

Migration
and
International Legal Norms

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In contrast to the Treaty Establishing the European Community, the World Trade Organization (WTO) does not aspire to the abolition, as between Member States, of obstacles to the free movement of goods, persons, services, or capital.¹ The WTO asserts a much less ambitious goal in its preamble, namely, "reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations."² In accordance with the WTO rules, each member government retains a great deal of latitude to determine how substantially its trade barriers should be reduced and how much market freedom to permit. Nevertheless, joint action to undo obstacles to the movement of goods, persons, services, and capital defines the current competence of the WTO.

The movement of people is a relatively new concern for the trading system. In the pre-WTO era of 1947-1994 under the General Agreement on Tariffs and Trade (GATT), almost no attention was paid to workers and professionals. In 1948, the United Nations Conference on Trade and Employment had included "skills" within the mandate of the prospective International Trade Organization,³ but the ensuing treaty never went into force, and the topic of skills remained outside of the trading system until it was brought back during the Uruguay Round negotiations (of 1986-1994).

Attention to the movement of people fits comfortably into the equity and efficiency rationales for the trading system.⁴ Just as barriers to the transborder move-

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¹ See Treaty Establishing the European Community, Art. 3 I(c).

² Marrakesh Agreement Establishing the World Trade Organization, preamble. This Agreement and all other WTO agreements discussed herein can be found in WTO, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (1999).

³ Art. 11 2(a) of the Charter of the International Trade Organization (ITO) had authorized the ITO, in collaboration with other inter-governmental organizations, to make recommendations for international agreements to assure just and equitable treatment for the enterprises, skills, capital, arts, and technology brought by one Member country to another. *Charter for an International Trade Organization*, available at <http://www.worldtradelaw.net/misc/havana.pdf>. An early report (1947) of an ITO drafting committee stated that the transit of persons was not within the scope of the Charter, while noting that it may be the concern of another international agency. WTO, *Guide to GATT Law and Practice* (1995) p. 214.

⁴ D. Rodrik, Comments at the Conference on "Immigration Policy and the Welfare State," Trieste (23 June 2001), pp. 1, 2.

ment of goods will reduce economic efficiency, so too will barriers to the movement of labor. There are numerous border barriers and domestic non-tariff barriers that prevent the operation of an efficient and free market for individuals and man-made products. The equity rationale for the WTO is further justification for reducing barriers to the movement of people. For example, the "special and differential treatment" norm in many WTO agreements suggests that rich countries should be especially open to goods imported from poor countries in the interest of raising the income of those countries. This same equity norm could also justify greater openness by industrial countries to workers from the developing countries. Indeed, the WTO General Agreement on Trade in Services (GATS) calls on governments to make commitments for "the liberalization of market access in sectors and modes of supply of export interest" to developing countries.⁵

The new WTO trade negotiations launched in November 2001 in Doha, Qatar, promote further expansion of the current low level of governmental commitments on the movement of natural persons. Some progress is expected in the next few years as this issue is a priority for large U.S. and European corporations, and for many governments in poor countries.⁶ At this time, it seems unlikely that any of the underlying WTO law on services will be changed. Rather, the negotiations will focus on the commitments that governments make to reduce their own barriers.

This chapter discusses how trade law addresses international migration. The first section review the WTO rules on the movement of natural persons and notes some issues lacking clarity. The second section looks at the actual liberalization agreed to at the WTO. The final section discusses proposals to improve the WTO's interface with migration issues.

WTO RULES ON THE MOVEMENT OF NATURAL PERSONS – THE NORM AND ITS GAPS

Formally speaking, the WTO does not confer on individuals a right to live and work in foreign countries. As many treaties do, the WTO protects the individual indirectly by imposing obligations on governments regarding how they treat persons. With a few exceptions, the WTO's obligations pertain only to aliens, not to nationals of that government. No individuals can directly enforce such obligations at the WTO.

Nevertheless, in a roundabout way, the WTO does make it easier for individuals to work in foreign countries. The relevant norms are contained in the GATS. These norms arise out of treaty law. Customary international law plays little role in the WTO. The GATS obligations (like all WTO obligations) are in effect only between WTO member countries (currently 144).

