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Liberalising Global Labour Markets: Recent Developments at the WTO

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The paper considers the GATS commitments made by WTO members on the movement of natural persons (mode 4) since the completion of the Uruguay Round. Two groups of demandeurs exist for liberalisation. The first are developed countries which have sought market access for intra-corporate transferees (ICTs) and professionals. While developing countries were demandeurs during the Uruguay Round negotiations they gained little during the round and have made substantial concessions during the process of WTO accession. These commitments made by developing countries have not only been in the traditional areas such as ICTs but in new areas such as “trading rights”, which are GATT commitments with unclear and untested implications for the GATS under mode 3 and mode 4. In the run-up to a new round of negotiations on services, new and very innovative proposals have come from labour-exporting developing countries such as India for the liberalisation of mode 4. The paper considers a wide range of mode 4 proposals made by WTO members, some of which will have profound effects upon global labour markets.

Introduction

This paper considers the recent post–Uruguay Round developments in the liberalisation of the movement of natural persons under the terms of the *General Agreement on Trade in Services* (GATS). Consideration is initially given to two significant but less well known and understood post–Uruguay Round developments. These are the WTO accession commitments of new WTO members in the area of mode 4 (i.e., movement of natural persons), which have imposed greatly strengthened commitments and disciplines on acceding countries. (For a discussion of the nature of mode 4, see the technical annex to this paper.) Another relatively arcane but potentially more significant development in WTO accession has been the emergence of the principle of “trading rights”, which appears to extend the legal personality of the GATT Article III on National Treatment to juridical and natural persons. The negotiations on domestic disciplines on accounting services and the reasons for apparent lack of progress are also considered. Existing negotiating proposals for mandated service sector negotiations from both developed and developing countries are reviewed.¹ In particular the liberalisation proposals of the government of India, the most comprehensive to be tabled at the WTO thus far, and their implications for the process of further labour market liberalisation following the Doha Ministerial Conference will be considered. The range of existing WTO commitments and disciplines as negotiated during the Uruguay Round and the interaction between mode 4 and the other modes of supply are reviewed briefly in the technical annex.

Two principal groups of *demandeurs* are concerned with the expansion of mode 4 rights in quite different ways. On the one hand transnational service suppliers, which are by and large capital- and high-technology-intensive service exporters from developed countries, seek greater access for their executives, managers and specialists as intra-corporate transferees. On the other hand developing countries are also seeking a liberalisation of mode 4 to facilitate their exports of labour-intensive and hence more sensitive services. The results of the Uruguay Round and post–Uruguay Round negotiations have provided the nominal mode 4 market access coverage required by the large developed countries and their service exporters. In key areas of the trade in services, the existing range of market access commitments is largely confined to intra-corporate transferees, executives, managers and specialists, and business visitors. However, the market access commitments of the GATS, even as they pertain to the interests of developed country service exporters are more apparent than real as there have been no effective WTO disciplines on conditions of market access or on national

treatment limitations. Moreover, there are no standardised definitions of language used in these commitments. It is the absence of these subsidiary commitments and disciplines that renders GATS market access commitments largely ineffective.

With regard to labour market liberalisation, during the Uruguay Round only the most modest nominal concessions were made on mode 4. The developing countries, which were also *demandeurs*, gained little from the mode 4 negotiations and subsequently have resisted the development of subsidiary mode 4 disciplines in areas such as accounting services in the wake of the Uruguay Round. Despite the fact that some LDCs and low-income developing countries are significant exporters of labour services they have generally not been *demandeurs* during negotiations. The more advanced developing countries and transitional economies were the most aggressive *demandeurs* in this area during the Uruguay Round. However, subsequent to the completion of the Uruguay Round, it has been the developing countries that through accession to the WTO have been making the most significant and liberal concessions in mode 4.

Post-Uruguay Round Developments

Following the completion of the Uruguay Round negotiations, significant new market openings have occurred in the service sector in general and in mode 4 in particular. These concessions have been made by countries acceding to the WTO directly through the normal process of GATS commitments and also through the introduction of the entirely new precedent under GATT Article III of “trading rights”, which appears to establish new and as yet untested rights for natural persons wishing to establish a commercial presence in acceding countries. An important post-Uruguay Round development with regard to mode 4 has been the completion of the adoption of the *Disciplines on Domestic Regulation in the Accountancy Sector*, which will be considered later in this section.²

GATS Accession Commitments

The most obvious pattern regarding the extent and depth of mode 4 commitments during accession has been the extent to which these have been increased with time. Accession is a profoundly different negotiating process from the normal WTO negotiations where parties negotiate from a position of “equality in principle” but from fundamentally different power bases which stem from differences in size and economic importance. In the GATS, unlike the GATT,³ any party may be a *demandeur* during trade negotiations.⁴ However, accession to the WTO, the rules-based

multilateral system, while replete with procedures is devoid of rules, and under the terms of the agreement accession is on terms to be determined by the members.⁵ There are no negotiating rights for countries in the process of accession. The WTO members may impose a cost, and this has been an ever-increasing cost of membership since the creation of the WTO, but the acceding party has no right to impose costs on the membership. Given this inherent imbalance, which is enormously beneficial to WTO members, the accession process has been long and costly, and has over time imposed progressively higher costs on members and resulted in WTO-plus demands from the *quad* members,⁶ which are the only countries with adequate financial and personnel resources to be able to follow the accession process.⁷

