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MOVEMENT OF NATURAL PERSONS AND TRADE IN SERVICES: LIBERALISING TEMPORARY MOVEMENT OF LABOUR UNDER THE GATS

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Foreword

There has been considerable expansion of trade in services in recent years. However, there are numerous non-tariff barriers to such trade, especially when it occurs through the temporary movement of the service provider to the overseas market or the movement of natural persons. A number of developing countries have significant potential for exporting many services through temporary movement of professionals, as well as semi-skilled and unskilled workers. The General Agreement on Trade in Services (GATS) thus far has limited implications for liberalising service trade through the movement of natural persons.

This paper by Dr. Rupa Chanda suggests ways to strengthen the overall GATS framework through greater transparency and specificity in the commitments on movement of natural persons. It also proposes the introduction of multilateral guidelines on regulations that restrict service trade through the movement of natural persons. The paper was prepared as part of a research project at ICRIER for the Ministry of Commerce. I am sure that this analysis helps bridge a knowledge gap in an important area which will become even more important in the years to come as India realises its competitive potential in service sector exports, e.g., software, health, financial services, etc.

November, 1999

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MOVEMENT OF NATURAL PERSONS AND TRADE IN SERVICES: LIBERALISING TEMPORARY MOVEMENT OF LABOUR UNDER THE GATS

Rupa Chanda[1]

1. INTRODUCTION

World trade in services has expanded considerably in recent years. This growth has been spurred by many factors, including rapid advances in information technology, rising demand for services in both developed and developing countries, the growing importance of multinational firms, and increased outsourcing of many service activities by firms. The range of traded service activities is wide, ranging from software to health to telecommunications to construction and engineering, among others. Although service sector statistics are subject to many weaknesses, as of 1996, exports of commercial services stood at $1.26 trillion, over 20 percent of world exports.[2]

Services are traded through four modes of supply. These include: (1) cross-border supply which is analogous to trade in goods; (2) consumption overseas which is the movement of consumers to the home country of the service supplier; (3) commercial presence or movement of capital; and (4) movement of labour (temporary migration) to supply the service in the foreign market. The relative importance of these modes in the delivery of the service depends on the characteristics of the sector, the regulatory framework and trade barriers facing the sector, and other factors such as infrastructure, labour market conditions, immigration policies, and the openness of the economy.

Although trade in services has expanded considerably, there remain numerous regulations that constrain further expansion. While some of these regulations are in place to address public policy concerns and cannot be termed barriers per se, some other regulations are discriminatory and protectionist in nature. These barriers are particularly

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[1] The author is an Assistant Professor at the Indian Institute of Management, Bangalore. This paper was written for ICRIER as part of a project for the Ministry of Commerce, India on "Trade in Services: Opportunities and Constraints".

[2] WTO (Nov. 1997), p.11.

severe on the mobility of factors, particularly, temporary movement of labour related to the delivery of services in overseas markets.

Given the growing recognition of the importance of services in promoting trade and development and the presence of trade barriers in this sector, services were brought into the purview of the multilateral trading system during the Uruguay Round of negotiations. The General Agreement on Trade in Services (GATS) was the outcome of these multilateral discussions on services. GATS addresses trade liberalisation in all four modes of supply for services, namely, cross-border supply, consumption abroad, commercial presence, and the movement of natural persons. Under GATS, countries have scheduled commitments for market access and national treatment, for each of these four modes of supply, in individual service sectors that are of interest to them, and horizontally across all service sectors.

Although GATS has taken an important step towards bringing services into the multilateral framework of trade rules and disciplines, the liberalisation commitments that have been made during the first round of negotiations are subject to serious shortcomings. They are highly uneven across different service sectors and across different modes of supply. In particular, liberalisation is strikingly limited in the case of movement of natural persons, for both developed and developing countries. The latter reflects the sensitivity of this mode of supply and often its bearing on sectors which are more closed and regulated.

Since developing countries generally have a comparative advantage in exporting labour-intensive services, the lack of significant liberalisation under the movement of natural persons limits the overall value of GATS for developing countries. If GATS is to effectively promote trade in services and address the interests of developing countries, the forthcoming round of WTO negotiations on services must aim at liberalising the movement of natural persons.

