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Domestic Regulation and Visa Regime: An Unsustainable Interaction

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DOMESTIC REGULATION UNDER GATS AND THE LEGAL REGIME: AN UNSUSTAINABLE INTERACTION

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ABSTRACT

The increase in demand for skilled labor has made Mode 4 of service supply, i.e. supply through the 'presence of natural persons' important for the developing countries. Since service supply through Mode 4 requires the physical "presence of natural persons", it is impossible without gaining entry into the territory of another Member country (i.e. without qualifying another Member's immigration or border measures). Such border measures often involve cumbersome application procedures, elongated processing times, high visa fees which remains non-refundable, no recourse to appeal on rejection of visa, etc. and are serious impediment to the supply of service through Mode 4. This paper examines the interplay between the visa requirements for temporary presence of service suppliers and the domestic regulation disciplines under the GATS. Further, the paper also explores the possibility of certain visa administrative procedures may be streamlined under the domestic regulations' disciplines pursuant to Art. VI:4 of the GATS and the plausible options to address this interaction.

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I. INTRODUCTION

Services trade has witnessed an unprecedented growth in the recent times. The share of services trade constitutes about one-fourth of world trade and could trigger a new wave of trade globalization.[1] In fact, the World Bank has predicted that services trade is likely to contribute more in poverty reduction than agriculture and manufacturing.[2] Services trade essentially occurs through four modes; cross border trade in services, consumption abroad, commercial presence and the presence of natural persons.

There has been an increasing interest in the supply of services through the presence of natural persons for certain developing countries, including India. The developed countries traditionally have had an advantage in trade in services in general and skilled workforce in particular. However, certain developing countries, owing to the advancement in technology and other factors like labor surplus, have caught up with their developed counterparts. As such, they now have a relatively higher potential in services trade, specifically for supply of services through the presence of natural persons. However, even after two and a half decades of the General Agreement on Trade in Services ("**GATS**") coming into force, the developing countries have not been able to utilize their underlying potential in trade in services, particularly service-supply through the presence of natural persons.

There are various factors for the inability of the developing countries in harnessing their potential. One major factor is the lack of market access commitments in Mode 4 by developed Members. Another decisive factor is the domestic regulations of the Members. Domestic regulations are measures of general application which affect services trade and may include certain procedural and substantive requirements such as licensing requirements and procedures, qualification requirements and procedures, etc. These measures streamline the standardisation of services and service suppliers.

Domestic Regulations do not impede market access or national treatment commitments of Members *per se* but can have a real defeating effect, if not implemented properly. In fact, the current issue surrounding the liberalisation of the trade in services is the impasse of Working Party on Domestic Regulations (WPDR) under the GATS Art. VI:4. The non-standardisation of domestic regulations has the maximum impact on the mobility of service suppliers from the territory of one member to

[1] Prakash Loungani, Saurabh Mishra, Chris Papageorgiou, and Ke Wang, *World Trade in Services: Evidence from a New Dataset, IMF Working Paper*, WP/17/77, (March, 2017).
[2] World Bank Presentation, *Role of Services in Economic Development*, Geneva, July 2012 (World Bank, 2010).

that of another.[3] In fact, that Domestic regulations have had limiting effects on the mobility of services suppliers remains uncontested.

In the backdrop of the above, this Paper critically examines the issue of entry barriers faced by service suppliers as natural persons vis-à-vis the visa regimes of Members. In particular, the Paper examines the overlap of the visa requirements and other entry barriers with domestic regulations under the GATS. While exploring the available options for making Mode 4 of service-supply more streamlined, the paper looks at the possibility of visa requirements being covered by the disciplines developed pursuant to Art. VI:4. The Paper has also analysed whether the Working Party on Domestic Regulations ("**WPDR**") at the WTO is the appropriate forum or if there could be an alternate plurilateral approach to resolving this issue.

II. SHORTAGE OF SKILLED WORKFORCE IN THE DEVELOPED COUNTRIES AND MIGRATION

The European Migration Network in its report entitled *Determining labour shortages and the need for labour migration from third countries* has pointed out that with technological advancement, finding workers with "relevant qualifications" has become a challenge.[4] This need is more pronounced because of the declining population and the ageing workforce in Europe. The report clearly states that while the various EU instruments are successful in predicting the labour shortages that the various EU Members would face, they have not really considered "migration" as a tool to address the challenge. Although scarcity of workers with relevant qualifications appears to be a major challenge afflicting European competitiveness, concerns regarding local workers far outweigh the challenge of labour shortages. The Report reveals that the limited applicability of the EU's Blue Card Directive[5] is one reason why the EU's efforts to attract skilled workers from third countries was successful only to a limited extent. Another factor responsible for the lack of attraction of skilled workers from third countries was the various EU legislative instruments.