Table 8 in the annex to this paper indicates that acceding countries have over time made progressively greater commitments on mode 4, to the extent that these have been in the interest of *quad* countries, i.e., in areas that pertain to intra-corporate transferees and business visitors. Unlike Uruguay Round commitments, since early 1997 all acceding countries have made commitments on executives, managers and specialists under mode 4 with the exception of Bulgaria.⁸ During the Uruguay Round only 19 of the total 47 commitments on intra-corporate transferees were made by developing countries.⁹ All recently acceding countries have made commitments on market access for business visitors, a key U.S. demand. Also of significance is that the commitments of acceding countries are qualified with relatively insignificant restrictions on market access. Of the acceding countries only Jordan negotiated an economic needs test as a market access limitation, which it largely negotiated away in the U.S.-Jordan Free Trade Agreement.¹⁰ By contrast, during the Uruguay Round a total of 32 developing countries (approximately 30 percent of all horizontal commitments) made horizontal commitments in mode 4 subject to an economic needs test.¹¹ Despite the provisions of the GATS on quantitative restrictions in mode 4, the market access limitations during accession in terms of quota restrictions have remained common, occurring in 7 of the 14 accessions.¹² The limitations imposed through upper limits to the duration of stay have tended to be more clearly defined and more generous.¹³ It is also relevant to note that since the Uruguay Round, accession commitments in mode 4 have become progressively more onerous, much like accession commitments in other sectors.

GATT “Trading Rights” and Accession

The most opaque development since the completion of the Uruguay Round has been the development of an entirely new GATT concept which has unavoidable but as yet imperfectly understood implications for GATS commitments in terms of modes 3 and 4 as well as sector-specific commitments. The issue of traders’ rights stems in large measure from concerns of the United States regarding the right of natural and juridical persons to import and export goods in acceding countries. The rights of these persons have been seen as most seriously at risk in middle-eastern countries where market access for traders is felt to be most seriously impaired. In light of the unwillingness of many acceding countries to make commitments in either wholesale or retail sectors and in light of the range and depth of mode 4 commitments made by acceding countries, some WTO members have felt the need for new assurances of the right of market access for traders and their representatives.¹⁴

The first acceding country to make what are now known as commitments to “trading rights” was Bulgaria.¹⁵ All trading rights commitments in the accession protocols have been stated in the negative, i.e., that actions in violation of “commitments” will not be taken, but this wording clearly implies the conferring of rights to individuals in a legal instrument where rights are conferred upon WTO members, i.e., signatory states. The earliest post-Uruguay Round accessions did not include such obligations¹⁶ but by the time of the Kyrgyz accession the language of commitment had become largely standardised¹⁷ and has been slightly varied in subsequent accession protocols. In the most recent protocols of accession, commitments have been clearly made in terms of natural and juridical persons.¹⁸ Contention over the issue of trading rights arose between the United States and the EU in the accession of the Baltic states, which are also simultaneously preparing accession to the European Union. The more generous trading rights commitments made by Baltic states during accession have possible implications in terms of the harmonised market access commitments of EU members, in that such commitments may well undermine market access policy by allowing a conduit for more liberal access through the Baltic states.

Trading rights have also been an issue in the accession negotiations of China. Given the history of highly unequal trading agreements between China and developed countries in the 19th century following the two “Opium Wars” and their emphasis on trading rights of foreigners, this has necessarily been a particularly sensitive issue. Nevertheless China has also reportedly agreed to the inclusion of text on trading rights in its accession negotiations¹⁹ that appears to create unlimited rights of natural and

juridical persons to trade, i.e., import and export, following a three-year transition period. What this means in terms of the right of sojourn of those employed in such firms remains, as with all previous protocols, unspecified.

The confusion regarding the meaning and limits of such commitments as they pertain to market access for natural persons as well as commercial presence has manifested itself in accession documents. For example the Jordanian commitments on trading rights have been made “without prejudice to Jordan’s schedule of commitments on services”.²⁰ Trading rights are structured as a GATT commitment and the inclusion of a such a caveat as found in the Jordanian text only further underlines the blurring between GATS and GATT commitments. Specifically, trading rights obligations may conflict with existing sector-specific GATS commitments in the wholesale and retail sector, especially in small states where the delineations between importer, wholesaler and retailer are not relevant. More significantly, the obligations under trading rights may also broaden the horizontal commitments as they pertain to modes 3 and 4. The inclusion of such provisions stated in terms of natural and juridical persons changes the legal personality of the GATT commitments, and while it establishes no precedent for those WTO members that have not made such commitments it creates a very real possibility that a panel will, at some future time, create quite unexpected and unforeseen precedence with wider application than that envisaged by the current proponents of “trading rights”.²¹

