

**TRADE IN SERVICES THROUGH THE TEMPORARY
PRESENCE OF NATURAL PERSONS: A WIN-WIN
FORMULA FOR EGYPT AND THE EU**

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1. INTRODUCTION

Multilateral trade negotiations within the context of the Doha Development Agenda¹ (DDA) have all but fatigued most members of the World Trade Organization (WTO). At present, it is not likely that any substantive global agreement based on the DDA will be reached before 2009.² Nevertheless, the center of gravity for trade negotiating has simply flowed from the multilateral forum to the regional and bilateral forum at an even faster rate, with a view to concluding new or deeper preferential trade arrangements away from the deadlock of the DDA. One particular objective of this increased preferential negotiating activity, led in large part by the United States (US) and the European Union (EU), is a concerted focus on ‘*the liberalization of trade in services*’ to open up substantive access to developing country services markets further than what the latter group has already agreed to (in their respective commitments) in the WTO. Developing countries, on their part, are not hesitant to enter into such negotiations, as this should also prove beneficial to upgrading and furthering their services sector to render it more competitive.

For Egypt, this presents both challenges and opportunities; managing the former and seizing the latter will be instrumental to ensuring that Egypt gains from any liberalization of trade in services at the bilateral level. For Egypt, specifically opening-up of the EU’s market for services supplied through the temporary presence of natural persons (or ‘Mode 4’ in WTO parlance), is a positive-sum game. Not only will it help enhance the capabilities of executives, managers and specialists, but it should be equally beneficial to natural persons belonging to less advantaged labor groupings. This paper focuses on one specific area of liberalization of trade in services—*the supply of services through the temporary presence of natural persons*—a concession which Egypt has long sought from developed countries. In that sense, this paper takes a qualitative look at the key issues involved in negotiating such access and treatment for Egyptians *vis-à-vis* the EU, as well as the possible ways in which both Egypt and the EU might emerge as winners from the EU’s liberalization of services supplied by natural persons.

This paper comprises four main sections that follow this introduction. Section 2 will address the general background to negotiations on trade in services, the definition of ‘Mode 4’

¹ The Fourth WTO Ministerial Conference, held between the 9th and 13th of November, 2001 in Doha (Qatar) succeeded in launching a new round of trade negotiations called “The Doha Development Agenda”.

² At the time of this writing in early 2008, it was expected that the conclusion of meaningful multilateral trade negotiations would have to wait at least until the conclusion of the 2008 presidential election cycle in the US.

and the complexity of scheduling Mode 4 commitments. Section 3 will review existing commitments, arrangements and negotiating frameworks which, taken together, necessarily color the negotiating space Egypt and the EU must operate within. Section 4 will take a qualitatively strategic look at basic supply and demand matters which, properly understood, provide natural opportunities for constructing a win-win formula. Finally, Section 5 will conclude with a set of preliminary recommendations for consideration.

2. THE SUPPLY OF SERVICES THROUGH THE PRESENCE OF NATURAL PERSONS

The purpose of this section is to elaborate on the understanding and the functioning of Mode 4 as a way of supplying services through the temporary movement of natural persons across the physical boundaries of WTO member states; while at the same time pointing to the major flexibility inherent in the General Agreement on Trade in Services (GATS) in this respect. The Section also deals predominantly with the most frequent constraints applied on the opening-up of Mode 4 trade, in addition to problems arising from the lack of a common approach in the classification of Mode 4 service suppliers within different WTO members' scheduled commitments.

2.1. Overall Trends in the Negotiations for Liberalizing Trade in Services

The push by developed countries to shift negotiations to the bilateral track is not unexpected or surprising, since developed country perceptions of services liberalization at the multilateral level reflect a view where, at best, only modest progress has been made (only partly because of the stalling of the DDA). Liberalization of trade in services in the Uruguay Round³ represented only the first attempt to devise a legally enforceable multilateral agreement, where developing countries pushed hard for additional flexibility. The resulting agreement—the GATS—was drafted in such a way as to allow developing countries an opportunity to liberalize at their own pace within the WTO framework.

The bilateral push now underway creates both challenges and opportunities for developed and developing countries alike; on some levels it even seeks to move beyond the

³ The Uruguay agreements, as the eighth round of trade negotiations, were signed as a "Single Undertaking" on the 15th of April 1994 in Marrakech. This notion was used for the purpose of preserving the cohesion of the agreements as a whole and to ensure that participating member countries will not sign agreements that only suit their interests and leave out other agreements that might not be of interest to them. This ensured that all countries, after signing in Marrakech and the ratification of parliaments, would adhere to the package that created the WTO as a whole.

basic elements of the GATS—a frightening concept for some developing countries. These “more than GATS” bilateral agreements have come to be known as ‘*GATS-plus*’ arrangements.

As a background, it is important to understand why GATS-plus⁴ arrangements are sought in the first place. When the GATS was negotiated as part of the Uruguay Round from which the WTO emerged, negotiating parties could not achieve (within the time constraints) a consensus on how the GATS should address various key issues.⁵ Furthermore, *international trade in services* was a nascent concept still not readily manageable for most countries from a concessions perspective; in fact, even statistics on measuring trade in services were somewhat difficult to assemble in many cases. In turn, convincing developing countries in particular to grant market access and liberalize other areas of trade in services was a daunting task as markets were still grappling with how to define and measure ‘services’ as an economic activity to begin with. Ultimately, a relatively limited range of commitments under the GATS reflected the resistance to liberalization, pending a deeper assessment. As a result, the GATS included a ‘built-in’ mandate to negotiate further in future rounds so as to reduce or eliminate impediments to market access.⁶ Arguably, developed countries seem less convinced that progressive liberalization through the WTO will help advance the overall liberalization of trade in services at a regular pace as was once anticipated. Furthermore, in the view of many developed countries, the perceived sluggishness of the traditional bilateral *request-offer* approach⁷ (implemented as a part of the GATS negotiations framework) has only contributed to fuelling the push towards preferential arrangements on trade in services—in other words, to pry open developing country markets through GATS-plus arrangements.

⁴ ‘*GATS-plus*’ is negotiating (a) obligations beyond those already agreed under the GATS framework; or (b) further commitments in addition to those already scheduled under the GATS. Conceptually, preferential trade arrangements under GATS Article V are “GATS-plus”.

⁵ The so-called ‘unfinished business’ of the GATS, such as ‘Domestic Regulation’, ‘Emergency Safeguard Measures’, ‘Government Procurement’ and ‘Subsidies’. For a comprehensive treatment of the ‘unfinished business of the GATS,’ particularly in light of preferential trade arrangements on services, see Markus Krajewski’s “*Services Liberalization in Regional Trade Agreements: Lessons for GATS ‘Unfinished Business’?*” in *Regional Trade Agreements and the WTO Legal System*, edited by Lorand Bartels and Federico Ortino, Oxford University Press (2006); pp. 175-200. Negotiations on the GATS ‘unfinished business’ pre-dates even the DDA, since 2000.

⁶ GATS Article XIX.

⁷ Flexibilities afforded by the *request-offer* process was time and again emphasized during the sixth ministerial conference in Hong Kong. The request-offer process is a critical element of the GATS structure, and was considered vital to making the GATS concept acceptable to developing countries in 1994. For a further discussion, see the *South Bulletin* number 121, April 1st, 2006 issue.

Additionally, some developing countries perceive that, in certain instances, their ability to negotiate better trade terms *vis-à-vis* developed countries may be enhanced in a bilateral (or regional) forum *precisely because* of either (a) the exclusion of other countries, and/or (b) the informal inclusion of other subjects in parallel negotiations, thus magnifying non-trade advantages that might accrue to both parties (such as greater cooperation on political or security-related matters, or additional financial and technical assistance, or greater market access for agricultural goods, for example). Such a possibility would otherwise be diluted or foregone in a multilateral trade arrangement less accommodating of non-trade linkages, due in part to a lower likelihood of convergences on non-trade interests among considerably more negotiating parties (which probably might lack at least a regional affinity). For example, taking advantage of a bilateral negotiations framework to explore non-trade advantages that are linked to the subject of the negotiations, including budgetary and technical assistance are common. In prior bilateral trade negotiations with the EU, Egypt successfully negotiated a modernization package for industry. Similar packages may be sought for the upgrade of human resource capacities (such as specialized training, vocational strengthening, support to full processes leading to the recognition of qualifications, including support to assist in the attainment of recognized equivalencies in certifications, proficiencies or licenses, etc.), interventions that would ultimately give further value to potential Mode 4 concessions by the EU.

2.2. Interpretation Problems of Mode 4 within the Multilateral Approach

The reference point for the purposes of this paper is necessarily the WTO's GATS agreement, which outlines four basic modes (or ways) through which services may be supplied (GATS Article I.2).⁸ In this context, the supply of services through the physical presence of natural persons (in the receiving, host or importing state) is a 'Mode 4' activity as defined by the

⁸ In the simplest sense, a service may be supplied through:

Mode 1: From the territory of one WTO member into the territory of any other WTO member (i.e., the service supplier does not cross a physical boundary, even if the service itself does);

Mode 2: In the territory of one WTO member to the service consumer of any other WTO member (i.e., the service supplier does not cross a physical boundary, even if the service consumer does);

Mode 3: By a service supplier of one WTO member, through commercial presence in the territory of any other member (i.e., the service supplier crosses a physical boundary as a business, but not necessarily as a natural person);

Mode 4: By a service supplier of one WTO member through the presence of natural persons of a WTO member in the territory of any other WTO member (i.e., the service supplier crosses a physical boundary as a natural person).

