Ensuring a Level Playing Field in Service Provision
The Requirement of Liberalization of Service Migration
ENSURING A LEVEL PLAYING FIELD IN SERVICE PROVISION
THE REQUIREMENT OF LIBERALIZATION OF SERVICE
IMMIGRATION

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One cannot legally compare European Union (EU) law provisions with World Trade Organization (WTO) law provisions, however comparing with an instructive or informative aim can be constructive and revealing. Against the background of the aim to reach a level playing field through international trade liberalization to be implemented in the sensitive policy fields of immigration and the labour market, this paper will examine the difference in effect on, and implementation of, EU and WTO law in the Dutch legal order. As will be described, a strong tension exists between trade liberalization on the one hand, and national immigration and labour market policies on the other. It should be emphasized that this paper will focused on this general aim and not on specific obligations. Moreover, while thinking regarding service migration is influenced by security issues as well, that issue will not be discussed here.

1. Rationale of the two Treaties, the aim of liberalization

The choice of a historical departure point is by definition arbitrary, yet the impact of the First and Second World War on international cooperation, and international trade as a means to reach that cooperation, can hardly be overestimated. The origins of both the WTO and the EU can be traced to the great wars in the twentieth century, the political, economical and monetary situation prior to their outbreak and the desire to create lasting peace through international cooperation at the end of both wars.²

Where the United Nations concerns international politics and security issues, the Bretton Woods system and the GATT can be seen as initiatives aimed at

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1 Irwin and Weiler emphasize the different telos and the equally different economy of the EU and WTO founding treaties, yet comparisons may nevertheless be instructive, Irwin & Weiler 2008, p. 101. Examples of studies comparing these international legal orders from the perspective of temporary service provision are: Guild 2008 and Persin 2008.

2 Craig and De Búrca point out that while most accounts regarding European integration choose the Second World War as a starting point, this important moment in history should be placed in a much longer time-frame, Craig & De Búrca 2008, p. 4.
preventing the economic and monetary conditions of the previous decades which contributed greatly to the outbreak of the two world wars.³

Similarly, the idea of a united Europe has been submitted in proposals by various authors since the seventeenth century and the First World War gave a push towards thinking on European union as a means towards ending the constant cycles of war that have plagued the continent. It was the Second World War that finally convinced several governments of the need to create a united Europe.⁴

Not only is there a clear parallel to be found between the devastation of war leading to reactions of international cooperation,⁵ the reverse is also true. Strained interstate economic conditions prior to both World Wars have contributed to their eruption.⁶

As Cass states: ‘(...) interstate trade has been, if not synonymous, then closely associated, with the course of war and peace, and the construction of international order. This coincidence is not surprising. International order has long been bound up with the practice of institutions and ideas about democracy and individual freedom, and in many cases trade has been the key vehicle for these changes.’⁷

**Similar methods, different levels**

The underlying rationale of both international agreements is also apparent from the adopted method, preventing protectionism through the liberalization of international trade. Comparing the EU and WTO preambles demonstrates that the ultimate aim is to reduce barriers to trade in order to reach a level playing field for national and international competitors, as well as for international competitors.⁸

Besides rhetoric included in the preambles, the central provisions ensuring the abolishment or reduction of barriers to trade contain this 'level playing field' idea. The central WTO law concept of national treatment indicates that,

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⁵ Prime examples are the League of Nations after the First World War and the United Nations after the Second World War.
⁸ The EU aims at the establishment of an internal market where the factors of production can freely cross borders and where competition is not distorted, article 3 EC. The preamble of the WTO Agreement indicates the aim of: 'substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations.'
once products or services are allowed access to a certain market, they must be treated similar as domestic products or services, otherwise discriminatory treatment undermines the market access concessions which result from the negotiation process. Similarly, the EU provisions provide the right to pursue economic activities in another Member State 'under the same conditions as are imposed by that State on its own nationals.'

Whatever the current status in aspiring towards this historical aim, it is important to keep this notion of a level playing field in mind as it is directly derived from the above described nexus between economic discrimination (either protectionism or differential treatment between foreign traders) and deterioration of international relations. This aim lies at the heart of both international legal orders.

A level playing field in service provision

Both legal orders include international trade in services. The original European Economic Community treaty provided free movement of services from its inception, and the expansion of the GATT trading regime through the WTO Agreement saw the creation of the General Agreement on Trade in Services (GATS).

While modern communication technologies allow for international trade in service in the 'classical' cross-border sense, many services still require proximity between supplier and producer. Therefore, any international framework

9 Contrary to the EU internal market, which (at least legally) already provides full market access for the factors of production, WTO market access is achieved progressively, trade in goods through negotiations on the reduction of tariffs and trade in services through the negotiation of market access commitments, article II GATT, article XVI GATS. Equality for competing foreign service providers is ensured by GATS article II containing the Most Favoured Nation Treatment (MFN).

10 Article II GATT, article XVII GATS. See for this argument in relation to national treatment relating to trade in goods: Matsushita, Schoenbaum & Mavroidis 2006, p. 234.