U.S. Bilateralism/Regionalism

During its eight-year tenure the Clinton administration attempted to introduce into the multilateral trading system several new issues, e.g., labour standards and the mainstreaming of environment, that it deemed to be in the interests of the United States. It was thwarted in these attempts at the inclusion of such issues in the international trade agenda by the combined efforts of developing countries. As a result, towards the end of its tenure the Clinton administration began to pursue its trade policy interests bilaterally. U.S. policy towards the WTO accession process has become a bipartisan leg of U.S. trade policy where economic interests are being pursued bilaterally. However, that bilateralism has extended not only to accession, with the Chinese case being the most prominent, but also to bilateral free trade agreements. The most notable of these has been the U.S.-Jordan FTA,²² which was completed in the final weeks of the Clinton administration. While the agreement was of little economic significance it broke much new ground in areas such as labour,

environment, intellectual property, and services. At the same time the United States pursued FTAs with considerable energy with both Chile²³ and Singapore.²⁴

The U.S.-Jordan FTA was completed several months after the Jordanian accession to the WTO.²⁵ Yet there exist some significant differences in the commitments on the presence of natural persons between the Jordanian WTO service commitments and those found in the FTA, which reflect to a very large degree the concerns of the United States. One of the concerns expressed during WTO accession negotiations was the application of economic needs tests. In the FTA the rights to restrict market access using economic needs tests were eliminated for intra-corporate transferees in all sectors except financial services and energy distribution. In the FTA intra-corporate transferees in the financial services sector are however “presumed” to meet the economic needs test.²⁶ The service sector commitments in the U.S.-Jordan FTA, as in the WTO accession commitments, provide for temporary work permits for one year for natural persons. However, in the FTA commitments were made for automatic extension “as long as the work permit holder continues his/her status within the juridical entity employing him/her”.

Significant new commitments have been undertaken by Jordan in its negotiations with the United States. The incoming Republican administration had quite different trade policy priorities from those of its Democratic predecessors. However the ability of U.S. firms to establish and move natural persons would appear to be a bipartisan matter; it will almost certainly be pursued in the bilateral negotiations with Singapore and will certainly be transferred to any other envisaged bilateral negotiations such as those with New Zealand. The new administration has placed increased emphasis on the extension of NAFTA through the completion of negotiations on the Free Trade Area of the Americas. Here the movement of natural persons will become an issue of concern, as both developed countries and developing countries will become *demandeurs*, and many of the WTO disagreements will migrate to the FTAA negotiations.²⁷

Disciplines on Domestic Regulation in the Accountancy Sector

At the close of the Uruguay Round ministers felt that many of the disciplines that had been negotiated in the service sector were inadequate. This was a view held in both developed and developing countries. To accelerate liberalisation ministers at Marrakesh called for the creation of a working group on professional services under the auspices of the Council on Trade in Services.²⁸ In particular, negotiations were

mandated to develop disciplines on the regulation of the accounting sector under a narrow remit²⁹ that focused upon multilateral disciplines on domestic regulatory requirements and not upon further market access. The remit was predicated upon the outcomes constituting a “covered agreement” binding all WTO members.³⁰ Such a negotiating process predicated upon consensus of all WTO members making binding commitments in accounting services (88 percent of all WTO members made commitments in accounting) would guarantee an outcome that would result in capture by vested interests in at least one large member state, leading to weak disciplines. The alternative plurilateral approach found in the *Understanding on Commitments in Financial Services*, because it binds only signatories, has tended to result in stronger disciplines than found in the multilateral approach.

The disciplines negotiated before the close of the Uruguay Round involved basic commitments on transparency, licensing requirements and procedures, qualification requirements and procedures, and technical standards. The disciplines on qualification requirements and procedures for accountants,³¹ for example, involved no more than an obligation that competent authorities take account of equivalency and that all examinations be relevant. On the all-important subject of mutual recognition agreements the agreement “notes” their role in facilitating verification of qualifications. The weaknesses of the disciplines in accounting were highlighted by the International Federation of Accountants, which had acted as one of the key NGOs supporting the negotiations.³² The U.S. industry groups which had supported the negotiations lobbied the U.S. government not to agree to the disciplines.³³ In the end the disciplines were agreed to but shelved pending the completion of the current round of mandated negotiations.³⁴

The reasons for the failure of the accounting negotiations to result in the development of meaningful disciplines are important. First, while the disciplines were requested by developed and developing countries alike they were not part of a broader package of negotiations and hence the possibility that any one WTO member would not benefit from the package was increased. Second, even though there was support from the developing world for disciplines the principal proponents were seen as the larger developed (predominantly anglophone) countries. Third, there was little support inside the EU and in some developing countries. Indeed because the accounting negotiations were isolated and preceded the much broader mandated service sector negotiations by two years it was seen as a strategic error to concede in an area of interest to the developed world without specific and reciprocal benefits for the developing world. As a result, it was relatively easy for the negotiations to be captured

by regulatory and private sector interests in countries where there was no interest in enhanced international competition in the sector. The ability of vested interests and regulatory authorities to capture the negotiations was further strengthened by the fact that initially the disciplines were to be a covered agreement extending to all WTO members rather than just those that had made sector-specific commitments. This lesson provides an invaluable insight into some of the possible pitfalls of the mandated negotiations.

