¹⁰⁷ Ironically, like developing countries, India advocates for clarity in defining terms, particularly personnel categories. This may have to do with India’s strange position as a quasi-developed developing country but more importantly, it illustrates that clarity of terms is of vital importance for functional utility of specific commitments.

¶57 India also cites restrictions on entry and stay as an administrative problem with current commitments. India’s primary complaint is that *temporary* movement of labor is often not separated procedurally from *permanent* movement of labor, usually involving costly and lengthy applications for working visas and permits. What this means in practical terms is that foreign service suppliers, both individuals and TNCs, have substantial transaction costs when entering foreign markets, thereby eroding their comparative advantage and limiting market access.

¶58 In its request for negotiations, India lays out possible areas of improvement in the structure of commitments. In terms of horizontal commitments, India advocates adding a category for “individual professionals” that would more easily allow those laborers not associated with a TNC to participate in Mode 4 commitments.¹⁰⁸ In addition, India advocates for expanding the scope of horizontal commitments by including in the definition of “specialists” middle and lower level professionals.¹⁰⁹

¶59 In terms of sectoral commitments, India, like Columbia, advocates for more sectoral level commitments. In addition, categories need to be more clearly specified for service providers in each service sector and sub-sector. To this end, India suggests using the International Labour Organization’s (ILO) International Standard Classification of Occupation¹¹⁰, which creates an internationally recognized classification of nine major occupational groups, as an overlay for the WTO Services Sectoral Classification List.¹¹¹ By combining the ILO’s classifications for occupation with the WTO sectoral classification list, members may create more precise commitments while still using existing, internationally recognized standards.

¹⁰⁶ *Id.* at ¶ 4.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at ¶ 17

¹⁰⁹ *Id.*

¹¹⁰ Resolution concerning the revision of the International Standard Classification of Occupations, Fourteenth International Conference of Labour Statisticians ISCO-88 (Oct.-Nov. 1987). Available at <http://www.ilo.org/public/english/support/publ/booksre.htm>.

¹¹¹ WTO, *Services Sectoral Classification List, Note by the Secretariat*, MTN./GNS/W/120 (July 10, 1991).

¶60 India also advocates for more transparency in domestic regulations on visas and work permits.¹¹² Temporary service providers should be recognized legally as a work force wholly separate from permanent immigration.¹¹³ In addition, conditions for entry and stay for persons working under Mode 4 should be less stringent than for permanent migration while still building in the proper safeguards to ensure that a member's immigration regulations are still respected.¹¹⁴

TRENDS IN NEGOTIATIONS

¶61 In looking at the proposed negotiations under Mode 4, there are a few key trends that emerge: improved specificity and transparency for procedures involving temporary movement of labor, more focus on sectoral commitments in sectors which are of interest to developing countries, either abolition or more clearly defined ENTs, and more emphasis on the consideration of Mode 4 outside the context of Mode 3.

IMPROVED SPECIFICITY AND TRANSPARENCY IN PROCESS FOR WORKING PERMITS AND VISAS

¶62 In terms of creating a useful distinction between domestic immigration laws and regulations regarding the temporary movement of service suppliers, specifying the terms and rendering transparent the process by which service suppliers may gain access to working permits or temporary work visas is vital. The important issue is whether to focus on the process by which higher skilled workers obtain working permits, as the US and EU urge, or try to clarify and harmonize the system for workers across the skill spectrum.

¶63 Implicit in this question is the consideration of how closely trade policymakers would have to work with immigration policymakers to create regulatory systems for the temporary movement of labor. If trade negotiators focus only on the transparency of process for highly skilled workers, then it is not necessary for them to work closely with immigration policymakers since, as shown above, highly skilled workers are more likely to return upon expiration of their visas. If, however, as Canada suggests, trade officials work closely with immigration and labor market officials in developing joint policies, this would more likely create a system which included more provisions for the movement of unskilled workers as well. What is unclear is whether the inclusion of unskilled and semi-skilled workers in such a system would necessitate stricter tolerances than if the regime simply focused on the movement of highly skilled labor.

¹¹² India Proposal, *supra* note 102 at ¶ 18.103.