⁵ General Agreement on Trade in Services (GATS), Art IV:1(c)

⁶ S. Ostry, "The Uruguay Round North-South Grand Bargain: Implications for Future Negotiations," in D.L.M. Kennedy and J.D. Southwick (eds), *The Political Economy of International Trade Law* (2002) pp. 285-297.

GATS Article I recognizes four modes of trade in services.⁷ The first mode deals with a service supplier in one country providing services to another country (e.g., editing services). The second mode deals with a service consumer from one country going to another country to receive the service (e.g., education or medical treatment). The third mode deals with a service supplier who has a commercial presence in the receiving country (e.g., a bank). The fourth mode deals with a natural person, who is a service supplier and has a presence in another country (e.g., a banker).

Mode 4 is the central concern of this article.⁸ Under GATS, a natural person (a human) is distinguished from a juridical person (a corporation). The GATS makes it easier for aliens to work by calling on governments to reduce barriers and improve market access to natural persons supplying Mode 4 services. Although the term "work" is not used, it is the focus of Mode 4 because it seeks to enable the individual to trade services for money. One might cavil that GATS looks at a natural person only as a supplier of services, rather than as an individual, yet the practical effect of either view is the same.

The relevance of GATS to individual workers is somewhat clarified in the GATS Annex on Movement of Natural Persons Supplying Services Under the Agreement ("Annex on Movement"). The term "movement of natural persons" is used in the Annex, but not in the GATS itself. The Annex on Movement states that the GATS "shall not apply to measures affecting natural persons seeking access to the employment market of a [WTO] Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis."⁹

While this appears to be an enormous exclusion, the exact parameters are not sharply defined. The sentence above leaves the implication that GATS covers measures regarding employment on a *non-permanent* basis, and therefore presumably covers individuals seeking such temporary employment. Yet whether or not GATS applies to employment at all remains unclear.

At issue is how to interpret the provision in the Annex on Movement which suggests that GATS does not apply to persons seeking access to the employment market. When individuals are self-employed, they may be treated as being outside of the employment market. When individuals relocate to work for a company at its branch in a host country, they can be perceived as working outside the employment market of the host country because they do not place themselves on the market. A key unsettled question in WTO services law is whether the GATS Agreement applies to individuals who work for companies of the host country. For example, nurses and computer technicians may want to enter a country and work for its local employers. As yet, there is very little WTO case law to interpret GATS and no case law to inter-

⁷ GATS Art. I:2 The GATS excludes services supplied in the exercise of governmental authority. *Id.* at Art. I:3(b) This exclusion will differ from country to country.

⁸ Mode 2 is also important to individuals who may seek to cross borders in order to consume services in other countries. Many governments make it difficult to change visa status when an individual enters on an education visa.

⁹ GATS Annex on Movement of Natural Persons Supplying Services under the Agreement ("Annex on Movement"), para. 2 The term permanent is not defined in the GATS.

pret Mode 4. It is interesting to note that several regional trade agreements contain provisions modeled on the GATS Annex on Movement.¹⁰

The exclusion of permanent migration from the GATS had been advocated from the beginning, even by free traders. For example, Jagdish Bhagwati wrote in 1986 that permanent migration flows "raise a different, and more difficult, set of issues which, if brought into the discussion, would compromise the possibility of making significant progress on the issue."¹¹ Bhagwati also observed that the issue of permanent migration "is generally judged by moral-philosophical principles very different from the utilitarian calculus that underlies the economic case for free trade and free investment flows."¹²

The GATS Annex on Movement states that GATS shall not prevent governments from applying measures to regulate the entry of natural persons into their territory, or to regulate their "temporary stay," including those measures necessary to protect the integrity of borders. This provision makes clear that Mode 4 access for individuals will be tempered by national immigration regulations on the right to enter. There is a further proviso that a government border measure not be applied in such a manner as to nullify or impair the benefits accorded in a specific trade commitment. Therefore, governments do not have absolute discretion in immigration policy. A footnote to this proviso makes clear that governments may require visas for nationals from some countries and not from others. Of course, each government remains in control of what specific commitments it bargains away, so these GATS jurisdictional provisions are merely guides for negotiations.