GATS (it is called Mode 4 because it is the *fourth* of four possible ways to supply services). The GATS ‘Annex on the Movement of Natural Persons’ (AMNP), however, makes clear that Mode 4 *does not include* coverage of migration, or the movement of persons from one state to another *specifically to seek permanent residence or employment* in the ‘importing’ state (among other things). It explicitly states that Mode 4 is only concerned with the ‘*temporary presence*’ of natural persons in the receiving host state (or importing state) so as to supply a service in that host state. Hence, GATS deals only with the *temporary* presence (and therefore, the necessary movement) of service suppliers within the purview of international trade. As such, many observers argue that international trade rules and regulations—as distinct from immigration legislation and labor market policy—should be the predominant regulatory channel from which to view and manage Mode 4 matters. To give the Mode 4 concept operational functionality, specific legislation on ‘GATS Mode 4’ at the national level is necessary, yet severely lacking in all but a handful of countries. Without such internal recognition at the national level, Mode 4 matters will likely continue to fall prey, quite unnecessarily, to both labor and immigration debates.

Still, despite this clear separation (of different policy areas) being made in the early stages of the negotiations (in other words, GATS Mode 4 does not condone or cover migration or those seeking permanent employment), commitments under GATS Mode 4 remain disappointing even at the time of this writing. Uruguay Round commitments in the Mode 4 context were mostly confined to the movement of high-level personnel within multilateral corporations.⁹

Since WTO Members have unilaterally introduced various terminologies in their *schedules of commitments* to define the scope of their commitments related to Mode 4, there has always been a range of interpretational problems at the multilateral level. Left unaddressed at the bilateral level, especially in advance of negotiating any bilateral concessions, matters of definition and nomenclature may haunt would-be benefactors of any negotiating outcome, in both the private and public sectors.

A closer look at Mode 4 under the WTO’s GATS rules indicates that Mode 4 in simple terms is ‘the temporary presence of a national of a Member, for the purpose of supplying a

⁹ A review of the scheduled commitments of WTO Members reveals that over 70 percent of the WTO’s GATS scheduled commitments under Mode 4 are either linked to Mode 3 (commercial presence) or as employees of other entities, and specifically for highly-skilled natural persons.

specific service to a consumer in another Member’. Whereas such a definition is limited by the contractual nature and the duration of the stay, it is unlimited as to the level of skill of the supplier of the service¹⁰ and the geographic origin of the contract. Despite this, one often stumbles upon *four* common and repeated problems of interpretation stemming from the disparity in how commitments are scheduled.

The *first* is the confinement of Mode 4 to ‘intra-corporate transferees’ (i.e., exchange of typically high-level and skilled labor among companies and their affiliates across borders). Nowhere is Mode 4 limited to ‘intra-corporate transferees’ in the GATS Agreement itself or its Annexes. In fact, the term ‘intra-corporate transferee’ was unilaterally introduced and used by some WTO Members to self-classify a ‘type’ of natural person service supplier they describe within *their scheduled commitments*. A lack of uniformity in terminology—between and among Members—continues to perpetuate this misunderstanding, falsely institutionalizing the belief among non-specialists that only ‘intra-corporate transferees’ are the intended subjects of Mode 4 activity.

The *second* problem of interpretation is to exclusively link Mode 4 with professional natural person service suppliers (business executives, physicians, university professors, etc.) and to exclude other types of natural person service suppliers as not being Mode 4 inclusive. At its most basic level, a Mode 4 service supplier could be a natural person hired as an independent contractor to pick grapes in a vineyard for a few weeks, a computer programmer hired as an employee of a home-country software firm and sent for 18 months to program a particular section of software code for a host-country bank, or a cardiovascular surgeon, contracted by a host country specialist hospital in his or her self-employed capacity as a natural person to perform a complex heart bypass operation for only one day. It is important, therefore, to recognize that Mode 4 does not differentiate by skill *level* or skill *type*, it is, in other words, a *skill-neutral* modality. The mere fact that the overwhelming majority of scheduled commitments for Mode 4 are skewed towards highly-skilled professionals does not in itself preclude the GATS from recognizing the legality of Mode 4 coverage for other skill levels or types, and therefore, the right of all WTO Members to negotiate market access for a wide range of skill levels and types.

¹⁰ Naturally, this applies only to those services, which are ‘legally permissible’ under the national laws of the host state, regardless of the origin of the service supplier.

The *third* problem involves an assumption that a contract between buyer and seller is required in advance of the natural person's movement from the exporting country into the importing country. In other words, there are views that only the 'delivery' of a pre-contracted service is covered by the GATS insofar as natural persons are concerned. The text of the GATS¹¹ and subsequent judicial affirmation through findings by the WTO's Appellate Body,¹² however, appear to offer a decidedly different interpretation. The "supply of a service", as defined within the GATS itself,¹³ recognizes that the reality of business transactions is that they are a dynamic multi-stage process and not a static spot transaction. As such, the "production, distribution, marketing, sale and delivery of a service" are all considered integral parts of the 'supply of a service'.¹⁴ This is a critical interpretive matter, since the 'marketing' of a service, to be supplied by a natural person, by its very nature, may well involve a need for interaction(s) with a potential service consumer during some time period *before* a sales agreement (or contract) might actually be concluded. In other words, it may well be a violation of various provisions of the GATS to restrict the movement of persons under Mode 4 on the sole basis of a need to demonstrate *a priori* possession of a contract with a service consumer. By extension, the contestability of the market for the supply of certain services through the temporary presence of natural persons will, by default, be directly affected by how this aspect is interpreted (and enshrined) into any regional or bilateral arrangement on trade in services that addresses Mode 4 activity. It is also important to clarify here, therefore, that the marketing of a service to be supplied through temporary presence (which is GATS-compliant activity) is not the same as 'seeking employment', which is not a matter covered by the GATS.

The *fourth* (and perhaps most hotly contested) problem of interpretation involves whether or not natural persons from one member (the home country) who are supplying services in the territory of another member (the host country), but for a 'wholly-owned' firm (the employer) from the host country member, fall within the purview of GATS Mode 4, or are not covered by GATS at all. While there is no definitive language in the GATS to

¹¹ GATS Article XXVIII (on Definitions) paragraph (b) read in conjunction with sub-paragraph (c) (iii) of the same article.

¹² European Communities – Regime for the Importation, Distribution and Sale of Bananas (WT/DS27/AB/R) in paragraph 220.

¹³ See *supra* note 11.

¹⁴ *Ibid.*

preclude this situation, there are many observers who favor a strict interpretation, which would deny such natural persons recourse to the GATS as a basis for non-discrimination, market access, national treatment or other obligations and/or scheduled commitments. When to classify a natural person as an *employee* and when to classify that person as an *independent contractor service supplier* (i.e., self-employed) are important considerations, with implications in both cases as to whether or not one or the other is always to be regarded as a Mode 4 activity.

As we look at the fourth problem, one finds:

First, GATS Article I (3) (b) states that "...'*services*' include any service in any sector except services supplied in the exercise of governmental authority."

Second, Paragraph 1 of the Annex on the Movement of Natural Persons (AMNP) states that: "This Annex applies to measures affecting natural persons who are service suppliers of a Member, and natural persons who are employed by a service supplier of a Member, in respect of the supply of a service."

Third, according to paragraph 2 of the AMNP, only 'permanent employment' is excluded from GATS coverage.

The only scope-limiting factor in Paragraph 1 of the AMNP, therefore, is that the GATS *does not* provide coverage to natural persons of a WTO Member who are employed by a "non-service supplier" of a WTO Member.¹⁵ It would appear, therefore, that if the natural person who is a service supplier wishes to provide services to an employer, who is *not* also a service supplier (regardless of firm ownership), the contractual arrangement should probably not be structured as an "employment contract", as that arrangement would only fall within the ambit of the GATS if the 'employer' was *also* deemed to be *both* a service supplier supplying a service *and not* of host-country origin.

Finally, while the Annex recognizes a need for considerable flexibility to members in regulating the temporary entry (into their territory) of natural persons,¹⁶ it further provides for the right of governments "to regulate entry of natural persons ... including those measures

¹⁵ For the sake of consistent analysis, we ignore any situation involving a non-Member of the WTO.

¹⁶ Joint WTO-World Bank Symposium on Movement of Natural Persons (Mode 4) under the GATS; WTO, Geneva, 11-12 April 2002, Paper on "Temporary Entry of Natural Persons as Service Providers," as presented by Richard Self and B. K. Zutshi.

necessary to protect the integrity of, and to ensure the orderly movement of natural persons across borders...”.¹⁷ Despite these provisions, authorities remain concerned that bound commitments in country schedules will undermine their flexibility to administer temporary entry measures in a responsive way. These concerns, among others, contributed to the relatively modest commitments under Mode 4 in the Uruguay Round and the difficulty in further liberalization of Mode 4.¹⁸ The misconceptions described earlier, as well as the clarifications above have been suggested in part to help negotiating parties and other interested actors understand both why it is important to decide on *nomenclature* and at least some degree of *common interpretation* early on, as well as ideas on ways and means of addressing some key grey areas. It may well turn out, however, that the *Realpolitik* of the negotiations process and the sovereign posturing that often accompanies such processes, may itself lead parties to prefer not to be too specific about definitions after all. Since such an arrangement would be bilateral, this would likely be at greater detriment to the Egyptian side than the EU, especially given Egypt’s longstanding interest in Mode 4 access to developed country markets.

In the final analysis, then, the scope of GATS Mode 4 is effectively limited only by (1) classification as a service supplied by a natural person, (2) duration of stay to provide the service and (3) nature of the contractual relationship, specifically if the contract is one of self-employment in relation to a service consumer or employment by a service supplier from a WTO member. Ideally for Egypt and the EU, these three elements are integral aspects, therefore, of a common understanding which needs to be achieved—preferably early in the negotiations process. In conclusion, while negotiating parties should in essence rely on the GATS definitions, including that of Mode 4, there is nothing to preclude the expansion of these definitions for Mode 4, within the framework of bilateral negotiations, if mutually agreed by both parties. Such deviations from the GATS, as mutually agreed by negotiating parties, have already occurred for the expansion of the definition of Mode 3 to cover services and goods so as to include the right of establishment, for example, in the context of Euro-Med negotiations as well.

