Restrictions on Mode-4 Access: Recent Evidence[ψ]

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The downturn that the global economy has been experiencing for nearly a year now has appeared more enduring now that its effect is being felt on the global trade flows. The World Trade Organization (WTO) has recently reported that "the collapse in global demand brought on by the biggest economic downturn in decades will drive exports down by roughly 9 per cent in volume terms in 2009, the biggest such contraction since the Second World War".[1] While the decline in developing countries' exports was expected to be much lower than those of the developed countries, the former set of countries could eventually be worse off since many among them have high dependence on export earnings that have dwindled in the aftermath of the crisis.

The bleak predictions of the WTO Secretariat on the prospects of global trade during the current year appear to be extremely realistic, given the sharp increase in protectionist tendencies in recent months. The Report of the WTO Director-General to the Trade Policy Review Body on the financial and economic crisis and trade-related developments increase has brought out the fact that WTO Members have resorted to increases in border protection measures through higher levels tariffs and imposition of new non-tariff measures. Besides, these countries have also increased the use of trade defence measures such as anti-dumping actions. The Report has further observed that while the financial and fiscal stimulus packages that have been introduced to tackle the crises have generally included elements which could help restore the rate of growth of global trade, some of these packages include elements - state aids, other subsidies and "buy/lend/invest/hire local" conditions – that favour domestic goods and services at the expense of imports. The increase in the protectionist sentiments as is reflected by the above-mentioned measures should cause consternation particularly because these measures have been adopted by most of the prominent members of the WTO.[2]

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[1] WTO (2009), "WTO sees 9% global trade decline in 2009 as recession strikes", Press Release, 22 March (accessed from: http://www.wto.org/english/news_e/pres09_e/pr554_e.htm)

[2] Many WTO Members are facing increased pressure to take protectionist actions. At the start of this year, most WTO Members appeared to have successfully kept these pressures under control. 33 WTO Members (individual EU Members are not counted) had taken the measures to stimulate their economies as also to protect their domestic industries from facing import competition. For details, see, WTO (2009), "Report to the TRPB from the Director-General on the Financial and Economic Crisis and Trade-Related Developments", JOB(09)/30, 26 March.

The above-mentioned developments have been viewed with considerable trepidation as they threaten to stymie the benefits that expansion of trade flows between countries has brought with it over the past two decades. Trade expansion had provided the trigger for enhanced integration of economies during the past two decades, and this in turn had contributed to the rising economic fortunes in large swathes of the world. Although there have been pockets of disenchantment in the developing world in particular, it was widely felt that the problems of those voicing concerns could be addressed through further deepening of global economic integration. A major contribution in realising this objective was expected from the on-going Doha Round of multilateral trade negotiations, which was to provide a framework for widening the scope of economic integration.

For most developing countries, the Doha mandate for liberalising trade in services brought with it expectations that temporary movement of natural persons, or Mode 4, in which these countries have substantial export interests, would witness meaningful liberalisation. And because trade in services under Mode 4 has historically been the most protected among the four modes of supply of services, the potential suppliers of mode 4 services had high expectations from the Doha Round. However, belying the expectations of a majority of WTO Members little progress has been made in the Doha Round on Mode 4 issues. The developed countries have remained reluctant to take additional commitments to allow greater market access under Mode 4. Ironically, this has happened even as the WTO Membership has recognised that there exists asymmetry of commitments in Mode 4 compared to other modes of supply[3] that can be addressed through improved commitments.[4]

Given the sensitivities of the developed countries in allowing temporary movement of natural persons from other WTO Members in their territories[5], it was hardly surprising that the economic downturn would bring with it renewed attempts by the potential importers of Mode 4 services to raise import barriers. In this context it needs to be pointed out that while much attention has been given to the protectionist measures taken by countries, which have affected global trade in goods and some of the more prominent services, relatively little attention has been paid to the restrictions being imposed on Mode 4 services. And this has happened notwithstanding the fact that in the early days of the economic downturn, Juan Somavia, Director General of the International Labour Office had warned that the "current global financial and economic crises have serious implications for migrant workers worldwide".[6] Perhaps more importantly, Somavia reminded the global community of past experience which showed "that migrant workers,

[3] WTO (2007), Communication from China, India, Pakistan, Peru, and Thailand - Liberal Mode 4 Commitments: A win-win for all Members, JOB(07)/175, 12 November 2007, paragraph 20.