Objectives of study

This study is motivated by the latter concerns. It is prompted by the need to generate information and ideas for discussion on trade via the movement of natural persons in the upcoming round of service sector negotiations. The aim of this study is threefold.

The first objective is to highlight the importance of service trade through the movement of natural persons (here on, also referred to as mode 4),

either as individual service providers or as service providers in the context of establishments or firms, and the constraints to such trade. The second objective is to assess the nature of liberalisation that has taken place in this mode under the existing GATS framework. The final objective is to suggest ways of improving the nature of commitments on movement of natural persons and introducing greater objectivity and transparency in the way these commitments have been scheduled. The ultimate goal is to facilitate international mobility of factors of production, both labour and capital to realise greater gains from trade liberalisation.

Outline of study

The study provides a detailed discussion of trade in services through the movement of natural persons. There are four sections to the paper. Section 1 provides a factual and theoretical overview of trade in services, including a discussion of the importance of temporary migration for trade in services and the sector-specific features of such service trade. Section 2 discusses the constraints to trade in services via the movement of natural persons and the implications of such barriers. Section 3 assesses the commitments under GATS for mode 4 in terms of their sectoral profile, the extent of liberalisation, and their overall significance for developing countries. Section 4 presents several proposals to deepen and broaden GATS commitments in mode 4. The paper concludes by highlighting various domestic reforms and measures that would be required to benefit from liberalisation under mode 4.

2. Overview of trade in services and movement of natural persons

The service sector has become increasingly important in the international economy. Global trade in services increased from US $0.4 trillion in 1980 to US $0.9 trillion in 1992 and further to US $1.2 trillion in 1996. Trade in services accounts for over 20 percent of total world trade.[3] Between 1982 and 1992, trade in services grew at an average annual rate of 8.3 percent per year, faster than world trade in goods. Developed countries account for the bulk of trade in commercial services, accounting for over 80 percent of global exports of commercial services in 1992.[4]

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[3] These statistics are likely to underestimate the true value of trade in services due to the cross-border supply of many services through telecommunications and other electronic means which are difficult to capture and quantify.

[4] Hoekman (1995), pp. 1-2 and WTO (Nov. 1997), p. 11.

Table 1 provides the geographic composition of world trade in commercial services by values and shares. It shows clearly that most of world trade in services occurs among developed countries in North America and Western Europe. The main exporters of services are countries in North America and Western Europe while the main importers are countries in Africa, Asia, and Western Europe. Among the leading exporters and importers of commercial services are developed countries such as the United States, Germany, United Kingdom, Japan, and France with individual shares of over 5 percent of total world exports and imports of services. Developing countries account for one percent or less of world trade in commercial services, though some countries such as Egypt, India, Mexico, and Brazil have a sizeable value of trade in services and are important players in the international market in several service sectors.[5]

It is difficult to get a good idea of the sectoral composition of trade in services as available data are not sufficiently disaggregated by sectors. Existing trade statistics in services cover three broad categories, namely, transport, travel, and other services. The category "other services" contains a heterogeneous set of services including, construction, communication, finance, insurance, and other business services. According to available data, in 1996, of a total of US $1,260 billion in world exports of commercial services, exports of travel, transport, and other services amounted to $415 billion, $315 billion, and $530 billion, respectively. Imports of commercial services amounted to $1,265 billion in 1996 of which imports of travel, transport, and other services accounted for $390 billion, $375 billion, and $500 billion, respectively. Thus, in the case of both exports and imports of commercial services, the category "other services" accounted for the largest share, at 40 percent and 37 percent, respectively in 1996. Furthermore, within the "other services" category, "other business services" which include a wide variety of professional services (such as advertising, legal, health, and accountancy services), constituted about 50 percent of total trade.[6]

Along with the growth of trade in services, there has also been a significant growth in foreign direct investment (FDI) in services. In the early 1990s, services accounted for 50 percent of the global stock of FDI. In several developed countries, services constitute over 60 percent of total annual flows of FDI. The growing presence of FDI in services is more prevalent in the case of non-traditional service activities where contestability of the

