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International Law Forum
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THE WTO/GATS MODE 4, INTERNATIONAL LABOUR MIGRATION REGIMES AND GLOBAL JUSTICE

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Research Paper No. 7-07
May 2007

May, 18, 2007

Published by the International Law Forum of the Hebrew University of Jerusalem Law Faculty

Editor: Dr. Tomer Broude
Assistant Editor: Yonatan Arbel

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ABSTRACT

This paper asks whether the model of international labour migration regulation found in the WTO's General Agreement on Trade in Services (GATS) "Mode 4" conforms to principles of global justice. To answer this question on the backdrop of the complex set of policy considerations relating to labour migration, I explore four competing theories of global justice: Cosmopolitanism; Statist Realism; Rawlsian "Society-of-Peoples"; and Nationalism. While the initial assumptions of these approaches are far removed from each other, and their ideal prescriptions seem mutually incompatible, a shift to non-ideal formulations reveals a broad range of commonalities and complementarities. From these one may derive general principles that delineate the common ground of international migration regimes that might be morally acceptable to all approaches. These include the encouragement of global distributive justice; the protection of basic human rights of migrants; promotion of the effectiveness of migration policy; and emergency safeguards for migration receiving states. As analyzed in the article's final section, the GATS Mode 4 does not satisfy any of these requirements.

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1. Introduction

The WTO's General Agreement on Trade in Services (GATS)¹ "Mode 4" is currently the only internationally agreed legal instrument with the potential to become a functioning multilateral labour migration regime.² It is an international mechanism aimed at liberalizing labour mobility³ on the basis of qualified negotiated commitments by states to accept non-permanent foreign labour migrants, subject to substantive rules that regulate and restrict states' unilateral labour immigration policies.

International trade and migration specialists query whether Mode 4 is effective as a global economic regime, and what may be done to make it work better (OECD: 2004). In this article I ask, rather, if GATS Mode 4 is *just*: does the model of international labour migration regulation that it represents conform to principles of global justice? This question is closely related to evaluations of the morality of national immigration policies, but is independent of them, going one step beyond and considering an international legal and institutional migration arrangement from a global justice perspective.⁴ The exercise clearly holds lessons for the design of any future labour migration regime, but it is also important in the more general WTO context. To the extent that the WTO purportedly represents a global economic "constitution" for globalization, as is sometimes suggested,⁵ it must be sensitive to conflicting political and philosophical visions of global justice and the way that they relate to

¹ General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994).

² Regional labour mobility arrangements do exist, though their scope is usually limited (Nielson: 2003). The exception is the freedom of movement of workers in the European Union, that while not free of any of the problems discussed here, is geographically restricted to the European regional space and more importantly, is deeply embedded within an advanced system of economic and political integration. For a comprehensive, if not up to date, monograph on the subject, see Weiss: 2002.

³ The GATS aims to achieve higher levels of liberalization in the international trade in services, towards "the growth and development of the world economy"; see GATS Preamble.

⁴ For a series of critiques of global institutions, primarily from a cosmopolitan point of view, see Barry and Pogge: 2005.

⁵ 'Constitutionalism' in the WTO is multi-faceted. For a thorough critique, see Dunoff: 2006, and the sources cited there.

international economic disparity.⁶ This is especially poignant with respect to GATS Mode 4, because labour migration is strongly associated with transnational differentials in wages, social benefits and skills, and because immigration policy constitutes a major a fault line between cosmopolitan and communitarian liberal theories of global justice.

How does a trade agreement relate to labour mobility?⁷ The GATS applies to labour as an internationally tradeable service. Under article I:2 GATS, the agreement covers four "Modes" of international service provision.⁸ Among these, "Mode 4", is the provision of a service "by a service supplier of one Member, through presence of natural persons of a Member in the territory of another WTO Member". This entails movement of labour for the purpose of supplying a service on site in a foreign, service-importing country, and may include either self-employed suppliers remunerated directly by consumers or employees of service suppliers (Carzaniga: 2003, 23). Such labour mobility may occur in any of the service sectors covered by the GATS (e.g., health professionals, construction workers, tour guides, accountants or software developers).⁹ However, the GATS applies only to labour-migration that is service-related and does not establish free movement of yet unemployed labour. The *GATS Annex on Movement of Natural Persons Supplying Services under the Agreement* expressly provides that the GATS "shall not apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis". This caveat has regulatory implications that technically (if not artificially) differentiate GATS commitments from immigration laws, and service-provision from labour. Mode 4 may facilitate the mobility of workers, but these enter a foreign country under GATS as service suppliers for the purpose of supplying a service in a specific sector. They cannot enter for the purpose of seeking

⁶ For a general egalitarian critique of the WTO, see Moellendorf: 2005.

⁷ The well-worn disclaimer apologizing for the brevity of the background discussion is especially apt here. For a good introduction to the GATS see WTO: 2005.

⁸ The four Modes are (1) *Cross Border Supply* (supply of a service "from the territory of one Member to the territory of any other Member"); (2) *Consumption Abroad* (supply of a service "in the territory of one Member to the service consumer of any other Member"); (3) *Commercial Presence* (supply of a service "by a service supplier of one Member, through commercial presence in the territory of any other Member"); and (4) *Temporary Presence of Natural Persons*.

⁹ The GATS covers twelve general service sectors (Business, Communication, Construction and Engineering, Distribution, Education, Environment, Financial, Health, Tourism and Travel, Recreation, Culture and Sporting, Transport, and the catch-all "Other"), that are further divided into sub-sectors.

employment, and their entry is for a limited period of time, as may be necessary for the provision of a service under contract.

The GATS does, however, cover significant labour-intensive service sectors, and there is substantial overlap between the Mode 4 definitional concept of the supply of a service through presence of natural persons and what would more regularly be considered temporary movement of labour. For example, a foreign company providing services in the sub-sector "General construction work for buildings" (CPC 512), which includes "construction work (including new work, additions, alterations and renovation work) for all types of buildings, residential or non-residential, whether privately or publicly owned" (for discussion, see WTO, 1998) in a service-importing country, could do so either through Mode 3 commercial presence, contracting local labour or (if so allowed by local laws and regulations that may or may be not anchored in a GATS Mode 4 specific commitment) through the temporary presence of construction workers from its home country or from other WTO Members. From the GATS legal perspective these labourers would be service providers; they would not necessarily have a labour contract in the host country, nor have any right to seek further employment there, let alone a right to pursue permanent residence and citizenship. However, in direct economic terms they would be fully equivalent to temporary labour.

The GATS attempts to adjust the classical legal principles of trade in goods under the General Agreement on Tariffs and Trade (GATT)¹⁰ to the more complex areas of trade in services. Thus, as a general obligation, the most-favoured nation (MFN) principle applies to all measures covered by the agreement, in any service sector, preventing discrimination between service suppliers from different WTO Members (article II).¹¹ However, a Member must allow service suppliers access to its market only in those sectors and in those modes of supply in which it has entered specific commitments in its GATS schedule, subject to any terms and conditions specified therein (article XVI). The national treatment principle that prevents discrimination between domestic and foreign service suppliers, similarly applies

¹⁰ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194.