[4] This issue was highlighted in the Hong Kong Ministerial Conference of the WTO in 2005. For details, see WTO (2005), Doha Work Programme: Ministerial Declaration, WT/MIN(05)/DEC, 22 December 2005.

[5] Hoekman and Mattoo have commented that "mode 4 is politically extremely sensitive", see Hoekman and Mattoo (2007), "Regulatory Cooperation, Aid for Trade and the General Agreement on Trade in Services", Policy Research Working Paper # 4451, World Bank, p. 9.

[6] International Labour Office (2008), Message by Juan Somavia, Director-General of the International Labour Office on the occasion of International Migrants Day, 18 December, 2008 (accessed from: http://www.ilo.org/public/english/bureau/dgo/speeches/somavia/2008/migrants.pdf)

especially women workers and those in irregular status, are among the hardest hit and most vulnerable during crisis situations".[7]

The relative neglect of problems faced by suppliers of Mode 4 services has been glaringly evident in the statements made by global leaders opposing the advent of the "new protectionism". These leaders have voiced their concerns about the adverse impact of the economic downturn on the labour through reduced employment opportunities, but they failed to recognise that the foreign workers have faced extremely adverse conditions as countries have adopted policies to ensure that the interests of the local workers are given preference over those of their counterparts from other countries.[8]

This paper is an attempt to capture some of the more prominent measures to restrict access to Mode 4 services that have taken place since the onset of the economic downturn. It must be mentioned here that the paper would be focusing only on the measures that are being taken by countries to restrict fresh inflow of foreign workers through enhanced levels of domestic regulation and that the paper would not consider the impact of the policies adopted in response to the crises on the existing foreign workforce because sufficient evidence is lacking.

The paper has two sections. At the outset, the restrictions that have imposed or are proposed to be imposed on import of Mode 4 services would be enumerated in detail. As stated earlier, these measures have been taken at a time when the global comity of nations is engaged in the process of resurrecting the now stalled Doha Round of multilateral trade negotiations, which was intended to provide a fillip to the process of liberalising trade in services. The following section would provide an assessment of the measures taken especially by the US Administration to restrict the level of Mode-4 access.

Restrictions on Mode-4 Access: The recent evidence

This section focuses on the restrictions imposed by the US and the EU member countries, particularly since the onset of the current phase of economic downturn, which have adversely affected temporary movement of persons. These trans-Atlantic economies are the two largest importers of Mode 4 services and therefore measures taken by them can have far reaching implications on the global market for this mode of service transactions. At the outset, we would discuss the details of the measures that have been taken by the US Administration to introduce stricter regulations on Mode 4 service providers. In a subsequent section, we would discuss the situation in this regard emerging in the EU member countries

(i) Measures introduced/proposed by the US to regulate Mode-4 Access

The most pervasive restrictions on temporary movement of persons under Mode 4 have been proposed by the policy makers in the United States. These restrictions have been introduced as a part of the economic stimulus package. More recently, additional measures to restrict entry of

[7] International Labour Office (2008), Message by Juan Somavia, Director-General of the International Labour Office on the occasion of International Migrants Day, 18 December, 2008 (accessed from: http://www.ilo.org/public/english/bureau/dgo/speeches/somavia/2008/migrants.pdf)

[8] The G-20 Summit held in April, 2009 and the London Jobs Conference did not comment on imperative to keep the market for Mode 4 services as an essential step to create more jobs and therefore additional demand in economies that is essential for reversing the economic downturn faced by most countries. See, G-20 (2009), The Global Plan for Recovery and Reform, 2 April 2009 and

temporary workers in the US have been proposed in the H-1B and L-1 Visa Reform Act 2009[9], a narrowly-tailored bipartisan legislation that is aimed at preventing "abuse and fraud" and to "protect American workers". This proposed legislation includes a stronger enforcement regime in respect of H-1B visas. Complementing the initiatives taken in this proposed legislation are measures that are being taken by the Department of Homeland Security (DHS) to introduce robust employer enforcement as a critical part of the US immigration system[10]. These measures are ostensibly aimed at deterring foreign workers from participation in the US economy, and as we shall discuss later, the measures are already impacting on the nature of participation in the H-1B program.