¹¹³ *Id.*

¹¹⁴ *Id.*

A FOCUS ON DEEPER SECTORAL COMMITMENTS

¶64 While all the proposals seem to agree that deeper sectoral commitments are needed in Mode 4 (indeed, this is consistent with the push to further liberalization of trade in services), there is significant division as to when those deeper commitments should happen and in what sectors. To date, the only specific sectors in GATS which have been negotiated are in Financial Services and Telecommunications, neither of which is a sector of particular interest to developing countries, and both of which only feature deeper commitments in Mode 4 in intra-corporate transferees.

¶65 In its proposal for negotiations, Columbia highlighted sectors which were of considerable interest to it, and which would presumably be of interest to other developing countries as well. Among them are: professional services, construction and related engineering services, computer services, social services, services incidental to agriculture, hunting and forestry, health-related services, tourism and travel-related services, recreational, cultural and sporting services, cleaning services, personnel placement, and supply services.¹¹⁵ The interesting thing to note about this list is that for most of the services, there is also a clear need for highly skilled and semi-skilled labor. In addition, for some of the sectors like computer and professional services, it is not clear that there is a reason to make deeper commitments for unskilled labor at all. This illustrates that, even developing countries have a wide range of skill levels. And making commitments which allow the temporary movement of unskilled workers is not necessarily their highest priority.

RECONSIDERING THE ECONOMIC NEEDS TESTS

¶66 An economic needs test (ENT) is generally defined as a domestic regulation which requires service suppliers entering a market to assess the “need” for the service supplier in the domestic market.¹¹⁶¹¹⁷ In terms of the GATS, the imposition of an ENT is considered a limitation on market access (Art. XVI GATS).¹¹⁸

¶67 The EC, in its proposal for future negotiations in Mode 4, states that when labor market tests or ENTs are sufficiently unspecified, they “practically fulfill the role of a permanent safeguard measure.”¹¹⁹ The EC’s apparent frustration with ENTs is somewhat justified. In the 54 instances in which Member’s have

¹¹⁵ Columbia Proposal, *supra* note 100 at ¶ 7.101.

¹¹⁶ OECD, TRADE IN SERVICES, NEGOTIATING ISSUES AND APPROACHES 28 (2001).

¹¹⁷ OECD, TRADE IN SERVICES, NEGOTIATING ISSUES AND APPROACHES 28 (2001).

¹¹⁸ *Id.* at 29.

¹¹⁹ EC Proposal, *supra* note 87 at ¶ 9.88.

reserved the right to operate ENTs, only three of them specify the relevant criteria on which the test will be judged.¹²⁰ This criteria usually centers around investment related issues.¹²¹

¶68 While the EC's criticism of unspecified ENTs bears further investigation, it is not entirely clear that the hierarchy established in the Financial Services commitments by the use of ENTs is altogether unreasonable. As illustrated above, one of the primary concerns for unskilled labor is the fact that they usually take jobs requiring lower skills in the receiving country, or in a situation in which a receiving country's economic growth is technology driven, there are no unskilled jobs at all. ENTs, administered with clearly defined criteria in a transparent manner, would ensure that if unskilled labor were to be included in Mode 4 commitments (it is not clear they should be), they would be ensured job placement in the receiving country.

FURTHER SEVERING MODE 4 FROM MODE 3

¶69 In their proposal for negotiations, the Japanese emphasize that great gains can be made with deeper horizontal commitments regarding intra-corporate transferees because they relate to the liberalization of Mode 3.¹²² If it can be inferred from this suggestion that a developed country's perspective on Mode 4 is that it only complements or facilitates trade under Mode 3, then liberalizing Mode 4 for unskilled labor makes little sense. After all, it is unlikely that unskilled labor will be transferred intra-corporately.

¶70 By contrast, India's proposal advocates for adding a category of "Individual Professionals", thereby "delinking" Mode 4 commitments from Mode 3. This would allow professionals and contract labor to be competitive in cross-border service provisions with large trans-national companies.

¶71 The question then is whether to understand Mode 4, as the Japanese seem to, as merely a complement to Mode 3 existing only to ease service supply through commercial presence. Or, as the Indians seem to perceive Mode 4, as a unique mode of delivery, which exists partially because there are some situations where there is no alternative to provide a service except through the presence of a natural person. How this question is answered will in many ways determine the direction of further negotiations.