¹⁷ Paragraph 4 of the GATS Annex on the Movement of Natural Persons.

¹⁸ See supra note 16.

Egypt and the EU

Emanating from the legal basis in the Association Agreements between the EU and the Mediterranean partner Countries, the EU's 2006 regional initiative to negotiating the liberalization of trade in services is part of one such approach: the multi-dimensional 'Euro-Mediterranean Partnership'.¹⁹ As outlined in the Ministerial Declaration of March, 2006 in Morocco, the negotiations seek to progressively and mutually liberalize *trade in services* and the *right of establishment*, within the larger context of the sustainable development and strengthening of regional integration.²⁰ Participating countries include the 27 EU Member States²¹ in conjunction with the European Commission, as well as Egypt, Israel, Jordan, Lebanon, Morocco and Tunisia.²²

From the perspective of the EU, pursuing an interest in the further opening up of Egypt's services markets beyond what Egypt has committed to in the WTO (under the GATS), combined with a similar interest in opening up EU markets from the Egyptian perspective (beyond what the EU has committed to under the GATS), gives the Euro-Mediterranean negotiations a *GATS-plus* character for the trade in services element of that agenda.

The agreement to launch negotiations on trade in services in 2006 between Egypt and the EU affirms the relevance of this subject at this juncture in time. The decision to agree on an *Action Plan* as yet another means to increase the potential participation of Egypt in the

¹⁹ The Euro-Mediterranean Partnership emerged from the Barcelona Process, which began in 1995 and brought together the then-15 Member States of the EU with the countries bordering the Mediterranean Sea. The purpose was to construct a zone of closer political, economic and social relations. The economic component originally strived for a Free Trade Area by 2010.

²⁰ Ministerial Declaration of the *Ministerial Meeting on the Launch of Euro-Mediterranean Negotiations on the Liberalization of Trade in Services and the Right of Establishment*, 24 March, 2006. It should be pointed out that the Euro-Mediterranean Partnership is a parallel and distinct arrangement, which is complementary to the more over-arching European Neighborhood Policy (ENP). The ENP does not replace the Euro-Mediterranean Partnership, but merely offers a long-term mechanism (an 'Action Plan' for each ENP partner) to integrate more deeply than the arrangements currently on offer through the Euro-Mediterranean Partnership. For a more comprehensive treatment, see Bernard Hoekman's "*From Euro-Med Partnership to European Neighborhood: Deeper Integration à la Carte and Economic Development*," Working Paper No. 103, the Egyptian Center for Economic Studies (ECES), July, 2005; and the *European Neighborhood Strategy Paper*, Communication from the Commission, COM (2004) 373 Final, European Commission 12 May, 2004.

²¹ The 27 EU Member States: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, The Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom.

²² It is expected that at a later date Algeria and Syria, and eventually Libya and the Palestinian Authority may be invited (or elect) to accede to this negotiations process in one form or another.

EU's internal market is separate, but parallel.²³ As such, examining how Egypt and the EU may *both* benefit from further liberalization of trade in services through the presence of natural persons²⁴ (i.e., Mode 4 at bilateral level) necessarily requires a deeper understanding of how Mode 4 has been dealt with thus far. Indeed, it is a highly sensitive negotiating topic, since the presence of natural persons requires the crossing of borders, permission to enter another country's territory and the potential of this kind of movement being somehow abused or transformed into *migration*, which this paper and GATS Mode 4 do not cover.

Additionally, without fully understanding the nuances of Mode 4 as a manner of supplying services, it is difficult to extract meaningful and commercially viable concessions from negotiating parties. For Egypt, Mode 4 trade represents perhaps one of the greatest potential areas for growth and export development in terms of *trade in services* with the EU—indeed, for Egypt, very few 'trade in services' concessions could come close to matching the untapped potential exports locked in Mode 4. For Europe, there are shifting dynamics and considerable challenges to the future of the simple ability of supply to balance demand on its services market (as delivered by natural persons from within the EU or outside of the EU) in the absence of finding innovative ways to reasonably open up that market. That dilemma is at the crux of what may be a win-win formula for mutual gain.

2.3. Traditional Constraints to Mode 4 Liberalization

In addition to problems of definition, there are two key substantive constraints to Mode 4 liberalization which are relevant to explain at this juncture. Both are born from the vested interests of non-trade policy areas which, by default, at least superficially overlap with Mode 4 in practice: labor market and immigration policies, as mentioned earlier. These constraints are:

(A) Economic needs tests (ENTs)

²³ In March 2007, Egypt and the EU agreed to an Action Plan for Egypt within the context of the European Neighborhood Policy [ENP] (see footnote 20 above) outlining key areas and benchmarks of progress necessary to increase Egypt's access to the EU's internal market. The Action Plans revolve around greater harmonization between the EU and ENP partners in regulatory approaches and processes, but not the harmonization of laws; instead, Action Plans strive towards the approximation of laws in certain areas, so as to make 'similar' various operating conditions.

²⁴ A *natural person of a Member* is defined in GATS Article XXVIII (k) as a national of that Member or a natural person who has a *right* to permanent residence in that Member's territory.

(B) Visa and administrative restrictions

Economic needs tests (ENTs)

ENTs have been identified in GATS as a barrier to market access²⁵ and the free movement of natural persons as service suppliers. Since neither the definition of ENTs, nor rules, criteria or procedures of their application have been elaborated upon in the GATS, ENTs [or Labor Market Tests (LMTs)] are often used as an alternative to specified quantitative limitations in schedules of commitments. The discretionary and non-transparent nature of such tests certainly reduces the predictability of trading conditions.²⁶

The EU has used the ENT instrument frequently on Mode 4 liberalization commitments in a wide range of services.²⁷ Several members of the WTO, including Egypt, have called for the elimination of ENTs. It has also been suggested that in cases where this would not be feasible members should ensure that such tests are as transparent as possible, by specifying the applicability of objective criteria in the schedules, and establishing durations for their application.²⁸

Visa and administrative restrictions

Even where persons meet the criteria set out under Mode 4, the administration of a given visa regime can pose another barrier to trade. Thus, efforts should be made to streamline visa regimes when visa issuance is requested for the trade-related movement of persons. It has also been previously suggested at the multilateral level to tailor visa issuance to Mode 4-specific natural persons categories, in what, for example, are known as ‘*GATS-Visas*’, either

²⁵ GATS Article XVI.

²⁶ “Service Providers on the Move: A Closer Look at Labor Mobility and the GATS.” Working Party of the Trade Committee, TD/TC/WP (2001) 26/FINAL, OECD, Paris.

²⁷ UNCTAD/ITCD/TSB/8: Lists of ENT in the GATS Schedules of Specific Commitments, 17 August 1999. All services under Mode 4 are subject to an ENT, such as medical services, services provided by nurses and midwives, pharmacists, business services, construction, distribution and tourism services, higher education services for opening of private universities, hospital services, hotels, restaurants and catering where ENT is applied on the opening of new bars, cafes and restaurants, travel agencies and tour operators, entertainment services, sports and other recreational services, taxi services, limousine services, passenger and freight transportation by road and inter-city bussing services.

²⁸ WTO document number TN/S/W/14: “Proposed Liberalization of Mode 4 under GATS Negotiations,” Argentina, Bolivia, Chile, China, Colombia, Dominican Republic, Egypt, Guatemala, India, Mexico, Pakistan, Peru, Philippines, South Africa and Thailand. In the Information Note by the Secretariat JOB(05)196, presented on 19 September 2005 to the Council for Trade in Services, a “Reference Paper on the use of ENTs” was suggested, which would address the following elements: (i) definition of ENTs; (ii) criteria (qualitative/quantitative) for introduction of ENTs; (iii) procedures for application; (iv) guidelines for administration of ENTs, transparency and full availability of information; (v) duration and review of ENTs application.

automatically or for long validity periods and multiple-entries of specified durations.²⁹ It is essentially meant that the conditions for temporary entry and stay ought to be less stringent than for permanent immigration, which Mode 4 does not cover. GATS-Visas, as suggested, could cover Mode 4 commitments made both horizontally and on a sectoral basis. Also, adequate safeguard mechanisms may be built in to prevent GATS-Visa holders from entering into the permanent labor market. In other words, by creating a special category of visas recognized by WTO members as GATS-Visas, many concerns of actors and interests in both labor policy and immigration policy circles may be addressed, and a similar regional (Euro-Med) scheme could be structured in any case in parallel or independently of multilateral developments.

WTO members' proposals in the WTO framework, including Egypt, have focused on the removal of restrictions that undermine the value of Mode 4 commitments. Several proposals have called for the elimination of residency or citizenship requirements,³⁰ quantitative restrictions, pre-employment conditions, discriminatory tax treatment and social security contributions,³¹ elimination of wage-parity requirements as a pre-condition for the entry of business visitors and all other discriminatory measures. In cases where removal of restrictions would not be feasible, the same group of developing country WTO members has called for improving the clarity and transparency of such restrictions in the schedules, for instance through inscribing a clearly-bound numerical limitation as opposed to a discretionary one.³²

Discrimination also often takes the form of preferences in government procurement granted to domestic service suppliers over foreigners. It is expected that Egypt will face

²⁹ WTO document number S/CSS/W/12: "Proposed Liberalization of Movement of Professionals under the GATS," India on 24.11.2000.

³⁰ Residency or citizenship requirements are frequently imposed as eligibility conditions, putting foreign suppliers at an immediate disadvantage.