This trend persists in other countries also, including the United States, Australia, etc. where the domestic legal and regulatory framework makes it challenging for employers to hire skilled workers from abroad. In fact, the recent shift in the immigration policy by the Trump-led US administration is largely aimed at protecting the competitiveness of the local workers (both skilled and semi-skilled). In Australia, every year, the Department of Home Affairs publishes different occupation lists for enabling and attracting foreign workers in different professions. Although the list usually remains predicable, the government has complete autonomy on the professions that it opens up each year for foreign workers and the requirements they need to fulfil.

Interestingly, it is predicted that the shortage of semi-skilled and skilled workers in these countries may increase rapidly. Despite such predictions, the countries seem to be very protectionist insofar as the movement of natural persons is concerned. (This issue is relevant under the GATS as it concerns temporary movement of skilled workers and Members have undertaken horizontal commitments in Mode 4 for categories such as highly specialized workers, specialists, etc.). The

[3] *Id*.

[4] European Migration Network, *Determining labour shortages and the need for labour migration from third countries in the EU*: Synthesis Report for the EMN Focussed Study 2015, <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/whatdo/networks/european_migration_network/reports/docs/emnstudies/emn_labour_shortages_synthesis__final.pdf > (last accessed June 2, 2019).

[5] EU Blue Card Directive aims to streamline entry and residence conditions for highly-qualified non-EU nationals wishing to work in a highly-qualified job in an EU country (other than Denmark and the United Kingdom), and for their families. *See*, EU Blue Card – entry and residence of highly qualified workers, Directive 2009/50/EC on the conditions of entry and residence of third country nationals for the purposes of highly qualified content. (May 25, 2009).

limited market access in Mode 4 under the GATS is also significantly impeded because of entry barriers. In today's era, with increasing digitization and technological advancement, domestic regulatory regimes including application procedures and other administrative measures, are becoming increasingly streamlined. Even developing countries are using it as a tool to attract more investment by cutting down red-tapism, facilitating trade, etc. In such a scenario, entry barriers by developed countries seem even more prominent and the need is felt increasingly to address the issue. The following part examines the visa requirements of Members in juxtaposition with the mandate of domestic regulation disciplines under Art. VI:4 of the GATS.

III. INTERPLAY BETWEEN VISA REGIMES OF MEMBERS AND THE DOMESTIC REGULATIONS

The supply of service through the presence of natural persons (otherwise known as Mode 4 of service-supply) essentially requires the service supplier's presence in the territory of the service consumer. As this mode requires entry and physical presence of a natural person in the service consumer's territory, many trade barriers exist. These barriers are primarily in the form of domestic regulations and related visa administrative procedures.

In general, there could be many restrictions that affect the liberalisation of trade in services through the presence of natural persons. However, for the purpose of this Paper, there are two main restrictive practices; (a) immigration measures such as visa administrative procedures that regulate the entry and stay of the service supplier and (b) regulations that govern technical standards, qualification and licensing requirements and procedure of the service supplier.

Visa regime or immigration measures are primarily the domestic regulatory measures that affect the trade in services through the presence of natural persons. They also act as the primary barriers on the entry and stay of natural persons for the delivery of services. These restrictions are generally in the form of strict eligibility conditions for applications of work permits/visas, cumbersome procedures for actual application and processing of these visa and permits, limitations on the length of stay and transferability of employment in the overseas market. [6]

It needs to be emphasized that the supply of service through the presence of natural persons subsumes entry, since presence without entry is meaningless. In fact, presence can't be envisaged without providing entry. However, entry in itself is not absolute i.e. it is regulated and even though there are commitments taken under the GATS for certain sectors, entry in those sectors is also not automated. To gain entry, an individual service supplier has to fulfil the immigration or border measures. The Annex on the Movement of Natural Persons ("**Annex on MoNP**") provides Members with the right to regulate entry through immigration measures, provided such measures do not nullify or impair the commitments.