The first set of restrictions on H-1B beneficiaries was included in the stimulus package introduced by the Obama Administration through the American Recovery and Reinvestment Act (ARRA). The ARRA, which was signed into law in February 2009, included the Employ American Workers Act (EAWA) that introduced conditions on hiring foreign nationals to work in the H-1B "specialty occupation[11]" category by employers receiving funds through the Troubled Asset Relief Program (TARP) of the Emergency Economic Stabilization Act of 2008 (EESA). It must be mentioned here that the initial goal of the proponents of the EESA was to prohibit TARP recipients from employing H-1B workers. The legislation which was eventually adopted allows such employment by firms receiving TARP funds subject to a number of conditions. These conditions are not imposed on most firms that did not receive federal funds under the stimulus package.

All H-1B workers "hired" by a covered employer between February 17, 2009 and February 16, 2011 are covered by the EAWA. Petitions covered by this Act include those filed for new hires whose petitions were approved before the date EAWA became effective. The EAWA does not apply to petitions to change the status of a foreign worker already working for the employer in another work-authorised category as also to those seeking an extension of stay for a current employee for the same employer.

It is important to note here that the EAWA limits the applicability of the requirements described above as the "hire" of H-1B workers. The term "hire", according to ARRA, is "to permit a new employee to commence a period of employment." This provision thus seeks to clarify that the conditions on the hiring of H-1B workers does not to apply to existing employees of an organisation.

Under EAWA, firms seeking to hire employees under the H-1B visa program would be considered "H-1B dependent employers" if they are receiving TARP funds. The concept of "H-1B dependent employers" was first introduced in the H-1B program in 2001 as a transitory measure and was re-introduced in 2005 after it was included in the H-1B Visa Reform Act of 2004. This regulation provides that for employers having 51 or more full-time equivalent

[9] US Senate (2009), S. 887, 111th Congress, April 23

[10] Department of Homeland Security (2009), Testimony of Secretary Napolitano before the Senate Committee on the Judiciary, Oversight of the Department of Homeland Security, May 6 (accessed from: http://www.dhs.gov/ynews/testimony/testimony_1241706742872.shtm)

[11] According to the US Citizenship and Immigration Services (USCIS), "specialty occupation" is one that requires theoretical and practical application of a body of specialized knowledge along with at least a bachelor's degree or its equivalent.

employees, the "H-1B dependent employers" would be those having 15 per cent or more H-1B workers.[12]

The restrictions on the employment of non-immigrant workers introduced by the EAWA imply that TARP recipients are now subjected to the same rules as "H-1B dependent employers" regardless of the share of H-1B workers in their total workforce. Thus, while the new regulations do not put a blanket ban on the hiring of H-1B workers TARP recipients, they do, however, impose several conditions that would have the effect of discouraging employers from engaging non-immigrant workers, as would be brought out in the following discussion.

The EAWA requires that all "H-1B dependent employers" must make the following additional attestations to the U.S. Department of Labor (DOL) when filing a Labor Condition Applications (LCA):

(i) They have taken good faith steps to recruit US workers[13] using industry-wide standards and offering compensation that is at least as great as those offered to the H-1B non-immigrant;

(ii) They have offered the job to any US worker who applies and is *equally or better qualified* for the job that is intended for the H-1B non-immigrant (emphasis added);

(iii) They have not "displaced" any U.S. worker employed within the period beginning 90 days prior to the filing of the H-1B petitions and ending 90 days after their filing. The conditions clarify that a US worker is deemed to have been displaced if the worker is laid off from a job that is *essentially the equivalent of the job*[14] for which an H-1B non-immigrant is sought (emphasis); and

(iv) They would not place an H-1B worker to work for another employer unless it has inquired whether the other employer has displaced or is likely to displace a US worker within 90 days before or after the placement of the H-1B worker.