Mode 4 Issues for the Mandated Negotiations

Negotiations have effectively commenced for further liberalisation in mandated sectors such as agriculture and services. Prior to the Seattle Ministerial Conference and in the lead-up to the Doha Ministerial Conference WTO members presented public negotiating positions which reflect the concerns of the two groups of *demandeurs*. Broadly speaking, two types of positions have emerged – that of the *quad* and that of the larger more advanced developing countries. However, the positions are in fact not as polarised as is so often the case with North-South trade issues at the WTO. As we shall see, there are areas of apparent common interest where the forthcoming negotiations can make substantive progress in liberalising the movement of natural persons. The needs of *quad* countries with regard to the liberalisation of mode 4 stem largely but not exclusively from the inherent link which exists between that mode and the other modes of supply which facilitate market access. Thus the objective of the negotiations on mode 4 from the perspective of the *quad* is the clarification of commitments that have already been made. Broadly, the *quad* seeks a deepening of commitments. For the larger and more advanced of the developing countries, where firms are far smaller and the movement of natural persons in the recognised professions is so vital to the trade in services, the presence of natural persons becomes in itself a vital mode of supply and hence there is a demand for a broadening of sectoral coverage. The least developed and low-income developed countries are conspicuously absent from the negotiations as *demandeurs*.

Quad and Other Developed Country Positions

In large measure the *quad* countries have, at least in terms of coverage, if not substantive market access, achieved a large portion of their trade policy objectives pertaining to the movement of natural persons with Uruguay Round and post-Uruguay Round market access offers for intra-corporate transferees. However there are very substantial weaknesses in the substance of the commitments that have been

made by WTO members and these have been the subject of *quad* negotiating proposals for mandated negotiations. Upon examination a now familiar pattern of WTO negotiating proposals and positions emerges from the proposals tabled by the developed countries. The U.S. proposal on mode 4, an area of keen interest to the developing WTO members, is the least forthcoming, and those of the other *quad* members, in this case the EU and Canada, are far more comprehensive.

The U.S. position³⁵ breaks no new ground but seeks to address the perceived difficulty of accessing information as well as the need for procedural transparency in the granting of market access to natural persons. Significantly the United States also complains that:³⁶

...service suppliers in mode four are not permitted to establish a presence, and therefore they must face the same entry restrictions anew each time they seek to provide their services.

In light of the successful U.S. negotiation for the inclusion in the Jordanian service sector commitment of the U.S.-Jordan FTA of automatic visa renewal for intra-corporate transferees, it would not be unreasonable for WTO members to expect a similar demand in the mandated service sector negotiations. However, the U.S. demand follows the core GATT/WTO principles of transparency and openness, which do not imply any market opening demands. Formal U.S. communications prior to the Seattle Ministerial Conference shed further light on U.S. thinking on how new negotiations in services should proceed in mode 4. In these communications the U.S. asked members to consider horizontal commitments “to provide access for certain commonly defined categories of natural persons as service suppliers”, which, in light of U.S. trade interests, would almost certainly mean intra-corporate transferees and business visitors.³⁷

Japan’s proposals³⁸ in the area of mode 4 have been extremely modest, focusing on the liberalisation of professional services³⁹ with particular emphasis on the barriers to market access in the recognised professions. These barriers include nationality barriers, reciprocity in recognition of qualifications, lack of a legal framework for the recognition of foreign qualifications, and the prohibition on the establishment of offices and/or branches in architecture and engineering services. In a subsequent elaboration of its negotiating position Japan has sought added commitments and disciplines on the application of economic needs tests.⁴⁰

The Canadian negotiating proposal⁴¹ on mode 4 shares the common *quad* position on increased transparency and predictability of existing commitments. Canada has also proposed the extension of commitments to general business visitors and professionals. However, in a proposal that presages much of the debate on “a level playing field” that is raised by the Indian negotiating position, Canada has proposed duty free access for “portable tools of the trade” required by service providers in supplying services in foreign markets.

The EU proposals⁴² are far more comprehensive in nature than those of either the United States or Japan and constitute a more developed bargaining position, coming as they do in the wake of the comprehensive proposal from the government of India.⁴³ The EU, like the United States, clearly sees the need to deepen mode 4 commitments and improve the quality of existing mode 4 commitments on the range of service suppliers of interest to themselves, i.e., intra-corporate transferees, but implies that this should be part of an acceptable trade-off for the acceptance of new disciplines in the recognised professions⁴⁴ through the use of the ILO nomenclature⁴⁵ and its incorporation into GATS offers. The EU proposal suggests three areas of “reflection” which include the development of a series of harmonised definitions, strict disciplines on the application, definitions and use of economic and labour market tests, and access to information and enhanced transparency.

Other developed countries such as Switzerland,⁴⁶ Australia⁴⁷ and Singapore⁴⁸ have also submitted proposals, either during the preparations for the Seattle Ministerial Conference or subsequently, that support the continuation of the liberalisation process in all modes of supply. Some, such as Australia have made specific demands in the area of the recognised professions.