11 Article 49 EC; The provisions establishing the EU internal market are defined as nondiscrimination principles, see for an example relevant to the topic at hand: C-113/89 Rush Portuguesa [1990] ECR I-1417, par 11. Several cases indicate that non-discrimination is no longer the leading principle, a mere barrier to trade is sufficient to trigger application of the EU Treaty, for example: case C-76/90 Säger v Dennemeyer [1991] ECR I-4221, par 12; see for an explanation: Barnard 2004, p. 273-276.

12 The term free movement of services is derived from EU law which ensures the so-called 'four freedoms'. The four freedoms indicate the liberalization of goods, services, labour and capital.

13 Services often cannot be controlled at the border or would require a costly and burdensome policing system, Matsushita, Schoenbaum & Mavroidis 2006, p. 604-605. The invisible character of services, the intangible and personal nature and the requirement of proximity between supplier and consumer are often cited as explanations for the diffi-
dealing with trade in services will have to incorporate ways to accommodate movement of either supplier or consumer across borders.\textsuperscript{14} However, this form of service provision is no longer confined to the realm of trade law. International trade now enters the domains of immigration policies and domestic labour market policies, two subjects that states traditionally are reluctant to yield to international binding agreements.\textsuperscript{15}

2. Comparison EU and WTO law on posted workers

The rights derived from the EU internal market relating to the free movement of persons are to some extent available for nationals of non-EU Member States (third country nationals).\textsuperscript{16} Besides movement rights for long term residents\textsuperscript{17} the European Court of Justice (ECJ) has established the right for businesses to move with their own labour force, including third country nationals, to another Member State in order to provide services.\textsuperscript{18} In order to utilize their economic right to provide services, employers must be allowed to post their employees on the territory of the Member State where they provide their service, under certain conditions.

It is important to realize that this right is derived from a business’s right to provide services and thus should not be seen as establishing free movement of labour rights for third country nationals.\textsuperscript{19} The rationale that led the Court to this decision is that, in order to compete under the same conditions as imposed on national service providers, foreign (EU established) service providers must be allowed to move freely to another Member State including its staff. This entails that making the movement of staff subject to restrictions such as conditions as to engagement \textit{in situ} or an obligation to obtain a work permit, would discriminate against the foreign service supplier as its competitors in the host country are able to use their own staff without restrictions.\textsuperscript{20} In other words, such conditions distort the aim of a level playing field.

\textsuperscript{14} Bast 2008, p. 574-575.
\textsuperscript{15} Bast 2008, p. 575.
\textsuperscript{16} In this paper the term Member States will be reserved for the EU Member States, in contrast to the term WTO Members.
\textsuperscript{18} This right was first established in the cases C-113/89 \textit{Rush Portuguesa} [1990] ECR 1-1417 and C-43/93 \textit{Vander Elst} [1994] ECR 1-3803.
\textsuperscript{19} Similarly, the GATS does not affect measures regulating access to the employment market, GATS Annex on Movement of Natural Persons Supplying Services under the Agreement, article 2.
\textsuperscript{20} \textit{Rush Portuguesa}, par. 11-12.
An identical source for temporary migration rights is found in the GATS. Article II of the GATS divides trade in services into four modes of supply. The GATS not only applies to cross-border trade in services (mode 1) but also to forms of trade where consumers move abroad (mode 2); where providers make use of a commercial presence abroad (mode 3); and where natural persons move across borders to provide services (mode 4). Mode 4 services provision is defined as the temporary movement of either self-employed service providers, or employees of a service provider, providing a service to a consumer on the territory of another WTO Member.\(^{21}\) It is this second part of the definition which is similar to the EU extension of the freedom to provide services to include movement rights for third country personnel.\(^{22}\)

Based on the reaction of Member States to the ECJ case law on the posting of third country national employees, Guild demonstrates a tension between the movement of persons for service provision and national law and policy on economic immigration.\(^{23}\) In a series of cases, the European Commission has commenced proceedings against several Member States for violations of the free movement of services through immigration and employment policy legislation.

While the EU obligations are forced upon the Member States through ECJ case law, the Dutch government has freely committed itself to several obligations regarding temporary labour migration through the GATS.\(^{24}\)

**Dutch law concerning the posting of workers**

The Aliens Act (AA, Vreemdelingenwet 2000)\(^{25}\) regulates the right of foreign nationals to enter and reside in the Netherlands. Employers of posted workers

\(^{21}\) GATS Annex on Movement of Natural Persons Supplying Services under the Agreement. Consumption abroad and commercial presence can involve movement of consumers, respectively personnel of corporations, across borders. This paper will focus on the movement of posted workers only. However, as noted by Guild and Barth, mode 2 does not seem to involve the right of consumers to move across borders. Similarly, the original EU provision establishing freedom of service provision was limited to provision of services. However, the ECJ ruled that freedom of service provision applied equally to the recipient of services, case 286/82 Luisi and Carbone [1984] ECR 377; Guild & Barth 1999, p. 398.

\(^{22}\) Annex on Movement of Natural Persons Supplying Services under the Agreement, article 1.


\(^{24}\) That these EU obligations are forced upon the Member States is evident from several procedures in which the ECJ has declared national law incompatible with the freedom to provide services, some of which will be described below.