GATS Mode 4 applies notionally to any individual providing services, from a business executive to a laborer. Some governments sought a narrower coverage during the Uruguay round, but the developing countries insisted that GATS should at least provide the possibility of covering construction, tourist, and domestic workers.¹³

Mode 4 obligations are symmetric to the obligations in the other three modes. The GATS contains several core rules that include the most-favored-nation requirement (subject to exemptions), transparency of regulations, and a responsibility to enter into successive rounds of negotiations with a view to achieving higher liberalization.¹⁴ In addition, each government is required to set out in a schedule¹⁵ the ex-

¹⁰ See J. Nielson, "Current Regimes for Temporary Movement of Service Providers," Paper Presented at the Joint WTO-World Bank Symposium on Movement of Persons (Mode 4) Under GATS, April 2002, paras. 32-38, available at http://www.wto.org/english/tratop_e/serv_e/symp_mov_natur_perso_april02_e.htm.

¹¹ J.N. Bhagwati, "Economic Perspectives on Trade in Professional Services," 1986 *University of Chicago Legal Forum* (1986) pp. 45, 49. See also *id.* at 50 (emphasizing that the temporary nature of factor relocation be made explicit).

¹² *Id.* at 52.

¹³ C. Atup, *The New World Trade Organization Agreements Globalizing Law Through Services and Intellectual Property* (2000) p. 125.

¹⁴ GATS Arts. II, III, XIX:1, XIX:4.

¹⁵ The schedule is the detailed list of services commitments made by each WTO Member country. Schedules have to be negotiated with other countries. *Id.* Arts. XVI:1, XX. A government may not amend its schedule, even to liberalize it, without concurrence of other WTO Members through a review process or through a negotiation. *Id.* Art. XXI.

tent of its own specific commitments and is prohibited from maintaining market access restrictions that are not listed on its schedule.¹⁶ In sectors where specific commitments are undertaken, a government shall accord national treatment – meaning that the foreign supplier is to be treated no less favorably than the domestic supplier – unless the government reserves an exception.¹⁷ Similarly, in sectors where specific commitments are undertaken, governments shall ensure that measures of general application are administered in a “reasonable, objective and impartial manner.”¹⁸ Furthermore, governments shall not apply licensing requirements and technical standards that (a) are not based on objective and transparent criteria, (b) are more burdensome than necessary to ensure the quality of the service, or (c) as a licensing standard would restrict the supply of a service.¹⁹ When government authorization is required for the supply of the service, the competent authorities shall “within a reasonable period of time” inform the applicant of the decision.²⁰ Another key rule provides that governments shall institute judicial, arbitral, or administrative tribunals that can be invoked by an affected service supplier for a prompt review of administrative decisions.²¹ These last two rules are examples of how the WTO indirectly accords procedural rights to individuals (although not enforceable by the individual in the WTO).²²

The GATS rule on the qualifications of professionals has particular relevance for Mode 4. The GATS does not require a recognition of equivalent qualifications by foreign professionals. Instead, it encourages governments to recognize the education and experience obtained in foreign countries and the licenses and certifications granted.²³ In that regard, the GATS directs the destination country government to give a foreign government an adequate opportunity to seek the recognition of its education, experience, licenses, and certifications.²⁴

The GATS is a complex agreement that contains many exclusions. One article allows governments to carry out international agreements to avoid double taxation even though it would lead to different treatment of nationals from different countries.²⁵ Another notable exclusion, Article V *bis* (Labor Markets Integration Agreements), states that the GATS shall not prevent WTO members from being a party to an agreement establishing full integration of labor markets, provided that the agreement exempts citizens of parties to the agreement from requirements regarding residency and work permits. A footnote explains that typically such agreements provide foreign citizens the right of free entry to the employment market, and include provisions concerning conditions of pay, conditions of employment, and social benefits.²⁶

¹⁶ Id. Arts. XVI, XX. An example of such a restriction is a quota on foreign employees. Id. Art. XVI:2(d).