Developing Country Positions

Three features of developing countries’ negotiating positions on the further liberalisation of mode 4 are noteworthy. The first and certainly not the most significant is the fact that this is one of the areas where there is a considerable overlap of views between developed and developing countries, and a substantial and far reaching agreement on further liberalisation on mode 4 is by no means impossible in the mandated negotiations, as developing countries appear willing to deepen commitments in response to a *quad* agreement for widening. Second, the almost complete absence of the LDCs and low-income developing countries as *demandeurs* is also striking. The debate is being monopolised by the more advanced developing and developed countries and is focused on the liberalisation of professional services,

where LDCs have no comparative advantage. But by far the most striking feature is that the more advanced developing countries have so significantly shifted their development policy position on the movement of natural persons since the height of the 1970s and 1980s debate on developing country brain drain that they are now *demandeurs*. While it remains a virtual mantra of WTO dialogue on mode 4 that mode 4 liberalisation is not an immigration issue, the fact that developing countries now see temporary movement and export of skilled professional services as being in their interest constitutes a quantum shift in thinking on the issue.

The most common developing country position since the preparations for the Seattle Ministerial Conference has been the general position that a demonstrable imbalance exists between the commitments that have been made by WTO members on mode 3, i.e., commercial presence, and mode 4, natural persons, and that this imbalance needs to be rectified.⁴⁹ This position became *de rigueur* for the developing world in the lead-up to Seattle given the push by the developed countries for the inclusion of investment issues in the new round. An equally common position has been that negotiations should cover a wider range of sectors and all modes of supply.⁵⁰

The most significant developing country positions for the mandated negotiations have come from Pakistan⁵¹ and India.⁵² The earlier proposal from Pakistan outlined the main impediments to the movement of natural persons. The proposal focused on the need for disciplines on mutual recognition and recognition of qualification, the need for disciplines on the application of economic needs tests, and the need for transparency on visa requirements and licensing issues.

However it is the proposal by India that is by far the most comprehensive and innovative proposal on mode 4 liberalisation from any WTO member. The proposal develops specific solutions to existing problems confronting market access of developing country service suppliers that are worthy of note. To facilitate the movement of professionals, India has suggested the development of new horizontal commitment for a new category which it defines as Individual Professionals. Clearly this proposal aims to focus at the competitive end of the professional market where the competition from large trans-national suppliers is at a minimum but it is a category that would be highly sensitive in developed countries. India also seeks an expansion of the categories “other persons” and “specialists” to include middle- and lower-level professionals. Like developed countries, India proposes clarity of definitions and multilateral disciplines on the application of economic needs tests (ENTs) through a reference paper that would define such tests, the criteria for their introduction,

procedures for application, guidelines for their administration and transparency, and duration and review of the ENT application.⁵³

Perhaps the most innovative part of India's proposal deals with the administrative application of visas and work permits. The proposal for the creation of a "GATS Visa",⁵⁴ which would be applicable to all service providers covered by the agreement, is clearly an adaptation of the concept of the APEC visa. The intention is that the visa would be outside the normal migration procedures and would be flexible and renewable while providing a built-in safeguard mechanism to prevent individual service providers from entering the permanent labour market.

In the area of recognition of qualifications the proposal outlines a number of ways in which the concerns of developing countries can be addressed, including the establishment of multilateral norms to facilitate recognition for professional services and equivalence of academic qualifications, along with a compensatory system based on aptitude tests for recognition. The proposal also includes the establishment of norms for temporary licensing.⁵⁵

The section of the Indian proposal most likely to raise serious objections is the introduction of norms on social security payments. It is here that GATS and domestic labour market policy overlap in a politically sensitive manner. Natural persons entering to work temporarily in a labour market are rarely able to benefit from the domestic social security provisions existing in host developed countries, yet are generally not exempt from those taxes. Moreover, short-term intra-corporate transferees are obliged to contribute and in some cases there is no refund upon exit from the market. This not only diminishes the benefit to the transferee but also often substantially raises the cost to the service supplier, who loses the competitive advantage associated with recruitment from a developing country. A double social security cost is imposed, as contributions are made in both the home and host countries. However, just as the Canadian proposal for duty free access for "tools of the trade" would undermine the competitive position of the host-country competitor, so this proposal would, even more dramatically, undermine the competitive position of domestic suppliers. It would also be seen as a threat to the social security systems that exist in most developed countries.

Conclusion

In principle, if not in actual practice, the GATS disciplines established in mode 4 during the Uruguay Round broke considerable ground. The Uruguay Round resulted in an architecture that could facilitate further opening but the outcomes of that round were heavily biased in favour of mode 3, commercial presence; where disciplines were negotiated in mode 4, commitments were in areas that facilitated commercial presence or cross-border supply. In the WTO accession process, the developed world has used its considerable bargaining power to exact market openings from developing countries and economies in transition that enhance the market access of service suppliers from developed countries. The inclusion of “trading rights” for natural and juridical persons under GATT Article III during the WTO accession process has resulted in as yet untested and thoroughly opaque market opening commitments for commercial presence and natural persons. The accession process has also resulted in heightened disciplines for intra-corporate transferees. Events following the Uruguay Round have demonstrated that in mode 4, an area where developing countries have been principal *demandeurs*, they have in fact become principal liberalisers as a result of the imbalance in power in the accession process.