\(^{25}\) See regarding the official translations from Dutch: Dutch Ministry of Justice, in cooperation with the Immigration and Naturalization Service, the Agency for the Reception of Asylum Seekers and the Royal Military Constabulary, Begrippenlijst Vreemdelingenbeleid, p. 46-63.
performing labour on Dutch territory have to comply with the Aliens Employment Act (AEA, Wet arbeid vreemdelingen).26

The Aliens Act and the Aliens Decree clarify the relationship between residence permits and employment licenses. The Aliens Act requires the relevant authority, the Immigration and Nationalization Service (Immigratie en Naturalisatie Dienst), to provide labour migrants with a residence permit if a work permit had been granted. The duration of the residence permit is linked to the duration of the employment license. Foreigners who have the right to work in the Netherlands can only be refused a residence permit if the foreigner is a threat to the public order.27

Access to the labour market for foreigners in general is based on a work permit system directed at employers. The central provision of the Aliens Employment Act prohibits employers to let a foreigner supply labour in the Netherlands without a work permit.28 Regarding temporary labour, as per definition is the case with posted employees of service providers, several conditions certify that admitting foreigners to perform temporary labour does not lead to a longer stay. Moreover, after the temporary labour has ended, employees have to stay abroad for a certain amount of time before they can be the subject of a new work permit.29

The application for a work permit must be submitted by employers.30 The Aliens Employment Act provides several imperative refusal grounds and discretionary refusal grounds which therefore form the conditions under which foreigners may perform labour in the Netherlands.

Refusal grounds

Article 8 Aliens Employment Act contains several imperative refusal grounds. The most important ground for refusal is availability of priority enjoying labour. In GATS terminology this would be referred to as an economic needs test.31 The term priority enjoying labour relates to inter alia citizens of states that enjoy free movement rights in the European Union and EU citizens. Thus, if the specific labour required by the employer requesting a work permit for a foreigner can be fulfilled by priority enjoying labour, the application must be

26 Note that several specific regimes, which will not be described in this paper, deviate from these rules, for instance the rules applying to high skilled workers.
27 Article 3.31, par. 1 Aliens Decree (AD, Vreemdelingen besluit 2000). The relevant temporary residence permit is provided on the basis of article 14 Aliens Act; see also: De Lange 2007, p. 270.
28 Article 2, par. 1 AEA.
29 Article 11, par. 1 and 3 AEA; Van Drongelen, Van Bogaard & van Rijs 2005, p. 50.
30 Article 6, par 1 AEA.
31 See: article XVI GATS.
refused. A work permit can also be granted under certain conditions which require an employer to increase efforts to rely on priority enjoying labour regarding future applications.

Other imperative refusal grounds are inter alia:
- The job position was not notified five weeks prior to the submission of a request for a work permit relating to a foreign national. Coupled with the period of five weeks in which the relevant authorities decide upon the request, the total duration of a work permit application can take up to ten weeks.
- The foreigner is admitted for the first time but does not earn, during the period of a month, at least the minimum wage.
- The labour does not serve the Dutch interest.

The five weeks notice of the job position serves the purpose of providing time to make sure that available priority enjoying labour fulfils the position. As the authorities have five weeks to decide whether to grant or refuse a work permit, the total duration of a work permit application can take up to ten weeks.

The minimum wage requirement serves two purposes. In the first place, it prevents that a residence permit is rejected on the basis of insufficient fund while an employment permit is granted. Secondly, the minimum wage requirement should be seen as expressing the requirement that foreigners must contribute to the Dutch economy in order to pass the restrictive migration rules.

Besides the imperative refusal grounds, article 9 Aliens Employment Act contains a wide range of optional refusal grounds. Several of these grounds relate to an employer’s efforts to ensure that priority enjoying labour fulfils the labour in question.

As is apparent, competing foreign service providers are at a severe disadvantage. The process of obtaining a work permit alone can take up to ten weeks, and only when priority enjoying labour is not available can a business utilize its regular staff. Regardless all the other conditions, it is already apparent that service contracts requiring fast action will be difficult to obtain by foreign companies.

32 Article 1 AEA in conjunction with articles 3, par. 1(a) and 4, par. 1 AEA. See in particular: Van Drongelen, Van den Bogaard & Van Rijs 2005, p. 126-127.
33 Article 6, par 2 AEA; Van Drongelen, Van den Bogaard & Van Rijs 2005, p. 41.
34 See also article 6, par. 2 AEA.
35 Van Drongelen, Van den Bogaard & Van Rijs 2005, p. 41-42.
36 Article 9 AEA, see in general: Van Drongelen, Van den Bogaard & Van Rijs 2005, p. 44-46.
37 Note that this regime says nothing regarding actual access to the market for the business itself, that topic is not addressed in this paper.
The implementation of GATS obligations in Dutch law concerning the posting of workers

The change derived from the GATS on the above described legal system concerning posted workers, is limited to the abolishment of the priority enjoying labour test (or economic needs test). This conditions is not required when a business posts its employees in the Netherlands to provide a service if the service provision falls within the scope of the GATS agreement. As the requirement of a five weeks notice for the job application is related to priority enjoying labour having the chance to fulfil the application, this requirement is not applied as well.