¹⁷ Id. Art. XVII.

¹⁸ Id. Art. VI:1.

¹⁹ Id. Art. VI:5.

²⁰ Id. Art. VI:3.

²¹ Id. Art. VI:2.

²² Steve Charnovitz, “The WTO and the Rights of the Individual,” 36 *Intereconomics* (2001) p. 98.

²³ GATS, Art. VII:1.

²⁴ Id. Art. VII:2.

²⁵ Id. Art. XIV(e).

²⁶ Id. GATS Art. V *bis* n. 2.

The existence of Article V *bis* beclouds the applicability of GATS to the employment market. If GATS does not apply to the employment market in the first place, why is this article needed if it has relevance only to such a market? Furthermore, is the WTO staking out some competence on labor policy by insisting that recognized agreements have exemptions regarding residency and work permits? Time will tell.

The GATS exception for security is also ambiguous. The exception would permit a government to violate a GATS rule or a national schedule for various reasons, such as a war or international emergency.²⁷ Yet the exception is unclear as to whether a domestic emergency would qualify.

Pursuant to GATS, the governments negotiated an "Understanding on Commitments in Financial Services" that contains an outline of commitments, including one on the "temporary entry of personnel."²⁸ This provision states that when a foreign financial service supplier establishes a commercial presence in the receiving country, that government shall permit temporary entry of senior management personnel possessing proprietary information. In addition, subject to the availability of qualified specialists in the receiving country, the government shall permit the entry of temporary personnel who are computer specialists, telecommunications specialists, actuaries, or legal specialists. The specific commitments made in the financial services sector are touted as a model for other sectors in future negotiations.

In summary, the GATS is both a shallow and a potentially deep international agreement. It is shallow because a protectionist government can comply fully with GATS while refraining from opening its market to foreign individuals who are service suppliers.²⁹ It is deep in that a government can make binding commitments that will implicate its ability to regulate the domestic market, at least *vis-à-vis* foreign service suppliers.³⁰ It should also be noted that Mode 4 does not include any obligations for the country of origin to allow an individual to exit. For example, Bangladesh, India, Indonesia, and Pakistan often prohibit women from taking jobs abroad as domestic workers. Such restrictions are not covered by GATS. Thus, to the extent that GATS does prescribe a legal norm for migration, it is tentative and narrow.

To better describe the Mode 4 norm and its gaps, one might consider two comparative perspectives. First, how do Mode 4 obligations compare to other WTO obligations? Second, how do Mode 4 obligations fit into the broader international regime on the movement of people?

Consider the WTO obligations on the movement of goods, services, capital, technology, and people:

- Government regulations and taxes affecting the entry of foreign goods are supervised by extensive rules in several WTO agreements including the GATT, the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS),

²⁷ *Id.* Art. XIV *bis*

²⁸ WTO, Understanding on Commitments in Financial Services, para. B(9), available at http://www.wto.org/english/taatop_e/serv_e/21-fin_e.htm

²⁹ P. Sauv , "Trade, Education and the GATS: What's In, What's Out, What's All the Fuss About?" Paper Prepared for OECD/US Forum on Trade in Educational Services (23-24 May 2002), p. 11

³⁰ See, e.g., text accompanying note 19

and the Agreement on Technical Barriers to Trade (TBT). These obligations apply generally to all measures affecting goods, without any need for filing schedules.³¹ For example, under GATT jurisprudence, taxes and regulations cannot be applied in a way to limit equal competitive opportunities for imported products. Under the SPS Agreement, sanitary measures shall be based on scientific principles.³² Under the TBT Agreement, technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective.³³

- The GATS leaves much discretion with governments as to the breadth of their commitments on *services*. In general, however, the first and third modes can extend beyond temporary relationships. For instance, under Mode 3, a service supplier can seek to have a permanent presence and provide services to anyone in host country. Of the four modes, Mode 4 provides the least discretion.
- With respect to restrictions on *capital* movements, the WTO contains some disciplines and exceptions, and establishes links to the International Monetary Fund.³⁴ In general, however, governments retain considerable discretion to impose restrictions.
- For *technology*, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) requires that governments recognize and safeguard the intellectual property of aliens. The TRIPS Agreement also calls for cooperation to prevent international trade in goods infringing intellectual property rights.³⁵ Beyond TRIPS, the WTO does not supervise government restrictions on technology transfer. For example, it is probably not a WTO violation for a government to prohibit imports of fetal stem cells for research, even when there is no scientific basis for doing so.