[5] WTO (Nov. 1997), Table A6, p. 29.
[6] WTO (Nov. 1997), Tables A4 and A5, p. 28.

overseas market requires commercial presence. As with trade in services, FDI in services is mainly among developed countries.[7]

The striking growth in trade as well as FDI in services is due to a variety of factors. These include innovations in information technology such as electronic commerce, multilateral trade liberalisation, growing world demand for services, increased outsourcing by firms, greater specialisation and product differentiation, and deregulation of many service sectors in both developed and developed economies.

2.1. Global service trade via the movement of natural persons

It is very difficult to assess the extent of trade in services that occurs via the movement of natural persons. This difficulty arises from general problems with service sector data as well as problems specific to this mode of trade in services.

In general, few countries systematically collect such data at a sufficient level of disaggregation. The intangible and non-storable nature of services make it difficult to assess value added and trade in this sector. For almost all countries, service sector data, including trade-related and BoP data, are of poor quality, inadequate in terms of coverage, lacking in consistency and time series comparability, and subject to problems of methodology, definition, and interpretation. These problems are compounded by the fact that services can be traded through different modes of supply. For instance, the fact that certain services can be traded through electronic means or the fact that some services can only be provided through commercial presence overseas means that trade in many service activities may be unreported or underestimated. Thus, a major shortcoming of existing service trade statistics is that they fail to capture trade through the different possible modes of supply and therefore do not provide a good indication of the relative importance of these various modes for trade in services. Overall, available trade information for the service sector is better at capturing service trade through cross-border supply and consumption abroad, and to a limited extent commercial presence. It is highly inadequate with regard to trade in services via the movement of natural persons.

One of the main reasons for the difficulty in capturing service trade through mode 4 is the poor sectoral coverage of available service sector data for

[7] Hoekman (1995), p. 2.

most countries. Trade statistics in services are most commonly reported for the communication and transportation sectors. They are less common in areas such as computer and software services or business services such as legal, accounting, consulting where movement of natural persons is important. Moreover, even if information is available in areas such as business services, there is a problem of comparability across different countries due to varying coverage of activities within this broad category.

It is also difficult to assess the importance of the movement of natural persons in service sector trade due to the lack of information on direct measures to quantify the significance of this mode. One needs to use proxy measures such as labour income and remittances rather than direct measures such as the number of service sector personnel based abroad. Today, the closest indicator for mode 4 based trade in services is the compensation of workers based abroad. BoP statistics capture labour-related flows in three categories, namely, labour income which includes wages and salaries (with the assumption that residence remains in the home country), remittances, and migrant transfers.

There are, however, major problems with using such proxy measures. The foremost problem is that all foreign labour is covered by these statistics. There is no separation for labour that is related solely to the provision of services in the foreign market.[8] Secondly, BoP statistics for labour income only cover workers residing abroad for less than one year (technically non-residents in the foreign market). Stay of more than one year is counted as a change in residency and output generated and sold in the host market in such cases is not covered in the BoP. Therefore, commercial presence and movement of natural persons of more than one year are not reflected in the data. However, provision of services through the movement of natural persons as well as commercial presence often involve residence abroad for periods exceeding one year. This is common in sectors such as software and health services. Since such cases are excluded from the BoP statistics, the data tend to underestimate the true magnitude of trade through the temporary movement of persons.

A more general problem in assessing the magnitude of trade through the movement of natural persons is that often this mode of delivery is part of a

[8] In the case of commercial presence, local sales of foreign affiliates are an indication of the importance of this mode of supply. However, BoP data again do not separate out such sales for services. Also, one does not get a true indication of the extent of trade via commercial presence since sales are captured as part of cross border sales and earnings are included as compensation of employees in the BoP.

larger services package, such as commercial presence, So, it is often difficult to separate out the value of trade that is due to the presence of the service provider from the value of trade that is due to the service firm established abroad.[9] Thus, trade data for commercial presence and movement of natural persons tend to overlap in many cases and one cannot get reliable quantitative estimates of the significance of the individual modes of supply.