In a further tightening of regulations underlying movement of persons under Mode 4, the EAWA removes an important exception that was hitherto available to H-1B dependent employers. The earlier rules provided an exemption from the extra attestations for H-1B workers who possess master's degrees or who receive wages of at least $60,000, the EAWA makes this exemption unavailable to TARP recipients.

In addition to the aforementioned, an employer subject to the new regulations is prohibited from placing the H-1B worker with another employer in situations where there is indication of a relationship between the worker and the other employer, unless the new "receiving" employer has not displaced a US worker within 90 days before or after the non-immigrant is placed. This,

[12] For smaller companies, i.e. those having less than 50 employees the number of H-1B employees that must employ to be considered as "H-1B dependent" are the following: (i) at least eight H-1B non-immigrant workers for employers employing 25 or less full-time equivalent employees and (ii) least 13 H-1B non-immigrant workers for employers employing 26-50 full-time equivalent employees.

[13] Defined as US citizens or nationals, lawful permanent resident aliens, refugees, asylees, or other immigrants authorised to be employed in the United States (i.e., workers other than non-immigrant aliens)

[14] A job is considered to be the essential equivalent of another job if it involves essentially the same responsibilities, was held by a United States worker with substantially equivalent qualifications and experience, and is located in the same area of employment as the other job

in other words, implies that the employer cannot outsource any H-1B worker to work for another employer unless that employer first makes a "bona fide" inquiry as to whether the other employer has displaced or has the potential of displacing a US worker within 90 days before or after the placement of the H-1B worker.

The conditions imposed on the "H-1B dependent employers" could put the TARP beneficiaries in a cleft stick, thus affecting their prospects of a turnaround from the present economic downturn. This situation could arise as many financial institutions, the sector that has received the largest share of the TARP funds, have been experiencing a reduction in workforce but since they are receiving federal relief funds they would be prevented from hiring new employees in H-1B category.

The pitch on the issue of restricting the inflows of non-immigrant workers in the US has been queered by the recent move by two Congressmen, Assistant Senate Majority Leader Dick Durbin and Senator Chuck Grassley, to introduce the H-1B and L-1 Visa Reform Act 2009 (henceforth, "Durbin-Grassley bill"). Durbin and Grassley have introduced this narrowly-tailored bipartisan legislation that seeks to amend the Immigration and Nationality Act in order to prevent "abuse and fraud" and to "protect American workers".[15] Providing the raison d'être for the bill that he had co-sponsored, Senator Durbin stated that the H-1B visa program had not realised its stated objective: "to benefit the American economy by allowing US employers to import high-skilled and specialised guest-workers when no qualified American workers are available". [16] In other words, the H-1B visa program was expected to complement the US workforce, and not replace it. Durbin argued that "the H-1B visa program is plagued with fraud and abuse and is now a vehicle for outsourcing that deprives qualified American workers of their jobs", and the bill he had co-sponsored was therefore designed to "put a stop to the outsourcing of American jobs and discrimination against American workers". The proposed bill, Durbin clarified, was aimed at making reasonable reforms by plugging the loopholes that, in his view, have allowed foreign guest-workers to displace qualified American workers. And, this was to be done, according to the author of the proposed legislation by keeping unaltered the number of H-1B visas that are currently available.

Durbin sought endorsement of his position in the assessment made by the US Department of Labor (DOL) on the operation of the "H-1B Work Visa for Specialty Occupations" program during 2002-06. In its assessment, the DOL had stated that the "H-1B workers may be hired even when a qualified US worker wants the job, and a US worker can be displaced from the job in favour of a foreign worker".[17] Durbin has interpreted this assessment by DOL as saying that employers can legally discriminate against qualified Americans by firing them without cause and recruiting only H-1B guest-workers to replace them. Some companies that discriminate against American workers are so brazen that their job advertisements say "H-1B visa holders only." And some companies in the United States have workforces that consist almost entirely of H-1B guest-

[15] US Senate (2009), S. 887, 111th Congress, April 23.

