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Technical Annex

Liberalising Global Labour Markets: Recent Developments at the WTO

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This document is the technical annex to the full paper “Liberalising Global Labour Markets: Recent Developments at the WTO” which is available separately.

The Definition of Mode 4 and Its Interaction with Other Modes of Supply

One of the greatest conceptual breakthroughs of the Uruguay Round was the inclusion of service sector liberalisation disciplines based upon a positive list approach¹ where members made both economy-wide or horizontal commitments as well as more detailed service sector commitments. The service sector liberalisation involved the development of an entirely new architecture based on “modes of supply”.² This technical annex addresses the difficult questions of the interpretation of and the limits created by the definition of mode 4, which is defined in the GATS as:³

the production, distribution, marketing, sale and delivery of a service by a service supplier of one Member through the presence of a natural person of a Member in the territory of another Member.

This definition of mode 4 would imply that a natural person⁴ covered in the above definition can, in WTO parlance, either be an unattached service provider or be attached to another juridical person.⁵ Significant GATS provisions as they pertain to the movement of natural persons are found in the main body of the GATS as well as in

the *Annex on the Movement of Natural Persons Supplying Services under the Agreement*. Two fundamental differences exist between the GATS obligations and those found in the *Annex*. The first is that the GATS obligations refer to the stock of service suppliers while the *Annex* refers to the movement or flow of natural persons. The *Annex* also provides potential obligations with regard to nationals employed in firms owned by foreigners which are specifically excluded in the drafting of the GATS obligations. The *Annex* limits the extent of obligations of members with regard to the right of movement of natural persons even though the intent of the original developing country proponents of the *Annex* was otherwise.⁶

The provisions of the *Annex* are intended to refer to the right of movement of natural persons for the purpose of temporary sojourn as service providers. Moreover, the length of the sojourn can be defined on a sector-by-sector basis by individual members. The *Annex* attempts to clarify members' obligations and commitments with regard to labour market access under the GATS and states that commitments do not apply to measures affecting those seeking access to the employment market.⁷ Indeed the position of the USA,⁸ which was among the principal proponents of the GATS, has been that the neither the GATS nor mode 4 was intended to provide immigration rights, even though in retrospect it assured the rights of temporary movement of intra-corporate transferees, which is no less a matter of immigration than is that of permanent movement of natural persons.⁹ The *Annex* obliges members to allow access where specific commitments have been made and it therefore clearly creates temporary immigration disciplines.¹⁰ The terms of the *Annex* do not prevent a member "from applying measures necessary to ensure the orderly conduct of natural persons across its borders provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any member under the terms of a *specific commitment*".¹¹ Also the *Annex* states that visa requirements from particular nationals and not others (i.e., MFN, or Most-Favoured-Nation violations as they pertain to specific commitments under mode 4), do not constitute nullification and impairment.¹² When viewed together with the provisions of GATS Article V bis these latter provisions constitute an effective MFN carve-out for both sector-specific and horizontal commitments.¹³

Despite the concrete legal definition of what exactly constitutes mode 4 and its limits to the rights of labour mobility, there remains a need for clarification as to the limits of the application of the provision. An example will perhaps best clarify the difficulties associated with understanding the application of the GATS and *Annex* mode 4 provisions and the economic inconsistencies that flow from the political

compromise between developed and developing countries that is embedded in the *Annex*.

Assume a WTO member has made sector-specific commitments in the provision of accounting services that provide for no restrictions on mode 4, and normal Uruguay Round horizontal commitments which are based on the rights of intra-corporate transferees and specialists. Let us further assume that there is a demand for imported accounting services in the automobile industry of the member. The identical and imported accounting services can be provided in at least four different ways that are relevant to GATS mode 4 obligations.

- The accounting service can be supplied to the end user through a foreign firm which employs a foreign accountant as an intra-corporate transferee.
- The service can be supplied by individual accountants who work as “unattached service providers” and who are contractually maintained by a domestic service user.
- The accounting service can be supplied to the end user through a foreign accounting firm which employs a foreign accountant who is not an intra-corporate transferee.
- These same services can be provided by foreign accountants employed as salaried employees of the end user, i.e., the automobile manufacturing firm, in the WTO member making the commitment.

Do the GATS provisions on mode 4 apply equally in each of these cases? Clearly this will depend both upon the horizontal and sector-specific commitments of the individual WTO member as well as the terms of the GATS. There is little doubt that the first case, that of an attached service provider as intra-corporate transferee, is covered¹⁴ by the GATS obligations and is covered by most specific commitments. Where the accountant is an unattached service provider, as in the second case, this would be consistent with GATS obligations made by WTO members. Indeed, if the individual accountant is a single proprietor (as is common in the sector) on contract he or she is in effect an intra-corporate transferee. It is only in the third and fourth cases that the issue of the application of the GATS becomes more contentious and is need of further elaboration. Whether the employee of the service firm or the final end user is covered will depend crucially upon the nature of the offer of the WTO member. Most horizontal commitments made by WTO members would not in fact cover these situations but the *Annex* does not in principle preclude either being covered; treatment would appear to depend on the interpretation of whether “the natural person is seeking

access to the employment market” or is instead recruited by the service provider or the end user, as in case 4 above. Clearly, the GATS does not apply in the case where the employee is seeking employment but may apply in cases where the employee is recruited from abroad, and especially so in the case of a service provider. The situation is certainly in need of clarification as ambiguities, quite possibly intentional products of a difficult negotiating process, appear to exist.