The removal of the requirement to utilize priority enjoying labour is significant as this forms a serious impediment on the notion of a level playing field as described above. Yet clearly the abolishment of this test is only the beginning towards this aim, as all other requirements described above, still apply. Moreover, the GATS regime applies under the following severely restrictive conditions:38

- Service provision does not exceed three months and the service contract was established in accordance with relevant Dutch or EU public tender rules.
- The posted workers are part of the regular staff of the service provider and have been employed over a year in relation to the services to be provided.
- Residence in the Netherlands is limited to three months within a two year period.
- Posted employees may only provide labour in relation to the service to be provided and the number of posted employees may not exceed that which is reasonably required in order to provide the service.
- The type of service provision is limited to the following sectors: accountancy, taxation advisory services, architectural services, engineering services, integrated engineering services, urban planning and landscape architectural services, computer and related services, construction services.
- Posted workers require a university degree, three years of relevant work experience and should comply with relevant Dutch requirements relating to the profession concerned.

It seems safe to presume that the requirement of labour serving the Dutch interest should be considered fulfilled under these circumstances. As this category of

38 Delegation and Implementation Decree Aliens Employment Acts (Delegatie en Uitvoeringsbesluit Wav), article 8, par 18 under b.
GATS service provision is limited to a specific list of service sectors, the Dutch government clearly intended to allow service provision in these sectors. In any case, the Dutch horizontal commitment on mode 4 service provision would be violated if the Dutch authorities would refuse the granting of a work permit to a posted worker in one of these sectors on the condition that the Dutch interest is not served.\textsuperscript{39}

Finally, it is important to note that the GATS does not affect a WTO Member’s right to maintain visa requirements, as long as that requirement does not nullify or impair the granted movement rights for natural persons. As such, the EU visa rules can still be applied.\textsuperscript{40}

\textbf{EU case law concerning the posting of workers}

As indicated above, the regime applying to posted employees of EU based businesses is quite different. The perceived tension between temporary service provision and national labour market policies is apparent from various ECJ cases where measures affecting the rights of businesses to post their staff in a Member State were at stake.\textsuperscript{41} The following measures are examples of measures used to control such movement in cases where the employee concerned is a third country national.\textsuperscript{42}

- Requirement of a work permit, or a specific posting visa to be obtained prior to arrival (ensuring job priority for EU national workers, compliance with social welfare rules, minimum wages, working conditions and the duration of contracts).
- Employment contract conditions, indefinite duration and in existence for certain amount of time before the employees are posted (necessary to protect the labour market by ensuring that the employee has lawful and regular employment and a stable link with the Member State of origin and the company reducing risks of exploitation, needed to avoid social dumping and to ensure return of the employee).
- Requirement of a residence permit (needed to control the movement of aliens).
- Passport valid for period of residence.

\textsuperscript{39} The EU and Dutch GATS schedules of commitments are described below.
\textsuperscript{40} GATS Annex on Movement of Natural Persons Supplying Services under the Agreement, article 4, fn 13; Council Regulation 539/2001 of 15 March 2001, listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ L 81 2001, p. 1.
\textsuperscript{41} Several of these cases are addressed in: Tans 2008.
- Information concerning the dates of beginning and ending of the posting, information concerning the business, its clients, identities of employees and remuneration.
- Evidence that wage and employment conditions, social security provision and affiliation to social security schemes covering sickness and accidents are met for duration of posting (preventing social dumping).
- Bank guarantees to cover the cost of repatriation at the end of the contract (providing security for employees).

As indicated by Guild, the motivations for such measures roughly fit into two categories:
- The risk of abuse of service provision to gain access to the labour market for third country nationals.
- The risk of exploitation of the employees who are posted.\(^{43}\)

While the ECJ recognized the validity of the objectives concerned, it ruled that none of these measures were proportionate to the aim they sought to ensure. In particular the ECJ indicated that concerns regarding the enforcement of labour protection rules could be met by requiring simple declarations from the employer. Similar, the conditions attached to the employment contract were found to be excessive for the protection of social welfare. In particularly, this is an obstacle for sectors where services to be provided necessitate a certain speed of action.\(^{44}\)

As was the case in the original *Rush Portuguesa* and *Vander Elst* judgments, the Court stressed that posted employees do not gain access to the labour market of the host state as they return to the country of origin when the service provision is completed. While legitimate control to prevent entry to the national labour market is allowed, this control should not render illusory the right to provide services which may not be made subject to the discretion of national authorities.\(^{45}\)

The outcome of these cases is reflected in Dutch law as the above described rules do not apply. A notification requirement applies when businesses established within the EU post their third country national employees to provide a service in the Netherlands.\(^{46}\) Notification should be prior to the posting and

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\(^{43}\) Guild 2008, p. 8. Immigration concerns could be added as well, however these in part relate to the same concerns, insofar as they do not address national security.

\(^{44}\) Commission v Germany, par. 35.

\(^{45}\) Commission v Luxembourg, par. 38.