¹¹ MFN is subject to regional services agreements (article V), labour market integration agreements (article V *bis*) and valid MFN exemptions, some of which relate to Mode 4 (OECD: 2004, 148).

only to sectors in which a Member has elected to make specific market access commitments (article XVII).

Taken together (and at face value), these principles mean that if a WTO Member commits to open its services market in a certain sector under Mode 4, it must provide market access, MFN and national treatment to foreign labour, significantly constraining the autonomy of its labour immigration policy in that sector. It is therefore not surprising that specific commitments under Mode 4 have so far been very modest and subject to significant reservations (for example, a significant portion of commitments made are restricted to "intra-corporate transferees", whose presence is related to Mode 3, investment related commitments; executives; and business visitors (Carzaniga: 2003, 25)).

Mode 4's small impact in practice enhances rather than diminishes the unique opportunity that it provides us to examine the global justice implications of a multilateral labour migration regime, as applied. Indeed, a pragmatic view holds the concepts of justice and effectiveness as mutually reinforcing. Mode 4's practical weaknesses hint at the existence of both political impossibilities and moral deficiencies. In contemplating the ethics of global labour migration regimes in general, and the GATS Mode 4 in particular, this article considers that neither pure consequentialist analysis nor untainted deontological thinking will prove satisfactory. When applied to problems of international labour migration, ideal theories of global justice lead to prescriptions that are either politically impractical (e.g., utopianly advocating fully "open borders") or practically unhelpful (e.g., merely upholding the right of states to regulate the entry of labour migrants to their territory).¹² Nonetheless, the opportunity costs and real injustices of the current virtually unregulated international environment are too high to ignore. The question of international labour migration regulation thus lies deep in the realm of "non-ideal theory", in which we must search for "policies and courses of action that are morally permissible and politically possible as well as

¹² A similar problem has been noted with respect to the ethics of refugee policy (an area whose guiding justifications distinct from those of labour migration): "Political philosophy appears to present us with a rather polarized choice between a communitarian, or nationalist, ethics of closure and an expansive, universalist ethics of inclusion that appears to impose unfeasible demands" (Boswell: 2006, 664).

likely to be effective" (Rawls: 1999, 89).¹³ Making the gradual shift from ideal to non-ideal even more difficult, the field is bogged with empirical uncertainty and scientific controversy. If "any defensible global political theory must rely on factual statements about the world" (Caney: 2005, 2), a global theory of labour migration regulation must, at least for the time being, rely on incomplete facts, and so maintain a degree of flexibility in accommodating competing political and philosophical perspectives.

This article ultimately argues that Mode 4 fails to meet even these elastic benchmarks, and is in at least this sense inappropriate as a prototypical labour migration regime. The next section provides an overview of the different dimensions of the global labour migration debate, as context for the global justice analysis of GATS Mode 4. The third section applies principal theories of global justice to the idea of a multilateral global labour migration regime, drawing the outer policy bounds of what might be considered as common, morally acceptable ground. The fourth section then returns to the GATS Mode 4, critiquing it as a labour migration regime from the perspectives of these limits of global justice, followed by brief conclusions.

2. The Three Dimensions of the Global Labour Migration Debate

(a) The 'International Development' Debate

The first dimension of the migration debate revolves on the effects of international labour migration on the reduction of global economic inequality and the development of poor countries, many of which are labour-abundant. International migration is a distinctly North-South phenomenon (though not exclusively so). In 2000, about 3% of the world's population lived in a country other than that in which they were born, approximately 175

¹³ This reference to Rawls does not imply that I adhere to Rawls' distinction between ideal theory and non-ideal theory as dependent on the (non-)existence of a world in which "all peoples accept and follow the (ideal of the) Law of Peoples" considered as "well-ordered peoples" (Rawls: 1999, 4, 89). More generally, the gap between ideal and non-ideal theory depends on political realities. If ideal theory suggests that states should maintain full control over immigration, non-ideal theory would acknowledge that in practice borders are highly permeable to migration that the state might not be interested in; and if ideal theory conversely indicates that the world should be borderless, non-ideal theory would acknowledge that in practice states impose strict barriers to migration. On the transition from ideal to non-ideal theory, see Phillips: 1985; and with specific reference to migration, see Carens: 1996.

Million people (Deutsche Bank Research: 2003, 15).¹⁴ At the same time, the US alone was home to 28.4 Million foreign born people, or 10.4% of total US population (US Census Bureau: 2001, 1). Europe, as a region, contained 56 Million people of migrant stock (UN: 2002), roughly equivalent to the entire population of France at the time. Clearly, most migrants move from low-income to high-income countries, and stay there, if they can. Most labour migrants are relatively poor in global terms, even if they do not come from the poorest segments of their source societies.

The constituent questions in this debate are many (Kapur and McHale: 2005; Lucas: 2005; Pritchett, 2006): what are the effects of "brain drain", highly-skilled migration from developing countries, on their development? Who in developing countries benefits from labour emigration? How useful are financial labour remittances to developing economies and under which conditions? What are the differences between temporary and permanent labour migration in these respects? Do migrant diasporas contribute to development in their source countries, and if so, how? Which immigration policies of developed countries are most conducive to development? How can developing countries influence emigration patterns to their benefit? International labour migration is now in the cutting edge (or *bon-ton*) of international development policy, with the historical record of development aid provision so dismal (for a popular but persuasive account, see Easterly: 2006) and the prospects of international trade effects on development appearing so moribund within the WTO's Doha "Development" Round (Broude: 2006).

A common point of departure in this debate is the assessment of net global welfare gain from labour migration, as well as potential benefits for both developed and developing countries. Estimates of the overall economic gains from the elimination of all restrictions on labour mobility are as high as a net doubling of worldwide annual GNP, leading to a fairer international distribution of income as well (Hamilton and Whalley, 1984). More conservative estimates also indicate very significant welfare gains from freer movement of

¹⁴ Or less: compare Zegers de Beijl (1997), according to whom "the global stock of migrant workers, defined as persons who are economically active in a country of which they are not nationals and excluding asylum-seekers and refugees, is estimated by the International Labour Organization to be between 36 and 42 million. Accompanied by a slightly higher number of dependents, the total population of migrants is in the range of 80-97 million... The economically active persons amount to a mere 1.4 to 1.6 per cent of the world's labour force of 2.6 billion".

people (Winters, 2003). The potential benefits of increased international labour mobility are strongly linked to economic differentials between developed countries and developing countries (or as one economist has bluntly put it, "[I]f people were goods, the solution to different wage and employment levels would be obvious: encourage the transfer of 'surplus' people from poorer to richer nation states" (Martin: 2004, 443)). Much of the growing interest in labour migration regulation relates, therefore, to the different anticipated economic effects of liberalized migration in low- and high-income states. A recent World Bank study calculated that the continuation of increased migration from developing to developed countries at the same rate as was observed during the period 1970-2000, would raise the labour force of developed countries by 3% over the period 2001-2025, leading to a small decline in wages in developed countries that would be offset by a rise in income, on average, from increased returns to capital. At the same time, new migrants' wages would rise as would wages in developing countries, in addition to direct economic effects of financial remittances. Overall net welfare gains would therefore be positive in both developed and developing countries (World Bank, 2006).