¶72 If indeed Mode 4 is to be delinked from Mode 3, another consideration will be made in terms of defining occupations and related skill levels of workers to clearly differentiate between skilled, semi-skilled,

¹²⁰ Secretariat Background Note, *supra* note 15 at 13, ¶ 40. This is in direct contrast to scheduling guidelines published by the WTO which state "the entry should indicate the main criteria on which the [economic needs] test is based e.g. if the authority to establish a facility is based on a population criterion, the criterion should be described concisely." MTN.GNS/W/164/Add.1 at ¶3.

¹²¹ *Id.*

¹²² Japanese Proposal, *supra* note 92 at ¶ 4.93.

and unskilled workers. While the WTO has defined service sectors based on the UN classification system, GATS negotiators up to this point have not defined occupations. This has left regulatory authorities with huge discretion to define, for instance, what constitutes a specialist, and potentially changing that definition depending on political or labor market pressures.¹²³ By creating standard definitions of occupations, or as the EC suggested, using the ILO's list, a clear delineation would be made between those commitments which were made in order to further the goals of liberalization of Mode 3, and which were genuinely made as a means of liberalizing the movement of workers.

CONCLUSION

¶73 Unskilled labor primarily moves through illegal channels, from developing to developed countries, although it is not always clear whether the movement is temporary or permanent. The primary beneficiary of the movement are industries in the developed world, relying on a steady stream of unskilled, cheap labor to fill job positions that domestic workers are either unable or unwilling to fill. In terms of the movement of skilled and semi-skilled labor, developing countries can alleviate brain drain by making the movement temporary. The question therefore becomes, which of the above problems can Mode 4 realistically be employed to solve in a way that is beneficial for developing countries, and how much work are current trends in negotiations doing towards that goal?

¶74 Clearly, the movement of semi-skilled workers is an important element in the transboundary delivery of services. Current and future negotiations in GATS have rightly focused on further liberalizing access for independent contract labor. Clearly, this is beneficial for developing countries, especially in terms of combating against the negative effects of brain drain.

¶75 The solution is not so clear, however, for the movement of unskilled workers. While permanent migrations of unskilled labor can help a developing country alleviate strains of unemployment on domestic economies and social services, it does little to help solve the systemic problem which is causing the unemployment. In addition, the money which developing countries receive in remittance is usually spent on non-durable goods, and rarely contributes to the economy of a developing country the way direct infusions of capital do. Further, the utility of these remittances is further reduced by the opportunity costs of not having the workers employed in the domestic economy, as well as transaction costs associated with sending the money

¹²³ Winters, *supra* note 82 at 67.

home. Finally, with the best workers generally being sent abroad, the domestic economy is further crippled by having to employ lower skilled and less qualified laborers, further reducing domestic productivity, and eroding traditional community structures as those whose roles have traditionally been outside the workplace fill job openings left by migrating workers.

¶76 In the case of temporary workers, the problems are compounded. Depending on how long the workers are gone, increased unemployment rates can greet them when the workers return home. In addition, the problems associated with remittances are similar to those for migratory, permanent labor. Additionally, temporary workers often do not gain any new skills in foreign countries, and so rarely come home with anything to add to the domestic economy, other than serve as a further drain on economic and social resources.

¶77 If developing countries focus on the liberalization of Mode 4 for unskilled labor as a means of capitalizing on their comparative advantage of large quantities of unskilled labor, their efforts may be misdirected. By sending their unskilled labor to work menial jobs in developed countries, they may be effectively reducing their competitive advantage by allowing the developed host country to capitalize on the labor. This is primarily why large interest groups in developed countries are in favor of the current system which allows large amounts of cheap unskilled labor across borders illegally.

¶78 Even if the system was internalized into the GATS, and done legally, the problems mentioned above would still exist, as well as an additional problem that potentially more unskilled labor would leave developing countries. This would reduce their comparative advantage even more. With this in mind, it makes more sense for developing countries to discourage the migration of unskilled labor, temporary or not, and capitalize on their comparative advantage at home in manufacturing instead.