\(^{46}\) Section 1e Decree implementing the Aliens Employment Act. See for an overview (in Dutch) the website of the Ministry of Social Affairs and Employment <www.szw.nl>.
provide reliable information regarding the business, the provided service and the identity of the employee. Along the lines of the ECJ case law, this regime only applies to third country nations legally employed and residing in the Member State where the service provider is established. Businesses engaged in the making available of labour are exempted and thus fall within the regime for employers’ not enjoying EU free movement of services rights.

While the mere requirement of a declaration is in line with the above described ECJ case law, the European Commission has threatened the Dutch authorities with an infringement procedure as failing to oblige with this notification requirement can lead to significant fines. Again, the idea is that foreign service providers are at a disadvantage compared to domestic service providers. The risk of a substantive fine if the notification does not comply with the national rules forms a disincentive to post foreign workers in the Netherlands.

The Dutch legal regime applying to posted workers of non-EU based businesses shows an interesting parallel with the measures deemed disproportionate by the ECJ. As indicated by Guild, the EU Member States have difficulties in accepting the idea that the extension of a businesses right to provide services, allowing its employees to fulfil the service contract, is not similar to providing access to the labour market. The rationale underpinning the two international legal orders aim for service liberalization is similar, the creation of equal conditions for competing foreign and national service providers. It should again be stressed that the WTO legal order has by no means arrived at the same level of liberalization. Nevertheless, the idea expressed here is that this is the ultimate aim.

In the next paragraph, this paper will examine the WTO method striving towards this aim, the principle of progressive liberalization through negotiations. As will be demonstrated, there is a clear difference between the expressed ambitions regarding services in general and temporary service migration in particular and the actual level of trade liberalization reached and currently offered in the WTO negotiations.

Surely this difference is related to WTO mechanism, the level of liberalization is to be raised through progressive liberalization; thus more commitments are required. As indicated before, the process towards the level playing field in service provision is incomparable. However, WTO Members are currently

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47 A questionnaire concerning the required information is available through the website of the Ministry of Social Affairs and Employment: <www.szw.nl>.

48 This category of service providers was exempted from the Rush Portuguesa decision, Rush Portuguesa, par. 16.


involved in the Doha Round negotiations aimed at additional commitments. Moreover, developing countries are providing pressure on developed countries to open up their services markets in the area of mode 4. Nevertheless, studying the EU’s (and other WTO Member’s) existing mode 4 commitment and the current offer in the Doha round demonstrates that progress in the WTO area currently is so modest that it becomes questionable whether the mentioned aim is actually sought. An examination of the rationale for this reluctance is provided below.

4. WTO service liberalization

Over the last three decades the growth in services trade, under the influence of globalization and new technological possibilities, has been spectacular. It had taken until the 1980’s before trade economist started to show interest in services and before that time, services were mostly considered non-tradable. Nevertheless, in 2002 services was calculated to account for 72 percent of Global Domestic Product (GDP) in developed countries and 49 percent in developing countries. In 2005 the services sector accounted for 2.4 trillion of the total 12.5 trillion in world exports, turning services exports into the fastest growing sector of trade exports. In 2005 Foreign Direct Investment in services had surpassed that in manufacturing. Moreover, gains from services liberalization are expected to provide higher gains than liberalization in goods. Protection levels are currently higher regarding trade in services which suggests more potential for gains. Additionally, services play a significant role in the economy and liberalization relating to intermediate services leads to positive effects for downstream manufacturing industries. Services play an important role in human societies and human de-

51 Note that this applies to trade economists; services had certainly not escaped the interest of economists in general. Services have, for example, interested classical economists such as Smith and Marx as opposed to goods in attempting to define productive labour, and economists interested in the idea of services undermining jobs by replacing labour through technological change, see for a brief summary: Bhagwati 1984, p. 133. For an account of the placing of services trade on the international trade agenda see: Drake and Nicolaïdis 1992, p. 45-53; see also Sapir 1999, p. 52.
52 UNCTAD 2002.
54 OECD 2005, p. 60.
56 See for an account on the significance of services in lower and higher developed economies, Fernandes 2008, p. 107-108.
57 Examples of service sectors in which spill over effects can be significant are transport, banking and insurances, IT services, advertising and wholesale and retail trading. See →
velopment as well. Affordable education, water, health and electricity and universal access are crucial factors for equal development in societies.\(^5\)

The enthusiasm surrounding potential trade in services through liberalization is strongly expressed regarding liberalization of trade in services based on mode 4. Estimations of economic growth that could stem from liberalization in mode 4 vary considerably, yet estimations are high indeed. Appave indicates that a yearly growth of 150 to 350 billion dollar in global gross domestic product (GDP) is possible, based on a modest form of liberalization in mode 4.\(^5\) While in 2005 trade in services based on the movement of natural persons was estimated at a mere one to two percent of total trade in services compared to the other three GATS modes, this also means that there is a huge potential for growth.\(^6\) Whalmsley and Winters estimate that when developed countries would allow entry of migrants equal to 3\% of the current work population a growth of 150 billion dollar in global GDP could be achieved.\(^6\)

The total number of migrants in 2005 was estimated at 185 to 190 million migrants of which some 85 to 95 million participate in the labour market in the host country.\(^6\) It is difficult to derive the impact of mode 4 on these migration flows as some countries do not calculate temporary workers when the duration of their stay is short. Moreover, migration statistics are not intended to calculate mode 4 movements as it does not fall within standard migration regulation schemes. Calculating the amount of people that provide a service abroad based on mode 4 is therefore difficult.\(^6\) However, it goes without saying that an increase in mode 4 trade would lead to an increase in temporary migration.