[16] Durbin, Grassley Introduce Legislation to Reform H-1B Visa Program, April 23, 2009 (accessed from: durbin.senate.gov/showRelease.cfm?releaseId=311910)

[17] US Department of Labor (n.d.), Strategic Plan 2006-2011, Washington DC., p.35 (accessed from: http://www.dol.gov/_sec/stratplan/strat_plan_2006-2011.pdf).

workers. Employers can legally discriminate against qualified Americans by firing them without cause and recruiting only H-1B guest-workers to replace them.

To address the problems that have been outlined above, the Durbin-Grassley bill proposes to introduce the following conditions on the employers[18]:

(i) Require all employers who want to hire an H-1B guest-worker to first make a good-faith attempt to recruit a qualified American worker. Employers would be prohibited from using H-1B visa holders to displace qualified American workers.

(ii) Prohibit the blatantly discriminatory practice of "H-1B only" ads and prohibit employers from hiring additional H-1B and L-1 guest-workers if more than 50 per cent of their employees are H-1B and L-1 visa holders.

Effective monitoring of the H-1B and L-1 visa programs is yet another focus of the Durbin-Grassley bill. The bill seeks to respond to the view that under current law, it is very difficult for the federal government to monitor the program. It has been argued that the Department of Labor (DOL) is only authorised to review applications for completeness and obvious inaccuracies and that the Department does not have the authority to open an investigation of an employer suspected of abusing the H-1B program unless it receives a formal complaint – even if the employer's application is clearly fraudulent. According to Durbin, these deficiencies in the monitoring system have prompted the DOL's Inspector General to conclude that the H-1B program is "highly susceptible to fraud."

To address the above-mentioned issue, the Durbin-Grassley bill proposes to give the government more authority to conduct employer investigations and streamline the investigative process. For example, the bill would:

(i) Permit DOL to initiate investigations without a complaint and without the Labor Secretary's personal authorisation;

(ii) Authorise DOL to review H-1B applications for fraud;

(iii) Allow DOL to conduct random audits of any company that uses the H-1B program;

(iv) Require DOL to conduct annual audits of companies who employ large numbers of H-1B workers.

The Durbin-Grassley bill also seeks to influence the participation of H-1B non-immigrants through an elaborate wage determination system, one that imposes onerous requirements on the potential employers. The proposal in this regard states that during the period of authorised employment for each H-1B worker, the employer will offer wages that are determined on the basis of the best information available at the time the application is filed and which are not less than the highest of the following benchmarks:

(i) The locally determined prevailing wage level for the occupational classification in the area of employment

(ii) The median average wage for all workers in the occupational classification in the area of employment

[18] The following discussion is based on the provisions of the proposed Durbin-Grassley bill.

(iii) The median wage for skill level in the occupational classification found in the most recent Occupational Employment Statistics survey

In addition, the employer would provide working conditions for the H-1B non-immigrant that will not adversely affect the working conditions of other workers similarly employed. These detailed conditions increase the burden on the potential employers of H-1B non-immigrants because of the compliance measures that have been included. The compliance measures include the following:

(i) Conduct annual compliance audits of not less than 1 percent of the employers that employ H-1B non-immigrants during the applicable calendar year

(ii) Conduct annual compliance audits of each employer with more than 100 employees who work in the United States if more than 15 percent of such employees are H-1B non-immigrants

(iii) Make available to the public an executive summary or report describing the general findings of the aforementioned audits

It is clear from the above discussion that the explicit intent of the Durbin-Grassley bill is to introduce regulatory impediments in the process of employing H-1B non-immigrants. The employers would be have to bear significant administrative costs while seeking to employ the non-immigrants that could, in effect, dissuade them to employ such workers.