Notwithstanding the aforementioned problems, one can get some indication of the importance of the movement of natural persons from the sectoral composition of trade in services. It was noted earlier that "other commercial services" and within this category, "other business services" constitute the largest share of trade in commercial services. Since these subsectors mainly include professional services where the movement of qualified personnel is an important means to deliver the service abroad, this indicates that labour mobility is important in service trade.

Data on labour-related transfers and income flows also suggest the importance of mode 4 for trade in services. Table 2 provides the value and direction of remittances, transfers, and labour income for developed and developing countries. It indicates that net total labour related income flows are sizeable for developed and developing countries. Thus, the magnitude of labour movement across goods and services is significant in the world economy. Therefore, given the importance of services in global trade, the movement of labour flows in service trade are also likely to be significant. Thus, overall, one can infer that trade in services through the movement of natural persons is sizeable as proxied by the large values of labour income for developed and developing countries and by the large share of business and professional services in total service trade.

Table 2 also indicates that on net, developing countries are recipients of labour income from developed countries. This implies that developing countries tend to have a comparative advantage in exporting labour-intensive goods and services, in accordance with the predictions of standard trade models based on factor endowments. Hence, they are likely to have a strong interest in promoting temporary labour flows as a source of trade earnings. Table 3 shows the revealed comparative advantage of developed and developing countries. It shows that while developed countries have an RCA in exporting services as a whole, many developing

[9] Such trade mainly applies to skilled labour that moves in connection with overseas service establishments. It is greatest among developed countries due to strong intra-firm linkages among these countries.

countries also have a potential in exporting services based on skilled, semi-skilled, and knowledge workers.

Evidence on the importance of movement of temporary labour is also available from OECD countries. Demand for temporary foreign workers has been growing in the OECD countries. Foreign workers, including skilled, unskilled, and seasonal workers, are allowed to enter and stay under temporary and seasonal work permits for periods ranging from 3 months to four years. In the US, Canada, and Australia there are special programs for temporary workers to meet labour market needs. Table 4 shows that skilled workers accounted for over 80 percent of all entries of temporary workers in the US, for some 40 percent of all workers in the UK and Canada, and between 15 to 30 percent in the Netherlands and Australia in 1996. This again indicates the significance of professional services in international trade in services and thus the importance of movement of skilled, professional labour for trade in such services.

Global trade in services through the movement of natural persons occurs mainly in professional services such as accounting and auditing, legal, taxation, architectural, medical and dental, and engineering services. The importance of professional services for the movement of natural persons reflects trends in globalisation and deregulation in many countries around the world which have enhanced prospects for activities such as accounting and legal services as ancillaries to the emergence of global firms.

2.2. Trade theory and the movement of natural persons

It is difficult to use standard models of trade theory to understand the implications of movement of natural persons for the home and host countries of this labour. In traditional trade models, capital and labour endowments of a country are taken as given. Trade acts as a substitute for factor mobility by eliminating differences in factor payments across countries. Therefore, countries well endowed with labour specialise in labour-intensive products while countries that are well endowed with capital, specialise in capital-intensive products.

However, standard trade models for goods are not directly applicable to services via the movement of labour (and also capital) in two important respects. Firstly, unlike in those models, where trade takes place given endowments of the two countries, in the case of trade in services through labour or capital movement, trade results in a change in factor endowments. Secondly, trade is not a substitute for factor mobility but is rather represented by the labour or capital that moves across border. Thus

trade and factor movements are no longer distinguishable when we consider the cases of commercial presence and movement of natural persons for trade in services.