¶79 The ultimate question then is whether GATS is the proper forum to consider the temporary movement of unskilled labor. Developed countries are reluctant to make commitments in Mode 4 because they fear it will have adverse effects on their ability to regulate immigration.¹²⁴ This is due primarily to the fact that GATS commitments, once made, are difficult and costly to unmake. Regulation of semi-skilled labor may not be as dire a problem. Semi-skilled laborers working as contract laborers are likely to return to their country of origin after the job is completed as the process by which they enter countries, and the sanctions for

¹²⁴ See India Proposal, *supra* note 103.

infringement of the legal provisions for employers is often quite severe.¹²⁵ [I think there is a misplaced sentence here. Needs a rewrite by author, probably.]

¶80 For unskilled labor, again, the situation is different. While there have been suggestions of using various financial bonding mechanisms to ensure departure after temporary working visas expire, many temporary unskilled workers may just go “underground” and become permanent illegal migrants.¹²⁶

¶81 While the regulatory framework is rarely a major factor in determining the rate of inter-country migration, it should be stressed that if Members were to liberalize Mode 4 for unskilled labor to the point where it became easier to enter a country through a temporary working visa than through permanent means, workers may use the temporary avenues as a means of gaining access to a foreign country, only to attempt,, albeit illegal, a permanent migration.¹²⁷ This of course assumes that unskilled laborers would prefer illegal permanent migration over legal temporary work.

¶82 While this has not been proven empirically, the fact that large interest groups in developed countries prefer illegal workers because of their lower costs indicates that there will always be more jobs for illegal permanent workers than legal temporary workers, thereby creating an artificial demand for them. Indeed, as is the case to date, Members may be better off with Mode 4 commitments, which are more limited than their domestic immigration laws.

¶83 Looking at the current and future trends in commitments, in terms of the movement of unskilled workers and benefits to developing countries, what is the best approach to further liberalization of Mode 4? While more needs to be done in terms of advantaging developing countries in Mode 4 commitments, it is unclear is whether new Mode 4 commitments should only include independent skilled workers or also include independent unskilled workers. Most likely, the best solution will be a combination of both, with special consideration given to the needs of unskilled workers as well as the disadvantages their movement may pose to developing countries. Mode 4 should be further liberalized for independent skilled and semi-skilled labor, creating a more transparent procedural process, making sector specific commitments in sectors of interest to developing countries, creating a common model for ENTs, classifying occupations, and finally by keeping separate temporary foreign worker schemes and GATS commitments for unskilled workers.

¹²⁵ GHOSH, *supra* note 3031 at 51.

¹²⁶ MICHAEL J. TREBILCOCK and ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 498 (2nd ed. 2002).

¹²⁷ *See generally* SASKIA SASSEN, *GLOBALIZATION AND ITS DISCONTENTS* 24 (1998), (for a discussion on the de facto transnationalizing of immigration policy).

¶84 Liberalizing Mode 4 for independent skilled and semi-skilled labor is probably the single most important step for developing countries. In terms of developing countries, India's approach that Mode 4 should be considered a stand-alone mode of delivery, independent from Mode 3 is preferable to Japan's.

¶85 As developing countries have developed, they have experienced an increase in their skilled and semi-skilled labor force.¹²⁸ But this skilled work force often leaves their home country for developed countries which can offer them higher wages, leading to brain drain.¹²⁹ In addition, developed countries often skew their immigration policies in ways that encourage the migration of highly skilled workers.¹³⁰ This trend has manifested itself to some extent in the movement of temporary skilled workers as well. As was seen above, many of the current GATS commitments in Mode 4 deal only with highly skilled workers. In addition, those workers are usually required to be associated with a juridical person.¹³¹ As India points out in its proposal for negotiations, developing countries are primarily interested in the movement of independent professionals as opposed to intra-corporate transferees.¹³²

¶86 If developing countries are to take advantage of the movement of their skilled labor, Mode 4 should be liberalized for contract, semi-skilled and skilled labor which is not associated with juridical persons. This will enable developing countries to make better use of skilled labor and give skilled workers an opportunity to make short-term use of their skills abroad, benefit from higher wages, and still return to their home country to assumedly provide basic services there. In addition, one of the problems commonly associated with return migration is the difficulty of re-assimilating into their native country.¹³³ This would be substantially alleviated since, workers would only be in the host country for shorter periods.