Beyond the aggregate global economic considerations, labour migration is regarded as an extremely important generator of economic benefits for developing countries and for the weaker segments of their societies. Empirical research has found that international migration has a strong impact on the reduction of poverty in developing countries (Adams and Page: 2003). In the rosiest scenario, labour migration can achieve a "win-win-win" outcome: the emigrating individuals receive higher income and improved benefits, the country of origin benefits from financial remittances, overpopulation relief, poverty reduction, and "networking" effects with its diaspora; and the receiving country gains a workforce that addresses pressing economic and demographic needs (Tanner: 2005, 23-24).

Along these lines of analysis, the October, 2005 Report of the Global Commission on International Migration (GCIM), an expert group appointed by the previous United Nations (UN) Secretary-General, expounded on the importance of migration to development calling for concrete international steps that would realize "the potential of human mobility"(UN: 2005, Ch. 2). Senior economists such as Joseph Stiglitz, a Nobel Prize laureate in economics, have also suggested that the liberalization of labour migration from developing countries to

developed countries should be prioritized in multilateral negotiations in the WTO's Doha Round, and that the development dividends in this area, if taken seriously by all involved, would be no less important, if not greater, than the effects of reduced subsidies and increased liberalization in agricultural trade (Charlton and Stiglitz, 2004).

(b) The 'National Interest' Debate

The second dimension of labour migration discourse is the national interest debate, a politically charged argument that recurs in many jurisdictions. It focuses on the effects of immigration on the well-being of the nation and its citizens in the face of the socio-economic changes that labour migration brings. The debate in each state may have its own special characteristics and idiosyncrasies, but in general the parameters are quite similar. In each case, the state is considered as the most relevant unit of policy analysis, relying on the authority¹⁵ of the national government to regulate the entry of labour migrants according to the national interest, as perceived by politicians and their constituencies. Dilemmas that rise in this context include, among others, questions such as whether labour migrants are beneficial to the nation and its economy? Which immigrants should the state accept and how should it screen them? How many immigrants should the state allow, and under which conditions? Which domestic groups gain most from the influx of labour migration and which are most hurt by it? Is labour migration a sustainable solution to the problems posed by population aging in developed states? How may labour migration impinge on the social rights that the state grants its nationals? How can the social costs of immigrant absorption be reduced? What is the impact of immigration on social cohesion? How may unwanted immigration to the state be deterred, and nationally desirable immigration be promoted? These are the questions that dominate the national-interest immigration policy debate in rich, labour-importing countries: "who gets in" (Stoffman: 2002) to "heaven's door" (Borjas: 1999).

¹⁵ If not power – even once a national immigration policy is formulated, it is often very difficult to enforce, causing much of the migration debate to deal with the management of "illegal" immigration. For a provocative discussion of the distinction between national immigration policy targets ("first-order" immigration rules) and the different national rules and institutions used to implement them, *ex ante* and *ex post* ("second-order" immigration rules), see Cox and Posner: 2006.

Thus, the US debates its policy towards "illegal" immigrants and the construction of a wall-like barrier on the Mexican border. Europeans ponder the costs and benefits of allowing the "Polish plumber" in, under equitable terms or otherwise. Israelis argue how labour migrants impact upon the preservation of national agrarian ideals, how the treatment of temporary labourers can conform to the national civil rights regime, and how "demography" will be affected by the continued importation of labourers from Eastern Europe, China and South East Asia, themselves substitutes for cheap Palestinian labour now excluded for political conflict-related reasons (Rosenhek: 2000).

The national interest debate can be broken down into a political-economic aspect and a social-communitarian aspect. In the first, what is on the line are the general and distributive economic effects of increased labour immigration, including their impact on the incumbent skilled and unskilled workforce, on industry and on labour unions. Because of the implications for sensitive interest groups and the intuitive fear of losing jobs, research in this area is susceptible to political capture. However, among economists there is an emerging dominant view that in most scenarios only the least-skilled native workers suffer adverse effects from increased labour migration and that these effects are small and countervailable by domestic social policy measures rather than immigration restrictions (Chang, 2007). The social-communitarian dimension of the debate relates to the impact of increased immigration on the character and definition of the national community. Academically, this is a primarily philosophical and sociological debate, but in practice it is highly politicized, as natural chauvinistic tendencies merge with job-loss fear to form electoral platforms.

The national interest debate clearly involves ideal moral deliberation and serves as a focal point for differences between cosmopolitan and communitarian liberal approaches. One might rightly ask, what is the moral justification for the concepts of "borders", "citizenship" and "nationality", the fundamental terms upon which the national interest debate depends in both its economic and communitarian aspects. However, from a lawyer's pragmatic perspective, these questions are scholastic. What is more important is that international law *de lege lata* accepts that states have the authority, if not the obligation, to regulate labour immigration (Aleinikoff: 2003, 3). In terms of non-ideal theory, it would appear useless to argue that states do not have the moral right to regulate the influx of labour migrants, by

measures taken either at the border (e.g., in the form of admittance criteria, licensing procedures and the like) or "behind the border" (e.g., by prescribing equal or differential employment conditions and social rights for migrant workers). This is an authority that states exercise in practice (albeit with varying degrees of success), and so it must be taken well into account when evaluating the justness of global migration regimes.