The WTO Secretariat interpretation of these last two cases is that they would be outside the general purview of the GATS. The WTO Secretariat argues that:¹⁵

There appears to be some room for interpretation whether the foreign natural persons “employed by a service supplier of a Member” also include foreigners employed by host-country companies. While the wording of the Annex does not rule out this possibility, Article 1.2(d) of the Agreement seems to cover only foreigners employed by foreign owned companies.... Thus, while foreigners would fall under the GATS if they work on a contractual basis as independent suppliers for a locally-owned firm, they would seem not to be covered if they were employees of that firm.

The WTO Secretariat’s conclusion that employees are not covered is tautological, resting on the definition of service suppliers, which the Secretariat defines as “self-employed (or independent) suppliers who obtain their remuneration directly from customers...”.¹⁶ The WTO Secretariat conclusion regarding the application of GATS obligations to employees is thus true according to a definition that the Secretariat has created which is more restrictive than that found in the GATS, where “service supplier” is simply defined as “any person that supplies a service”.¹⁷ While the WTO Secretariat’s interpretation is noteworthy, it has offered no justification for its more restrictive interpretation of a service supplier than that which was agreed by members in the Uruguay Round Agreements.

There remain other areas of the interpretation of the GATS as it pertains to mode 4 that are ambiguous and in need of further clarification.¹⁸ However, if the WTO Secretariat’s note were an accurate assessment of the limits of GATS coverage then the same service delivered under employment contract to a local end user may be treated differently from precisely the same service provided under contract of supply by an unattached service provider or by a transnational company. While the commitments of individual members may result in precisely such a restriction, there appears nothing that in principle permits such a differentiation. Indeed, the economic logic of such a limitation on market access of employees, based on the length and

nature of the contract of supply, constitutes a legal limitation on market access that is neither found in nor implied by the WTO agreements.

Mode 4 commitments are in effect, if not by legal intent, linked to other modes of supply and other modes have little or no commercial meaning without effective mode 4 commitments. The WTO Secretariat provides the following example of the relationship between modes of supply in outlining service sector commitments:¹⁹

Where a service transaction requires in practical terms the use of more than one mode of supply, coverage of the transaction is only ensured when there are commitments in each mode of supply. E.g., a Member has made a commitment in the cross border supply of architectural services (e.g., by telecommunications or by mail). This commitment alone does *not* extend to the presence of natural persons (e.g., visits by architects). A separate commitment would have to be taken under “Presence of natural persons” to cover this case.

Thus, without a commitment on mode 4 along with a commitment on mode 1 the architect in the example above would face a considerable, if not overarching, commercial disadvantage in competing with a domestic supplier of this same service.²⁰ However, the mode 4 access is also crucial to other modes of supply. Mode 4 and mode 3 are closely related.²¹ Establishment of a commercial presence, especially a new presence in a particular WTO member’s jurisdiction will normally be associated, at least initially, with a number of intra-corporate transferees.²² Without the right of sojourn of such natural persons investment in service-related sectors would be greatly retarded. This interaction of the two key modes, 1 and 3, with mode 4 is vital in any understanding of the pressure that the *quad*²³ has placed on acceding WTO members in terms of the trade in services. It also explains the considerable pressure service exporters exert on their home governments, which are generally developed countries, to assure the expansion of the rights of movement of natural persons, but only as they pertains to the other directly market-expanding modes of supply.

There exist several other provisions of the GATS that directly affect mode 4 commitments made by WTO members. The transparency provisions²⁴ of GATS, while general in nature apply to mode 4 supply, which has been a mode of delivery where government regulatory systems have frequently been captured by groups of service providers to limit market access. The absence of transparency in regulations, licensing and work permit measures has constituted an important barrier to the movement of natural persons, especially in the recognised professions. The GATS also contains significant MFN exemptions for horizontal commitments by WTO members as they

pertain to labour market access within the context of labour market integration agreements.²⁵ The GATS obliges members to provide for adequate procedures to verify the competence of professionals.²⁶ The agreement also permits the Council for Trade in Services to develop necessary disciplines on licensing procedures,²⁷ which are another significant barrier to the movement of natural persons. While relatively weak disciplines on mutual recognition are found in the GATS there is a recognition of the need to develop common international standards in relevant service trades and professions.²⁸ While these disciplines are general in nature there are also disciplines on specific service sector commitments. Where WTO members make specific commitments members agree not to adopt, unless specified in their schedules, quotas, economic needs tests, or limitations on the total number of persons that may be employed in a sector.²⁹ Also of some potential significance to the mode 4 commitments are the general exception provisions, which permit a member to suspend its obligations under the GATS in order to maintain public order.³⁰

The outcome of the Uruguay Round as it pertains to the development of disciplines on mode 4 was a particular disappointment to the developing countries, which have been *demandeurs* for further liberalisation. As a result of the very limited economic benefits accruing from Uruguay Round commitments, developing countries proposed a ministerial decision³¹ for the Marrakesh Ministerial Conference that further negotiations would occur in 1994 and a report would be completed within six months. The negotiations were completed by July 1995³² with further but limited commitments being made by Australia, Canada, the European Community, India, Norway and Switzerland.³³ Subsequent to the Marrakesh Ministerial Conference there have certainly been continuing calls by developing countries for liberalisation of mode 4 and by developed countries for further disciplines on existing commitments. It will become evident in the subsequent sections that since 1995 the developing countries and economies in transition that are acceding to the WTO have been the ones liberalising mode 4 at the behest of the developed countries.