¶87 To this end, the EC has included a new group of workers defined as "Independent Professionals" in the horizontal section of its offer for new commitments under Mode 4.¹³⁴ These Independent Professionals would be self employed, and allowed to provide a service in the EU for a period of up to six months.¹³⁵ The limitations on the EC offer, however, are not inconsequential. The Independent Professional would be required

¹²⁸ Mukherjee, *supra* note 2324 at 22.

¹²⁹ STALKER, *supra* note 2930 at 107.

¹³⁰ *Id.* at 108.

¹³¹ *See infra* Section II, A, ii.

¹³² India Proposal, *supra* note 102 at ¶ 4103.

¹³³ STALKER, *supra* note 2930 at 112.

¹³⁴ European Communities and their Member States, *GATS Offer* at 15 (March 26, 2003), at <http://www.gatswatch.org/docs/offreq/EUoffer/EU-draftoffer-2.pdf>.

¹³⁵ *Id.*

to hold either a university degree in the related field or technical qualifications demonstrating relevant knowledge of an equivalent level, as well as six years of professional experience in the sector.¹³⁶ In addition, the EC reserves the right to use an ENT in specific sub-sectors.¹³⁷ Finally, the service contract must be obtained in one of a limited number of activities.¹³⁸

¶88 While these limitations would still substantially constrain many developing countries, many of the service areas which the EC offers the commitment under, such as “Computer and related services” or “Engineering and integrated engineering services” would be of interest to countries like India and China which already have the infrastructure in place to train these kinds of independent professionals.

¶89 The limitations on the scope of the Independent Professional commitment, however, severely limit its advantages for developing countries. For instance, one advantage skilled contract workers from developing countries would have over those from developed countries is that they would potentially be able to offer their services at a lower price relative to the domestic price in a developed country (but still a high wage in an absolute sense). But the EC offer makes clear that workers would have to comply with EC wage policy regulations.¹³⁹ Potentially, because there is no oversight from a parent company, some of these workers would “fall through the cracks” in the regulatory scheme, and be stuck with lower wages.

¶90 While planning for this kind of non-compliance with the system is not necessarily the most effective way of looking at the problem, there is a good chance that service consumers in receiving countries will endorse this behavior as it does for unskilled labor because it costs them less. The difference between this and the situation of unskilled labor is with semi-skilled and highly skilled independent service providers, working conditions are likely to be considerably better, and the relatively lower wage they make compared to a domestic is still going to be high in the absolute sense.

¶91 One of the most troubling limitations in the EC offer is the requirement that an Independent Professional have at least six years of professional experience in the sector. This limitation means that many

¹³⁶ *Id.* at 15-16.

¹³⁷ *Id.* at 16.

¹³⁸ *Id.* at 16. These activities are, specifically, “Architectural services, urban planning and landscape architecture services, Engineering and integrated engineering services, Computer and related services, Management consulting services, Services related to management consulting, Translation services.” One thing to note is that the EC refers to this list as “activities”. This is primarily due to the fact that some of the activities on the list are sub-sectors of services, such as “Translation services” while some are service sectors in and of themselves, such as “Computer and related services”.

¹³⁹ *Id.* at 15. See also BAK Position Paper *Movement of Natural Persons (Mode 4) under GATS: an assessment of the current negotiations*, Austrian Dept. of EU and Int. Affairs 5 (June 2003)(hereinafter “Austria Paper”). Available at http://www.uinon-network.org/UNisite/In_Depth/Interna_Relations/GATS/2003PDF/Mode%204%20-%20BAK%20Austria%20June%20EN.pdf. www.AKwien.at.

professionals emerging from technical schools and universities will not be able to take immediate advantage of their new skills, as well as their willingness to accept a lower wage than their elder and more experienced colleagues. This may drive many skilled professionals wishing to earn higher wages abroad but not able to meet the six year requirement to migrate instead. In many ways, therefore, the EC offer would not alleviate the problems of brain drain faced by developing countries.

¶92 The EC offer is a step in the right direction. But the limitations attached to the offer severely limit its utility for developing countries. While it is reasonable for the EC to demand that the offer apply only to certain service sectors and sub-sectors, and that the Independent Professionals meet certain education or skill qualifications, it is extremely limiting to demand that professionals work for an extended period in their home country.