Since entry is not absolute, one of the major obstacles part of immigration measures is the requirement of meeting the professional requirements to be eligible for visa. To this extent, there is substantial overlap between the domestic regulations and visa requirements. However, Members differ on whether the visa regime is or could be included within the disciplines under Art. VI:4 of the GATS. Art. VI:4 of the GATS provides:

> 4. With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute

[6] Rupa Chanda, *Movement of Natural Persons and Trade in Services: Liberalizing Temporary Movement of Labour under the GATS*', p. 10 < http:>//icrier.org/pdf/RupaCh.pdf > (last accessed June 6, 2019)

> unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, *inter alia*:
> (a) based on objective and transparent criteria, such as competence and the ability to supply the service;
> (b) not more burdensome than necessary to ensure the quality of the service;
> (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

The very objective of Art. VI of the GATS is to ensure that non-discriminatory measures relating to domestic regulation and disciplines governing Mode 4 related procedural aspects do not result in abuse of the market access commitments of Members.7 In particular, Art. VI.4 along with the Decision on Domestic Regulation (S/L/70)[8] provides for the development of disciplines to ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements and procedures do not constitute unnecessary barriers to trade in services. It also specifies that the domestic regulatory measures should not be more burdensome than necessary to ensure the quality of the service. This is known as the necessity test.

Before applying the necessity test under Art. VI.4, it must be established that the measure in question is related to one of the five categories listed in Art. VI.4, i.e., 'qualification requirements', 'qualification procedures', 'licensing requirements', 'licensing procedures' or 'technical standards'. Thus, in the present context, the prerequisite is to establish that administration of visa is related to the five categories mentioned within Art. VI.4.

The abovementioned issue has also been a critical point of discussion in the WPDR at the WTO. In 2005, Columbia presented a Communication Paper to the WPDR raising questions on the points of overlap between the visa administrative measures governing temporary/short-term service suppliers and the disciplines of Art. VI:4 of the GATS.[9] The paper *inter alia* highlights that the administrative measures relating to visa (or entry permit procedures for natural persons) constitute one major impediment for services supply and thus undermines the value of Members' market access commitments. Without questioning the right of visa requirement, Columbia has expressed concerns on the complex and discretionary administrative procedures that impede service supply through Mode 4. Such procedures include retaining of passport for up to two months due to administrative requirements or visa appointments in certain cases extending to eight months.[10] In principle, without questioning the fact of requiring a visa, Colombia's main concern revolves around "the administrative procedures involved in applying for and obtaining a visa or entry permit, to the extent that they constitute trade barriers which could nullify or impair the benefits accruing to a Member".[11]

In this context, visa administrative procedures could be said to include the following:

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[7] If domestic regulations make it too costly for foreign suppliers to enter a market and offer their services, these regulations have a negative effect on real market access. p. 168; *See* South Centre, *Domestic Regulation in Services (Art.VI.4): Analysing the Proposal and Implications for Africa and Developing Country*, p.11 https://www.southcentre.int/wp-content/uploads/2017/09/Ev_170925_SC-Workshop-on-E-Commerce-and-Domestic-Regulation_Presentation-Informal-Note-on-Domestic-Regulation-9-June-2017-Aileen-Kwa_EN.pdf (last accessed on 5 June, 2019).

[8] Trade in Services, Decision on Domestic Regulation, *Adopted by the Council for Trade in Services on 26 April 1999*., S/L/70 (April 28, 1999).

[9] *See generally*, Working Party on Domestic Regulation, Communication from Columbia, *Examples of Measures Relating to Administrative Procedures for Obtaining Visas or Entry Permits*, S/WPDR/W/29 (July 7, 2004).

[10] *Id*.

[11] *Id*, ¶ 14.

(i) visa application and processing procedures;
(ii) time frames for processing of visa application; and
(iii) documentation required for visa application, etc

These measures particularly come into play when the verification of an applicant's qualifications acquired in another country occurs at the stage of visa processing. The situations in which measures relating to visa administration can be considered as "relating to qualification procedures/requirements or licensing procedures/requirements" would include cases of the following nature:

(i) Grant of a license is subject to the duration of stay of a service supplier- In such cases, the grant of visa in effect is a prerequisite to obtaining or renewing a license;
(ii) Certain examinations are required to be qualified prior to obtaining visa- This would include language tests where the language is not necessarily a prerequisite for the supply of the service in issue;
(iii) Visa requires specific educational qualifications (e.g. engineering degree from internationally recognized institutions such as those part of the Washington Accord, etc.); and
(iv) Visa is subject to eligibility requirements such as no prior-cancelled visa application, no prior identical visa, etc.