Viewed in this multifactor context, WTO supervision over national regulation of the movement of people is weaker than supervision of goods, other services, and technology. It is perhaps on par with the lenient supervision of national restrictions on capital movements. For example, with respect to people, the WTO permits market access barriers without regard to whether there would be less trade-restrictive ways to achieve a legitimate societal objective. As compared to other services, the obligations on Mode 4 are shallower because they apply only to transient movements. Furthermore, as will be discussed below, the national GATS schedules for Mode 4 typically impose pre-employment requirements and other contractual conditions on individuals that severely hamper economic freedom.

³¹ The one exception is GATT Art. II which references each government's own tariff schedules

³² Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), Art. 2.2

³³ Agreement on Technical Barriers to Trade (TBT), Art. 2.2

³⁴ See GATT Arts. XII, XV, XVIII:B; Agreement on Trade-Related Investment Measures, Annex, para. 2(b); GATS Arts. XI:2, XII, XVI:1 n. 8. GATS schedules can also include commitments on monetary remittances

³⁵ TRIPS Art. 69

Another way of assessing GATS Mode 4 is to see where it fits into the international regime on the movement, both permanent and temporary, of people across borders. The WTO putatively has no role in permanent movement. The main categories for temporary transborder movement are refugees, tourism, family visits, educational and cultural exchanges, transit, and work. The WTO is interested in only the last category, work, and, more specifically, only services work. Even then, the WTO does not seek to spur negotiations over many of the reasons a government might have for denying foreigners an opportunity to resettle, such as xenophobia. Negotiations are possible, however, in response to the motivation of economic protection. Thus, across the whole spectrum of issues regarding the movement of people that could be the subject of international law, WTO law covers only a very narrow band.

Of course, much of the spectrum is bereft of any international law, so the GATS Mode 4 band is significant. Furthermore, because Mode 4 has growing economic salience, the WTO rules are likely to grow deeper as governments make more commitments in successive trade rounds. Looking ahead, the WTO may become a fertile source of migration law norms.

SURVEY OF NATIONAL MODE 4 COMMITMENTS

The second part of this chapter looks briefly at what governments have agreed to do in multilateral GATS Mode 4 negotiations. As noted above, the GATS is a bottom-up regime, and so the amount of market accessibility depends on each government's own schedule of commitments. Unfortunately, as a study by the Organization for Economic Cooperation and Development has noted, "Even by the modest standards of Uruguay Round liberalization on trade in services, little was achieved on Mode 4."³⁶ In some instances, however, actual regulatory regimes may be more liberal than a government has obligated itself to follow.

The existing Mode 4 commitments by over one hundred countries are heavily tilted toward high-skilled persons.³⁷ About 42 percent of the horizontal commitments (i.e., applying to all sectors) relate to intra-company transferees; 28 percent relate to executives, managers, and specialists; 13 percent are visitors for sales negotiations, and 10 percent are other business visitors. The remaining 7 percent are independent contractors and others. The typical practice in national schedules is to allow executives to stay for two to five years, while business visitors are limited to ninety days. A five-year stay would seem tantamount to migration, or at least temporary migration. As Allison M. Young has observed, "the tension between [national]

³⁶ Organization for Economic Cooperation and Development, Working Party of the Trade Committee, "Service Providers on the Move: A Closer Look at Labour Mobility and the GATS," TD/TC/WTP(2001)26/FINAL, p. 5 (20 February 2002) [hereinafter OECD Study].