The Understanding on Commitments in Financial Services, the Annex on Financial Services and the Presence of Natural Persons

As was argued in the introduction, there are two principal *demandeurs* which have strategic but quite different interests in the expansion of WTO disciplines as they pertain to mode 4 supply. One of the principal advances of the Uruguay Round agreements was their development as a single undertaking. However, such a process

of negotiations, requiring consensus from all members, limits the extent of concession where particular groups of countries are willing to liberalise more quickly than others. Whereas the Uruguay Round agreements were marketed as single undertakings there remained areas in which not only were plurilateral agreements continued, but also what were in effect new plurilateral agreements were expanded. This included areas of negotiation that were of interest to the developed world, such as the agreements on telecommunications, information technology and financial services.³⁴ Developed countries have moved ahead on liberalization in sectors where they feel they have a strategic interest through the development of side service agreements.³⁵ Significant among these agreements are the *Understanding on Commitments in Financial Services* and the *GATS Annex on Financial Services*. Whilst the *Annex* is a covered agreement applying to all WTO members making commitments in the sector, the commitments on mode 4 in the *Understanding* were meant to apply only to those developed and more advanced developing countries that would ultimately make scheduling commitments within the context of the *Understanding*.³⁶ As a result the commitments more closely reflect the demands of the developed world and the more advanced developing countries without reflecting the need for compromise with developing countries. Moreover, given the capital intensive nature of the sector, any mode 4 commitments would be less likely to entail politically sensitive concessions and hence developed countries were in a position to offer more liberal access.

Significantly, the *Annex* defines a financial service supplier differently from the more restrictive definition found in the GATS. The *Annex* definition clearly fails to differentiate between national and non-national suppliers and therefore implies a measure of national treatment in that sector not found in other commitments.³⁷

A financial service supplier means any natural or juridical person of a Member wishing to supply or supplying financial services, but the term “financial service supplier” does not include a public entity.

Given the inherent difficulty of separating modes of supply and the lack of agreement amongst members on any clear definitional delineation of modes of supply in the financial services sector in an age of electronic commerce, especially as it pertains to modes 1 and 2 supply,³⁸ it is clear that WTO members intended to significantly widen the coverage of commitments in the sector. The *Annex* does not exclude the movement of natural persons as employees in either banking or insurance services and makes no apparent distinction between nationals and foreign service suppliers nor between locally and foreign owned juridical persons as found in the

GATS.³⁹ Despite references to the definitions of Article 1 of the GATS agreement⁴⁰ in the *Annex*, it would appear that the intention of its architects was to provide a broader definition of financial services suppliers, including natural persons as employees, than would have been found in GATS.⁴¹

Section B of the *Understanding* addresses the temporary entry of “personnel” of a financial services supplier that “is establishing or has established a commercial presence” in the territory of another member. The length of time deemed to be “temporary” is not specified but appears to be directly related to the nature of the work in which the personnel are to engage.⁴² If the personnel enter a member’s territory to establish an enterprise, the temporary period should be deemed to have expired once the enterprise is operational. If the personnel enter the territory of a member to perform services for an enterprise that is already operational, the temporary entry authority should terminate at the conclusion of the specific circumstance that necessitated their presence. These disciplines are more significant than those found in the GATS for other sectors.

Two types of personnel are permitted temporary entry. The first type of personnel must meet three requirements: (1) they must be “senior managerial personnel”; (2) they must possess “proprietary information”; and (3) the propriety information must be “essential to the establishment, control and operation” of the financial service supplier.⁴³ For the purposes of the *Understanding* none of these categories are defined. However when there is a reference to “specialists” in computer services, telecommunication services, accounting, actuarial, and legal services, the *Understanding* states that these persons shall also be permitted temporary entry remaining “subject to the availability of qualified personnel” in the host member’s territory.⁴⁴ The inclusion of the phrase “subject to the availability of qualified personnel” implies an economic needs test, the terms and extent of which also remain undefined. It should be assumed that the host member will be given latitude when making such a determination but that the member’s conclusion must be founded on objectively verifiable information. Two aspects of this section of the *Understanding* warrant additional attention. Section B (9) refers to “personnel”. It does not exclude independent contractors retained by a service supplier, but the term “personnel” can imply an employer-employee relationship. This section also refers to legal “specialists”.

It is important to note that in the financial sector, where the *Understanding* was drafted largely by developed countries, key executives are excluded from economic needs tests while specialists remain subject to such tests. Subsequent to the Uruguay

Round, *quad* members have moved to dismantle economic needs tests in the accession negotiation of developing countries and economies in transition. These have also tended to disappear in bilateral negotiations for free trade areas under the provisions of GATT Article XXIV.

Mode 4 Commitments during the Uruguay Round

This section considers briefly the extent of commitments made by WTO members on mode 4 during the Uruguay Round and where appropriate compares those commitments to the commitments made under other modes of supply, in particular commitments to commercial presence. There have been a number of significant studies undertaken by the WTO Secretariat,⁴⁵ with detailed work by the UNCTAD Secretariat⁴⁶ along with several academic studies and commentaries including those by Ghosh,⁴⁷ Mukherejee,⁴⁸ and Altinger and Enders.⁴⁹ Given that there exists no simple mechanism for comparing and quantifying commitments, and given that each commitment will have widely different meanings in each jurisdiction, the quantitative measures that have been employed are often flawed, and simple comparisons between schedules are arbitrary and frequently devoid of meaning. The analysis below is based upon published results from the cited works.