It is significant to note that in the abovementioned situations, visa administration directly impinges upon the ability to supply a service. In principle, the abovementioned requirements would therefore constitute measures relating to "qualification requirements/procedures or licensing requirements/ procedures". Although in certain instances, they may not seem to be exclusively and directly fall into one of the categories mentioned in Art. VI.4, the requirement of Art. VI.4 would still get fulfilled if it is established that they "relate to" those categories.

In fact, there is ample WTO jurisprudence on the term "relate to" or "relating to". When determining the scope of Art. VI.4, the phrase "relating to" has been interpreted in its generic nature. Importantly, in *China- Rare Earths*, the Panel explained the meaning of "relating to" in the following manner:

> [w]hatever the term's precise definition, measures can "relate to" the conservation of exhaustible natural resources even if they do not explicitly apply to those resources… The Panel agrees with the parties that measures may "relate to the conservation of exhaustible natural resources" even if they are not imposed directly upon those resources.[12]

On the same point, the Appellate Body in *US-Gasoline* found that since the measures were designed to support "the objective of stabilizing and preventing further deterioration of the level of air pollution", such measures were "primarily" and not "merely incidentally or inadvertently aimed at the conservation of clean air".[13] The Appellate Body made the following observation:

> In our view, this means that the measures for which Article XX(g) is invoked need not be imposed directly on an "exhaustible natural resource", provided that they support or contribute to the conservation of an exhaustible natural resource. In the Panel's view, therefore, the subject matter of measures contemplated by

[12] Panel Report, *China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum*, W/DS431/R, (March 26, 2014), ¶ 7.250.
[13] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, (April 19, 1996), ¶ 3 at p.18 and p.19.

> Article XX(g) is not limited to raw natural resources, so long as the object of the concerned measures is to conserve, directly or indirectly, such raw natural resources. [14]

Essentially, the WTO Panels and Appellate Body have treated measures as "related to" one another where the measure

(i) is primarily aimed at the goals that it seeks to achieve; or
(ii) has a rational connection with the goals that it seeks to achieve; or
(iii) a substantial, genuine and close link with the goals that it seeks to achieve.

In the present case, if a visa administrative measure includes certain qualification/licensing procedures and/or requirements, such elements are in furtherance of ensuring the quality of a service and the service supplier. Therefore, they will be considered as "rationally connected to" or having a "genuine link" with the five categories mentioned in Art. VI.4.

This is corroborated by the fact that the language of Art. VI.4 explicitly employs the words "measures relating to" as against "measures affecting" or "measures on" the five categories included therein. This is because there could be measures that might not directly regulate or govern the five categories in Art. VI.4 but in effect do so. Considering the context of the objective of Art. VI, this interpretation cannot be considered far-fetched. The use of words "relating to" instead of "on" or "affecting" implies that a link between a measure and the five disciplines would be sufficient/adequate to bring it within the ambit of Art. VI.4 and therefore subject it to the disciplines developing thereunder.

It must be noted that many countries' visa categories involve a points-based qualification system which is substantially linked to the employment requirements *such as* salary threshold *or* language proficiency and would thus be covered by the disciplines of Art. VI.4.[15] Importantly, the GATS Annex on MoNP for supplying services suggests that visa measures should not be applied in a manner that nullifies or impairs the benefits accruing to a Member due to specific commitments undertaken.[16] This is an explicit recognition of the fact that visa measures could in fact be applied in a trade-restrictive manner. However, this would only be to the extent that visa measures hamper the recognition of qualification procedures/requirements or licensing procedures/requirements.[17]

The communication from Columbia didn't receive much traction and the conversation relating to the interplay between visa procedures and domestic regulations had almost died. Again, in early 2019, India brought this issue into the mainstream foray. The communication paper tabled by India on March 8, 2019 suggested that the domestic regulations should not themselves constitute an unjustifiable impediment to the movement of natural persons. These domestic regulation principles should apply to the application procedures and requirements for temporary entry of a service supplier related to the fulfilment of domestic regulations under Art. VI:4 of the GATS.[18] On the