CREATE A MORE TRANSPARENT PROCEDURAL PROCESS

¶93 As part of liberalizing Mode 4 for independent skilled and semi-skilled workers, Members should strive for uniformity and transparency in domestic regulatory procedures. In doing so, trade policymakers should work closely with immigration policymakers to ensure uniformity and decrease overlap with immigration and temporary worker regulations.

¶94 One point of consideration is how the methods of regulating labor (qualification requirements, qualification procedures, licensing requirements, licensing procedures and technical standards) should be considered, specifically whether they should be under Mode 4 or whether they should be considered under Article VI GATS, which deals specifically with domestic regulation. Article IV of GATS mandates that the Council for Trade in Services develop disciplines to ensure that domestic regulations are administered in a transparent manner, are not more burdensome than necessary, and do not constitute a restriction on the supply of a service.¹⁴⁰ Therefore, considerations about transparency and uniformity may not be solely limited to Mode 4 discussions and more headway may be made in Article VI GATS discussions, where a framework for procedural processes is more formalized.¹⁴¹

¹⁴⁰ GATS, Article VI.4.

¹⁴¹ See generally *Linking Mode 4 and Domestic Regulation*, South Centre Document (Dec. 2, 2003)(unpublished document, on file with the author)(for more discussion of the relationship of Article VI:4 GATS and Mode 4 and the implications of this relationship for developing countries).

MAKE SECTOR SPECIFIC COMMITMENTS IN SECTORS OF INTEREST TO DEVELOPING COUNTRIES

¶95 Generally, the current sector specific commitments in Mode 4 merely refer to the horizontal commitments which themselves are sparse.¹⁴² Sectoral commitments mean *more* in Mode 4 than in other modes of delivery because there are certain sectors where unskilled labor can play a larger role (construction, farming) and some where it can play practically no role at all (financial services). Therefore, if developing countries are to utilize their comparative advantage, deeper commitments should be made in service sectors where they can more actively participate.

¶96 One point of consideration is that in GATS negotiations, offers are usually *quid pro quo* in terms of commitments; a Member will offer deeper commitments in a service sector in exchange for deeper commitments from others in the same service sector. But it may be advantageous for developing countries to make deeper commitments in a service sector which provides them with little advantage, in exchange for deeper commitments from developed countries in sectors in which unskilled labor more commonly works.

CREATE A COMMON MODEL FOR ENTs

¶97 Those who advocate for further liberalization of Mode 4 would do away with ENTs all together.¹⁴³ Alan Winters likens ENTs to a prohibition of imports when local goods are available, which stymies competition, encourages inefficiencies in the domestic market by forcing manufacturers to use sub-par upstream components, and promotes the imitation of foreign goods.¹⁴⁴ Chanda advocates instead for an abolition of ENTs in horizontal commitments but to continue using them in limited sectors, so long as the scope of the ENT is clearly defined.¹⁴⁵

¶98 ENTs may be of limited use for business visitors connected with TNCs.¹⁴⁶ But if unskilled labor is to be included in future Mode 4 commitments, I would advocate taking a page from Chanda but instead of using ENTs in specific sectors, using them in specific occupation categories involving unskilled labor (the formation of which is discussed below). Goods and services markets are different in that services are fungible in ways that goods are not. In terms of unskilled labor, there is little risk of imitation of outside providers. In

¹⁴² Mukherjee, *supra* note 2324 at 24.

¹⁴³ Winters, *supra* note 8182 at 69.

¹⁴⁴ *Id.*

¹⁴⁵ R. Chanda, *Movement of natural persons and trade in services: liberalizing temporary movement of labour under GATS*, 24 WORLD ECONOMY 631, 652-53 (May 2001)654 (2000).

¹⁴⁶ This is due primarily to the fact that intra-corporate transferees are practically guaranteed a job in the host country. Indeed, Canada in its new offer in Mode 4 explicitly states that no ENTs are needed for business visitors. See Communication from Canada, *Initial Conditional Offer on Services*, Council for Trade in Services Special Session TN/S/O/CAN at ¶ 18 (April 2003).

addition, the goods of downstream manufacturer's are in no way affected by poor service provision, except in terms of production output. With a functioning ENT however, poor services provisions which effect output would trigger an infusion of foreign labor.