³⁷ The data in this and the next paragraph are drawn from WTO Council for Trade in Services, Presence of Natural Persons (Mode 4), Background Note by the Secretariat, S/C/W/75 (8 December 1998), Table 9. Some updated figures are updated in Antonia Carzaniga, "GATS, Mode 4 and the Pattern of Commitments," at 4 (11 April 2002), available at http://www.wto.org/english/tratop_e/serv_e/symp_mov_natur_perso_april02_e.htm

trade officials and immigration and labor market development officials ... is played out in the schedules."³⁸

About 17 percent of the commitments apply to low-skilled personnel, and these are often limited by an economic needs test that excludes the alien unless there has been a showing that qualified domestic workers are unavailable. Even when such a need exists, the paperwork involved can be daunting. It is interesting to note that the North American Free Trade Agreement (NAFTA) eliminates labor market certifications for the temporary entry of a few categories of workers, including traders and investors, intra-company transferees, business visitors, and qualified professionals defined through education or experience.³⁹ Applicable visa requirements, however, continue to apply.

The GATS schedules show numerous restrictions on foreign workers. The most common restriction is "pre-employment," meaning that a person must already be employed by the company he will be working for in the host country. Furthermore, Mode 4 entry and the corresponding work permit are normally confined to one sector or to one employer, and workers cannot freely move to another position or relocate geographically.⁴⁰ Some governments require that foreign workers be paid the prevailing wage.⁴¹ Some governments have reserved the right to suspend commitments in the event of a labor-management dispute.⁴² Some forbid temporary migrants from purchasing real estate. Some mandate that specialists train local staff. Together, these limitations undermine the significance of Mode 4 commitments.

PROPOSALS FOR IMPROVING THE WTO NORM AND ITS IMPLEMENTATION

The third part of this chapter looks at ways that the WTO might liberalize national barriers to the movement of natural persons. This can occur if governments make greater commitments in the ongoing WTO round. Some inspiration may be drawn from the labor mobility provisions in regional trade agreements, which in many instances go beyond the GATS. For example, the European Free Trade Association provides for the free movement of workers and the self-employed without requiring visas, although there is a limit of ninety days per year for service providers.⁴³ The Caribbean Community (CARICOM) provides for free movement and elimination of work permits for university graduates and selected occupations, such as media, sports, music and art, entertainment, and tourism.⁴⁴

³⁸ A M Young, "Where Next for Labor Mobility Under GATS?" in P. Sauvé and R M Stern (eds), *GATS 2000 New Directions in Services Trade Liberalization* (2000) pp 184, 187.

³⁹ North American Free Trade Agreement (NAFTA), 17 December 1992, Art. 1603. Temporary entry is defined as entry without the intent to establish permanent residence. The United States retains a quota on Mexican professionals until 2004.

⁴⁰ R Chanda, "Movement of Natural Persons and the GATS," in B Hoekman, A Mattoo and P English (eds), *Development, Trade, and the WTO. A Handbook* (2002) pp. 304, 305, 307.

⁴¹ OECD Study, *supra* note 36, at 16.

⁴² WTO Background Note, *supra* note 37, at para 45.

⁴³ Nielson, *supra* note 10, at para 20.

⁴⁴ *Id* at para 23.

This section will not delve into WTO negotiation strategies, but rather will discuss some key areas for new international cooperation. One idea being considered is the "GATS visa" tailored for service professionals temporarily working outside of their own country.⁴⁵ This would be a national visa category that a cooperating government would issue according to prescribed criteria. Because only a narrow range of individuals would qualify, the screening procedures could be separated from normal visa decisions. With streamlined administrative procedures, the visa could be provided within a few weeks. Ideally, such a GATS visa would be granted to qualified individuals without regard to the applicant's nationality. Such a non-discrimination feature seems unlikely, however, although the GATS visa itself may emerge from current negotiations. It is interesting to note that the Asia Pacific Economic Cooperation Forum has agreed to an APEC Business Travel Card to facilitate entry into thirteen participating economies without having to apply for a visa.