**Contrasting rhetoric**

These estimations are part of a broader trend. Many publications (in particular those from international organizations) emphasize that migration should be

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59 Appave 2005, p. 27; Martin 2006, p. v, who provides a critical perspective on these predicted gains.
60 WTO Annual Statistical Report 2005, p. 8; Winters 2003, p. 3. One should be cautious when using such figures as reliable and comparable data relating to mode 4 trade flows is lacking, WTO World Trade Report 2004 Exploring the Linkage between the Domestic Policy Environment and International Trade (Geneva: WTO 2004), p. 57. Nevertheless, it is safe to presume that current trade related to GATS mode 4 is still insignificant compared to other modes of supply.
61 Whalmsley & Winters 2005.
seen as an opportunity for development, a message also expressed by the European Union.64 As the estimated gains would benefit both developed and developing countries, temporary labour migration is often heralded as a remedy for poverty as well as a solution for shortages in work populations in developed countries.65 Moreover, the Doha Round agenda is specifically aimed at supporting developing WTO Members, hence the frequent referral to the Doha Development Round.66

The positive rhetoric derived from this ‘migration-development nexus’67 could fit in a broader EU policy objective. During and after the Uruguay Round, the EU strongly pushed for liberalization of services and the development of the GATS.68 As noted by Guild and Barth, during the 1990’s the EU saw trade in services for the developed European economies as the solution for the loss of manufacturing industries to developing countries.69 During the Lisbon summit, held in March 2000, the European Union Council expressed the intention to make the EU the most dynamic and competitive knowledge-based economy in the world by 2010.

Nevertheless, a dichotomy can be perceived within EU policies concerning the focus on trade in services and the restrictive external border policy.70 As

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65 UN 2004, p 127.

66 Defining services has been a topic of considerable debate within the Group of Negotiating on Services. Defining services touches the blurry and politically sensitive lines between trade in services on the one hand, and immigration or foreign direct investment on the other. Developed countries sought the inclusion of meaningful portfolio investment. This provided an opening for developing countries which were keen on including labour flows into the GATS framework. The result was the inclusion of both capital and labour, be it restricted to a temporary duration and a specific purpose, Drake & Nicolaidis 1992, p. 72-73; Lang 2009, p. 161. However, as is evident from the schedules of commitments, mode 3 has received far more attention than mode 4.


68 The development of the negotiating position of the European Community during the Uruguay round is thoroughly described in Drake & Nicolaidis 1992, see in particular: p. 77-80; Guild & Barth 1999, p. 397.

69 Guild & Barth 1999, p. 397.

70 See for an interesting account dealing with this dichotomy, Chetail 2008.
such this positive rhetoric is not reflected in the current GATS mode 4 commitments or in the current offers in the WTO Doha Round negotiations.\textsuperscript{71}

**Current mode 4 commitments**

The market access and national treatment obligations form the heart of GATS liberalization. However, these provisions are not general obligations. A Member specifically adopts commitments which indicate the service sectors and modes of supply to which these obligations apply, the so called positive listing approach. These commitments can be seen as Member’s contractual promises to open their services markets to foreign trade. Note that limitations to commitments follow a negative listing approach, if a Member wants to exclude certain measures from these obligations this must be explicitly indicated in their schedules.

Mode 4 liberalization is generally limited to a level below existing temporary labour schemes, as is apparent from several studies analyzing existing commitments negotiated and scheduled during the Uruguay Round negotiations.\textsuperscript{72} The modest liberalization achieved during the Uruguay Round can be explained by the fact that negotiations focused first on the question whether services should be included in the multilateral trading system, and then on the drafting of the GATS itself. As the Uruguay Round negotiations had to be concluded by the end of 1993, there was little time left for negotiating commitments.\textsuperscript{73}

**Future commitments, the Doha Round**

The GATS approach aims at a progressively higher level of liberalization through effective market access.\textsuperscript{74} As such, article XIX GATS commits Members to enter into successive rounds of liberalization negotiations, to commence no later than five years from the date of entry into force of the WTO Agreement. Currently, these negotiations take place within the Doha Round. The Doha negotiations are different in substance and nature when compared to the Ur-

\textsuperscript{71} Carzaniga 2003, p 24; Adlung & Roy 2005, p 1171-1172. When studying the schedules of commitments it is crucial to realize that the normal negative list approach towards scheduling limitations has been reversed for mode 4. Thus the few commitments that have been made are usually severely limited.

\textsuperscript{72} Examples of such studies are: Altinger & Enders 1996; Adlung & Roy 2005. See also: Chaudhuri, Mattoo & Self 2004; Leal-Arcas 2008, p. 19.

\textsuperscript{73} The services negotiations suffered from opposition by developing countries to the inclusion of services in the negotiating round and the novelty and technical complexity of the subject, Adlung & Roy 2005, p. 1163.