³¹ Foreign service suppliers have to pay social security and other taxes for which they do not get adequate tax credits in their home countries. For example, Desai et al. estimate that the US government collects as much as \$22.5 billion a year in the form of payroll taxes from H-1B Visa holders of Indian origin alone (it should be pointed out, however, that in 2005, around 25 percent of H-1B Visa holders were of Indian origin). Sources: Mihir Desai, Davesh Kapur and John McHale. 2001. "Sharing the Spoils: Taxing International Human Flows," Weatherhead Center for International Affairs, Working Paper 02-06. Harvard University, Cambridge, Mass. and the United States Bureau of the Census, 2005.

³² TN/S/W/31: "Categories of natural persons for commitments under Mode 4 of GATS," submitted by a group of developing countries on 17 February, 2005.

mounting pressure in this regard to agree to withdraw the preferences granted to its national service suppliers in government procurement projects.³³

2.4. The Scheduling of Mode 4 Commitments

Criticism is often leveled at the lack of harmonization in the manner in which commitments are made, as well as at the lack of clarity in the approach followed by WTO members to schedule their commitments under Mode 4. Falling short of a common approach to scheduling, members have inscribed their commitments by *category* of Mode 4 service supplier (e.g., intra-company transfers, business visitors, contractual service suppliers, etc.). Other members have scheduled with reference to the *job type* covered (e.g., managers, executives, specialists, etc.), without indicating what service supplier categories cover. Still others refer instead to *general requirements for entry* with no specific reference to any service supplier category or job type.³⁴ As suggested within WTO services negotiations, a common and comparatively easy-to-read format could be achieved through the scheduling of commitments according to common categories of service suppliers. It has been generally agreed in the multilateral negotiations that members undertake Mode 4 commitments, to the extent possible, based on the suggested categories for the sake of contributing to the transparency of Mode 4 commitments. These would in turn be divided where necessary into sub-categories such as ‘senior managers’ and ‘specialists’ for intra-corporate transferees and ‘service sellers’ for business visitors. According to the WTO Secretariat, commitments would be listed under five main headings:³⁵

- a. Intra-corporate transferees
- b. Business visitors
- c. Contractual service suppliers: this category is also sometimes referred to in schedules as “Professionals,” as there need not be a commercial presence in the

³³ It is important to keep in mind that the EC has recently tabled in the framework of Doha negotiations a proposal (so far the only one) that GATS commitments on *government procurement* could be scheduled by individual countries, sector by sector, in a similar way to the existing scheduling of market access and national treatment commitments. Though no headway was made at the multilateral level yet, it is expected that this proposal will haunt Egypt in the bilateral negotiations, where the same commitments valid under market access and national treatment will apply in government procurement.

³⁴ WTO, Communication from Bulgaria, Canada, the European Communities and Romania: Mode 4 – A Common Approach to Scheduling; TN/S/W32; 18 February 2005.

³⁵ The Secretariat’s note on “Categories of Natural Persons subject to commitments under mode 4” (Job (03)/195).

Member taking the commitment. The contractual service supplier category is of particular interest to developing countries and to SMEs in any country.

- d. Independent Professionals: natural persons who enter the territory of another Member temporarily to perform a service as self-employed persons pursuant to a contract between the service suppliers and any service consumer located in the territory of the other Member.
- e. Others

The United Nations Conference on Trade and Development (UNCTAD) has also pushed strongly for more clarity and accuracy of the commitments to make the linkages between the above-mentioned five categories, on one hand, and the International Labor Organization (ILO) International Standard Classification of Occupations (ISCO), which has established an internationally adopted classification of 9 major groups, on the other hand.

These groups are the following:

- a. Legislators, senior officials and managers
- b. Professionals
- c. Technicians and associate professionals
- d. Clerks
- e. Service workers and shop and market sales workers
- f. Skilled agricultural and fishery workers
- g. Craft and related trades workers
- h. Plant and machine operators and assemblers
- i. Elementary occupations

Against this background, various attempts are being made to attain clear guidelines for the scheduling of commitments under Mode 4, particularly with a view to permit its effective utilization on the part of both the *receiving* as well as *sending* countries. Specifically, it is important to ensure that within the framework of the regional negotiations, a uniform and harmonized system is applied regarding the scheduling of commitments on bilateral tracks. This will help to avert the confusion, which has ensued since the end of the Uruguay Round, as to the somewhat arbitrary approach to the nomenclature used for GATS scheduled commitments. Thus, it should be worthwhile to emphasize the need for a joint format for scheduling with the EU to be accessible and easy to read for all stakeholders, perhaps based

on the aforementioned WTO categorization combined with the standard classification of occupations.

3. RELEVANT EXISTING ARRANGEMENTS BETWEEN EGYPT AND THE EU

The purpose of this section is to highlight the relative weaknesses of both partners in their services sector liberalization. Whereas for Egypt this requires a substantive opening in a wider range of services, the case for the EU, however, is more confined to Mode 4. In either case both are apt to be placed under direct pressure for additional liberalization; Egypt to further open its overall services sector and the EU with regard to its Mode 4 commitments. Furthermore, the section arguably removes any doubt on the possibility of excluding Mode 4 from future negotiations.

3.1. Relevant GATS Commitments by Egypt and the EU

The Egyptian case

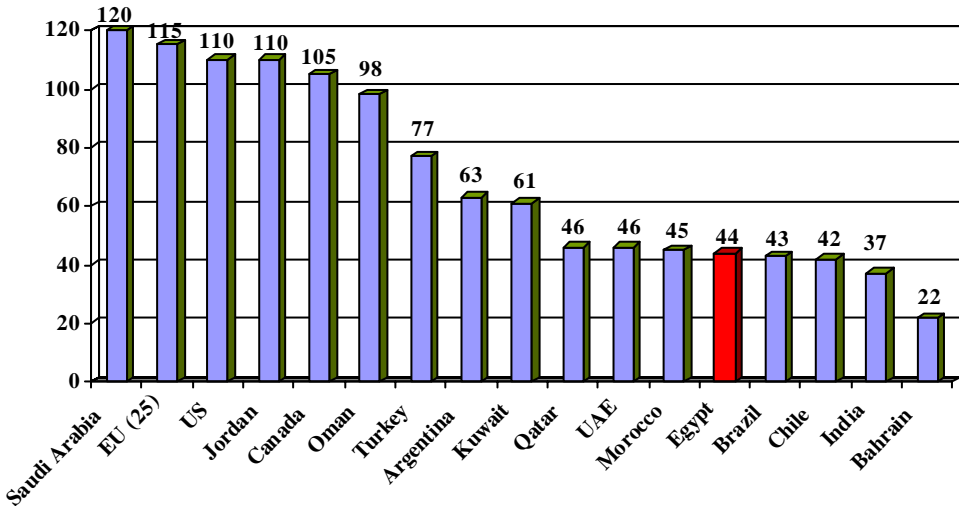
It is probably not surprising that in the area of the liberalization of trade in services, Egyptian officials felt more at ease making some of the fewest commitments³⁶ in the multilateral context under the GATS during the Uruguay Round negotiations. Initially selecting only four sectors: financial services, construction services, tourism services, and transportation/maritime services, the Government of Egypt (GOE) made commitments in 44 out of 155 possible sub-sectors.³⁷ For those 44 sub-sectors, Egypt made binding market access commitments for 104 items in its schedule out of a total of 620 items. This means that Egypt undertook market access commitments for 16.7 percent of the total negotiable items. In sectors such as tourism, Egypt undertook commitments that consolidated the status quo rather than properly liberalize the sector. The exception was the telecommunications sector, which Egypt effectively liberalized, albeit on a unilateral basis in 2002, some seven years after the conclusion of the Uruguay Round, which it subsequently inscribed into its schedules of commitments. Though in line with the majority of developing countries at that time, which (like Egypt) were reluctant to open up their services sector, Egypt's services liberalization is

³⁶ It is useful to understand that, within the GATS framework, there are 12 services sectors under which WTO members may schedule commitments. These 12 sectors are disaggregated into a further 155 sub-sectors in total. In each of the 155 sub-sectors, there are 4 possibilities for liberalization: via Modes 1-4. Altogether, this implies that there are 620 possible areas of liberalization of trade in services under the GATS (in terms of sectors and modes of supply).

³⁷ Egypt Schedule of Specific Commitments; GATS/SC/30; 15 April 1994.

certainly very modest compared to regional peer countries such as Oman, Jordan and Saudi Arabia. As the latter countries negotiated relatively later accessions after 1995, they were persuaded to make commitments in 98, 110 and 120 sub-sectors respectively (see Figure 1 below).

Figure 1. WTO Members’ Number of GATS Commitments at the Sub-Sectoral Level



Source: WTO Country Profiles.

With less direct pressure to liberalize on the multilateral level within the WTO’s DDA, Egypt is following its own pace of trade services liberalization which—at least to some observers—appears relatively slow and restrained. This is also due to the fact that to a large extent, the private sector appears unaware of the ‘commercial nature and tradability’ of the services sector and does not (at least publicly) push for additional services’ trade liberalization. Despite this, in December 2004,³⁸ Egypt submitted (at the multilateral level) a set of new offers including commitments in previously off-limits sub-sectors (such as construction), a refinement of the ENT in the insurance sector and the elimination of the expiry dates for certain sub-sectors (again in the insurance sector in addition to the communications sector). The revised offer was submitted in June 2005³⁹ and included commitments in new sectors such as air transport, courier services and computer services. The latter offer also further deepened the level of commitments already undertaken in insurance

³⁸ GATS/SC/30, 15 April 1994; On Trade in Services (94-1028), Egypt: Schedule of Specific Commitments.

³⁹ GATS/SC/30/Suppl.1, 28 July 1995; On Trade in Services (95-2255), Egypt: Schedule of Specific Commitments, Supplement 1.

and construction. At the bilateral level, however, Egypt is expected to be placed under greater and more direct pressure to more deeply liberalize trade in a wider range of services.