The impact of the restrictions that have been imposed by the US Administration on the entry of non-immigrant workers is already being felt. Beginning April 1 each year, the US Citizenship and Immigration Services (USCIS) receives H-1B petitions for filling the Congressionally-mandated cap of 65,000 visas, which are issued to non-immigrant workers for joining the workforce the following year. In 2008, the USCIS had received enough applications to meet H-1B quota within a week of accepting the petitions, while in 2007, the number of applications reached 150,000 in the first two days. In the current year, however, the experience has been radically different. On May 18, 2009, USCIS announced that it had received approximately 45,500 H-1B petitions counting toward the Congressionally-mandated 65,000 cap for the year 2010[19].

(ii) The European Context

In contrast to the slew of initiatives that have been taken in the US to introduce stricter regulation on the entry of non-immigrant workers, thus affecting Mode 4 access, the members of the EU have maintained their commitment towards providing a policy environment that seeks to enhance participation of foreign workers in their territories. In fact, EU Members have emphasised that "legal migration will play an important role in enhancing the knowledge-based economy in Europe, in advancing economic development", thus help realising the objectives of the Lisbon strategy that was aimed at making the EU "the most dynamic and competitive knowledge-based

[19] USCIS (2009), "USCIS Updates Information on FY2010 H-1B Petition Filings", 18 May (accessed from: http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=cd684e44d6551210VgnVCM1000004718190aRCRD&vgnextchannel=c94e6d26d17df110VgnVCM1000004718190aRCRD)

economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion, and respect for the environment by 2010"[20].

During the past two years, the EU Members have been engaged in a process of introducing enhanced transparency in the provisions determining entry of foreign workers in their territories, which was seen as a cornerstone of a comprehensive immigration policy for Europe. Towards this end, the European Commission had introduced in October 2007, a proposal for a "Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State" that was adopted by the European Parliament in November 2008[21]. More recently, in April 2009, the European Parliament adopted a resolution that underlines the principles, actions and tools for formalising the Common Immigration Policy for Europe[22].

But while the EU Members have collectively strived to provide a more predictable environment for foreign workers, the UK has taken a different view on the involvement of foreign workers in its economy, particularly since the onset of the economic downturn.

The initial steps to introduce enhanced restrictions on the entry of foreign workers in the UK was taken in February 2008 when the UK Border Agency launched the "new immigration system ... to ensure that only those with the right skills or the right contribution will be able to come to the United Kingdom to work and study". This new policy was based on the "Points Based System"[23] that included five tiers of non-immigrants based on their levels of skills. The first two tiers include skilled workers: highly skilled individuals who can contribute to economic growth and productivity were included in Tier 1, while Tier 2 included skilled workers with a job offer who can fill gaps in the labour force. Tier 3 included low skilled workers, while Tiers 4 and 5 included students and other workers that are allowed to work in the UK for a limited period of time.

Major amendments were introduced by the UK Border Agency in early 2009 in the points based system that were specifically aimed at restricting access to workers included in Tiers 1, 2 and 3. The first move was to suspend suspended tier 3 of the PBS to ensure no foreign national from outside the European Economic Area (EEA)[24] can come to the UK and work in a low-skilled job. The more egregious of the measures proposed in early 2009 took the form of "measures to raise

[20] Council of the European Union (2004), Brussels European Council: Presidency Conclusions 4/5 November, p. 19 (accessed from: http://ue.eu.int/uedocs/cmsUpload/EU_4.5-11.pdf)

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

[22] European Parliament (2009), A Common Immigration Policy for Europe, 22 April (accessed from: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0257+0+DOC+XML+V0//EN)

[23] UK Home Office (2006), "A Points-Based System: Making Migration Work for Britain", London.

[24] The EEA is defined as the European Union (EU) member states with the addition of Iceland, Norway and, for the purposes of immigration, Switzerland through a bilateral agreement. Workers of these additional countries possess the same rights to work in the UK as EU nationals. The ten new members of the EU that were inducted since 2004 do not, however, form a part of the EEA - separate immigration rules are applied for nationals of these countries.

the bar for foreign workers wishing to enter the United Kingdom, and to give domestic workers a greater chance of applying first for United Kingdom jobs"[25].