[14] *Id*.
[15] In most of these cases, the status of the "independent professional" is determinative of whether the activity in question is a service supply or employment. The same activity could be an employment or a service depending upon the terms of contract between the independent professional and the foreign client/employer.
[16] Annex on Movement of Natural Persons, ¶ 4.
[17] World Trade Organization, Working Party on Domestic Regulation, *Report on the Meeting held on 24 June 2004*, Note by the Secretariat, S/WPDR/M/27 (November 15, 2004).
[18] *See generally*, Working Party on Domestic Regulation, Communication from India, *GATS Article VI:4- Disciplines for Supply of a Service Through the Presence of a Natural Person of a Member in the Territory of Another Member*, S/WPDR/W/61/Rev.1 (March 8, 2019).

other hand, the developed countries have argued that the scope of Art. VI:4 cannot be extended to cover visa administrative procedures, since while being of an administrative nature, these provide only a formal right to enter the market.[19] Furthermore, GATS Annex on Movement of Natural Persons in para 4 states that visa measures should not be applied in a manner that nullifies or impairs the benefits accruing to a Member due to specific commitments undertaken. Japan in its communication paper has also mentioned about the need to examine the measures relating to entry of natural persons within the ambit of licensing requirements and procedures, qualification requirements and procedures and technical standards.[20]

IV. EXISTING MEASURES THAT STREAMLINE ENTRY

1. EU Blue Card

The Blue Card is an EU-wide work permit, introduced by Council Directive 2009/50/EC. The permit allows highly skilled non-EU citizens to work and reside in any Member State of the European Union, except Denmark, Ireland and the United Kingdom, which are not part of the abovementioned proposal.

The President of the European Commission, José Manuel Barroso and the Commissioner for Justice, Freedom and Security, Franco Frattini, presented the abovementioned Proposal at a press conference in Strasbourg on October 23, 2007. The former explained the motives behind the proposal as follows:

> The EU's future lack of labour and skills; the difficulty for third country workers to move between different member states for work purposes; the conflicting admission procedures for the 27 different member states, and the "rights gap" between EU citizens and legal immigrants.

This proposal was accompanied with another proposal [COM(2007)638] for the simplification of application procedures and common rights for third country workers.[21] While this was a remarkable initiative on the part of EU to address labour shortage and to provide more security to migrant workers from third countries, whether it is successful in increasing opportunities for the run-of-the-mill prospective service suppliers from developing countries is questionable. The prerequisites for a Blue Card include: a work contract or binding job offer with a salary of at least 1.5 times the average gross annual salary paid in the Member State, a valid travel document (and in specific cases a valid residence permit or a national long-term visa) and documents proving the relevant higher professional qualifications. Overall, whether the Blue Card initiative has been a gainful attempt by the EU Member States is arguable.[22]

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[19] *See*, World Trade Organisation, Working Party on Domestic Regulations, *Report on the Meeting Held on 24 June 2004*, S/WPDR/M/26, (September 8, 2004).

[20]*See*, *Working Party on Domestic Regulations*, Communication from Japan, *Draft Annex on Domestic Regulation*, JOB(03)/45/Rev.1, (May 2, 2003)

[21] Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, COM(2007) 638 final (October 23, 2007).

[22] Germany enacted the Blue Card legislation partially in April 2012. The requirements focused primarily on language skills and areas of need such as engineering, mathematics and IT. As of January 2014, 7,000 Blue Cards had been issued and 4,000 out of the total 7000 cards were issued to foreigners who already resided in Germany. Strikingly, as of January 1, 2018, Germany could not issue Blue Cards for third country workers that are eligible considering their experience.

2. APEC Business Travel Card

The APEC Business Travel Card (ABTC) was an initiative taken by the APEC[23] Member countries to streamline entry procedures of business travelers within the APEC region. A "verified business person" engaged in APEC business means "a person engaged in the trade of goods, the provision of services or the conduct of investment activities in the APEC region".[24] Amongst other things, one advantage of the ABTC is that it expedites the US visa-interview process for business travelers. The 'apply once, information used for multiple purposes' approach is used which means that applicants are only required to make one application for permission to enter participating economies. Successful applicants from fully participating economies are issued with a five-year card that serves as the entry authority to other fully participating economies which have granted pre-clearance for short-term business travels of up to sixty or ninety days. Interestingly, Canada and the US are mere transitional members of the ABTC scheme, which implies that they do not offer reciprocal entry arrangements, but provide a more streamlined and faster immigration processing at major international airports.