In addition, certain modifications are required in the notion of factor endowments as used in standard trade models when it comes to services. Given the heterogeneous nature of tradable services, one needs to look at services and the factor labour at a disaggregated level to determine comparative advantage. For instance, many developing countries may be better endowed with unskilled labour relative to skilled labour, but may still have a comparative advantage in certain services such as professional services and software which require skilled and technical manpower. Thus, when discussing trade in services through movement of labour, one needs to allow for finer classification of labour in terms of different levels of skills and occupational characteristics and look at services at a highly disaggregated level. This also means that countries may have comparative advantage in trading different classes of labour-based services, i.e., both unskilled and skilled labour services.[10] Another important difference from the standard trade models is that capital and labour are often not two alternate modes of delivery. In many services, labour movement actually complements the movement of capital, for instance, when professionals move to staff firms that have been established in overseas markets. Thus, not only are trade and factor flows no longer substitutable but complementary, but capital and labour flows may also complement one another.

However, in one fundamental respect, standard trade models are applicable to trade in services. Comparative advantage in services is still based on differences in endowments and relative costs and the direction and the nature of the factor flow is based on comparative advantage. For instance, a country that is well endowed with skilled technical labour, such as engineers, would have a comparative advantage in exporting such professionals to another country. As in goods trade where the good embodies the factor endowment of the country, the movement of natural persons for trade in services reflects the comparative advantage of the home country in that particular category of labour services. The latter could be unskilled, semi-skilled, professional, and technical labour services.

[10] A good example of such a developing country is India which exports unskilled labour to the Middle East and also exports professionals in the software and health care sectors. Understanding service trade requires a greater disaggregation of the factors of production, especially labour, in order to draw meaningful conclusions about sources of comparative advantage.

In addition to looking at standard trade theory, one can also use the theory of international labour migration to understand the reasons for the movement of labour across countries. These include factors such as geographic differences in wages, productivity, and employment rates, imbalances between supply and demand for the factor, need for diversification of income, risk, and search for capital and credit. There are also dual labour market theories which attribute labour migration to the search for higher wages in overseas markets by low wage migrants from developing countries as well as world systems theories which see labour migration as a result of capitalistic economic structures. Overall, international trade and labour migration theories make similar predictions about the determinants of trade in services through movement of labour and the direction of such labour flows on the basis of cost and endowment based differentials. Other important determinants of trade in services include the size of the domestic market, domestic and international regulations, and infrastructure.

2.3. Implications of temporary movement of labour

It is difficult to estimate the impact of temporary labour migration on home and host countries. The impact is specific to the type of labour in question, the sector receiving or sending the labour, the regulations in place, and many other factors that may vary across countries. It also depends on whether movement of labour is the sole means of delivering the service, whether it complements or facilitates trade in other modes such as commercial presence, and whether it can be replaced by other modes of supply. There are both costs and benefits to the countries sending and receiving the labour.

From the perspective of the home country, labour flows may promote specialisation, economies of scale and scope, and indirectly welfare. However, they also involve a loss of domestic resources and often a transfer of skills and educational investment. Brain drain can have a negative impact on development and the distribution of income. In the case of temporary labour outflows, the costs are likely to be smaller. While there may be a temporary loss of skills and educational investment, there are offsetting gains in the form of experience and skills gained abroad and remittances (which tend to be higher in the case of temporary as opposed to permanent labour).

For the recipient country, the impact of foreign labour depends on the impact of such workers on productivity, costs, the factor intensity of production, and the extent of substitutability or complementarity between foreign and domestic workers. Gains are likely due to transfer of skills and knowledge embodied in foreign workers and at lower costs. But these gains need to be weighed against costs due to displacement of domestic workers, costs in the form of social security, health care, and education. However, such costs are generally smaller in the case of temporary foreign workers. The balance of costs and benefits also depends on the regulatory framework of the recipient country. The extent to which costs can be lowered or skills can be transferred depends on the conditions that are enforced on foreign workers. Foreign suppliers may be forced to comply with domestic arrangements on wages, prices, and taxes which could erode their economic advantage and reduce the scope for trade. They may also be denied access to certain specified activities or forced to fulfil additional requirements, thus limiting the scope for transfer of skills and knowledge. Thus, the regulatory environment is critical to determining the scope and implications of trade in services through the temporary movement of labour.

3. Constraints to the movement of natural persons

There are many barriers to trade in services, especially with regard to the provision of services in overseas markets through the temporary migration of labour. However, unlike trade barriers in goods, trade barriers in services are difficult to quantify and even identify. They relate mainly to domestic regulations and are therefore mostly administrative in nature.