UK Border Agency has announced three significant changes to support British workers and to be more selective about the migrants coming to the United Kingdom from outside the EEA. The new proposals specifically target Tier 1 and 2 migrants, i.e. those that have high levels of skills[26].

The new proposals represent the most drastic tightening of the Tier 1 Highly Skilled Migrants visa requirements to date. Under Tier 1, the current minimum educational qualification is a Bachelors Degree, but this is proposed to be raised to a Masters Degree under the proposals. Similarly, the minimum earnings requirement under the current rules is £17,000, which will be raised to £20,000. In recent years, over 25,000 foreign workers have travelled to the UK each year under the Highly Skilled Migrant route. Available estimates indicate that the new requirements may reduce this number to fewer than 15,000 per year.

The proposals also include the possibility of restricting Tier 2 Skilled Migrants work to skills shortage areas. Furthermore, Tier 2 Skilled jobs need to be advertised at Jobcentres to allow UK/EU workers to have the opportunity to apply first, before a foreign national can be recruited. Almost 80,000 migrants travel to the UK per year under the Tier 2 Skilled Migrant/Work Permit arrangements. This number would be halved under the proposals.

There is also a proposal to restrict migrants' dependants from taking up employment in the UK. This would prevent spouses and children of skilled migrants from working in the UK. The UK Border Agency will first have the economic contribution of skilled foreign workers' dependants assessed before taking a decision. This approach of the UK Border Agency is in the nature of a compromise, after the Home Secretary had suggested the banning of foreign workers' families completely.

As in the case of the US, the UK Administration has initiated steps to introduce regulatory impediments that would put sands in the wheels of temporary movement of persons under Mode 4. Although most of the measures that UK Administration has proposed may not be implemented immediately, the introduction of these measures would have a large impact given that in the recent years, more than 100,000 Tier 1 and 2 migrants were gaining access to the UK labour market.

An Assessment of the Measures taken to Restrict Mode-4 Access

Are the measures taken by the US Administration to restrict Mode-4 access as described above aimed at affecting the interests of the foreign-service providers under Mode-4? The industry in countries like India that have utilised a large share of the H-1B visas granted in the past thinks that the US has in fact undermined its own interests by taking such measures. The association representing India's interests in IT and ITES, viz. Nasscom, has argued that the H-1B visas have been used to provide technically qualified talent that is in short supply, to open new markets, and to accelerate innovation and increase competitiveness for US companies. Nasscom has therefore

[25] UK Border Agency (2009), Migrant workers face tougher test to work in the United Kingdom, 22 February (accessed from: http://www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/migrantworkerstoughertest)

[26] This and the following information have been obtained from the UK Border Agency (www.ukba.homeoffice.gov.uk) and Mulberry Finch, an Immigration consultancy firm: (http://www.mulberryfinch.com/)

surmised that the stricter regulations accompanying the grant of H-1B visas and the H-1B and L-1 Visa Reform Act 2009 proposed by Durbin and Grassley would have a detrimental effect on the US economy by reducing its global competitiveness.

A recent study by the National Foundation for American Policy (NFAP) supports this view expressed by the Indian industry that the H-1B visa holders are important to innovation, entrepreneurship and job creation in the US[27]. The study has provided several interesting findings which contradict the view of the US policy makers that the restrictions on the grant of H-1B visas would, in the ultimate analysis, secure jobs for the US domestic workers during the economic downturn. Using the data provided by the technology companies in the S&P 500, the NFAP study shows that there is a positive and statistically significant association between the number of positions requested in H-1B labour condition applications (LCAs) and the percentage change in total employment. The results showed that for every H-1B position requested, technology companies based in the US were able to increase their employment by 5 workers. In other words, contrary to the assumptions made by the policy makers, there is a significant element of complementarity between the domestic workforce and the H-1B positions. The study further added that the degree of complementarity increased with smaller firms. In case of technology firms with less than 5,000 employees, each H-1B position requested in LCAs was associated with an increase of employment of 7.5 workers.