The European Union case

Of interest to this paper with regard to EU liberalization commitments is that the revised multilateral commitments put forward by the EU as of 2003⁴⁰ continue to be solely focused on the commercial presence mode of supply ‘Mode 3’ and the movement of persons in the form of intra-corporate transferees in connection with Mode 3. At present, the revised EU offer (which could provide additional opportunities) is confined to the movement of highly qualified natural persons and top management personnel. Furthermore, the EU’s global offer presents a good deal of variation between individual EU Member States. For example, there are limitations on immediacy of applicable commitments being offered by newly-acceded EU Member States. One such limitation is that the offer of easier entry of non-citizens for temporary stays (in a Mode 4 context) with respect to certain categories (including self-employed professionals), would not take effect in most of those Member States before 2011.⁴¹ It is true that following the 2004 enlargement of the EU, the revised offer automatically extended access conditions offered by the EU to the territory of the new Member States as well; nevertheless, the unilaterally-defined constraint of ‘highly qualified’ continues to put a ceiling on developing countries’ capacity to benefit from exporting services through a wider range of other service suppliers also demanded by the European market.

3.2. The Current Negotiations Framework

The economic dimension of Egypt-European Union Association Agreement (EEAA)⁴² is currently based on trade in goods. Although it is subtle, there is no mention of the supply of

⁴⁰ European Communities and their Member States: Schedule of Specific Commitments (March 2003), as revealed (and later acknowledged by the EC) on the following website: <http://www.gatswatch.org/docs/EU-draftoffer-2.pdf>.

⁴¹ Summary of the EU’s revised services offer in the Doha negotiations: June 2, 2005; Memo/05/190, Brussels, 2 June 2005.

⁴² Since January 2004, the trade provisions of the Association Agreement between Egypt and the EU (Egypt–European Union Association Agreement or ‘EEAA’) have been in force. The agreement replaced the 1977 Cooperation Agreement between the European Communities and Egypt, and although it entered into force in 2004, the EEAA is a direct result of the Euro-Mediterranean Partnership and the Barcelona Process begun in 1995. While the European Neighborhood Policy has emerged as the new flagship policy of the EU towards the Mediterranean and other neighboring regions to the EU’s south and east, it is intended in part to help give effect to the Euro-Mediterranean Partnership rather than supplant it. As such, the EEAA remains *the* integral agreement between Egypt and the EU on political, economic and social matters, and the legal basis for negotiations on trade in services.

services through the presence of natural persons from one party in the territory of another in the provisions, which address the potential for trade in services. In other words, while the EEAA does not currently contain any substantive provisions on trade in services, it does contain a procedural provision to ‘consider’ extending the scope of the EEAA in that regard, but, at least in the first instance, such an extension is qualified by inherently limiting it to Modes 1, 2 and 3 and, more specifically, on the basis of ‘*companies*’ supplying services, not *natural persons*. While this is not an *a priori* exclusion of one of the four modes of supply (which would be in direct contravention of the relevant provisions⁴³ of the GATS), the language of the EEAA reflects a built-in preference towards such an exclusion that should not, under optimal conditions, color the new bilateral negotiations on trade in services.

At a meeting in Marrakech, Morocco, ministers from the Euro-Mediterranean Partnership countries agreed to launch a round of regional negotiations on trade in services.⁴⁴ The Ministerial Declaration outlined the framework to be followed: Negotiations would proceed on a regional level at first, to agree on modalities. Logically, the bilateral tracks would have to follow the outcomes of the first stage so as to give regional utility to the outcomes of the second stage, although various negotiations tactics have already altered this logical sequence.⁴⁵

Key objectives and principles guiding the negotiations process include (a) compliance and compatibility with the WTO, (b) regional integration and (c) a development dimension. The initial plan was to achieve an agreement on the modalities by 2007 and an agreement by 2010, but the time constraints are indicative and non-binding. A draft template of what might form the base agreement itself, closely resembling the GATS in general (but not entirely) will

⁴³ GATS Article V (1) (a) requires regional and bilateral arrangements not to exclude coverage of any mode of supply (including Mode 4) in advance of the negotiations process.

⁴⁴ Ministerial Declaration of the *Ministerial Meeting on the Launch of Euro-Mediterranean Negotiations on the Liberalization of Trade in Services and the Right of Establishment*, 24 March, 2006.

⁴⁵ At the EU-Mediterranean Partnership held in October 2007 in Portugal, ministers agreed to proceed with the bilaterals in a parallel track to the ongoing regional negotiations, despite the relatively poor legal effects of such a decision. Not only does the absence of an agreed legal framework adversely impact the tangibility of ‘commitments’ that may be discussed bilaterally, but the ‘regional’ weight of the non-EU parties to the negotiations is cancelled on the critical first step of establishing the legal framework itself which should define the scope of commitments.

serve as a guiding instrument in the negotiations process. This template is known as the *Istanbul Framework Protocol*.⁴⁶

The relevant provision of the original Istanbul Framework Protocol (Euro-Med IFP) dealing with Mode 4⁴⁷ is a verbatim copy of its corresponding GATS provision.⁴⁸ It is not actually named, however, as ‘Mode 4’, but in line with the GATS, it is the fourth mode of supply listed (a, b, c and d). In summary, the current relationship and negotiations process with the EU does not suggest that Mode 4 is excluded from the agenda, but it is clear that if Egypt elects to pursue concessions from the EU on Mode 4 supplies of services, it will need to formalize its inclusion in the first stage of negotiations. GATS Article V again provides the rules-based framework on which to support such an argument.

4. STRATEGIC CONSIDERATIONS: CONSTRUCTING A WIN-WIN FORMULA

The liberalization of Mode 4 can act as an impetus towards the achievement of larger goals within the regional context of political, security and cultural cooperation between Egypt and the EU. Developed countries have become increasingly pre-occupied with security concerns stemming from the September 11, 2001 attacks whenever the ‘movement of natural persons’ is involved. One result has been a reduction in the public’s appetite for immigration in general. Many governments remain equally concerned that Mode 4 liberalization will force them into politically unsustainable concessions and find difficulty in differentiating between Mode 4 and migration, particularly with grass-roots constituencies. When portrayed in purely business and economic terms and the ‘uncoupling’ of Mode 4 from ‘migration’ is successful enough to end the perception of Mode 4 as an immigration issue, it is quickly adopted by labor interests and becomes a labor and employment issue. Developing countries that place a premium on gaining deeper Mode 4 concessions have done little to assuage these twin concerns of migration (as a security matter) and labor (as an employment matter).⁴⁹ Egypt would benefit from an ability to present an innovative risk management and emergency safeguards proposal, which would address both the security and employment dimensions in a satisfactory manner, while gaining greater access for Mode 4 service delivery. Indeed,

⁴⁶ Named after the July 2004 Istanbul Ministerial of the Euro-Med Partnership where it was first introduced as a ‘working paper’ for discussion.

⁴⁷ Euro-Med IFP Article II(c) (iv).

⁴⁸ GATS Article I (2) (d).

⁴⁹ Self, Richard and B.K. Zutshi (2003) “Mode 4: Negotiating Challenges and Opportunities,” in Mattoo and Carzaniga (Oxford University Press and World Bank, Washington, D.C.).

learning how to distinguish and manage *Mode 4 temporary service delivery* on the one hand from *immigration* and *permanent employment* on the other hand would be advantageous to both Egypt and the EU.

4.1. Demand and Supply-side Matters: Potential Gains

At the onset, constructing a win-win formula for Egypt and the EU must in the simplest terms allow for each party to maximize gains from an agreement on greater Mode 4 Egyptian services exports to the EU, and more importantly, for the EU to ensure that it can import Mode 4 services without undue risks to existing policies and objectives for both immigration and employment. As shall be demonstrated, Egypt enjoys a surplus of natural person service capacities while the EU faces a rapid decline in natural person service suppliers. That does not imply that services are commodities and of the same type, quality or value, but it does suggest that there is ample space for increasing services trade in a meaningful and measurable manner.

Demand-side

In recent years, the EU’s demographic trends reflect considerably shifting centers-of-gravity if migration is entirely removed from the equation. Without external interventions (including migration), the demographic structure of the EU’s population would be somewhat imbalanced by 2025, when compared to statistics for 2005. This is characterized *first* by the steadily declining segment of the population below 40 years of age, *second* by the population levels generally stagnating between 40-60 years and *third* by the rapidly rising segment of the population aged 60 and above, as follows:⁵⁰

- Young active (20-40): -17 percent
- Old active (40-60): 0 percent
- Retired (65+): +34 percent

When combined with policies less accommodating of immigration, a gap emerges that will ultimately have a direct impact on certain categories of work and services. As the demography changes, services performed in the past by younger workers will become more and more difficult to obtain within the EU, possibly forcing costs upwards as service consumers compete for fewer and fewer available (and willing) workers. That, in turn, may

⁵⁰ Philippe Fargues: “Temporary Migration: Matching Demand in the EU with Supply from the MENA,” (2005), European Commission, Europe-Aid Cooperation Office-MEDA Program.

reduce the competitiveness of the EU *vis-à-vis* other economic blocs or countries, not a pleasant prospect in a world where India and China are rapidly forcing competitors to become even more competitive. This quandary is more acute than it may seem on the surface. For example, consider that a study (conducted before the most recent enlargement in 2005) demonstrated that if the EU sought to maintain the size of the population aged 20-60 at its 2005 levels in the aggregated EU 25 through 2025, the total number of temporary service suppliers (or workers) that would be required continuously increases, from just above 1 million in 2010, to more than 20 million by 2025, as follows:

Table 1. Mobility and Temporary Workers: Matching Demand in the EU

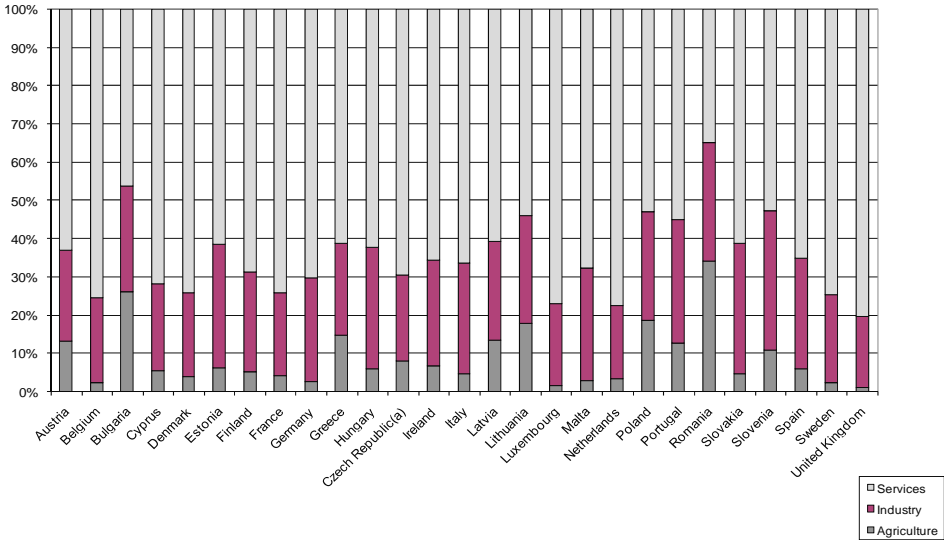
Year	Projected Population Aged 20-60	Temporary Entrants Required to Maintain Population Aged 20-60 at 2005 Levels
2005	254,389,000	0
2010	253,237,000	1,152,000
2015	249,481,000	4,908,000
2020	242,550,000	11,839,000
2025	232,800,000	21,589,000

Source: Adapted by the authors from Fargues: “Temporary Migration: Matching Demand in the EU with Supply from the MENA”.

In addition to the aging population and the shifting labor force dynamics in the EU, it is worth mentioning that in the last decade or so, partly as a result of the immense progress in technology, a continuous increase in the share of total employment in the service sector, at the expense of the agricultural and industrial sectors, has taken place. Figure 2 reveals the extent to which services are the dominant sector in terms of employment share in a majority of the 27 EU Member States.

As such, a remarkable increase in job opportunities in the services sectors has occurred, such as business-to-business, healthcare and other services, but there are also opportunities in the agricultural and industrial sectors to fill the increased vacancies. Several European countries encounter increased difficulties in meeting their labor demand on various levels (skilled, semi-skilled and unskilled). Eventually, other alternatives (such as Mode 4 service suppliers) may help fill short-term bottlenecks in the market for services supplied by natural persons.

Figure 2. Share of Employment by Major Economic Sectors in the EU-27 in 2003*



Source: Statistical Yearbook of the Economic Commission for Europe (UNECE).
 * Although data are from 2003, all 27 current member states of the EU are included.
 (a) Data from 2001.

Supply-side

Egypt could certainly learn how to benefit from this situation, with official unemployment figures rising in aggregate numbers. Additionally, unemployment is concentrated among more educated persons, including university graduates, and even more so at the intermediary levels, such as vocational diploma holders. Together these constitute 80 percent of unemployment—a majority of which (81 percent)⁵¹ are new entrants in the labor market.⁵²

It is not a secret that Egypt faces a serious employment dilemma, which will require as innovative a solution as the demographic dilemma facing the EU. Several studies have demonstrated both a mismatch in terms of the *education supplied* and *skills demanded* within Egypt for years, which even at the time of this writing is the subject of much debate.⁵³ Egypt needs to become competitive at the regional level by raising its educational and technical

⁵¹ Assaad, Ragui, personal interview in December, 2007 and based on panel data.
⁵² Assaad, Ragui, “Unemployment and Youth Insertion in the Labor Market in Egypt,” ECES Working Paper No. 118, February 2007.
⁵³ For a detailed discussion, see Galal, Ahmed, “The Paradox of Education and Unemployment in Egypt,” Working Paper presented at the World Bank’s Mediterranean Development Forum IV in Amman, Jordan, 2002.

standards to compete internationally.⁵⁴ Recent studies project that Egypt's labor force will increase from around 23 million in 2005 to around 34 million by 2020.⁵⁵ On balance, the annual increment to the size of the workforce in Egypt will reach a figure of around 790,000 persons annually by 2015-2020.⁵⁶ For Egypt, juxtaposing 2006 unemployment shares against the categorical definitions used earlier which demonstrated where the EU was rapidly changing its demography, the following spread emerges:⁵⁷

Below 20: 12 percent of unemployed Egyptians

Young active (20-40): 85 percent of unemployed Egyptians

Old active (40-60): ~3 percent of unemployed Egyptians

In other words, for Egypt, the age group 20-40 (which is the most rapidly declining EU population segment over the next 20 years in the absence of replacement through migration), is a population segment with a rising surplus of unemployed persons, including those with higher and university education. In fact, 70 percent of the unemployed within this segment alone are aged 20-29.⁵⁸

This does not mean, however, that Mode 4 exports to the EU are in any way a simple solution to Egypt's employment dilemma, nor does it mean that the EU's demographic conundrum will simply be solved by Egypt and other countries' increased access to provide Mode 4 exports. To be sure, there are a great many factors beyond the scope of this paper that warrant detailed analysis, such as *which* specific categories of service suppliers will the EU need, in which Member States, by *when*, and *what* is the impact of technology on mitigating the decline in certain age groups and their corresponding share of service provision?

What the above figures do, however, is to reflect the indicatively complementary nature of both the EU's and Egypt's problems where Mode 4 exports are relevant. Indeed, any real

⁵⁴ University-educated talent in low-wage countries like China, India, and the Philippines, surpasses that in the high-wage countries. India alone has nearly as many young professional engineers as the US, and China has more than twice as many; China has twenty times the number of doctors as the UK; Russia has almost 10 times as many finance and accounting professionals as Germany. In addition, the suitability of job candidates varies by country. While 50 percent of engineers in Poland or Hungary are suitable to work in multinational companies, only 10 percent of Chinese ones and 25 percent of Indian ones would be suitable. Source: McKinsey Global Institute, *The Emerging Global Labor Market*, June 2005.

⁵⁵ "Egypt Country Profile: The Road Ahead for Egypt," FEMISE, December 2004, p.152 (a projection through 2025 is not presented).

⁵⁶ *Ibid.*

⁵⁷ *Egypt Labor Market Panel Survey of 2006*, The Population Council, Egypt's Central Authority for Public Mobility and Statistics (CAPMAS) and the Economic Research Forum (ERF).

⁵⁸ *Ibid.*

gains are not expected to be earned from transferring unemployed Egyptians into the EU to fill gaps in the market either. Even if all relevant barriers to Mode 4 were removed,⁵⁹ the advanced and relatively competitive service consumption markets in the EU would remain highly selective: only the best, brightest and most qualified service suppliers from Egypt, in each respective skill type and category, would have a chance to perform temporary work purely on market terms. But it is just that phenomenon itself which could help both Egypt and the EU. With some Egyptian service suppliers ‘out’ of their local market for temporary periods of time, at least some opportunities *within* Egypt would open up to replace those Mode 4 actors, ‘moving the queue’, so to speak. In other words, at least some *underemployed* Egyptians would ultimately move into local jobs more demanding of their capabilities, while still some others who are unemployed may eventually find openings within the market to replace the underemployed who have ‘moved up in the queue’.

At the qualitative level, the competitiveness of Egyptians who can win more than one contract in the EU via a Mode 4 arrangement, will likely raise not only their own competitiveness, but the standards and experience demanded within Egypt itself, which is the home market such service suppliers would have to ultimately return to in any case.

A conservative quantitative estimate of the value of Egyptian Mode 4 access to the EU, based on an assumption that Egyptian service suppliers captured just 1 percent of the gap created by the EU’s demographic changes between 2010 and 2025 reveals an aggregate value

⁵⁹ A full assessment of all Mode 4 barriers is complex but will necessarily require the use of tools such as the *Trade Restrictiveness Indices* employed by the Organization for Economic Cooperation and Development (OECD). An analysis by country and sector will be necessary, but would prove quite useful in knowing where to expend negotiating capital.

that could be worth at least \$480 million or up to \$2.45 billion.⁶⁰ Capture 3 percent and the figures jump accordingly to around \$1.44 billion up to \$7.35 billion. Again, these figures are not meant to be authoritative calculations (which are beyond the scope of this paper); indeed, they only indicatively hint at the possible dimension of economic value, which could be realized through much greater access to the EU market for Mode 4 service exports.⁶¹

4.2. Optimizing Negotiation Capital for a Win-Win Outcome

It is important to recognize those elements, which might seem worth negotiating in the first instance, but upon closer scrutiny, may already be automatically accessible without the need for expending negotiating capital. Three important matters fall into this category: (1) Automatic rights applicable in a regional setting by virtue of the WTO agreements, specifically GATS, (2) automatic rights which accrue as a result of the EU ‘*acquis*’ (or acquired body of law) and (3) the EU’s existing offers on Mode 4 activities at both the multilateral and bilateral levels.