\textsuperscript{74} Article XIX:1 GATS.
guay Round. The aim of the Doha Round is to extend liberalization and complement the GATS rules where the Uruguay Round left them incomplete.\textsuperscript{75}

However, so far little progress was achieved. The latest failed attempt at a successful conclusion of the Doha Round was in June 2008.\textsuperscript{76} Studying the current offers, in particular the EU’s offer regarding mode 4 reveals little progress. It is important to note that offers during a negotiating round do not bind WTO members, thus until the round is completed, changes might occur.\textsuperscript{77}

Besides five (three groups and two individual Member States) extremely confusing differentiations in the definition of intra-corporate transfers (relating to the question where the commercial presence, wishing to transfer one of its employees, is established), the EU offer notably now includes graduate trainees as a new group of intra-corporate transfers.\textsuperscript{78} Furthermore, an entirely new category of contractual service suppliers, independent professionals, is included allowing access to seven service sectors, be it under several limitations.\textsuperscript{79}

Regarding the posting of employees by contractual service suppliers, the service sectors where contractual service suppliers and their personnel are now welcome (though the severe limitations remain similar) are extended with the following sectors:\textsuperscript{80}

- Bookkeeping services.
- Related scientific and technical consulting services (relating to technical testing and analysis services).
- Maintenance and repair of equipment in the context of an after-sales or after-lease services contract.
- Environmental services.

\textsuperscript{75} Leal-Arcas 2008, p. 10-11.
\textsuperscript{76} The 2008 Geneva mini-Ministerial began on 21 July and ended unsuccessful in a collapse on 29 July. See: Bridges Daily Update WTO Mini-Ministerial, Geneva, issues 1-10, July 2008 available online through the ICTSD website <www.ictsd.net>.
\textsuperscript{77} See: WTO (TNC) 2008, par. 4; Persin notes that the EU offer on mode 4 is more generous than those of other WTO Members, Persin 2008, p. 840, fn 2. Speculating, in the light of offers from other developed countries, the EU might backtrack on its current offer.
\textsuperscript{78} Other minor, and from a terminology perspective positive changes are renaming intra-corporate transferees to intra-corporate transfers and the inclusion of the titles ‘managers’ and ‘specialists’ as common nominators for the old two categories of intra-corporate transferees i(a) and i(b).
\textsuperscript{79} WTO (CTS) 2005 Conditional Revised Offer EU Horizontal Section.
\textsuperscript{80} WTO (CTS) 2005 Conditional Revised Offer EU Horizontal Section.
5. Reluctance relating to service migration

Several attempts have been made to indicate the reasons why results so far have been limited. Besides the above explained lack of time during the Uruguay Round, scheduling under the current level of unilateral liberalization leaves room to maneuver in the WTO negotiation process. The difference between commitment and the current level of openness in services sectors can be used as bargaining material when requesting commitments from other Members.

A thorough overview is provided by Adlung and Roy who list several factors possibly providing disincentives to negotiate and schedule commitments:

- Services commitments may incur more costs and time to be implemented as they can require changes in regulations and the creation of administrative bodies.
- Various governmental departments may share competences required to liberalize trade in services, leading to coordination problems.
- A lack of information and commercial interest: national positions in trade negotiations tend to reflect internal balance of country in protection seeking and liberalizing interests. Producers are usually better organized than consumers, thus they tend to carry more political weight. Border protection and high costs of basic consumer needs (food) provide a good example as even a tariff equivalent of several hundred percent in OECD countries does not lead to resistance. Education and basic health are very different due to social policy which drives a wig between supply and demand. This leads to an even lower incentive for consumers to press for efficient resource use. On the other hand, providers usually denounce competition as a threat to those basic policy objectives.
- The GATS might be too complicated, thus basic information concerning the benefits of liberalization might be missing. This lack of support from export industries leaves only the protectionist voice;
- Specifically regarding mode 4, restrictions are easy to enforce due to strict immigration controls. Regarding mode 4 there is continuing heavy resistance.82

81 Roy provides an analysis of possible motivations for governments to undertake different levels of market access commitments under the GATS. He suggests four key determinants: democracy (democratic states realize legal implications and value locking-in effect of commitments), relative power (powerful states undertake more commitments), relative abundance in human capital (providing a comparative advantage in services) and the negotiating process (WTO Members that joined later have undertaken more services commitments), Roy 2009, p. 2.

This last argument is interesting regarding the topic at hand. In general, and particularly regarding temporary service migration rights, adopting a more liberal access scheme is different from binding that scheme in a commitment. When economic conditions change a state has the option to re-instate restrictions. This option is no longer available after binding the current measures or policy by inscribing them in the schedules of commitments.83

Yet, as is evident from the above described reluctance to abolish measures deemed contrary to the EU freedom to provide services, the heart of resistance regarding mode 4 liberalization is likely the sensitivity of this form of trade liberalization. This sensitivity is derived from the proximity to labour migration policies and immigration policies. This is also evident from the rather apparent denial of this proximity when mode 4 is discussed. As such, the GATS specifically indicates that mode 4 concerns temporary service provision and not the liberalization of labour.84 As quoted by Persin: ‘even though Mode 4 is not a migration category or concept, it is in practice regulated by migration policies including visa requirements’.85