(c) The 'Migrant Welfare/Rights' Debate

The last, though not least important, dimension of the labour migration debate relates to the rights and welfare of labour migrants themselves, as individuals. Although labour may be commoditized as a "factor of production", labour migrants do not act like commodities; rather, they are non-passive human actors (and beings), driven by aspirations that transcend simple economic logic. International migration is a clear expression of people's aspirations to improve their lot,¹⁶ as practiced by a significant chunk of humanity.¹⁷ These observations may be obvious but they have significant policy implications for international labour migration regimes, relating to both effectiveness and justness. Migrants that are highly motivated and determined to enter a foreign labour market in the face of immigration restrictions will take great risks, even life threatening ones, and endure great hardships to do so: braving shark-infested waters in rickety, overcrowded boats, walking for weeks through inhospitable deserts (and many times, dying there (Cornelius: 2001)), paying excessive premiums to people-smugglers and labour contractors, subsequently living invisible, undocumented lives, treated "like rustlers, like thieves".¹⁸ For "illegal" or "irregular"

¹⁶ Among migrants, the "vast majority [...] move in search of better economic opportunities" while only 10% are considered "refugees" (IOM: 2005, 379-381). A "Refugee" is a person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country"; see Article 1(a)(2) of the 1951 United Nations ("UN") *Convention Relating to the Status of Refugees*, 189 UNTS 150; and Article 1(2) of the 1967 UN *Protocol Relating to the Status of Refugees*, 606 UNTS 267. These definitions clearly exclude migrants who simply migrate in pursuit of better lives. In practice, however, there are obvious gaps and overlaps between such economic migrants and refugees – people counted as political refugees even though they have sufficient cause to seek economic migration, or economic migrants who are also politically persecuted, or people whose economic deprivation is the result of political persecution – these may all be counted as both economic migrants and refugees.

¹⁷ The 175 Million figure mentioned above reflects only the number of those people who have actually managed to realize their migratory hopes under the current international regulatory conditions, which are not conducive to labour migration, to say the least. A more liberal labour migration regime would likely multiply the number of migrants manifold, for better or for worse.

¹⁸ Woody Guthrie, *Deportees (Plane Wreck at Los Gatos)*.

immigrants, it matters little whether the immigration restrictions that they are circumventing are unilaterally imposed by the target country's government, or the result of an internationally agreed migration regime. It cannot be assumed willy-nilly that a global labour migration regime will be any easier to enforce than national migration policy. Thus, in order to be effective, its design must take into account migrants' willingness to adjust to the regime, increasing incentives to comply with it. Furthermore, as a matter of legal context, migrants have been granted several specific rights under international law, including protection from racism and racial discrimination, procedural rights in case of expulsion and in some cases national treatment in work conditions (for an overview, see Fitzpatrick: 2003), although often these rights are not enjoyed by them in practice. For the sake of legal consistency, a labour migration regime must take account of these rights.

The area of migrant rights is of independent importance, and many might consider that it is the core of the moral problems relating to immigration. Moreover, the debate becomes particularly important for present purposes when it raises questions that may contradict goals and interests that emerge at the global development or national interest levels. For example, enhanced migrant rights may agitate towards granting temporary labour migrants social protection at the level granted to domestic labourers. However, in welfare states this would impose significant fiscal burdens that reduce the willingness of governments to allow labour immigration, thus foregoing the national and global benefits of labour mobility altogether. This is what has been called the "immigration paradox": the liberal commitment to grant migrant workers equal rights once admitted to the labour market agitates against their admission, in which case migrants may end up worse off than they would have been if they had been admitted yet granted lesser rights (Chang: 2003). Furthermore, the entire concept of "temporary" labour migration, which in theory is attractive to both national interests (e.g., by reducing social disruption) and global development (e.g., by reducing brain drain and increasing remittances) is problematic from a migrant rights perspective, to the extent that enforcement of the temporariness of migrants' stay may involve infringement of their human rights and dignity (such as detention although they have committed no offense, or labour licensing arrangements that bind migrants to a single employer in a manner tantamount to enslavement).

These are the main dimensions of the labour migration, that pose any would-be international labour migration regime with a policy justice "trilemma": how to encourage welfare-enhancing and poverty reducing labour migration while accommodating and/or overcoming national-interest based resistance, and preserving the rights of migrants? Is there a coherent moral approach to global justice that might be able to take all factors of this equation into account?

3. Political-Philosophical Approaches to International Labour Migration Regimes

(a) From National Immigration Policy to International Migration Regulation

The critique of national immigration policy is an obvious battleground for international political philosophers, serving as a watershed distinguishing between schools of thought about global society, the state, the community, the individual, and their interrelationships.

Modern states reserve the authority to prevent non-nationals from crossing their borders, no matter how well-intentioned or industrious these people may be, through national immigration policies that distinguish among people primarily on the basis of the place where they were born. Is this a morally relevant criterion, or a merely arbitrary one? By segregating different social environments in which people may act, on a national basis, immigration restrictions produce inequalities of opportunity among individuals who should otherwise be considered equal. Are these restrictions morally defensible? To enforce immigration policy, states at least project the willingness to use force against innocent and harmless people ("Borders have guards and the guards have guns", as Carens (1987, 251) so plainly notes). How could this violence, actual or threatened, be justified?

The reflexive responses to these queries rest on "sovereignty" and "community" (at times mutually compatible, but not always so). States are mainly defined by their territory, population and government. Their sovereign governors are charged with the maintenance of order in their territory, the well-being of their nationals and the national interest. Their first order of duty is therefore accepted as owed to their own "people". It might then be argued

that states and their nationals have no obligations towards non-compatriots, and that national immigration control is legitimately self-interested, with openness towards immigration at most a display of charity or hospitality, not moral obligation.¹⁹ Most reasons advanced for limitations on immigration fall well within the bounds of the "national interest" debate discussed above: nationals pay taxes, non-nationals do not; immigrants harm the economic well-being of (some) nationals; immigration increases inequality among incumbents within the state; immigration compromises national culture; immigration erodes the capacity of national institutions to provide the just entitlements of nationals (for a survey and rebuttal of such arguments supporting immigration restrictions, see Moellendorf: 2002, 61-67; and Goodin: 1992, 6-11).

In response to these national/communitarian defenses of restrictions on immigration, universalist or cosmopolitan critiques argue, on the basis of the shared humanity of nationals and non-nationals, that international borders should generally be open, and that the only justifiable immigration restrictions are those that would apply in equal force towards nationals at home (*mutatis mutandis*) (Carens: 1987). While these "open-border" arguments focus on the (im)morality of restrictions on international free movement because of the injustice they cause individuals (raising arguments related to the "migrant welfare/rights" debate), they muster additional force by pointing out that national immigration restrictions impair global distributive justice, serving as barriers to movement from poorer countries to more affluent and developed ones (thus engaging in the "global development" debate).²⁰

Moreover, this article is not directly concerned with the general justification (or undermining) of the existing practice of nationally imposed immigration restrictions. Neither does it aim to determine what might independently be considered as just national immigration policy. Rather, the question is whether GATS Mode 4, a seminal *international* labour migration *regime*, satisfies principles of global justice. The fact that states exercise their

¹⁹ For an interesting case study of Australian employment visa requirements on the backdrop of Derrida's reading of Kant's right to hospitality, see Kordvani: 2006 (referring to Derrida: 2001).

²⁰ See, e.g., Caney's reference to a "standard economics textbook" (Begg, Fischer and Dornbusch: 1991, 644) maintaining that "[t]he quickest way to equalize world income distribution would be to permit free migration between countries" (see Caney: 2005, 106).

own independent immigration policies may be judged separately, but when examining international labour migration policy regimes from a pragmatic moral perspective, it should rather be taken as a given, a worst-/best-case expression of political reality. The intellectual task in the present case is not to critique national immigration policies as such, but to identify the contours of morally defensible and practically effective global structures of international labour migration regulation.

