

IOM – WORLD BANK – WTO SEMINAR ON TRADE AND MIGRATION

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SPEAKING POINTS FOR CARLO GAMBERALE

NATIONAL IMPLEMENTATION OF INTERNATIONAL OBLIGATIONS

- The theme of this session (and a central one in this event) is the relationship between the international treaty obligations undertaken by states at the bilateral, regional and multilateral level and the domestic implementation rules of such obligations.
- In the preceding sessions we have learnt about the way states manage the temporary movement of natural persons through bilateral and regional agreements and how these agreements are translated into domestic regulatory frameworks. The GATS is the only multilateral agreement, which allows states to undertake binding commitments on the movement of certain categories of natural persons and as such it raises some very specific issues relating to its national implementation.
- In discussing national implementation a general distinction must be made between the implementation of bilateral and (deep integration) regional agreements as opposed to the implementation of multilateral instruments (*i.e.*, Mode 4 commitments). Preferential trade agreements (unlike deep integration agreements) generally present implementation problems similar to Mode 4.
- Broadly speaking, there seems to be a closer relationship between bilateral / (deep integration) regional agreements and implementing national rules than between multilateral rules and national rules, insofar as the former are more closely connected to national processes of regulatory reform in the field of migration. Indeed, bilateral and regional instruments are in some cases used to shape domestic policies and regulatory frameworks (and vice versa), so that the definitions and concepts used can be the same or similar.

[In some cases of deep integration this may result in a national law being the direct translation of a regional / bilateral treaty or regional / bilateral treaty rules having direct effect into national law].

- In the case of Mode 4 of the GATS (and as considered earlier in some preferential agreements) we see a different approach. The GATS and Mode 4 commitments would also be ideally implemented into domestic laws by *ad hoc* instruments, reflecting the definitions and concepts used in these multilateral instruments. However, unlike for

bilateral and regional instruments, we do not see such a close relationship between Mode 4 and the shaping of domestic regulatory policies and frameworks.

- It is probably unrealistic, however, to expect that Mode 4 be used to shape directly the migratory policies and laws of almost 150 WTO Members, while it is understandable why bilateral and regional instruments are sometime used for this purpose, considering factors such as geographical vicinity, level of development, cultural and historical ties, and the fact that they deal with more than just trade matters.
- Indeed, the closeness between national regulatory frameworks and some bilateral and regional agreements makes sense in so far as we are dealing with the implementation of migratory and trade policies that are dictated by flows and concerns specific to a group of countries. Moreover, regional and especially bilateral agreements are generally much broader in their coverage than GATS Mode 4.
- First they generally cover temporary movement of workers, regardless of any distinction between services and manufacturing sectors.
- Second, they cover many aspects of migration which go beyond the trade concept of market access and the reach of GATS Mode 4 (although some of these measure may arguably provide a favorable backdrop for Mode 4 commitments). Among these: obligations on source and host countries concerning the management of migratory flows (controlling migratory flows; obligations to train workers prior to their movement abroad, measures to ensure the return of temporary workers), measures to offset labour shortages, the creation of cross-border labour markets, the protection of migrant rights, ect.
- The same cannot be said of Mode 4 implementation, which is limited to a set of access commitments. WTO Members agree to liberalize Mode 4 trade, but this is without prejudice to their unilateral, bilateral or regional migratory policies. After all, while Members may well have migratory policies in the back of their minds when negotiating Mode 4 commitments, Mode 4 is not about liberalizing migratory policies but about liberalizing the supply of services which involves the movement of natural persons.
- The GATS, in the case of Mode 4 as for all modes of supply, does not forces Members to deregulate nor it directly regulates (*e.g.*, through harmonization) Members' policy areas. Indeed, WTO Members remain free to shape their domestic policies and laws, provided they respect their international obligations under the GATS.
- WTO Members agree on binding commitments of liberalization based on a set of GATS concepts and definitions, which are not necessarily reflected in national laws, although, in order to facilitate national implementation, WTO Members endeavor to use in their schedules common concepts and definitions that reflect to the extent possible national practices. In most cases, Mode 4 commitments are “accommodated” within existing

regulatory frameworks (also an indication of the fact that Mode 4 commitments almost always consist in the binding of the *status quo*), which only where strictly necessary are adapted to reflect the multilateral obligations.

- Moreover, Mode 4 commitments are confined to the movement of natural persons in connection with the supply of a service, while the vast majority of national regimes do not distinguish between workers in the services sector as opposed to those in the manufacturing sector.
- The main downside of this type of implementation is, therefore, represented by the difficulty of reconciling the Mode 4 movement liberalized under the GATS with categories and concepts used in national regulatory frameworks with resulting additional administrative and procedural obstacles to the Mode 4 movement of natural persons.
- In this respect, it should be noted that while a full reflection of GATS Mode 4 concepts into national regulatory frameworks on the temporary movement of natural persons is unrealistic and possibly unnecessary, a certain degree of Mode 4 specific national implementation is desirable and so is work in the WTO on common categories and definitions to facilitate national implementation.
- In this context, it should be pointed out that more clarity and precision in the definition of Mode 4 categories might also facilitate liberalization of Mode 4 insofar as it would reveal to regulators the limited reach of Mode 4 within the migratory field. Indeed, the absence of clear distinctions between Mode 4 and other types of temporary movement may constitute a drag factor in the liberalization of Mode 4.
- Two key approaches have thus far been suggested to improve Mode 4 commitments (and their national implementation): (1) multilateral work on common categories and definitions for Mode 4 that would facilitate national implementation; and (2) the adoption of flexible national implementing instruments (such as the “GATS visa” and Additional Commitments on transparency and domestic regulation) addressing some of the most trade restrictive administrative and procedural barriers resulting from the incompatibility between Mode 4 commitments and national regulatory frameworks.
- Concluding, the concerns relating to the effective implementation of GATS Mode 4 commitments cannot be addressed through regulatory uniformity with migratory policies and laws. It is nevertheless crucial to the implementation and to the expansion of specific commitments on the movement of natural persons that Mode 4 concepts and definitions be better reflected into national regulatory frameworks.