Social dumping and labour market protection

The concept of social dumping can be explained as follows. Developed countries argue that the liberalization of international trade, in some way has to be connected to labour law. The argument is based on the thought that weak labour law regulation leads to a competitive advantage in relation to countries with a higher level protection. Low wage countries claim the opposite, a connection between liberalization of trade flows from protectionism and would negate a legitimate comparative advantage.86

From a services perspective social dumping has a different form.87 Through liberalization low wage workers become available in countries where before liberalization companies could only use expensive domestic workers. This ap-

83 UN Millennium Project 2005, p. 87. While it is possible to withdraw commitments, the GATS rules prescribe that a compensating commitment needs to be negotiated, see: GATS article XXI. Persin provides an interesting study based on the United Kingdom’s reluctance to increase its mode 4 commitments, while it did allow movement of labour from the new EU Member States before this was obligatory. Her main conclusion relates to the argument that mode 4 commitments are binding, thus lacking flexibility required in labour market policies, Persin 2008.
85 Persin 2008, p. 841.
86 Servais 1989, p. 423; Langille 1997, p. 29-31; Florkowski 2006, p. 54. Many developing countries underline this viewpoint, for instance the Association of South-East Asian Nations (ASEAN) and India, see: Mah 1998, p 292-302, p. 292.
plies to local companies as well as to companies established abroad operating within the country through the posting of personnel.\textsuperscript{88}

The idea is that migrants are willing to work for lower wages and under worse circumstances than local employees. Attracting personnel from abroad influences the local level of wages even if wage parity is ensured. Normally, a shortage in personnel will lead to an increase in the level of wages. However, the possibility to employ foreign workers will disrupt this process.\textsuperscript{89} Possibilities to employing workers from abroad could also lead to job loss for local workers. From a human rights perspective an opposite fear is expressed, providing foreign workers with a lower wage violates the principle of non-discrimination.\textsuperscript{90}

Consequently, fear over migrants unfairly competing with domestic workers, and fear regarding job loss in general have lead to the adoption of restrictive migration policies in an attempt to protect domestic labour markets.\textsuperscript{91} It is interesting to point to the aims of the above described Dutch legislation concerning the employment of aliens which contain \textit{inter alia} a restrictive policy of access for labour migrants and combating illegal labour.\textsuperscript{92}

Whether these fears over mode 4 trade liberalization are justified depends on the conditions that apply to the commitments. Countries can simply inscribe mode 4 commitments with the condition that service providers from abroad have to be paid a minimum wage or at wage parity. The application of national labour standards regulation can be ensured in this manner as well. Most WTO Members that have adopted mode 4 concessions, including the EU, have included language to ensure wage parity and equal working conditions for GATS migrants.\textsuperscript{93}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{88} Gray 2005, p. 13.
\item \textsuperscript{89} Martin 2006, p. 7 and 12.
\item \textsuperscript{90} Trebilcock and Howse argue that fear of job loss and pressure on social security is unwarranted, except regarding job loss for the lowest wage jobs, as long as migration is guided orderly, Trebilcock & Howse 2005, p. 614-615. Martin is far more critical, regarding mode 4 advantages, Martin 2006. See also: Edström 2006, p. 131.
\item \textsuperscript{91} Dommen 2005, first paragraph.
\item \textsuperscript{92} Dutch parliament: Kamerstukken II 1993/94, 23 574, nr. 3 (memorie van toelichting), p. 4.
\item \textsuperscript{93} Dommen 2005, paragraph on wage and working conditions. The EU has firmly protected itself by indicating that \textquoteleft[a]ll other requirements of Community and Member States' laws and regulations regarding entry, stay, work and social security measures shall continue to apply, including regulations concerning period of stay, minimum wages as well as collective wage agreements.' EU schedule of commitments, horizontal section.
\end{itemize}
\end{footnotesize}
Conclusion

Traditionally trade negotiations are aimed at the reduction of obstructive border measures. However, WTO obligations now ‘reach beyond the border’ and are increasingly aimed at the removal of barriers to trade derived from domestic regulation.

This paper has investigated the intention of two international legal orders to liberalize trade in services, including the movement of posted workers. In particular, it has sought to move beyond the implementation of specific norms. Both international agreements seek the creation of a level playing field for foreign and domestic competitors. Yet creating this level playing field for services migration clearly requires a step far beyond the current level of openness in immigration and labour market policies.

The EU legal order imperatively requires the Member States to take this required step. Contrary, the WTO legal order is based on progressive liberalization reached through reciprocal trade negotiation. Studying the EU’s schedule of specific commitments and the revised offer is extremely challenging due to an excessive amount of limitations, which moreover vary between the Member States. The schedule and the negotiation process reveals considerate reluctance to open this particular service market, a reluctance strongly influenced by proximity to labour market policies.

As concerns relating to social dumping can be addressed through the application of national and EU laws to posted employees, these concerns should not play the major role they currently have in developed countries. Potential gains from mode 4 liberalization are significant and WTO Member states have indicated their willingness to contribute to the migration-development nexus. Adding a few service sectors to a small list of heavily limited categories of natural persons providing services will make the process slow indeed.
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