Horizontal Commitments

The most comprehensive analysis of the extent of horizontal commitments has been made by the WTO Secretariat. Of 106 countries submitting service sector commitments during the Uruguay Round approximately 87 contained horizontal or economy-wide commitments. With later accessions this grew to 100 commitments, which form the basis of the most recent WTO Secretariat study. Table 3 describes the extent of commitments that were made at the completion of the Uruguay Round.⁵⁰

The most obvious result appears to be that most commitments in mode 4 were related to executives, managers and specialists as either intra-corporate transferees or as independent service suppliers.⁵¹ Of a total of 328 horizontal commitments made by members by 1996, 240 were in this category. Only a very small proportion, less than 4 percent of horizontal commitments during and after the Uruguay Round, related to lower-level service providers as defined by the category “not specified”, which implies the greatest level of commitment.⁵² Commitments were normally for the category of intra-corporate transferee (41 percent of aggregate entries), though a substantial portion of commitments were made towards executives, specialists and managers that were not intra-corporate transferees (31.7 percent of aggregate entries).

The vast majority of remaining entries were for business visitors (21.3 percent) (see table 1).

The principal limits to the mode 4 commitments were in the form of economic needs tests, quotas and pre-employment conditions. When scheduling commitments on employment of intra-corporate transferees, the most statistically significant restriction was the existence of pre-employment conditions, which normally implied that the intra-corporate transferee had been an employee of the company for a period of one year. The next most significant restriction was in the form of quota restrictions, for either a maximum number of staff or a maximum payroll, which occurred in the case of 76 commitments. For executives, managers and specialists that were intra-corporate transferees a further significant limitation on mode 4 commitments was the existence of approval conditions. This was prevalent in almost half the commitments made in this area.

Economic needs tests were the third most significant restriction. Predictably, the incidence of economic needs tests in WTO members' commitments rises the lower the position in the professional hierarchy, and the incidence of such tests is also dependent on whether the individual is an intra-corporate transferee or not, rising sharply in the former category. These tests did not specify the criteria that would be used in determining whether a natural person's employment complied with the economic needs test. This lack of transparency constitutes a formidable limitation on the value of market access commitments (see table 2). A further significant limitation on the value of the commitments was the fact that the duration of the sojourn of the service provider was generally unspecified (see table 5), with the clear implication that this creates no commitment on members' scheduling commitments. Developing countries also limited access by requiring technology transfer, generally through training of local counterparts, as a condition of market access.

Other discriminatory provisions of significance in the horizontal schedules which limit market access include the availability of subsidies (the most common limitation) and national treatment limitations on property ownership (the second most common). Six separate members limited their national treatment obligations in the case of taxation.⁵³

However, the most significant points of comparison in GATS commitments are not the differences in individual mode 4 commitments and the national treatment limitations. More significant is the extent of the difference between mode 4 commitments and those made under other modes of supply, most notably commercial presence.⁵⁴ During the Uruguay Round some 31 WTO members made horizontal

commitments to commercial presence that were unlimited in nature. No similar commitments were made in mode 4. Table 3 and 4 depict the horizontal commitments in mode 3, which contrast sharply to the commitments on mode 4. Horizontal commitments were in general made in either mode 3 or 4 and by far the greatest number and most liberal concessions were in mode 3. This imbalance between mode 3 and mode 4 commitments has been a constant point of contention between developed and developing countries.

Sector-Specific Commitments

A general and predictable pattern emerges in terms of sector-specific commitments. First, developed countries tended to make by far the greatest number of sector-specific commitments during the Uruguay Round and the number of sectors covered by these commitments decreased, with some notable exceptions, with the level of development of the WTO member.⁵⁵ Countries making concessions in more than 80 of the sectors included the *quad* and countries that were either members of EFTA or on the verge of joining the European Union, or transition economies that were first in line to accede. However as we shall see there are areas in which developing countries did make substantive concessions.

Second, WTO members made commitments and imposed market access and national treatment limitations according to the relative economic and political sensitivity of the various modes of supply. Generally speaking the least sensitive mode of supply is consumption abroad⁵⁶ (i.e., mode 2) followed by cross-border supply (mode 1). Sensitivities exist over commercial presence (mode 3), and the most politically sensitive mode of supply is mode 4, especially in labour-intensive sectors. The statistical evidence suggests that quite predictably WTO members made far more substantial commitments precisely in accordance with the pattern described above.⁵⁷ This is seen in table 6, which also demonstrates that the greatest number of unlimited sector-specific commitments in mode 4 were made by developing countries and that market access and national treatment limitations were greatest amongst developed countries in mode 4.⁵⁸ Sector-specific market access limitations in mode 4 were generally limited in scope because the market access and national treatment limitations on horizontal commitments rendered further sector-specific limitations largely superfluous. However, what remains anomalous and somewhat counter-intuitive in terms of commitments is the fact that the incidence of unlimited mode 4 commitments is greatest amongst developing countries.⁵⁹

Table 1 Types of Natural Persons Supplying Services (Horizontal Commitments)