The next sections examine migration regimes from different perspectives, referring to Caney's useful classification of theories of global justice, consisting of cosmopolitanism; realism; 'society-of-states' approaches (including Rawls' 'society-of-peoples'); and nationalism (Caney: 2005, 3). Each theory naturally gravitates towards a certain ideal-type of international labour migration regime. However, when the real multi-dimensional complexities of the global labour migration debate are grafted on to ideal theory, each approach proves capable of adjustment, suggesting a number of general policy prescriptions. These provide us with a common, pragmatic basis for evaluating international labour migration regimes, the outer bounds of what is considered morally acceptable, if not ideally so, by each theory.

(b) Cosmopolitanism

Cosmopolitan approaches emphasize the equal moral worth of all human beings, independent of group membership, from which derive universally applicable mutual obligations among all persons (Pogge: 1994, 89; Tan: 2004, 2). Important expressions of moral cosmopolitanism are extensions of the basic principles of Rawls' liberal *A Theory of Justice* (Rawls: 1971) to the international sphere (Beitz: 1999 [1979], 127-136; Pogge: 1989), although Rawls himself rejected this project (Rawls: 1999).

Applied to questions of international labour migration, cosmopolitanism, as a form of liberal egalitarianism, agitates against national immigration control.²¹ "Open borders" are preferred, as these would best conform to the global equality of opportunity among human beings that can be understood as cosmopolitanism's underlying system of distributive justice

²¹ See Carens: 1992, 43: "liberal egalitarianism entails a deep commitment to freedom of movement which can be overridden at the level of principle only with great difficulty".

(Caney: 2005, 122-123). 'National interest' is pushed aside, the focus being on international development and migrant rights. This might be somewhat qualified to the extent that entirely free movement of people might induce chaotic outcomes that would cause excessive harm to incumbents and also undermine the achievement of the rights it was intended to promote (Carens: 1987, 259), or might otherwise be tempered by attempts to resolve gaps between national immigration restrictions and the liberal cosmopolitan paradigm.²² There is however no intention here to reopen this aspect of the debate, i.e., are national immigration restrictions themselves morally justified? Rather, the question is, given that states retain the authority to restrict labour immigration to their territory, what would be the attributes of an international global migration regime that would be morally acceptable from a cosmopolitan perspective? In answering this question two general parameters emerge.

First, a (non-ideal) cosmopolitan approach would evaluate the extent to which an international migration regime encourages states to liberalize immigration in patterns that promote global distributive justice in cosmopolitan terms. This is not merely to say that the more migration restrictions are removed or reduced, the better, but that the regime should obligate and motivate well-off states to allow immigration (a) from those locations whose residents would most benefit from increased migration (these may not necessarily be states, but in reality it would be very difficult to apply this logic otherwise); and (b) of those migrant workers who would most benefit from migration (themselves, as well as their families). This formulation is a practical interpretation of the cosmopolitan's global application of Rawls' "difference principle", whereby social and economic inequalities should be arranged to the greatest advantage of the least advantaged to be acceptable.

Second, a cosmopolitan approach would assess the way the regime applies to the individual migrant and his or her dependants. The reality of state-imposed immigration control cannot justify any other infringements of universal human rights. An international labour regime that allows violations of the basic human rights of migrants, in the process of immigration, while working as labour migrants, or in their repatriation, would be unacceptable from a cosmopolitan moral perspective.

²² See Trachtman: 2006.

(c) Realism

Realists are statist communitarian's who assert that to the extent international relations include a moral component, it is that states have an obligation to pursue their own interest, not utopian ideals such as universal equity (Morgenthau: 1951; Waltz: 1979).²³ Yet as we have seen, the 'national interest' debate in the labour migration context is fraught with definitional and empirical problems, presenting the realist with difficult policy choices. However, this uncertainty may ossify realist perspectives of international migration regimes, in both principle and practice, rather than loosen them. For the realist, a legally binding migration regime would at first blush not seem to accomplish anything that a state might not achieve through unilateral policy. Long-term commitments would constrain the state from adjusting its immigration policy to changing needs and interests over time. The first choice of the realist would therefore likely be to remain with the current 'regime', i.e., the condition in which states have overall and essentially absolute authority to determine their labour migration policy.

This rigid realist approach would, however, ignore the real, non-moral, constraints on the ability of the state to unilaterally pursue its interests, however defined. These constraints include, at minimum, the difficulties faced by states in preventing the entry of immigrants that their self-interested policy has defined as 'unwanted'; and the problem of enforcing the temporariness of 'wanted' temporary immigration. These are problems that might be mitigated through international cooperation, increasing the attractiveness of an international migration regime even in realist eyes. A (non-ideal) realist approach might therefore accept an international labour regime that would conform to the following parameters:

First, an international labour regime should provide significant payoffs to migration-attracting states in areas in which unilateral policy has proven ineffective, to the detriment of national-interest based policy. Specifically, an international regime would be morally acceptable to the realist only if it included mechanisms that increase rather than reduce the

²³ For a survey of nuanced versions of realism, see Caney: 2005, 7-10.

state's capacity to enforce immigration policy and its ability to repatriate labour migrants once their presence is no longer in the 'national interest' (even at the price of binding or at least restricting national immigration policy).

Second, the realist would be wary of any international regime that does not provide the state with some sort of trump card in the case of unexpected developments that are seriously detrimental to the state's interest, such as economic disruption due to unbridled immigration, or large social welfare expenditures that are not covered by the benefits of immigration. Contingent and temporary state safeguard measures are therefore an essential component of any international labour migration regime that a realist approach might subscribe to, although the depth and breadth of such safeguard measures would need to be carefully considered.

(d) 'Society-of-States/Peoples' Approaches

In contrast to cosmopolitanism, society-of-states approaches to international political-philosophy acknowledge that states have independent value as bearers of moral rights. Although these approaches are also statist-communitarian, they differ from realism in that they recognize that states have moral duties beyond the state itself, that is, towards other states, though not individuals. Taken in conjunction, these elements of a society-of-states approach would maintain that "a just global order is one in which there are states and the states accept that they have moral duties to other states" (Caney: 2005, 10).

Society-of-states theories are highly attuned to current international legal structural realities. Indeed, if one supplants the 'moral' with the 'legal', society-of-states approaches are formally similar to traditional Westphalian doctrines of international law as reflected in contemporary international relations. How would these approaches apply to the idea of an international labour migration regime? Taken narrowly, a society-of-states approach would merely uphold the independence of states' policy-making as constrained by the principle of non-intervention (Bull: 1977). In actual terms, this would be far less of an obstacle to an international migration regime than a realist approach, merely granting states unconstrained

authority (and hence, the discretion to cooperate) in the area of immigration control, but not linking migration policy to a particular policy guideline, such as the 'national interest'.