Restrictions to the movement of natural persons can be broadly grouped into four categories. These relate to:

immigration related regulations concerning entry and stay of service providers;
regulations concerning recognition of qualifications, work experience, and training;
differential treatment of domestic and foreign service personnel; and
regulations covering other modes of supply, particularly on commercial presence which indirectly limit the scope for movement of natural persons.

It is important to note that not all of the above regulations are necessarily barriers. Many of these regulations, particularly those concerning recognition and to some extent even regulations concerning differential

treatment and commercial presence often stem from public policy concerns such as consumer protection, public interest and security concerns. It is really regulations such as immigration laws and procedures, labour market policies, or regulations attaching prior conditions to the employment of foreign service providers which act as barriers to the movement of natural persons.

The following discussion elaborates on the above categories of regulations and how they constrain service trade through labour movement. The distinction between regulations that address public policy concerns and regulations that are trade barriers is made throughout the discussion. It is to be noted that some of the regulations discussed here may be permissible given commitments scheduled under GATS or may not even be covered under the general GATS disciplines. However, they are discussed since the objective is to provide an overview of the wide range of policies that affect movement of natural persons.

3.1 Restrictions on the Entry and Stay of Natural Persons

The main restriction to the movement of natural persons originates in immigration and labour market policies of individual countries. Temporary movement of labour is not separated from permanent movement of labour and therefore comes under the purview of immigration legislation and labour market conditions. These restrictions range from strict eligibility conditions for applications of work permits/visas, cumbersome procedures for actual application and processing of these visas and permits, limitations on the length of stay and transferability of employment in the overseas market. All of these restrictions raise the direct and indirect costs (due to delays and uncertainty) of entering the foreign market, thereby eroding the cost advantage of the foreign service supplier. These constraints are the main trade barrier in sectors such as software services.

To take the case of the software services sector for instance, Indian software professionals require work permits/visas to provide on-site software services in overseas markets such as the US and UK. However, employers filing for such work documents on behalf of foreign workers, must meet certain preconditions. These include providing evidence of an extensive search for a local person before hiring a foreign national, stringent advertising requirements and search specifications (as in the case of the European Economic Area), and demonstrating the infeasibility of training a local person. Failing all these other

avenues only one can submit an application for a foreign worker.[11] These advertising and search requirements tend to be cumbersome and time consuming. There may also be additional requirements specifying that the foreign worker must train a local person for replacement within a certain time period or age and residency based restrictions.

Wage parity is another restrictive eligibility condition. It is required that wages paid to foreign service providers be at par with those that would have been paid for a local person in the same position and with similar qualifications. This is of course pertinent to service activities where there is body shopping. The principle underlying the wage parity requirement is that overseas nationals are to be hired to address the shortage of suitably qualified service providers in the host country and not to save money by hiring cheap labour from abroad. However, the wage parity requirement also acts to negate the cost based advantage of many developing countries in exporting labour intensive services and works against the very concept of comparative advantage based on cost differentials.[12] Although wage parity is required on the grounds of fairness, as even developing countries would not want their professionals to receive lower wages than similar professionals in the host country, the main problem is that the entry procedures are complicated by the need to demonstrate wage parity before hiring foreign service providers. Wage parity is an important part of the labour certification process in many countries and constitutes an administrative hurdle delaying the issuance of work permits and visas.

The eligibility conditions are also subject to an inherent bias against middle and lower level service professionals with respect to wages, prior employment, and investment in most developed countries. For instance, under the tiered system of work permit application in the UK, tier 1 applications that are filed for higher level persons such as directors, senior executives, and intra company transfers are easier to obtain than permits

[11] There are penalties for hiring foreign nationals without a work permit. For instance, in the Netherlands, violations are subject to a fine of upto NL Guilder 25,000 per employee detected. The employer can also be required to pay the illegal employee six months wages at the approved rate and the employee faces deportation.