The negotiations on disciplines on the regulation of accounting were a disappointment for many negotiators and for large segments of the accountancy profession. Regrettably in many ways the failure of the accountancy negotiations may reflect the failure of a narrow negotiating remit that could not provide sufficient benefit to all parties. Nevertheless, despite differences, the foundations have been established for an equitable North-South trade-off in the mandated service negotiations in mode 4. This would involve a widening of commitments to further market opening for individual professionals and a simultaneous deepening of the GATS commitments sought by the *quad* through strengthened disciplines on market access and national treatment limitations.

Several caveats are needed to this happy scenario: the United States, the most important party at the WTO, may or may not be willing to consider such further liberalisation as envisaged in the EU proposal, and the LDCs and low-income developing countries could undermine the negotiations because the narrow remit of negotiations focusing on professional services does not benefit them. It remains by no means evident that a compromise, implied in large part by the EU negotiating position, will necessarily emerge. There are ample opportunities for any individual WTO member to water down any future GATS discipline unless the proposal

emerging from the next round of negotiations is comprehensive and is seen to provide a balance of rights and obligations that is fair and benefits all parties. It should be pointed out that during the Uruguay Round services were also seen as an area where mutually beneficial market opening commitments were possible. The history of the Uruguay Round showed that in the end developing countries gained little in the one mode of supply where they have a clear commercial interest.

It has been pointed out that the least developed countries along with low-income developing countries have, for what would appear to be obvious reasons, not been *demandeurs* in the GATS negotiations. However, countries such as Bangladesh and the Philippines have been exporters of semi-skilled and unskilled labour services into South East Asia and the Persian Gulf for over two decades. Other small vulnerable states in the South Pacific, the Caribbean and Central America have also been net labour exporters and yet they have not made substantial demands on trading partners. In part this stems from an exceedingly narrow interpretation of the coverage of mode 4 disciplines which is not implied from existing disciplines. One option for a more balanced approach to negotiating service sector commitments in mode 4 is to create quotas of seasonal or short-term labour that would facilitate temporary movement of natural persons, thus diminishing the pressures caused by the illegal movement of such labour.

Until an approach to GATS negotiations is devised that appears to result in a more equitable balance of rights and obligations for most WTO members the possibility for the negotiation of substantive disciplines in the most propitious sector, i.e., professional services, seems limited. Unless low-income developing countries and the least developed countries are able to either gain substantially in the GATS negotiations or obtain a trade-off in other sectors, their governments will be unable to resist the demands of their own professionals for protection from international competition caused by the widening and deepening of disciplines.

The most obvious alternative to comprehensive market openings, and one abundantly clear to the *quad*, would be an abandonment of the "single undertaking" approach to service sector disciplines and market opening commitments. This could be achieved through a plurilateral approach by those developed and developing countries concerned with sector-specific negotiations. This was already the case with the *Understanding on Commitments in Financial Services*, where only a limited number of WTO members agreed to heightened disciplines in a particular sector.

Endnotes

- * These are the views of the author and not necessarily those of the Commonwealth Secretariat or its member governments.
- ¹ GATS Article XIX.1 mandated that negotiations on further liberalisation shall commence no later than five years following the entry into force of this agreement.
- ² Adopted by GATS Council, 14 December 1998. See WTO News Press Release/118, 14 December 1998.
- ³ GATT Article XXVIII.1 stipulates that only principal suppliers or those with initial negotiating rights have negotiating rights when negotiations for modifications of schedules occur. This was modified under the terms of the *Understanding on the Interpretation of Article XXVIII of the General Agreement on Tariffs and Trade 1994* to cover other parties which have the highest ratio of exports affected by the concession.
- ⁴ GATS Article XXI on Modification of Schedules refers to the rights of any affected party rather than those of principal supplier as found in GATT 1947.
- ⁵ Marrakesh Agreement, Article XII.1.
- ⁶ The *quad* refers to the United States, the EU, Japan and Canada, which are the most powerful trading entities in the WTO.
- ⁷ The flaws in the accession process and the imbalances that these have created have been analysed in Grynberg, R. & Joy, R., “The Accession of Vanuatu to the WTO – Lessons for the Multilateral Trading System” *Journal of World Trade*, Vol. 34(6) December 2000, pp. 159-173.
- ⁸ Bulgarian accession, in the immediate wake of the war in Bosnia, was in several sectors far more lenient than that of other countries acceding at the same time to the WTO. This is true of both services and agriculture.
- ⁹ In the WTO the definition of “developing country” is determined by self-election. Thus countries that are either OECD members, such as Korea, or have GDP/capita higher than the OECD average, such as Israel and Singapore, have defined themselves as developing countries. Israel, Korea and Singapore were three of the “developing countries” making commitments on intra-corporate transferees.
- ¹⁰ “Agreement between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area”, 24th October 2000, Service Schedule A in Annex 3.1 – Jordan, *Schedule of Specific Commitments*.
- ¹¹ See Altinger, L. & Enders, A., op. cit., p. 321.
- ¹² GATS Article XVI.2(a).
- ¹³ It is generally understood that in the absence of a duration-of-stay commitment in a service sector schedule the member’s commitments are unbound.