	No. of entries	No. of aggregate entries	% of total entries	% of aggregate entries
Intra-company transferees				
Executives	45	135	13.7	41.1
Managers	44		13.4	
Specialists	45		13.7	
Others	1		0.3	
Executives	22	104	6.7	31.7
Managers	40		12.2	
Specialists	42		12.8	
Business visitors				
Commercial presence	30	70	9.1	21.3
Sale Negotiators	40		12.2	
Independent Contract Suppliers	3	3	0.9	0.9
Other	3	3	0.9	0.9
Not specified	13	13	4.0	4.0
Total	328	328	100.0	100.0

Source: WTO, "Presence of Natural Persons (mode 4) Background Note By the Secretariat", S/C/W/75,

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Table 2 Entry Conditions and Restrictions by Type of Natural Person

	Intra-corporate transferee				E	M	S	Business visitor		ICS	Other	NS	Total
	E	M	S	O				CP	SN				
ENT no criteria	1	4	5	1	2	14	17	1				6	51
ENT with criteria	1	1	1										3
Approval	1	1	1		3	8	5		1	1		2	23
Residency	3	1	1		3	4	3						15
Work permit		1	1		4	4	4	1	1	1		2	19
Pre-employment	34	32	35					3	2				106
Link to mode 3					7	12	12						31
Qualification						2	1						3
Recognition					1	1	1						3
Numerical limits													
Total staff	1	1	1		2	3	4		1		1	3	17
10%													
20%	1		1		2	2	2						9
20%	1	1			2	2	2						8
Abs. figure			2		3	3							8
Senior staff	1		1										2
15%													
20%						1	1				1		3
50%	2	1	1										4
Abs. figure						2	2						4
Ordinary staff					1	1	1						3
10%													
Payroll					1	1	2					1	5
15%													
20%					1	1	2		1				5
30%												1	1
Workforce							1						1
50%													
Unspecified	2	2	2					1	1				8
Minimum wage	15	15	15							1		1	47
Disputes	4	5	4			2	2	2	2	1			22
Technology transfer	1	1	1		7	8	12					2	32

Source: WTO, "Presence of Natural Persons (mode 4) Background Note By the Secretariat", S/C/W/75, 8

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Table 3 Horizontal Commitments from the Uruguay Round

Market Access	Number of Schedules	National Treatment	Number of Schedules
Total	87	Total	87
Entry of natural persons is subject to:		Unbound	2
an economic needs test	14		
a quota	3		
Binding on intra-corporate transferees of which:	70	No limitations	50
only on senior personnel	66	With limitations, relating to:	
subject to an economic needs test	11	taxation	6
subject to a quota	14	eligibility for subsidies	23
		purchase of real estate	8
		other	2

Source: GATT Secretariat, *The Results of the Uruguay Round of Multilateral Trade Negotiations*, Geneva, 1994

Table 4 Horizontal Commitments on Commercial Presence

Market Access	Number of Schedules	National Treatment	Number of Schedules
Total	87	Total	87
Unbound	1	Unbound	1
No limitations	31	No limitation	18
With limitations		With limitation	68
authorization subject to an economics needs test	10	taxation	11
Legal entity	25	eligibility for subsidies	28
Ceiling on foreign participation	20	purchase of real estate	41
		Nationality requirements for directors	8
		Access to local finance	6

Source: GATT Secretariat, *The Results of the Uruguay Round of Multilateral Trade Negotiations*, Geneva, 1994

Table 5 Duration of stay by type of Natural Persons

	Intra-corporate transferees				E	M	S	Business Visitor		ICS	Other	NS	Total
	E	M	S	O				CP	SN				
0-3 months				1	1	1	1	11	20	1			36
6 months								1	1	1			3
12 months			1	1									2
	(2)	(2)	(3)		(2)	(1)	(2)		(1)				(13)
24 months	1	1	1		1	1	1	1					7
	(1)	(1)	(1)			(1)	(1)						(5)
36 months	6	6	5	1	1	1	1	1					22
	(1)	(1)	(1)			(1)	(1)						(5)
48 months	5	4	4				1						14
60 months	4	5	5		1	1	2						18
72 months												1	1
Unspecified	25	24	24		16	33	32	16	18	1	3	12	204

Source: WTO, "Presence of Natural Persons (mode 4) Background Note By the Secretariat", S/C/W/75, 8 December 1998

Note: E = Executives, M = Managers, S = Specialists, O = Others, CP = Commercial presence, SN = Sale negotiations, ICS = Independent contract suppliers, NS = Not specified

Table 6 Limitations on Market Access and National Treatment in Uruguay Round Commitments
(percentage of commitments on service activities)

Country	Cross-border			Consumption Abroad			Commercial presence			Natural Persons		
	No Limits	Limits	Unbound	No Limits	Limits	Unbound	No Limits	Limits	Unbound	No Limits	Limits	Unbound
	Market Access											
Total	56	10	34	80	8	13	30	66	4	2	92	6
Developed	65	11	25	87	12	2	39	60	1	0	100	0
Developing	44	10	46	70	2	28	20	75	5	5	81	14
Transition	52	11	37	79	11	10	37	61	12	0	99	1
	National Treatment											
Total	63	4	33	83	2	15	11	83	6	30	61	9
Developed	70	5	25	95	3	2	0	97	3	17	83	1
Developing	52	3	45	66	1	33	28	63	9	45	34	21
Transition	70	3	27	93	3	4	0	88	12	51	48	1