The EU Blue card and the ABTC schemes are significant initiatives taken by various countries to address concerns of labour shortage and streamlining the entry procedures in different countries. The ABTC is particularly relevant in this regard as it is specifically aimed at the category of "business travellers", and includes service suppliers. The EU Blue Card and ABTC initiative underline the need felt by countries to expedite procedures for temporary movement and stay of natural persons.

V. RECOMMENDATIONS

As the market access negotiations await a breakthrough, it has become imperative for developing countries to get their Mode 4 interests addressed. In fact, the lack of any serious efforts by developed countries to proceed on Market Access negotiations on Mode 4 could be said to be defeating the principles laid down in the Preamble[25] and Art. IV of the GATS. Art. IV provides for facilitation of "increasing participation of developing country Members through negotiated specific commitments relating to…the liberalization of market access in sectors and modes of supply of export interest to them".

As already pointed out, few developing countries such as Columbia have put forth communication papers seeking to expand the discussions regarding the scope of Art. VI:4 disciplines. In fact, though not for inclusion of visa measure, Canada has also raised concerns regarding transparency of Mode 4 commitments.[26] It is understood that measures relating to visa and entry would inherently fall within the domain of domestic regulatory space and so to that extent would constitute exercise of the sovereign powers of a Member. However, it cannot be denied that Members in exercise of their sovereign rights, signed the GATS and thereby agreed to abide by certain rules and principles to ensure fairness, transparency and predictability in trade in services. Also, as certain Members have

[23] APEC, the Asia-Pacific Economic Cooperation, is an economic forum whose primary goal is to support sustainable economic growth and prosperity in the Asia-Pacific region. The United States is one of 21 APEC member economies, which include: Australia, Brunei Darussalam, Canada, Chile, China, Hong Kong China, Indonesia, Japan, Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, Philippines, Russia, Singapore, Chinese Taipei, Thailand and Vietnam.

[24] Asia-Pacific Economic Cooperation, <https://www.apec.org/Groups/Committee-on-Trade-and-Investment/Business-Mobility-Group/ABTC> (last accessed June 7, 2019).

[25] Desiring to facilitate the increasing participation of developing countries in trade in services and the expansion of their service exports including, inter alia, through the strengthening of their domestic services capacity and its efficiency and competitiveness.

[26] See, Council for Trade in Services Special Session, Working Party on Domestic Regulation, Communication from Canada, *Transparency Template - Canada's Revised Horizontal Mode 4 Offer*, TN/S/W/42 S/WPDR/W/33, (May 25, 2005).

put forth from time to time, the elements of Art. VI:4 disciplines have not been very clear. Stating simply, when a visa procedure requires a prospective service supplier to establish his qualification credentials or to submit a valid license, it perhaps enters the domain of Art. VI:4.

It, therefore, appears a rational option for Members to agree on including certain parts or stages of these procedures as being governed by the disciplines laid down under Art. VI:4. In fact, the ABTC initiative in which the US has expedited and fast tracked its visa interview procedures reveals the need for further liberalizing and streamlining entry procedures of temporary business travelers. This need is even more strongly felt given that technology has and continues to increasingly digitalize the administrative procedures.

The different alternatives available for Member States to ensure better and effective market access to Mode 4 service suppliers have been discussed below. These alternatives could include different safeguards to keep the policy making space of Members intact.

(i) Special GATS permit: A special GATS permit could be introduced in the form of an APEC Business Travel Card ("**ABTC**") to facilitate temporary movement of personnel covered by horizontal and sectoral commitments. Such a GATS permit could make the approval procedures accelerated and simplified. The merits and demerits of a GATS visa are subject of a separate detailed discussion and have not been included in this paper.

(ii) Inclusion of entry for temporary service suppliers under Art. VI:4: Entry disciplines could explicitly be inserted in Art. VI:4. To address Member's national policy concerns, a disclaimer could be inserted to restrict the scope of visa/temporary entry administrative procedures to the extent they require or are directly and exclusively contingent upon fulfilling the qualification and licensing criteria or in certain cases the technical standards. This could be specifically in cases where the visa requires prior license/other approvals. One concrete example of where the visa application would fall within the Art. VI:4 disciplines is where the application procedures is a points-based system and definite points are allocated to qualification/licensing requirements, previous work experience, language skills, holding of another country's visa, etc.