¹⁴ As Table 6 in the technical annex to this paper indicates there has been a consistent pattern of commitments on mode 4 for business visitors, which has in part addressed some of the concerns of developed countries.

¹⁵ Protocol of Accession of Bulgaria (Doc. WT/SPEC/14/Rev.1 of 17 July 1996):
The representative of Bulgaria confirmed that ... no restrictions exist on the right of foreign and domestic individuals and enterprises to import and export goods and services within Bulgaria's customs territory, except as provided for in WTO Agreements. He further confirmed that individuals and firms were not restricted in their ability to import or export based on their registered scope of business, and the criteria for registration of companies in Bulgaria were generally applicable and published in the State Gazette.

¹⁶ See Protocol of Accession of Ecuador (Doc. WT/L/68 of 1 June 1995); Mongolia (Doc. WT/ACC/MNG/9 of 27 June 1996); or Panama (Doc. WT/SPEC/33/Rev.3 of 6 August 1996).

¹⁷ Protocol of Accession, Kyrgyz Republic (Doc. WT/ACC/KGZ/26 of 31 July 1998):
The representative of the Kyrgyz Republic confirmed that from the date of accession, the Kyrgyz Republic would ensure that all of its laws and regulations relating to the right to trade in goods, and all fees, charges or taxes levied on such rights would be in full conformity with its WTO obligations, including Articles VIII:1(a), XI:1 and III:2 and 4 of the GATT 1994 and that it would also implement such laws and regulations in full conformity with these obligations. The Working Party took note of these commitments.

The Kyrgyz Republic received considerable and generous technical assistance from the U.S. government through USAID in the preparation of their accession to the WTO.

¹⁸ The language in the Protocol of Accession of the Hashemite Kingdom of Jordan (Doc. WT/ACC/JOR/33 of 3 December 1999) refers explicitly to the rights of natural persons:

The representative of Jordan said that Jordan's requirements on the right to trade would not in any way contradict Articles III, XI, and VIII of the GATT 1994. The representative of Jordan confirmed that no restrictions existed on the right of foreign and domestic individuals and enterprises to import and export goods and services into Jordan's customs territory, except as provided for in WTO Agreements. He confirmed that individuals and firms were not restricted in their ability to import or export based on their registered scope of business and the criteria for registration of companies in Jordan were generally applicable and published in the official gazette of Jordan.

¹⁹ Draft Protocol of Accession of China – Consolidated Text on Trading Rights, 2 July 2001, reported in *Inside US Trade*, Vol. 19, No. 27, 6 July 2001, p. 25.

²⁰ Ibid.

²¹ Under the terms of Article 3.2 of the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* there is an attempt to limit judicial activism. “Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreement.” It is difficult to imagine that any system based on legal precedent could avoid the establishment of legal precedent which stems from the circumstances of a particular case but has more general application.

²² “Agreement between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area”, 24 October 2000.

²³ White House Press Release, 29 November 2000, quoted in *Inside US Trade*, 30 November 2000. Clinton said, “I have directed Ambassador Charlene Barshefsky to assign high priority to advancing negotiations for an FTA.”

²⁴ *Inside US Trade*, 17 November 2000. The FTA was to be modelled on the “U.S.- Jordan FTA” and completed by the end of 2000.

²⁵ See Grynberg, R., “The United-States-Jordan Free Trade Agreement – A New Standard of North-South FTAs” *Journal Of World Investment*, Vol. 2 No. 1, March 2001, pp. 5-19.

²⁶ Presumption in this case does not imply an automatic compliance with the unspecified criteria of the economic needs test.

²⁷ See FTAA – Free Trade Area of the Americas – Draft Agreement (FTAA.TNC/w/133/Rev.1), 3 July 2001. The first derestricted text is not sufficiently developed to invite meaningful comparison with other agreements.

²⁸ WTO, The Results of the Uruguay Round of Trade Negotiations, *Decision on Professional Services*, para. 2.

²⁹ *Ibid.*, para. 3

³⁰ It was only at the end of the negotiations that the remit was narrowed to cover only countries making sector-specific commitments.

³¹ *Disciplines on Domestic Regulation in the Accountancy Sector*, *ibid.*, para. XI- XIII.

³² Letter from IFAC to the Director General of WTO, 26 January 1998, quoted in *Inside US Trade*, 6 February 1998:

Many of the provisions now appear simply to provide flexibility for regulatory authorities to maintain existing practices and to avoid accountability for the decisions which they take.... As a consequence the disciplines are becoming less and less relevant to improving the conditions for trade in accountancy services.