¶99 There are distinct advantages to using standardized, transparent ENTs (as the EC offer does) for unskilled labor. First, if countries can standardize criteria for ENTs they can be used to ensure there are jobs for incoming workers because workers going to foreign countries may not always get jobs or get inferior jobs. Second, ENTs used in this way would be useful for receiving countries to ensure a quick influx of unskilled labor to meet economic needs, allowing a steady stimulation of economies without having to adjust immigration regulations.¹⁴⁷ Finally, ENTs could work as a safeguard clause to prevent market shock of an over-influx of unskilled labor. This would be particularly useful in light of the fact that no genuine safeguard system exists currently in the GATS.

¶100 If ENTs are standardized, instituted, and administered in a transparent manner, they can be a useful tool of the regulation of the temporary movement of unskilled workers.

CLASSIFICATION OF OCCUPATIONS

¶101 A standard classification of occupations would allow Members to more accurately and efficiently create concessions. For developing countries, it would be especially advantageous to expand the classification to lower level professionals, as well as artisans and laborers.¹⁴⁸ While there is no clear system for occupation classification built into Mode 4, or the GATS, using the ILO occupation classifications, or basing a system on the ILO list, would ensure sufficient detail in all levels of skill.

¶102 A standardized list such as the ILOs would allow Member making commitments for lower skilled workers to know exactly to whom the commitments are to apply. In addition, as mentioned above, occupation classifications would allow standardized and transparent ENTs to work more effectively. Finally, as Winters suggests, a standardized list would keep powerful players from designing commitments in a way that only goes into detail in those areas they are interested in. This would leave other areas of interest to developing countries vague and unpredictable.¹⁴⁹ In addition, as described above, a standardized list of occupations would

¹⁴⁷ Austria Paper, *supra* note 135 at 2.

¹⁴⁸ See Winters, *supra* note 8182 at 67.

¹⁴⁹ *Id.*

also make specificity and transparency in working visas easier to administer.¹⁵⁰

KEEP TEMPORARY FOREIGN WORKER SCHEMES AND GATS COMMITMENTS SEPARATE, PARTICULARLY FOR UNSKILLED WORKERS

¶103 The temporary movement of unskilled workers is a difficult issue because temporary unskilled workers often become permanent unskilled workers. After having established roots in a community, these workers become difficult to send home.¹⁵¹ It is also difficult to determine whether unskilled workers use temporary work regimes or illegal entry as a means of migrating.¹⁵² Nevertheless, this is not a question which should be answered by the GATS.

¶104 It is tempting to try and fit domestic foreign worker schemes into GATS commitments as a way of making the transition between GATS trade commitments and domestic immigration policy more seamless. But making commitments in GATS that mirror domestic temporary foreign worker policies has some distinct disadvantages.¹⁵³

¶105 Ideally, unskilled workers should continue to be regulated under domestic foreign worker schemes. Winters points out that one of the biggest challenges for integrating temporary worker schemes into the GATS is MFN, which would require member countries to treat workers from all sending countries similarly.¹⁵⁴ This would make regional or bilateral workers schemes, which are not found in Article V GATS exceptions, more difficult. Integrating such schemes into GATS commitments would also create a more rigid system than currently exists because countries would have to be more explicit and less discriminatory in their barriers to trade.¹⁵⁵ In addition, because GATS commitments are very difficult to change, a member's ability to respond to fluctuations in cultural biases, as well as political objectives would be compromised.¹⁵⁶

¶106 Current schemes for temporary unskilled workers are flawed. Too often, workers abuse them as a means of becoming permanent residents of another country. But integrating an imperfect system into the GATS, ossifying it simply for administrative convenience,¹⁵⁷ would simply create a system whereby more

¹⁵⁰ See *infra*, sec. II.D.i.

¹⁵¹ TREBILCOCK, *supra* note 122123 at 498.

¹⁵² See Winters, *supra* note 82 at 53.

¹⁵³ It is important to note that in regards to permanent migration policies and their relationship to the GATS, it is fairly clear that they should be considered wholly outside the GATS system. See *generally*, India Proposal, *supra* note 103.

¹⁵⁴ Winters, *supra* note 82 at 53.

¹⁵⁵ *Id.*

¹⁵⁶ See *Id.*

¹⁵⁷ See *Id.*

unskilled labor goes underground, and remains unaccounted for and unprotected by international and national regulations.