(iii) Including a higher threshold for necessity test/qualified legitimate objectives test: In furtherance of the previous option, the application of Art. VI:4 disciplines to temporary stay and entry of service suppliers could be circumscribed by keeping a higher threshold of the necessity test or including the fulfilment of legitimate objectives within the necessity test. An example of the necessity test also addressing Members' legitimate objectives is para 2 of the Accountancy Disciplines. Paragraph 2 of the Accountancy Disciplines states that *Members shall ensure that such measures are not more trade restrictive than necessary to fulfill a legitimate objective*. It also provides an inclusive list of the legitimate objectives to include *inter alia* the protection of consumers, quality of service, professional competence and integrity of the profession. Necessity could be a major balancing factor between legitimate regulatory interference and protectionism.

(iv) Separate disciplines/guidelines for temporary entry procedures: This would include adopting a different set of disciplines in the form of soft law prescribing fair, transparent and expeditious procedures for temporary entry of service suppliers. These disciplines could include the key features of the proposed texts by various Members and be customized to cater to temporary entry requirements of service suppliers. To ensure that the policy space of Members remains intact, Members could circumscribe the scope of these measures only to

the committed sectors. Further, to ensure security to Members, these disciplines could be exempted for particularly sensitive sectors and issues. Recently, India tabled a proposal on Art. VI:4 exclusively for the supply of services through the presence of natural persons.[27] Some of the Members in the WPDR raised concerns on Art. VI:4 not being Mode specific. However, it appears that Art. VI:4 also does not prohibit in any manner the making of Mode specific disciplines.

(v) De-linking of wage requirements: One of the main objectives of the discussion on wage parity would be to remove the cumbersome preconditions wage parity places on the issuance of visas. The earlier recommendation for specifying a maximum time frame for issuing GATS visas and notification requirements for delays and additional conditions should take into account wage related and corresponding labour certification requirements. Delays and rejections on account of wage conditions should be open to challenge at the dispute settlement forum of the GATS. Thus, the aim would not be to eliminate wage parity as a condition, but to make it a transparent requirement and de-link it from visa procedures.

VI. CONCLUSION

For almost two decades, colloquia, seminars and various communications by developing Members have underlined the need for the facilitation of temporary entry of service suppliers. In the guise of regulatory space, what the developed Members committed to under Art. IV has been ignored for more than two decades now. These are all overlapping issues with transparency, Domestic Regulations, etc. However, most discussions have largely focused on the developed Members' comparative advantages and the available opportunities in the developing Members. Furthermore, concerns about competition with local workers are voiced in public and policy debates at national level, and act as impediments for Member States. These have also prevented them from taking a proactive role in managing labour and migration, whether skilled or semi-skilled on an economic basis.

Perhaps, all the concerns regarding the movement of natural persons as service suppliers cannot be tackled by trade policy alone, but trade policy definitely plays a decisive role in this regard. Trade agreements will definitely be useful so long as there are reasonable expectations of Members from one another. Both trade and non-trade policy settings need to be set in order to cater to the needs, challenges and vulnerabilities of Members. A balanced approach will go a long way in achieving comprehensive solutions to these highly sensitive and intricate issues of development, labour market and demographic challenges.

While the Secretariat in the WPDR discussions has expressed concerns on the scope and content of Art. VI:4 disciplines, it is high time that Members address this issue multilaterally. Reasons behind WPDR discussion not moving forward are primarily due to the absence of concrete negotiations on services in the Doha Agenda and as there is no consensus among the Members to continue with the text-based negotiations for the domestic regulation disciplines.

Adoption of a multilateral approach will also enable in fulfilling the true mandate of the GATS, particularly as enshrined in the Preamble and Art. IV. In the case of goods, the multilateral system has recognized the need to establish disciplines to facilitate the flow of products. Art. V, VIII and X of the General Agreement on Tariffs and Trade ("**GATT**") lays down a set of legal rules aimed

[27] Working Party on Domestic Regulation, Communication from India, *GATS Article VI:4- Disciplines for Supply of a Service Through the Presence of a Natural Person of a Member in the Territory of Another Member*, S/WPDR/W/61/Rev.1 (March 8, 2019).

at streamlining procedures and minimising the costs associated with exports and imports of goods. Similarly, as regards services, the GATS establish a number of important principles, for example Art. III, IV, VI and XVIII and the Annex on MoNP, which should be taken into consideration in these discussions. Overall, rule-making needs to be more cohesive for reducing the entry barriers and facilitating further trade in services, particularly through Mode 4.