However, we must also address the implications of a more complex (if controversial) 'society-of-states' theory, that is, Rawls' 'society-of-peoples' (Rawls: 1999).²⁴ Rawls considered global society to constitute five types of 'peoples': liberal peoples, committed to individual rights; non-liberal but 'decent' peoples²⁵ (these are both, to Rawls, 'well-ordered' peoples); aggressive and despotic 'outlaw states'; societies burdened by unfavorable conditions; and benevolent absolutisms.²⁶ To Rawls, principles of international justice are those principles that are acceptable to both liberal and decent peoples – this is a partial or selective social contract, from which the other forms of peoples are all but excluded.

Rawls' assumes that most migration is caused by the effects of bad governance in the source country (1999, 8-9). Free movement would therefore cause the costs of the bad governance of non-liberal, non-decent peoples to be borne by liberal and decent peoples. For this reason, according to Rawls, well-ordered peoples have "at least a qualified right to limit immigration" (1999, 39, fn. 48).²⁷ Moreover, Rawls did not directly address the issue of migration between liberal peoples and non-liberal, decent peoples (i.e., among well-ordered peoples); presumably, if the cause of migration is the lack of respect for human rights, there is no reason to prevent such migration. If, however, the cause of migration is the denial of public participation, then Rawls' justification for migration restrictions would apply in his model. Moreover, none of these questions would be problematic once the deficiencies of non-liberal and non-decent societies were solved, because Rawls surmises that in these conditions the demand for migration would disappear of itself. This approach is clearly a justification of the unilateral and restrictive immigration policies of the affluent states who define the meaning of liberalism and 'decency'.

²⁴ For a critique of the distinction between 'states' and 'peoples', see Caney: 2005, 11-12.

²⁵ 'Decent' peoples are "nonliberal societies whose basic institutions meet certain specified conditions of political right and justice", including public participation in political decisions (Rawls: 1999, 3).

²⁶ 'Benevolent absolutisms' honour human rights but deny participatory politics and so "are not well-ordered" (Rawls: 1999, 4).

²⁷ This seems unpersuasive, in that it allocates the consequences of bad governance to the governed, not to the governors, in peoples whose non-liberal political systems prevent participatory governance, and so should not be faulted for their leaders' conduct. The people are punished twice – first, by suffering from poor governance; second, by not being able to migrate to more liberal pastures.

Does this mean that an international labour migration regime comprising agreements between well-ordered peoples and other peoples on the regulation of migration could never be justified under Rawls' terms? This would be a difficult position to defend. While to Rawls well-ordered states (and indeed, any state) may bear no *duty* to allow immigration, they do have a *right* to do so (or put otherwise, they have no duty to refrain from accepting immigrants). At the very least, the choice to either accept or reject immigrants as the externalities of poorly-ordered peoples, so to speak, and of their bad governance, is the prerogative of well-ordered societies. Surely the acceptance of labour immigrants has important benefits to liberal and decent societies - Rawls simply emphasizes (one of) the 'push' factors of emigration (bad governance) but ignores the 'pull' factors or demand for immigrants in developed countries. Nothing in Rawls' theory suggests that agreements to bind immigration policy are improper as such.

With respect to 'burdened societies', while the duty to assist may not include migration as a method of assistance,²⁸ it ought to be the case that the immigration policy of well-ordered peoples should not be allowed to *contradict* the aims of the duty of assistance. Thus, immigration policy should not impair the prospects of burdened societies to gain the independent capacity to manage their affairs reasonably. Surely this implies that immigration policies should avoid enhancing 'drain brain' problems in developing countries, and encourage the return of labour income to their economies. These are goals that might better be achieved through international cooperative arrangements, and so an international labour migration regime that promotes the goal of the duty of assistance should be accepted as reasonable by liberal and decent societies. This would be the case even if the labour migration regime established obligations on well-ordered societies to accept immigrants.

One qualification to this is Rawls' concern that egalitarian ideals should not be foisted on non-liberal societies. Rawls rejects cosmopolitan principles of distributive justice because they would be 'intolerant' to non-liberal societies (Rawls: 1999, 59 *et seq.*). This does

²⁸ Rawls implies that allowing migration from burdened societies is *not* part of the duty of assistance, particularly because the aim of the duty is "to help burdened societies to be able to manage their own affairs reasonably and eventually to become members of the Society of well-ordered peoples" (Rawls: 1999, 111). Other positions on this issue may be defensible, but there is no need to pursue them here.

not appear to be a concern because a labour migration regime that did not intervene in the political systems of source countries by imposing political or economic policy conditionality would be considered 'tolerant' in this sense.

In addition, Rawls agrees that peoples have a duty to honor human rights. Thus, a regime that promoted respect for migrants' rights (to be distinguished from the right to migrate) would be morally acceptable and even desirable. Furthermore, although Rawls rejects equality of opportunity as a moral principle at the global level, he does include the right to means of subsistence among the rights to be respected (Rawls: 1999, 65). To be sure, this cannot form the basis for a right to migrate, but if an international labour migration regime had as one of its objectives the promotion of this right, this would not be objectionable, even if it applied to non-decent peoples.

In sum, an international labour migration regime would be morally consistent with Rawls' theory if it increased the capacity of burdened societies to become well-ordered, respected human rights and promoted the right to subsistence, while avoiding the imposition of egalitarian ideals upon non-liberal societies. Rawls 'society-of-peoples' accepts global inequality but does not mandate it; thus, while it may not demand an international labour migration regime, such a regime could be considered morally attractive, under these conditions.

(e) Nationalism

Communitarian nationalism attaches moral significance to nationality, bearing on rights and duties (Caney: 2005, 13). This is distinct from a realist approach, because a 'nation' is a community with a shared ethnic or cultural identity, as opposed to the state conceived of as a political entity. I will not linger on the merits of these distinctions or their implications – indeed, even 'nationalist' philosophers blur them at times (e.g., Miller: 2004, referring to the justification of immigration policies of 'nation-states'). For present purposes, what is important is that a nationalist perspective would require an international labour regime to strengthen the nation's capacity to enforce its immigration policy, even at the cost of making prior commitments to accept migrants; and would also, like the realist approach, expect a

migration regime to provide effective safeguards should increased immigration pose a threat to the nation.

5. GATS Mode 4: A Global Justice Critique

(a) Synthesis: Principles for a Just Labour Migration Regime

As the analysis in the previous section demonstrates, while the initial assumptions of cosmopolitan and communitarian approaches are far removed from each other, and their ideal prescriptions seem mutually incompatible, a shift to non-ideal formulations reveals a broad range of commonalities and complementarities. The following principles may be distilled from the discussion, delineating the common ground of international migration regimes that might be morally acceptable to all approaches:

1. Global Distributive Justice: The regime should address global inequality by liberalizing international labour migration and causing well-off states to accept immigration (a) from those locations whose residents would most benefit from increased migration; and (b) of those migrant workers who would themselves most benefit from migration, while avoiding the establishment of migration patterns that are detrimental to the social, economic and political development of developing countries.