The GATS negotiations also address the economic needs test. A minimal action would be to increase transparency of how these tests are implemented.⁴⁶ A more important action would be to harmonize the tests so that government decisions are easily reviewable. Ideally, such tests would be banned as inconsistent with the spirit of the WTO. After all, governments cannot refuse to import foreign goods on the grounds that the goods are not needed because domestic substitutes are available. Similarly, the TRIPS Agreement does not permit a government to refuse to award a patent or copyright to a foreign national simply because the local economy does not need it.

Greater recognition of foreign licenses is another possible outcome of the Doha trade round. The GATS currently calls for cooperation between WTO members and relevant international and non-governmental organizations toward the adoption of common international standards for recognition and for the practice of services trades and professions.⁴⁷ Aside from this provision, little progress has occurred.

WTO negotiators may also consider ways to improve the mobility of Mode 4 service suppliers in receiving countries. At present, visas and work permits are used to control where individuals can conduct business. Entry and residency are often pre-conditioned on working for a particular company. Such restrictions on freedom of movement make no sense in a dynamic world economy, and are a good example of how the WTO treats people less favorably than products. Under the GATT rules, the exporter of a product does not have to name in advance the final consumer in the country of import.

Prevailing wage requirements are another barrier to trade in services. They are, in effect, a "social clause" for the receiving country motivated by the idea of taking wages out of competition.⁴⁸ If an alien service supplier seeks equal pay, *vis-à-vis* local workers, then she ought to be able to insist on that pay level. Conversely, if the

⁴⁵ OECD Study, *supra* note 36, at 48 (Box 6)

⁴⁶ M. Hatcher, "Mode 4 Trade - The Protagonists' View," Paper Presented at the Joint WTO-World Bank Symposium on Movement of Persons (Mode 4) Under GATS, April 2002, available at http://www.wto.org/english/tratop_e/serv_e/symp_mov_natur_perso_april02_e.htm

⁴⁷ GATS Art. VII:5

⁴⁸ For a discussion of social clauses, see V. Muntarhorn, "Child Rights and Social Clauses: Child Labor Elimination as a Social Clause?," 6 *Int'l J Children's Rights* (1998) pp. 255, 270-271.

alien is willing to lower her expectation for compensation, then she ought to be able to do that too. Nevertheless, WTO member governments continue to reserve the right to prevent an alien provider from working for less than the prevailing host country wage. The WTO norm for goods is importation without quantitative restriction, with an equal opportunity to compete on price against domestically-produced goods in the receiving country.⁴⁹ Conversely, the WTO norm for people is to limit competition.

Another challenging issue is solving the unfairness to foreign workers when they have to pay social insurance taxes to the host country even though they will not receive any benefits. In many instances, this amounts to double taxation because the foreign worker is already paying social taxes in his home country.⁵⁰ As noted above, the GATS permits governments to undertake international accords to prevent double taxation,⁵¹ yet no trade norm has emerged on social insurance. This would be a good topic for cooperation between the International Labor Organization (ILO) and the WTO, but the WTO has resisted undertaking any cooperation with the ILO. The ILO first addressed the problem of the transferability and totalization of social insurance as early as 1935 with the Convention concerning the Establishment of an International Scheme for the Maintenance of Rights under Invalidity, Old-Age and Widows' and Orphans' Insurance (No. 48). More recently, the ILO has legislated a framework Convention Concerning the Establishment of an International System for the Maintenance of Rights in Social Security (No. 157).

Promoting Cooperation

The issues in GATS Mode 4 are difficult as they lie at the intersection of trade, labor, and public security policies. If greater progress is to be made, governments will need to provide assistance to each other in identifying best practices. The GATS calls for technical assistance to developing countries,⁵² but not in the reverse direction and not among industrial countries. The GATS also provides for consultation and cooperation with other international organizations having a mandate regarding services, but only a few organizations (such as the International Telecommunications Union) are invited to meetings of the WTO Council for Trade in Services. That parochialism should end: When the Council considers issues regarding natural persons, it ought to invite the ILO and the International Organization for Migration (IOM) to attend and to assist in capacity building efforts.