First, it has already been demonstrated that Article V of the GATS is a crucial basis upon which Mode 4 should not be excluded from the negotiations. It is further argued that within Mode 4, a majority of the sectors and sub-sectors should be covered (liberalized) to one extent or another so as to meet the GATS Article V requirement. Finally, this reality in itself, need not be a point of negotiations, since it should be understood as a ‘given’, a built-in

⁶⁰ These figures are estimated as follows: (a) The projected population gaps presented in Table 1 indicate an aggregate total of ~21.6 million persons required as ‘temporary entrants’, between ages 20-60, within the EU(25) during the period 2010-2025, so as to maintain current (2005) levels of labor supply. (b) It is presumed that only 50 percent of this group (~10.8 million persons) would still be required, as some labor ‘shortages’ may never actually occur in reality, even in the absence of ‘migration’, given the development of technology or the partial adaptation of the EU market to a different supply dynamic. (c) This figure of ~10.8 million persons is then reduced by 20 percent, under a conservative assumption that perhaps as many as 20 percent of all persons within this age range might be unemployed if there was no change in EU demographics, noting that 20 percent across-the-board for all the EU(25) is probably an exaggerated figure, but used nonetheless to maintain a conservative approach ... this results in a figure of ~8.64 million persons. (d) Capturing 1 percent of ~8.64 million ‘persons to be replaced’ is about equal to 86,400 persons over the period 2010-2025. (e) 86,400 persons, constantly earning for the entire period an average income equal to the lowest per capita GDP in the EU(25) in 2006 (Latvia at ~\$5,544) would yield ~\$480 million, while if it were raised to the weighted average per capita GDP in the EU(25) in 2006 (at ~\$28,420) it would yield ~\$2.45 billion. (f) All figures are based on *Eurostat* data from 2006, exchange rates as of 01.01.2006. (g) Only EU-25 data were used to maintain consistency with the Table 1 figures.

⁶¹ A thorough quantitative analysis to assess the ‘net’ impact on trade would require a more expansive study of expected remittances and consumption patterns, as well as secondary and tertiary effects upon merchandise trade (i.e., the phenomenon of Mode 4 Egyptian service suppliers importing goods from the EU as they return to Egypt, perhaps at higher-than-typical levels with corresponding effects on imports of goods). Conversely, the consumption patterns of large numbers of Egyptians residing in the EU may result in increases in exports of some products (food, in particular) to the EU, to offset a mild increase in demand for ‘home-country’ products, although probably much less robustly than possible increases in imports of EU goods into Egypt.

rule of the GATS privilege which Egypt and the EU seek to benefit from so as to legally reach a bilateral accord.

Second, it is crucial that Egypt fully comprehends the body of developed and established EU laws and rules, known as the ‘*acquis communautaire*’. For trade in services through the temporary presence of natural persons, the *acquis* is an important body from which to identify certain automatic rights granted to natural persons of third countries providing services within the EU, on all aspects of such a relationship. In many cases, it is unnecessary to expend negotiating capital (and therefore to make unnecessary concessions) so as to gain a perceived ‘preference’, which is inherently ‘granted’ by reason of the *acquis* in any case.⁶²

Third, it is equally important that Egypt understands the offers and arrangements that the EU made in the past, not only externally with third parties such as Mali, Jordan or the European Free Trade Association (EFTA) countries, but also internally between the Commission and the Member States. For example, at the internal level, Franco Frattini, Vice President of the European Commission and Commissioner for Justice, Freedom and Security has recently proposed an aggressive change in the EU’s posture towards the mobility of service suppliers who are natural persons.⁶³ In this proposal, a scheme involving a special work permit would allow “skilled” service suppliers or workers to apply for a “Blue Card” which would entitle them to a 2-year temporary residency, but with an opportunity to eventually stay on a longer-term basis. For “unskilled” service suppliers or workers a different scheme would apply, but with sufficient flexibilities and minimum working standards.⁶⁴

EU position

While it is true that the EU does not apply Economic Needs Tests (ENTs) on contractual service offers, there is ample ground for maneuvering with the EU for preferential deals in this respect. In its revised DDA offers at the multilateral level, the EU allows contractual

⁶² For example, EU law (as expounded in the *Van der Elst* decision in Case 43/93, [1994] ECR I-3803) permits non-EU natural persons legally employed as ‘employees’ in one EU Member State to cross the border of another EU Member state to perform temporary work as part of a contract between the employer of one EU Member State and the consumer in a second EU Member State ... although the right of the second state to prevent the workers from entering its territory for security or other non-commercial reasons remains intact.

⁶³ Bounds, Andrew, “Europe told to open borders for 20 m[illion] Asian and African workers,” *Financial Times*, Brussels, September 13, 2007.

⁶⁴ *Ibid.*

service suppliers entry for a maximum of six months,⁶⁵ compared to three months in the EU's Uruguay Round offer.⁶⁶ As an example of other developed country approaches, Canada permits entry and stay for an initial period of one year or the time necessary to complete the contract.⁶⁷ The EU schedule further specifies the services that can be provided in this (Mode 4) manner, and the list is substantially shorter for self-employed temporary service suppliers (those who will not temporarily work as "employees"). The EU reserves the right to apply numerical ceilings on the contractual service suppliers,⁶⁸ whereas Canada is less stringent on such matters, as it does so only for senior computer specialists, where there is a limit of 10 entrants per project.⁶⁹ An "H-1B Visa" type program for specialty occupations (along the lines of US commitments) can also be envisaged to permit individuals with highly specialized knowledge an initial stay of three years.⁷⁰ It is possible that the "Blue Card" system mentioned earlier may eventually provide this type of resolution, if it is ever adopted in one form or another. Table 2 shows the EU offers in specific services.

Also, looking at the coverage of the EU's offer on contractual service suppliers in selected areas, the majority are "unbound". In other words, these commitments can be withdrawn or altered without any reciprocal compensation to other WTO Members. This certainly does not help stability or predictability in Mode 4 services liberalization. Table 3 is indicative of the EU commitments in this area.

⁶⁵ WTO, Information Note by the Secretariat on Mode 4; JOB(05)/196, Council for Trade in Services, Special Session 1 July 2005.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ The actual regimes in certain countries may be more liberal than the EU commitments in certain respects. For example, a non-France based foreign company, with the cooperation of its French client, can use the 'temporary secondment' Visa to place their employees on its client's site in France for up to a maximum of 18 months and this may then be extended for a further 9 months rather than for just the 6-month period listed in the EU commitments.

⁶⁹ See supra note 65.

⁷⁰ H-1B Visas are part of Section 101(a)(15)(H) of the United States' Immigration and Nationality Act. The natural person in question must be professionally qualified, i.e., has a recognized bachelor's degree or its equivalent and be offered a skilled job position related to the worker's professional background. Numerical quotas exist on the issuance of H-1B visas.

Table 2. EU Offers in Specific Services

<p><i>Intra-corporate Transferees</i></p>	<p>Managers and specialists admitted for an initial period of 3 years with no economic needs test. Graduate trainees admitted for a period of one year with no economic needs test.</p>
<p><i>Contractual Service Suppliers</i></p>	<p>Employees of a juridical person, on a contract that has been tendered or advertised, admitted for a period not exceeding 6 months in any 12-month period, with no mention of an economics needs test. Commitments are subject to the application of a numerical ceiling, except where otherwise indicated, for a particular sub-sector. Commitments apply to a specific list of professions.</p> <p>Independent professionals, practicing as self-employed, on a contract that has been tendered or advertised, admitted for a period not exceeding 6 months in any 12 month period, with no mention of an Economic Needs Test (ENT). Commitments are subject to the application of a numerical ceiling, except where otherwise indicated, for a particular sub-sector. Commitments apply to a specific list of professions.</p>

Source: World Bank Policy Research Working Paper 3238, March 2007.

Existing programs

Several EU Member States have programs for less skilled, short-term foreign workers—for example, seasonal workers in agriculture, tourism, hotelier work, project workers in construction and various other employment-specified workers.⁷¹ Egypt can certainly benefit from these classification schemes as well as envisage including additional occupational groups, such as nurses, drivers, waiters and waitresses, translators, interpreters and foreign language teachers, among others. Thus far, the EU has refrained from including these types of classifications in their schedules of commitments, lest they become binding and Member States would be then compelled to apply them on a non-discriminatory basis. Accordingly, these schemes remain to the largest extent possible as sovereign prerogatives of the receiving (host) countries and, as they are not bound by GATS schedules of commitments, there is much flexibility in their implementation.

⁷¹ Winters, Alan, Terrie Walmsley, Zhen Kun Wang and Roman Grynberg, “Negotiating the Liberalization of the Temporary Movement of Natural Persons,” Economics Discussion Paper 87 (2002). University of Sussex, Brighton.

Table 3. Coverage of the EU's Offer on Contractual Service Suppliers in Selected Areas

Services	Commitments on Employees of Juridical Persons	Commitments on Independent Professionals
1. Professional services		
Legal services	Yes	Unbound
Accounting and book keeping services	Yes	Unbound
Taxation advisory services	Yes but unbound for several EU countries	Unbound
Architectural, urban planning and landscape services	Yes	Yes
Translation services	Yes	Yes
Engineering services	Yes	Yes
Medical and dental services	Unbound	Unbound
Veterinary services	Unbound	Unbound
Mid-wives, nurses, physiotherapists and para-medicals	Unbound	Unbound
2. Computer and related services		
	Yes	Yes
3. Research and development services		
	Yes but unbound for most EU countries	Unbound
4. Other business services		
Advertising services	Yes	Unbound
Market research and opinion polling services	Unbound	Unbound
Management consulting and related services	Yes	Yes
Technical testing and analysis services	Yes	Unbound
Related scientific and technical consulting services	Yes	Unbound
Maintenance and repair of equipment	Yes	Unbound
5. Communications services		
	Unbound	Unbound
6. Construction services		
	Yes but unbound for most EU countries	Unbound
Site investigation work	Yes but unbound for several EU countries	Unbound
7. Distribution services		
	Unbound	Unbound
8. Education services		
Primary, secondary and adult education services	Unbound	Unbound
Higher education services	Yes but unbound for most EU members	Unbound
9. Environmental services		
	Yes	Unbound
10. Financial services		
	Unbound	Unbound
11. Health related and social services		
	Unbound	Unbound
12. Tourism services		
Travel agencies and tour operator services	Yes but unbound for several EU members	Unbound
13. Recreational, cultural and sporting services		
Entertainment services	Yes but unbound for most EU members	Unbound
Sporting and other cultural services	Unbound	Unbound
14. Transport services		
	Unbound	Unbound

Source: World Bank Policy Research Working Paper 3238, March 2007.