³³ Letter from Robert Vastine, U.S. Coalition of Service Industries Working Group on Professional Services, to Ambassador Charlene Barshefsky, 30 January 1998, quoted in *Inside US Trade*, 6 February 1998:

The latest version [of the disciplines] dated January 13, 1998, in our view does not even meet the standards already set in Article IV and VII of the GATS.... In our view the United States government should not agree to the “disciplines” in their present form. Doing so would set an exceedingly low standard for the WTO’s work in the important area of domestic regulation.

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- ³⁴ WTO News Press Release/118, 14 December 1998.
- ³⁵ “Communication from the United States – Movement of Natural Persons”, S/CSS/W/29, 18 December 2000.
- ³⁶ *Ibid.*, p. 1.
- ³⁷ WTO, Council on Trade in Services, “Communication from the United States—Further Negotiations As Mandated by the General Agreement on Trade in Services”, S/C/W/119, 28 July 1999, para. 13.
- ³⁸ WTO, Council on Trade in Services, “Communication from Japan – The Negotiations on Trade in Services”, S/CSS/W/42, 22 December, 2000.
- ³⁹ Trade in professional services can involve all modes of supply but is closely associated with mode 4 issues.
- ⁴⁰ WTO, Council on Trade in Services, “Communication from Japan – Movement of Natural Persons – Supplement”, S/CSS/W/42/Suppl.2, 6 July 2001.
- ⁴¹ WTO, Council on Trade in Services, “Communication from Canada – Initial Negotiating Proposal on Temporary Movement of Natural Persons Supplying Services under the GATS (Mode 4)”, S/SCC/W/48, 14 March 2001.
- ⁴² WTO, Council on Trade in Services, “Communication from the European Communities and Their Member States – GATS 2000: Temporary Movement of Service Suppliers”, S/SCC/W/45, 14 March 2001.
- ⁴³ WTO, Council on Trade in Services, “Communication from India – Proposed Liberalisation of Movement of Professionals under General Agreement on Trade in Services”, S/CSS/W/12, 24 November 2000.
- ⁴⁴ Communication from the European Communities, *op.cit.*, para. 6.
- ⁴⁵ International Labour Organisation, *International Standard Classification of Occupations (ISCO-88)*, Geneva, 1990. The ILO classification code has divided professional classification into nine major groups stemming from the “highest” grouping (1) of legislators, senior officials and managers to (9) elementary occupations. This can be combined together with the Provisional United Nations Central Product classification, which is the current nomenclature used for GATS offers to create a nomenclature for disciplines in the recognised professions.
- ⁴⁶ WTO, General Council, Preparations for the 1999 Ministerial Conference, “Communication of Switzerland”, WT/GC/W/262, 21 July 1999.
- ⁴⁷ WTO, Council on Trade in Services, “Communication from Australia – Negotiating Proposal for Accountancy Services”, S/CSS/W/62, 28 March 2001; WTO, Council on Trade in Services, “Communication from Australia – Negotiating Proposal for Architectural Services”, S/CSS/W/63, 28 March 2001; WTO, Council on Trade in Services, “Communication from Australia – Negotiating Proposal for Construction and Related Engineering Services”, S/CSS/W/64, 28 March 2001; WTO, Council on Trade in Services, “Communication from Australia – Negotiating Proposal for Engineering Services”, S/CSS/W/65, 28 March 2001.

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- ⁴⁸ WTO, General Council, Preparations for the 1999 Ministerial Conference, “Communication of Indonesia and Singapore”, WT/GC/W/296, 5 August 1999. Under the WTO system of self-election, countries can elect to define themselves as developing countries. Singapore defines itself as a developing country despite having a GDP/capita which is as high as the average GDP/capita of OECD members.
- ⁴⁹ WTO, General Council, Preparations for the 1999 Ministerial Conference, “Communication of Kenya”, WT/GC/W/233, 5 July 1999.
- ⁵⁰ See WTO, General Council, Preparations for the 1999 Ministerial Conference, “Communication of Venezuela”, WT/GC/W/281, 6 August 1999; WTO, General Council, Preparations for the 1999 Ministerial Conference, “Communication of Turkey”, WT/GC/W/272, 27 July 1999.
- ⁵¹ WTO, General Council, Preparations for the 1999 Ministerial Conference, “Communication of Pakistan”, WT/GC/W/160, 1 April 1999.
- ⁵² WTO, Council on Trade in Services, “Communication from India – Proposed Liberalisation of Movement of Professionals under General Agreement on Trade in Services”, S/CSS/W/12, 24 November 2000.
- ⁵³ See UNCTAD “Lists of Economic Needs Tests in GATS Schedules of Specific Commitments”, UNCTAD/ITCD/TSB/8, 6 September 1999.
- ⁵⁴ See Rupa Chandra, “Movement of Natural Persons and Trade in Services: Liberalising Temporary Movement of Labour under the GATS”, Indian Council of Research on International Economic Relations, Working Paper No. 51, New Delhi, November 1999, pp. 28-31.
- ⁵⁵ *Ibid.*, pp. 33-35.

The technical annex to this paper, pages 82-105, is available as a separate document.

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