[12] In the US, the employer is required to obtain prevailing wage information from authorities or other sources and pay at least 95 percent of this wage rate to foreign candidates. In the EEA countries, wage rates paid to foreign candidates must be in line with the rates that have been set by collective labour agreements. Work permit applications are normally refused if the candidate is shown to be earning less than the minimum agreed wage for the type of work specified. Failure to comply with the wage legislation can create problems in receiving future work permits, rejection of work permit applications, and penalties if there is a violation. Moreover, there may also be stipulations on how the salary must be paid, such as under specified schemes, in order to prevent misuse of the provisions.

for personnel such as systems analysts and database consultants. This is because it is recognised that higher level managerial staff raises the competitiveness without significant displacement effects in the local labour market while entry by middle level persons is likelier to displace local labour.[13] In effect, these conditions amount to a discrimination against personnel such as systems analysts and programmers in the case of software services or construction engineers and designers who are very important in their respective industries for delivering the service abroad but who may not meet the conditions. Such biases in entry conditions tend to hurt developing countries which have a comparative advantage in middle level professionals rather than managerial and executive level personnel, who are also generally linked to commercial presence overseas. Thus, since the entry conditions are biased against the middle and lower categories of labour and instead favour categories associated with capital movement, they hurt the export potential of developing countries in several service sectors.

In addition to strict eligibility criteria for entry, procedures for the issuance of work permits are time consuming and burdensome. A typical application requires exhaustive details about the employer, the job, efforts to find local personnel and evidence of failure to do so, details of the candidate in terms of his experience, skills, and training, and verification of other personal details. The filing process may take from 2 weeks to over two months due to the cumbersome nature of the applications requirements. Such long and tedious processes hurt service sectors where personnel need to be shipped overseas at short notices and where delays mean a loss of opportunities and business. These processes tend to be more streamlined for larger companies and for higher categories of service personnel, again indicating the inherent biases against the movement of individual service providers or professionals working in smaller firms where developing countries are likely to have greater presence.

There also barriers in the form of quantitative limits on visas in important service importing markets such as the US. For instance, the US puts a cap on the number of H-1B visas (the most important visa for the

[13] It is required that the position attract a salary in excess of 50,000 pounds per year and be at board level 'or equivalent' with daily input into the direction of the company at a strategic level, or that the position be that of a high-level executive linked to inward investment of over 250,000 pounds in the UK, or that the position be a senior one that is filled by a high-level employee of a foreign branch of the company (or of a related company). Systems analysts generally do not command salaries in excess of 10,000 pounds and hence stand barred from this category of work permit applicants.

movement of natural persons).[14] Such quantity restrictions hurt service sectors such as software where most of the personnel enter the US market on H-1B visas. It also forces the professionals to compete with all others seeking to enter on H-1B visas, i.e., professionals in other categories and prospective entrants into the permanent labour market and immigrants. Thus, the quantitative restrictions on entry amount to treating permanent and temporary labour under the same set of immigration rules and procedures and thus discriminate against temporary labour, undermining the basis for trade through such flows.

Restrictions also apply to natural persons after they enter the foreign market. For instance, there are limitations on the transferability of work permits and mobility of the provider after he enters the host country. The work permit usually pertains only to the specific job detailed in the application and does not permit the individual to take up any work in the host country. To transfer, the entire application process has to be repeated.[15] While such provisions are intended as safeguards to prevent temporary labour from entering the host country's permanent labour market, they limit the flexibility of moving service personnel to various client sites to render the service and act as a disincentive to hiring foreign nationals.

There are also limits on the duration of stay for service providers. Work permits or visas are valid only for the specified duration which in turn depends on the nature of the position, the candidate's skill level, and other criteria. These limits range from 3 months to five years. Although permits are often extendable, renewals and extensions are subject to stringent conditions and high fees which discourage start up companies from hiring foreign nationals and force them to use local persons who may be in short supply and costlier. [16]

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[14] The normal limit on such visas is 65,000. This has been raised to 115,000 temporarily in view of the Y2K problem.