Table 7 Commitment Percentage by Sector and Mode of Supply (Professional Services)

MARKET ACCESS	Cross-border			Consumption abroad			Commercial Presence			Natural Persons		
	Full	Partial	No.	Full	Partial	No.	Full	Partial	No.	Full	Partial	No.
Legal Services	18%	67%	16%	24%	67%	9%	4%	87%	9%	2%	91%	7%
Accounting, Auditing and Bookkeeping Services	29%	41%	30%	41%	45%	14%	9%	89%	2%	2%	86%	13%
Taxation Services	44%	44%	12%	53%	44%	3%	15%	82%	3%	0%	88%	12%
Agricultural Services	52%	26%	22%	68%	20%	12%	24%	72%	4%	0%	92%	8%
Engineering Services	50%	28%	22%	55%	28%	17%	24%	72%	3%	0%	85%	5%
Integrated Engineering Services	59%	22%	19%	66%	22%	13%	31%	59%	19%	0%	94%	6%
Urban Planning and landscape Architectural Services	45%	36%	18%	52%	36%	12%	24%	73%	3%	0%	97%	3%
Medical and Dental Services	34%	29%	37%	61%	34%	5%	21%	68%	11%	0%	87%	13%
Veterinary Services	54%	19%	27%	69%	23%	8%	31%	58%	12%	4%	81%	15%
Services Provided by Midwives, Nurses, Physiotherapists	33%	33%	33%	47%	53%	0%	20%	80%	0%	0%	93%	7%
Other	33%	67%	0%	33%	67%	0%	0%	100%	0%	0%	100%	0%
II. NATIONAL TREATMENT	Cross-border			Consumption abroad			Commercial Presence			Natural Persons		
	Full	Partial	No.	Full	Partial	No.	Full	Partial	No.	Full	Partial	No.
Legal Services	22%	60%	18%	31%	58%	11%	16%	76%	9%	2%	91%	7%
Accounting, Auditing and Bookkeeping Services	34%	36%	30%	50%	36%	14%	32%	64%	4%	4%	80%	16%
Taxation Services	41%	41%	18%	56%	35%	9%	35%	56%	9%	12%	71%	18%
Agricultural Services	52%	30%	18%	64%	22%	14%	56%	38%	6%	8%	80%	12%
Engineering Services	45%	31%	24%	60%	21%	19%	52%	43%	5%	9%	79%	12%
Integrated Engineering Services	63%	19%	19%	72%	13%	16%	72%	13%	16%	9%	78%	13%
Urban Planning and landscape Architectural Services	52%	30%	18%	61%	24%	15%	58%	33%	9%	9%	85%	6%
Medical and Dental Services	47%	18%	34%	66%	24%	11%	45%	45%	11%	3%	87%	11%
Veterinary Services	62%	12%	27%	81%	8%	12%	58%	35%	8%	8%	77%	15%
Services Provided by Midwives, Nurses, Physiotherapists	40%	27%	33%	53%	47%	0%	53%	47%	0%	0%	93%	7%
Other	33%	50%	17%	33%	50%	17%	33%	67%	0%	17%	67%	17%

Source: WTO Secretariat. *Background Note on Accountancy Services*, Geneva, December 1998

Table 8 Service Sector Commitments of Acceding Countries

Country	Commitments						Quota (no. or %)	Duration of stay	Real estate	Subsidies
	Intra-corporate transferees*									
	E	M	S	BV	Others/not specified	ENT				
Ecuador/21 January 1996	Y _{60*}	Y*	Y*				See endnote i			
Mongolia/29 January 1997	Y*									
Bulgaria/1 December 1996	Y	Y					endnote ⁶¹			
Panama/6 September 1997		Y*	Y*				endnote ⁶²			
Kyrgyz Republic/20 December 1998	Y	Y	Y					SS- 90 days; ICT -3-5yrs		
Latvia/10 February 1999			Y	Y				ICT-5 yrs; BV- 90 days	Unbound – 99 year lease	
Estonia/13 November 1999	Y	Y	Y		Y-SS			3-5years		
Jordan/11 April 2000	Y	Y	Y	Y*		Y		ICT-1yr; BV-90days	Y	Y
Georgia/14 June 2000	Y	Y	Y				N	SS-90days; ICT-3- 5yrs;	Y	Y
Croatia/30 November 2000	Y	Y	Y				N	ICT-2yrs	Y	Y-limited to Croatian nationals
Albania/8 September 2000	Y	Y	Y	Y*	Y- SS		N	ICT-5yrs; SS-6mnths; BV-3mnths		
Oman/9 November 2000	Y*	Y*	Y*	Y*			Endnote ⁶³	2-4 years		
Lithuania/31 May 2001	Y	Y	Y	Y				ICT- 3years; BV- 3mnths-1yr;		
Moldova/ pending domestic ratification	Y	Y	Y					SSP- 90 days; CP- 90 days; BV- 3-5years		

SSP – Service sales person; **SSE** – Service supplier employee;

SS – Service supplier; **BV** – Business visitor;

ICT – Intra-corporate transferee; **CP** – Commercial presence

ICT* - This indicates those categories not classified under intra-corporate transferees.