The NFAP study has the backing of a rich body of analytical literature that has argued that the removal of restrictions on Mode 4 brings with it gains for both importers and the exporters of such services. The study by Jansen and Piermartini[28] arrived at an important conclusion that temporary movements of persons can have positive and significant effects on merchandise trade. The estimates provided by the authors show that a 10 per cent increase in Mode 4 services could increase US imports by around 3 per cent and exports between 1.8 and 2.7 per cent.

Subsequent studies by Walmsley and Winters[29] and Walmsley, Winters and Ahmed[30] demonstrated that removal of restrictions on the movement of natural persons would significantly increase global welfare with the benefits accruing to developing and developed countries. Walmsley and Winters showed that if skilled and unskilled temporary labour in the developed economies is increased by 3 per cent of their labour forces, and the additional labour comes from developing economies, there would be global welfare gains of around US $ 150 billion. Authors have also pointed out that there are significant gains to be made by all countries from the liberalisation of the movement of labour and that most of these gains accrue from the movement of unskilled workers.

[27] National Foundation for American Policy (2009), "H-1B Visas by the Numbers", NFAP Policy Brief, March.

[28] Jansen, Marion and Roberta Piermartini (2004), "The Impact of Mode 4 on Trade in Goods and Services", Staff Working Paper ERSD-2004-07, World Trade Organization, November, p. 13.

[29] Quoted in Walmsley, Winters and Ahmed (2007), "Measuring the Impact of the Movement of Labor Using a Model of Bilateral Migration Flows", GTAP Technical Paper No. 28, p. 6, (accessed from: https://www.gtap.agecon.purdue.edu/resources/download/3621.pdf)

[30] Walmsley, Winters and Ahmed (2007), "Measuring the Impact of the Movement of Labor Using a Model of Bilateral Migration Flows", GTAP Technical Paper No. 28, p. 42, (accessed from: https://www.gtap.agecon.purdue.edu/resources/download/3621.pdf)

Walmsley, Winters and Ahmed conclude in their study that it quotas on the number of temporary workers permitted into the developed economies are increased by 3% of the developed economies' labour forces, the real income of permanent residents in the developed economies increases significantly; with most of those gains arising from the lifting of quotas on unskilled labour. The results provided the authors show that permanent residents of developing countries also gain in terms of real incomes by exporting unskilled and skilled labour, although the gains from skilled labour could be lower.

The studies referred to above unerringly point to the fact that the countries imposing restrictions on the temporary movement of natural persons may, in fact, adversely affect their interests. It is, therefore, ironical that these countries would be imposing such restrictions as a strategy to improve their economic fortunes.

By way of conclusions

Temporary movement of natural persons under Mode 4, which has remained a contentious issue between the developed and the developing countries, has got into further imbroglio as some of the major economies, including the US and the UK have initiated measures that would effectively restrict entry of non-immigrant workers. Coming as it does in the midst of the economic downturn that has been deepened by the severe contraction of demand; these restrictive measures would impact both on the importers as well as the exporters of Mode 4 services. Ironically, however, the implications of the increasing restrictions on Mode 4 service suppliers have received much less attention in the on-going discussions centring on the economic downturn.

The relative neglect of this issue is more galling given the fact that although the global leaders, particularly those in the G-20, have been cognisant of the contribution that open markets can make towards extricating the economies from the current morass, they have remained silent on the imperatives of keeping the market for Mode 4 services. In view of the growing tendencies to impose restrictions on the market for Mode 4 services it is imperative that the global leaders take cognisance of the role that this mode of services can play in the turnaround of the global economy. The positive impulses that liberalisation of Mode 4 could unleash on the global economy can be substantial given that this mode of service supply accounts for only 1-2 per cent of the total trade in services.[31]

[31] WTO (2007), "Communication from China, India, Pakistan, Peru, and Thailand - Liberal Mode 4 Commitments: A win-win for all Members", JOB(07)/175, 12 November 2007, paragraph 5.