Commercial viability is necessary for a win-win outcome

For trade in services in certain specializations, the greater the skill level involved, the greater the need for addressing matters of *equivalency* and *recognition of qualifications*. Whether the natural person involved is a technician specialized in the installation of certain mechanical equipment, or a physician specialized in pediatric neurosurgery, it is quite likely that within their home countries, neither may legally claim to be specialized and advertise as such without meeting certain vocational or professional requirements. These requirements could be a type of education, a number of years of experience in performing a certain task, or even a combination thereof. An assessment of whether or not a given person has met these requirements is an exercise that is *itself* subject to its own rules and requirements. Without addressing this matter, many concessions may appear significant but turn out to be unrealizable in practice.

The GATS addresses this matter and, in simple terms, suggests that ‘*a Member may recognize the education or experience obtained, requirements met, or licenses or certifications granted in a particular country. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously*’.⁷²

Since the EU is composed of 27 Member States (and continues to enlarge), it is substantively inferior to be granted market access to the EU, but then learn that the relevant professional or vocational requirements of each Member State must be met separately. Within the EU, this is a complex matter, but the general trend has been that service suppliers who meet the necessary requirements in the home state are usually permitted to supply a service in another Member State without the need to demonstrate equivalency—in other words, through *mutual recognition*. There are exceptions to this, and wherever the EU has harmonized rules for service suppliers there are fewer exceptions and more frequent instances of recognition, but it is still an evolving area. For Egypt, what is important is to seek to secure a ‘*transitivity clause*’ in the agreement. Transitivity could mandate recognition by all Member States of the EU if at least *one* other Member State recognizes an Egyptian qualification or demonstration

⁷² GATS Article VII (on ‘Recognition’).

of equivalency—in other words, recognition *of* recognition.⁷³ The first instance of recognition will still be a tall order for Egypt, but the transitivity mechanism must be in place to make any Mode 4 concessions fully commercially viable in the long-run.

Because of how the legal subtleties of the EU's intergovernmental character sometimes eclipse the economic realities of its supranational character, some trade policy matters necessarily require the direct participation of the EU Member States as distinct from the European Commission, which otherwise usually leads trade negotiations.⁷⁴ The inclusion of a transitivity clause would be one such matter, as it might fall outside the scope of negotiating powers delegated to the European Commission by the EU Member States. Assembling a coalition of receptive Member States through bilateral consultations, in advance of a formal proposal on transitivity, might be a strategy worth further evaluation. Ultimately, licensing and qualification procedures in preferential arrangements that include natural persons as service suppliers should not be so restrictive so as to render any gains acquired through the negotiations as 'void'. Egypt's capacity to maneuver in negotiations in this area may include a willingness to consider the binding of unilateral liberalization steps it has already made on trade in services, particularly in the field of education. A win-win scenario on this element could be envisaged if Egypt bound such liberalization bilaterally *vis-à-vis* the EU, but on conditional criteria that any European actor seeking to use this bound commitment may only do so if the educational service provided is fully recognized at the level of the output (certificate, degree, diploma, license, etc.) by the relevant home country authorities or non-governmental bodies, and further still, that where there is EU-wide harmonization for such qualifications within the EU, the service provided would meet that accreditation standard within *any* Member State of the EU.

Most importantly, however, is that the *Realpolitik* of mutual recognition makes it likely that this will be a highly complex area, since recognition requires deep levels of mutual trust and confidence, not just in a system, but also in the continuous improvement, maintenance

⁷³ See Kalypso Nicolaidis' *Globalization with Human Faces: Managed Mutual Recognition and Free Movement of Professionals* in *The Principle of Mutual Recognition in the European Integration Process*, edited by Fiorella et al., 2004.

⁷⁴ This is known as "joint competence" and stems from overlapping policy areas within the Treaty of Rome. Some areas were always meant to be the purview of the Member States alone, while others were meant to be the purview of the European Commission alone. Still others necessarily required both the Member States and the European Commission to first agree on a position, where both parties enjoyed, to a degree, a legitimate mandate.

and enforcement of systems. That complexity, however, should not preclude the installation of the mechanism itself.

5. CONCLUSION AND RECOMMENDATIONS

In examining the liberalization of the delivery of services through the presence of natural persons, specifically within the context of negotiations between the EU and Egypt, there are recurring themes and relative indicators of how both parties may gain, what may be realistically expected and insights into the development of a win-win formula.

To take stock, the argument for why Egypt should seek the EU's liberalization of Mode 4 access is straightforward: The pressures on the Egyptian economy are lessened when Egypt can export services through Modes 1, 2, 3 *and* 4. The geographical proximity of Egypt to the EU makes cross-border supplies of services through the temporary presence of natural persons from Egypt into the EU less complex than to other developed markets. In short, there is much to gain for Egypt. On the other side, the EU's push to open up other avenues of Egypt's services markets might only be realistically balanced in meaningful terms with bilateral EU concessions on what is defined by the WTO as Mode 4 activity.

For the EU, the gains might seem less straightforward, but no less compelling. The ability to compete globally, especially in light of the rise of China and India, will be more greatly enhanced by removing restrictions imposed upon its own consumers, especially business-to-business consumption of imported services, including through temporarily employing natural persons from third countries. At present, only 5 percent of the EU's third-country service suppliers are skilled, while 85 percent are unskilled.⁷⁵ The US, on the other hand, attracts 55 percent of its third-country service suppliers from the skilled category and only 5 percent from the unskilled category.⁷⁶ The European Commission itself has argued that to compete with the US, the EU will need to re-evaluate how it manages this phenomenon.⁷⁷ Furthermore, the demographic re-alignment of the EU is rapidly creating gaps that may distort the market if left unresolved. When juxtaposed against a climate of concern over illegal immigration, security and a reduced appetite for increasing (legal) immigration, it is clear that alternatives are required. The notion that third-country service suppliers may be able to fill

⁷⁵ See supra note 63.

⁷⁶ Ibid.

⁷⁷ Ibid.

some of these gaps and then depart, without the real or perceived negative externalities which are sometimes linked to immigrants (legal or not), warrants serious consideration.

Based on the analysis, these recommendations may be of strategic interest or value:

- (1) Apply GATS Article V to ensure (a) that no Mode or sector is excluded from the negotiations, (b) that a majority of sectors are liberalized and (c) that special and differential treatment for developing countries is exercised.
- (2) Establish clear definitions and mutual understandings of (a) what constitutes Mode 4 or its equivalent for the purposes of the negotiations process and (b) how scheduled commitments will be categorized for different types of Mode 4 service suppliers (or their equivalents under the draft agreement).
- (3) Optimize negotiating capital by developing a full understanding—in advance—of the relevant EU *acquis* where it applies to matters related to Mode 4 or its equivalent involving third-country nationals.
- (4) Strive for automatic transitivity within the EU Member States on issues of mutual recognition and equivalency for which the EU Member States already grant each other horizontal recognition or equivalency on the same matters.
- (5) Negotiate a preferential delay for services trade liberalization commitments by Egypt for sectors that require more time to adjust to greater competition.
- (6) Establish a special *Euro-Med Temporary Worker Visa* scheme, where applicants can be pre-screened so that they may apply to perform short-term contract work. The scheme should have built-in incentives and disincentives to maximize compliance and minimize abuse.
- (7) Propose an Emergency Safeguards Mechanism, which would permit the temporary suspension of specific commitments (with reciprocal rights) without ‘backtracking’ or requiring the abandonment of the agreement itself and other commitments that could also be subject to negotiations.
- (8) Seek targeted technical assistance, which is directly linked to giving substantive value to the outcomes of negotiations, as well as budgetary support to offset the costs of trade in services liberalization. For example, the recognition of qualifications can be greatly enhanced if viable systems are established and

maintained for specific disciplines. This may begin through focused technical assistance and add value to negotiated outcomes.

Altogether, these recommendations are non-exhaustive and indicative of the analysis within this paper. It is advanced that there is a formula for a win-win outcome, where both the EU and Egypt may gain and mutually benefit from greater Mode 4 access to the EU market. This can be achieved through the EU's removal of restrictions on the Mode 4 supply of services from Egypt, while creating a special visa category for such service suppliers. It is not inconceivable that such a system could be quite easily established upon the backbone of the existing data cooperation systems within the EU (including the *Schengen*-visa system). The simple introduction of such a scheme could be carried out on a region-wide basis (the Euro-Med zone); indeed, such a move by Brussels would make credible the target of a free trade zone for both goods and services. Rules and regulations could be agreed to minimize abuse, while increasing the range of 'choice' of supply available to EU consumers, especially business consumers who need to remain both globally competitive and able to source from a more diverse selection of human capital.

Ultimately, however, it is incumbent upon Egypt's business sector, professional syndicates and other associations to organize themselves appropriately so as to benefit from any *trade in services* arrangement. Mode 4 as presented herein is only one part of a much larger and multi-dimensional array of both opportunities and risks that require serious study before moving forward. As stakeholders to the process, proactive involvement is the best guarantor of increasing the likelihood of a preferable outcome that extends to the business sector. Since potential direct benefactors of Mode 4 access are most likely to be at the individual level, there are few organized channels available to represent their interests for this matter, making adoption of the topic more appealing from a general welfare perspective. Understanding the key issues surrounding this subject, however, is a first step towards formulating an informed opinion. In the final analysis, such an opinion will be a key driver in the debate over what may be classified as a 'winning' outcome for Egypt on greater Mode 4 access to the EU (among other services gains), as Egypt is likely to make concessions in other areas of services *vis-à-vis* the EU if any bilateral (or regional) agreement on trade in services is to be reached.