Endnotes

- * These are the views of the author and not necessarily those of the Commonwealth Secretariat or its member governments.
- ¹ A positive list approach is one whereby commitments are made to a particular sector or, in the case of goods, a particular tariff line or heading, where parties to an agreement feel an ability to make such commitments. In contrast, a negative list approach lists only exceptions to a general principle. The former approach is normally considered to require a lower level of market opening or access commitment than the latter. MFN exemption schedules in the GATS are based on a negative list approach.
- ² This architecture, which included the movement of natural persons, was agreed at Mid-Term Review in Montreal in December 1988.
- ³ General Agreement on Trade In Services (hereinafter GATS) Article I.2(d) read in light of Article XXVIII(b)
- ⁴ GATS Article XXVIII(k). GATS commitments on the movement of natural persons only apply to non-nationals or non-residents of the WTO member.
- ⁵ *Ibid.*, Article XXVIII(l)
- ⁶ What was to become the *Annex* was originally submitted by developing countries as an attempt to assure labour market access. See Communications from Argentina, Columbia, Cuba, Egypt, India, Mexico, Pakistan and Peru – Annex on Temporary Movement of Services Personnel, GATT Doc. No. MTN.GNS/W/106, 18 June 1990.
- ⁷ Paragraph 2 of the *Annex* states:
The Agreement shall not apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis.
- ⁸ The United States proposed during the Uruguay Round that labour mobility be restricted to the temporary entry of senior managerial personnel essential to the provision of covered service. (“Communication from the United States, Agreement on Trade in Services”, GATT Doc No. MTN.GNS/W/75, 17 Oct 1989, p. 5).
- ⁹ “International Trade Outlook” 90 (BNA) No.11, (17 Jan 1990), Interview with Ambassador Hills. “The informal US position has been that the GATS was not contemplated to be an immigration bill”. Quoted in Stewart, T., ed., “The GATT Uruguay Round; A Negotiating History” Vol. II, *Kluwer Law*, Deventer, 1993, p. 2374.
- ¹⁰ *Ibid.*, *Annex*, para. 3
- ¹¹ *Ibid.*, para. 4
- ¹² See GATS Footnote 13.

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- ¹³ GATS Article 2 creates a general MFN obligation which is limited by country-specific MFN schedules.
- ¹⁴ Chanda, R., “Movement of Natural Persons and Trade in Services: Liberalising Temporary Movements of Labor under the GATS”, Indian Council for Research on International Economic Relations, New Dehli, 1999, p. 19
- ¹⁵ WTO “Presence of Natural Persons (mode 4)”, Background Note by the Secretariat, S/C/W/75, 8 December 1998, para. 56
- ¹⁶ Ibid., para. 55
- ¹⁷ GATS Article XXVII(g)
- ¹⁸ Young, A.M., *op. cit.*, p. 195:
...the definition of mode does not describe the employer of a service provided under mode 4 or the terms of the employment contract. Is the employer the sending country or the receiving country? Is the employment based on contractor-contractee relationship or on the employer-employee relationship?
- ¹⁹ WTO, “Revision of the Guidelines for the Scheduling of Specific Commitments – Note by the Secretariat”, S/CSC/W/30, 23 March 2001, p. 10, para. 35
- ²⁰ GATS Article I.2(a) read in light of Article XXVIII(b) defines mode 1 as:
the production, distribution, marketing, sale and delivery of a service by a service supplier of one Member from the territory of the Member into the territory of any other Member.
- ²¹ GATS Article I.2(c) read in light of Article XXVIII(b) defines mode 1 as:
the production, distribution, marketing, sale and delivery of a service by a service supplier of one Member through commercial presence in the territory of any other member.
- ²² Intra-corporate transferees include executives, managers and specialists.
- ²³ The *quad* includes the United States, the EU, Japan and Canada.
- ²⁴ GATS Article III
- ²⁵ GATS Article V bis
- ²⁶ GATS Article VI.6
- ²⁷ GATS Article VI.4(c)
- ²⁸ GATS Article VII.5
- ²⁹ GATS Article XVI(d)
- ³⁰ GATS Article XIV(a). The provision is subject to the limitation that the public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.
- ³¹ Decision on Negotiations on Movement of Natural Persons in WTO, “The Results of the Uruguay Round of Multilateral Trade Negotiations – The Legal Texts”, Cambridge University Press, UK, 1999, p. 402