2. Human Rights Protection: The regime must protect labour migrants from violations of their basic human rights, in the process of immigration, while working as labour migrants in the host country, and in their repatriation, as the case may be.

3. Migration Policy Effectiveness: The regime should increase the capacity of the international system and of states to control and enforce agreed immigration policy effectively and their ability to repatriate labour migrants whose legal term of stay under the regime has ended.

4. Emergency Safeguards: On the backdrop of increased liberalization, contingent and temporary emergency safeguard measures should be allowed in situations where labour

migration patterns seriously threaten economic and social interests of migration receiving states.

To be sure, these principles remain general, and their translation into legal prescriptions is challenging. Indeed, one of their advantages is the surprisingly wide space they leave for maneuver while remaining within the bounds of the overlapping non-ideal extensions of competing theories of global justice. Moreover, these principles furnish us with tools for assessing the justness of GATS Mode 4 as an international labour migration regime, on the backdrop of the dimensions of the international migration debate previously described. As argued below, Mode 4 runs afoul of these principles on many counts.

(b) Global Distributive Justice

The most damning indication of Mode 4's weakness in addressing global disparities is its *de facto* negligible impact on global migration and development to date. Historically, the inclusion of Mode 4 in the GATS was the result of developing country demands during the Uruguay Round (Lavanex, 2002, pp. 3-4). Yet in practice, specific commitments remain few, and most of them do not address developing country interests. The actual economic effects of temporary labour migration are generally very difficult to assess (WTO: 2004; Jansen and Piermartini, 2005), but it seems nigh impossible to establish any causality between any such effects and Mode 4 liberalization, given its paucity. In addition, in many cases national labour migration policies are more liberal than GATS specific commitments would require, so that any existing development dividend cannot be attributed to the GATS.

The failure of GATS to encourage developed countries to reduce labour migration restrictions stems from multiple causes, but the clearest is the asymmetrical North-South structure of labour migration combined with the traditionally reciprocal nature of concessions in the WTO.²⁹ Developing countries have little or nothing to offer in return within Mode 4 itself, and cross-linkages with liberalization in other Modes that would be of interest to developed countries, or indeed in other areas of WTO law and policy, have failed

²⁹ On reciprocity and development, see Broude: 2006, 259-261.

to materialize.³⁰ Article IV GATS recognizes the link between development and trade in services, including through the presence of natural persons.³¹ This sentiment is also echoed in the WTO's Council for Trade in Services "Guidelines and Procedures for the Negotiations on Trade in Services" (WTO, 2001) and in subsequent proposals and declarations produced during the ongoing Doha Round. Yet the language remains aspirational, and does not establish any concrete criteria that must be met for development and global distributive justice, such as quotas of commitments of interest to developing countries, or preferences for service-providing labour migrants from developing countries.

Not only are there no justice-oriented criteria for specific commitments in Mode 4, but some of the legal principles of GATS may actually prevent an applied consideration of development needs. As analyzed above, global distributive justice would require labour-receiving countries to discriminate in favour of labour migrants from developing countries, and among those – in favour of those migrants who would most benefit from liberalization. Yet MFN applies as a general commitment to all service-related labour migration, even in sectors in which no market access commitments have been made, legally precluding such preferences, as a rule (indeed this is sometimes mentioned as a source of reluctance to liberalize labour migration under Mode 4). Notably, the 'Enabling Clause' that permits developing countries to grant preferential market access to developing countries on a non-reciprocal basis,³² applies to goods, but not to services. Under article V:1 GATS, preferential treatment may be granted through regional services' trade agreements, provided there is substantial sectoral coverage and national treatment among the parties. This could allow for increased North-South liberalization in services trade, but on a reciprocal basis, and only if significant levels of overall service market integration were agreed upon.³³ Article V *bis*

³⁰ A full analysis of the political economy of the failure of Mode 4 is beyond the scope of this article. For one study, explaining that the GATS' effort to encourage labour-receiving countries to allow entry will have little migration liberalization impact, see Amin and Mattoo: 2005.

³¹ "The increasing participation of developing country Members in world trade shall be facilitated through negotiated specific commitments [...] relating to: [...] (c) the liberalisation of market access in sectors and modes of supply of export interest to them."

³² Waiver Decision on the Generalized System of Preferences, June 25, 1971, GATT B.I.S.D. (18th Supp.) at 24 (1972), *superseded by* Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries, Nov. 28, 1979, GATT B.I.S.D. (26th Supp.) at 203 (1980).

³³ Article V:2 allows a degree of flexibility to developing countries who are party to such regional services' trade agreements in the application of national treatment, but this would appear to merely permit developing countries to retain some discrimination in favour of local service-suppliers, and could not sanction an agreement whose main function was to grant market access to service-providers from a developing country.

specifically permits the establishment of bilateral or regional labour market integration agreements, but these would have to be fully integrative. Thus, the GATS does not include provisions that could be the basis for limited preferences for developing countries in Mode 4. Moreover, when the services provisions of existing North-South regional trade agreements are examined (Nielson: 2003) the Article V GATS consistency of many of them is questionable, because they provide for only limited or controlled GATS-style 'positive list' sectoral liberalization, and some do not at all liberalize the movement of labour beyond GATS commitments.

As for discrimination in favour of particularly deserving migrants, technically this is possible (e.g., by restricting market access in a given sector to labour migrants with an annual source-country income below a certain threshold), but no schedules of specific commitments do so in practice. Indeed, at a more fundamental level, the GATS' somewhat euphemistic treatment of labour migration as services-provision, and its exclusion of employment seeking migrants³⁴ significantly impair the capacity of Mode 4 to promote global equality of opportunity among potential migrant workers.

Another deficiency in Mode 4's potential to facilitate labour migration promotive of distributive justice is Article XVII GATS national treatment. In areas in which market access has been granted under Mode 4, labour migrants cum service suppliers must receive treatment no less favourable than the treatment accorded to domestic labourers, by any measure affecting the supply of services. Although Article XVII has its roots in international trade theory and Article III GATT 1947, not in international human rights law, it exemplifies the liberal immigration paradox. On the basis of Article XVII GATS, one might argue that foreign labour migrants must receive national minimum wage and social benefits. In some cases, this would deter the introduction of labour from low-wage countries, having been robbed of its competitive advantage, and hence trapped in its domestic setting. National treatment, originally designed to overcome non-tariff barriers to international trade, is in these cases a barrier to both trade and development. Beyond formal equality as such, human rights infringements do not necessarily arise in this scenario, as I will discuss presently, but distributive outcomes are thwarted.