The mobility of natural persons is important to economic development, and therefore, the IOM, the ILO, and the Office of the U.N. High Commissioner for Refugees should also be invited to meetings of the WTO Committee on Trade and Development. The UN Environment Program (UNEP) and the World Intellectual Property Organization (WIPO) already have observer status there, and organizations con-

⁴⁹ Of course, the application of antidumping and countervailing duties will encroach upon this norm.

⁵⁰ R. Chanda, "Movement of Natural Persons and Trade in Services: Liberalising Temporary Movement of Labor under the GATS," Indian Council for Research on International Economic Relations, Working Paper No. 51, pp. 21, 42-43.

⁵¹ GATS Art. XIV(c).

⁵² GATS Art. XXV:2 (Technical Cooperation). See also Art. IV (Increasing Participation of Developing Countries).

cerned with migration and labor are as relevant as UNEP and WIPO. Repeatedly, the WTO could increase its cooperation with non-governmental organizations (NGOs) and the private sector, many of whom are deeply interested in how Mode 4 movements can enable development. At present, NGOs, including business NGOs, are not permitted to be observers in the GATS entities. In April 2002, the WTO and World Bank joined together in hosting a symposium on Movement of Persons Under GATS. This was a positive step in bringing the WTO together with other international organizations and in highlighting the link between Mode 4 and the development agenda.

The WTO competence over the temporary movement of individuals provides an opportunity for the WTO to adopt a more "people-centered"⁵³ approach to trade and development. Rather than perceiving the GATS commitments as only obligations between the WTO member governments, the WTO could write its rules so that governments acknowledge obligations to service suppliers in their juridical and natural embodiment. One step in that direction that has already been taken is the noteworthy language in the GATS Annex on Movement that states that "Natural persons covered by a specific commitment shall be allowed to supply the service in accordance with the terms of that commitment."⁵⁴ If the GATS were more widely perceived as international law that could help workers, then the GATS might enjoy greater support from the public. At present, the movement of natural persons is discussed in the WTO mainly as a services modality, rather than in the broader context of allowing workers to gain new skills and career opportunities.

The WTO might also look for ways to better link the trade regime to the human rights and humanitarian regimes. Trafficking in women and children falls under the rubric of transborder services, and yet the WTO is not even considering cooperative practices to combat such trafficking. Under Article 69 of the TRIPS Agreement, governments agree to cooperate with a view of eliminating international trade in goods infringing on intellectual property rights. Perhaps the WTO should make a parallel commitment in the GATS Agreement to eliminate international trade in sexual services as infringing on basic human rights.

Finally, the broad competence of GATS over services has led to the question of how the WTO could include worker agency services in schedules. As David Richardson explains, labor unions provide such services and can create countervailing market power to anti-competitive market power of firms.⁵⁵ Richardson proposes that the WTO take steps toward a market-supportive worker agency agreement at the WTO. At the recent WTO/World Bank Symposium, a representative of Public Services International called attention to the need for "GATS workers" to enjoy the fundamental worker rights declared by the ILO.⁵⁶ Such ideas will merit attention in promoting the Doha Development Agenda.

⁵³ See United Nations, Monterrey Consensus, A/CONF/198/3, para. 8 (30 January 2002).

⁵⁴ Annex on Movement, *supra* note 9, para. 3.

⁵⁵ J. D. Richardson, "Narrow New Issues as a Natural Way Forward for the WTO," Institute for International Economics (2001).

⁵⁶ M. Waghorn, Paper Presented at the Joint WTO-World Bank Symposium on Movement of Persons (Mode 4) Under GATS, April 2002, available at http://www.wto.org/english/tratop_e/serv_e/symp_mov_natur_perso_april02_e.htm

CONCLUSION

In conclusion, the WTO's legal norm on the movement of people is in a nascent stage. Economic openness does not define the norm. The WTO does not demand even a minimal degree of openness, nor does trade law reflect obligations *erga omnes*. Rather, WTO law is a skein of obligations between governments as to how they regulate (or refrain from regulating) market access. Over time, however, the WTO will catalyze greater economic openness, including opportunities for individuals to sojourn and work outside of their home country. As that transpires, the international trade and migration law regimes will need to work more closely with each other.

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