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- ³² Young, A.M., “Where Next for Labour Mobility under GATS”, in Sauv , P. & Stern, R.M., eds., *GATS 2000: New Directions in Services Trade Negotiations*, Brookings Institution Press, Washington, 2000, p. 184
- ³³ The commitments made by the six WTO members relate to the movement of persons under service contracts for specific activities. This access is subject to conditions, including requirements of professional qualification, prior employment with the juridical person who has no commercial presence in the member offering the commitment, limited duration (three to twelve months). In some cases an economic needs test also applies to the commitment.
- See UNCTAD “Information on Temporary Migration Regimes (Law and Implementation Regulations) in Force in Selected Developed Countries”, UNCTAD/SDD/SER/7, September 1995, para. 5-6.
- ³⁴ Some of the special and differential provisions of the *Agreement on Subsidies and Countervailing Measures*, such as the provisions of Articles 3 & 27 which provide permanent exemption from prohibited export subsidy disciplines for agriculture, cover the Quad countries as the most important providers of such subsidies as well as LDCs and low-income developing countries.
- ³⁵ Following the Uruguay Round agreements a number of plurilateral service sector commitments were made in information technology and telecommunications. The GATT, since the Tokyo Round agreements, has a history of creating precedents through agreements that are initially plurilateral and that subsequently become multilateral. This was the case with the Tokyo Round Customs Valuation Code.
- ³⁶ In total 31 WTO members have made commitments under the *Understanding*. Subsequent to the Uruguay Round a number of developing countries and economies in transition that acceded to the WTO made commitments to financial services.
- ³⁷ *Annex on Financial Services*, para. 5(b). The GATS commitments on mode 4, for example, refer to service suppliers of “other members”.
- ³⁸ See WTO “Technical Issues Concerning Financial Services Schedules – Note by the Secretariat”, S/FIN/W/9, derestricted 22 April 1997.
- ³⁹ *Annex on Financial Services*, para. 5(a)(iv) and para. 5(a)(xvi)
- ⁴⁰ *Ibid.*, para. 1(a)
- ⁴¹ The relationship between the *Annex on Financial Services* and the *Annex on the Movement of Natural Persons Supplying Services under the Agreement* requires further clarification as to whether the provisions of the latter override those of the former.
- ⁴² GATT Secretariat, “Scheduling of Initial Commitments in Trade in Services: Explanatory Note” (MTN.GNS/W/164/Add.1) stipulates that “in the absence of a reference to a specific duration for the temporary stay of a service supplier, no binding is being undertaken in this respect” (para. 4).
- ⁴³ *Understanding on Commitments in Financial Services*, Section B, para. 9(a)
- ⁴⁴ *Ibid.*, Section B, para. 9(b)

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- ⁴⁵ WTO, "Presence of Natural Persons (mode 4) Background Note By the Secretariat", S/C/W/75, 8 December 1998. See also GATT Secretariat 1994, *The Results of the Uruguay Round of Multilateral Trade Negotiations*, Geneva, 1994.
- ⁴⁶ Butkeviciene, J., "Movement of Natural Persons under the GATS: Perspectives for the New Negotiations", UNCTAD Secretariat, unpublished mimeograph, 1998
- ⁴⁷ Ghosh, B., "Gains from Global Linkages: Trade in Services and Movements of Persons" MacMillan Press Ltd., UK, 1997
- ⁴⁸ Mukherjee, N., "Exporting Labour Services and Market Access Commitments under GATS in the World Trade Organisation" *Journal of World Trade*, Vol 30, October, 1996
- ⁴⁹ Altinger, L. & Enders, A., "The Scope and Depth of GATS Commitments", *The World Economy*, Vol. 19, No. 3, 1996, pp. 307-325
- ⁵⁰ When considering commitments and the ensuing obligations that have been created it must be recalled that many of the refinements of definition of commitments made by the WTO Secretariat occurred after the Uruguay Round and hence the commitments are often vague and ambiguous.
- ⁵¹ No agreed definition exists for the category of executives, managers and specialists; without such an accepted categorisation the transparency of the service sector commitments in mode 4 is diminished.
- ⁵² Only some 17 percent of total commitments cover lower skilled persons, i.e., business sellers, "non-specified" and "others". Of the commitments made under the category "other" all but one did not specify a duration-of-stay commitment and therefore under the terms of the GATS scheduling guidelines this meant that they were unbound in this regard; thus the commitment has little practical meaning for service providers.
- ⁵³ The reason members found it necessary to limit national treatment for taxation was not evident in light of the national treatment tax carve-out. See GATS Article XIV(d).
- ⁵⁴ See Mukherjee, N., "Non-Tariff Barriers and Trade in Services – A Comparative Assessment of Capital and Labour Mobility in the GATS under the World Trade Organisation", *World Competition*, 21(5) 79-91, 1988.
- ⁵⁵ See Altinger, L. & Enders, A., *op. cit.*, pp. 316-317.
- ⁵⁶ The rise of e-commerce and the lack of clarity of definition as pertains to mode 1 and mode 2 has meant in fact the relatively liberal commitments made by members on mode 1 on the assumption that this would be relatively benign in terms of increased market access may no longer be valid.
- ⁵⁷ It should be noted that the extent of the difference between service commitments diminishes between modes of supply in those sectors where the precise definition of the mode of supply is unclear. This is particularly so with regard to sectors such as financial services, accounting, and architectural services, where the definition of the mode of supply between mode 1 and 2 is entirely unclear.
- ⁵⁸ Table 6 indicates a similar pattern of concessions in the recognized professions.

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- ⁵⁹ Adlung, R., “Services Trade Liberalisation from Developed and Developing Country Perspectives”, p. 123 in Sauv , P. and Stern, R., eds., *GATS 2000: New Directions in Services Trade Liberalization*, Brookings Institution Press, Washington, 2000.
- ⁶⁰ An employer with a staff of more than ten employees must employ Ecuadoreans in proportions of not less than 90% of the ordinary workers and not less than 80% of skilled workers; this does not apply for an employer with a staff of up to ten employees.
- ⁶¹ The number of ICTs is not to exceed 10% of the average annual number of Bulgarian citizens employed by the respective Bulgarian juridical person.
- ⁶² Not less than 90% of the ordinary workforce must consist of Panamanian workers or workers with a Panamanian spouse or with ten years of residence in the country. Foreign specialized or technical personnel may not exceed 15% of the total workforce.
- ⁶³ Employees under this category are limited to only 20% of the total number of personnel of a service supplier.

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