³⁴ As per the GATS *Annex*, *supra* section 1.

Last but not least, the GATS simply does not include any language that might prevent labour migration policies of developed countries that are potentially detrimental to the social, economic and political development of developing countries. Brain drain and remittance dependence concerns are not incorporated into the GATS in any way.

(c) Human Rights Protection

The relationship between WTO disciplines and international human rights norms is a complex one, raising many international legal and 'constitutional' problems.³⁵ Moreover, the specific nexus between GATS Mode 4 and human rights is ostensibly far simpler in the sense that the rights in question are the rights of the actual workers whose migration is to be enabled by commitments under the GATS itself, not of indirectly affected persons (such as labourers manufacturing traded goods), and as we have seen, even a non-ideal global justice analysis would sincerely expect a labour migration regime to provide basic human rights protection.

Moreover, the GATS does not require Members to protect labour migrants from violations of basic human rights or to make international commitments in this respect. In GATS, reference is made to several non-WTO, international corpora of law,³⁶ but international human rights and labour rights obligations are not among them. Absent direct incorporation, the status of non-WTO human rights commitments in the WTO is academically controversial but effectively unenforceable in WTO law.³⁷ Thus, a labour-providing WTO Member could not complain against another Member for not protecting the basic rights of service providing labour-migrants. This stands in stark contrast to the

³⁵See Petersmann: 2000; Howse: 2002; Burgi, Cottier and Pauwelyn: 2005.

³⁶ Article VII:5 refers to relevant international and non-governmental standardization organizations; Article XII:2(b) refers to the Articles of Agreement of the International Monetary Fund (IMF), and Article XII:5(e) grants IMF findings an elevated factual status; and Article XIV(e) bases a general exception to GATS obligations on international agreements on avoidance of double taxation.

³⁷ See most recently, the Panel Report in *EC-Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291, 292, 293/R (29 September, 2006), in which the Panel denied applicability of the 1992 Convention on Biological Diversity and the 2000 Cartagena Protocol on Biosafety even for interpretative purposes under Article 31.3(c) of the Vienna Convention on the Law of Treaties because not all disputing parties were states party to these conventions.

situation in international intellectual property rights protection, where WTO Members may complain against lax protection of intellectual property rights of their nationals.³⁸

Again demonstrating the liberal immigration paradox, human rights or labour rights might nevertheless become relevant to Mode 4 in the reverse - if they were raised by labour-receiving states as justifications for preventing or restricting labour migration and its positive distributive effects through the discourse of rights. This could be done, for example, through the article XVII GATS national treatment principle,³⁹ augmented as the case may be by International Labour Organization (ILO) non-discrimination rules.⁴⁰ Moreover, non-discrimination establishes a higher standard of treatment than basic human rights do. Thus, labour migration may be excluded on this basis even when human rights are not truly at risk, while in other contexts human rights violations relating to labour migration may proceed unhindered by the GATS. For example, a Member may restrict labour migration by interpreting national treatment and non-discrimination norms as requiring full social benefits for labour migrants at the level of the host country, while at the same time violating basic human rights through aggressive repatriation policies for temporary labour migrants. Taking this to absurd heights, GATS and ILO national treatment norms have (unsuccessfully) been cited by labour importing contractors in order to simply lower the cost of foreign labour, while the basic human rights of labour migrants remain exposed to abuse both nationally and internationally.⁴¹

³⁸ See Article 41 of the TRIPS (Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125) and the request for consultations in *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights – Request for Consultations by the United States*, WTO Doc. WT/DS362/1 (Apr. 16, 2007).

³⁹ Another channel would be the public morals exception in Article XIV(a), but this would presumably enter into action only when genuine violations of human rights were involved, such as human trafficking, and would in any case also need to satisfy the 'necessity' test and the terms of the Article XIV GATS *chapeau*. For a discussion of these elements of Article XIV(a) in the light of the WTO Appellate Body Report, *US - Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/AB/R (Apr. 7, 2005), see Broude: 2005.

⁴⁰ See Zegers de Beijl: 1997. Notably, ILO conventions entailing non-discrimination against migrant workers are sparsely subscribed to by labour-receiving states, but economic non-discrimination would in many cases achieve the same affect, except that the complaining party would not necessarily be the migrants or their source country.

⁴¹ See H.C.J. *Bukbris et al. v. Hedera Tax Office et al.*, Israeli Supreme Court, unpublished, June 23, 2005.

(d) Migration Policy Effectiveness

Quite simply, the GATS does not provide Members receiving temporary labour migration under Mode 4 with any legal or other mechanism that would make migration policy any more effectively enforceable. Labour-attracting states interested in an international regime that might assist them in making their immigration patterns more predictable and controllable will not find any comfort in the GATS. This is noted here from a global justice perspective, but as in other cases, it is supported by political and economic considerations: World Bank economists have pointed out that the GATS is an ineffective mechanism for liberalizing international labour migration, because it does not include or even allow commitments from labour-providing states to repatriate labour migrants (Amin and Mattoo: 2005). Such commitments would of course need to conform to international human rights norms that limit a state's ability to prevent people from leaving their territory, while establishing obligations to receive prodigal nationals. The GATS, however, is quite oblivious to these issues.

(e) Emergency Safeguards

The GATS does not currently include any general emergency safeguard mechanisms, let alone in the specific contexts of GATS Mode 4 labour migration. Article X GATS calls for negotiations on the topic, but deadlines for the completion of these talks have been repeatedly missed and the default is that such safeguards do not exist. As an alternative, Article XXI GATS could permit a labour-receiving Member to modify or withdraw a GATS commitment, at any time after three years have elapsed from the date on which that commitment entered into force, subject to compensatory adjustments made towards Members whose GATS benefits have been affected by the modification or withdrawal. However, such a change in commitments would not be temporary *ex ante*, nor contingent on emergency conditions.

6. Conclusion

In this article I have attempted to tease out the basic principles of an international labour migration regime that could conform to competing theories of global justice on a pragmatic, non-ideal basis, and address the multitude of problems associated with the international labour migration debate. I have shown that these principles should include elements of global distributive justice, human rights protection, immigration policy enforcement and contingent emergency safeguards or 'escape clauses'. These principles reflect not only a philosophical common ground between cosmopolitan and communitarian approaches to this difficult area, but also a compromise among different political views.

However, the GATS Mode 4 spectacularly fails to meet any of these criteria. It is as ineffective in the promotion of global distributive justice as it is in the strengthening of migration policy enforcement, and as inadequate in the protection of human rights as it is in the prevention of seriously detrimental effects of labour migration. The establishment of a global labour migration regime that is morally permissible, politically possible and likely to be effective (Rawls: 1999, 89) will no doubt require careful consideration, negotiation and time; but the GATS Mode 4 does not appear to be the appropriate model, in too many senses.

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