[15] For example, in the UK, if a software house wants to move a candidate to a new project based at a different site not originally mentioned at the time of the work permit application, it must first obtain permission from the labour services bureau. Such applications have to be accompanied by details of the new project/client and, where appropriate, any relevant contract documents. Where there is a likelihood of a candidate needing to move between different clients, or between client and proprietary projects, it is important to draft the initial work permit application in a way that explains all the projects envisaged so as to remove the need for future applications when the candidate switches projects.

[16] For example, in the US, all new H-1B petitions and first extensions of H-1B's require a fee (in addition to the usual filing fees) of US$500. What is visibly protectionist about such renewal schemes is that the fees collected are used to fund a training program for resident US workers.

Apart from immigration-related restrictions on entry and stay, there are also entry barriers in the form of additional requirements imposed on foreign service providers. These include economic needs tests, local market tests, and management needs test to ascertain the need for entry as well as the number to be allowed to enter. Such additional conditions are applicable in the case of legal services and health services in EU countries for example. While these additional requirements may be imposed for public policy reasons such as public health and consumer welfare and are thus legitimate in nature, of- ten they are not clearly specified in terms of objective and transparent criteria, in terms of how they are administered. Thus, some degree of nontransparency and discretion enters into the administration of such requirements.

3.2 Regulations concerning recognition, certification, and licensing

Movement of natural persons in services is also constrained by requirements on qualifications, work experience, and licensing/certification. Recognition requirements may either prevent market access for the foreign service provider causing a rejection of the work permit or visa application, or may limit his scope for work to specific activities once he enters the overseas market. Such regulations are common in the case of accredited services such as legal, accountancy, and health services where there are licensing norms and procedure. For instance, Indian medical degrees are not recognised in the US and UK. Indian doctors and nurses must rectify in those countries by passing the local medical licensing exams in order to practice. Similarly, Indian legal degrees are not accepted in the US, UK, and Canada. Indian lawyers need to study JD or LLM in the US and then pass the State Bar examination in order to practice. Without this qualification, they can only have an advisory role in the US and are not allowed to represent clients in the US court.

It is important to note, however, that such regulations are really motivated by consumer protection and public interest concerns and not to impede trade flows per se. These regulations are required in many service sectors to ensure high quality of service and adherence to specified codes of professional conduct in order to prevent damage to consumers and social and national interest.

Residency and nationality requirements are often an important criteria for granting recognition to service professionals and for defining the scope of their activities in certain service sectors. While nationality requirements are

a barrier to movement of natural persons as they discriminate on the basis of citizenship, residency based requirements are not necessarily trade barriers as their main intent is to protect consumers, to prevent fly-by-night operators, to ensure sufficient familiarity with locals laws, conditions, and culture, and broadly to safeguard national interests.
A prime example of a sector where residency and nationality requirements are common is the legal services sector. In most countries, foreign legal consultants (who are part of overseas commercial establishments) can usually consult on international law and home or third country law, but are typically prohibited from practicing host country domestic law. Activities such as notary services, representation services, and the practice of domestic law are subject to nationality requirements in the legal profession in most countries.

In some sectors there are no formal certification or licensing procedures to accord recognition. In such sectors, there is some degree of discretion in granting recognition and equivalence between work experience and educational qualifications and/or training. The software services sector is a case in point. For instance, the stipulated qualification requirements for software professionals such as programmers and systems analysts in the US and UK exceed those actually needed for the service to be rendered, indirectly implying that the candidate's professional and educational qualifications are not appropriately recognised. Programmers and systems analysts applying to enter the UK are required to have five years or more of experience in a high-level (managerial, analytical, or executive) position or a graduate degree plus two or more years of senior post-graduation work experience. Similarly, in the US, candidates are generally required to have at least three years post-graduation experience in the occupation and a degree directly related to it. The inherent problem with such qualification requirements is that software personnel from developing countries such as India and Brazil may be skilled enough to render the service without supervision following 1 to 2 years of experience as opposed to the two-five years required given their strong engineering base and capability to adapt to new technologies. Hence, their previous experience and qualifications are not duly recognised and discretion in according them recognition amounts to a barrier to their entry into the developed country market.

3.3 Differential treatment of foreign service providers

Trade in services via the movement of natural persons is also constrained by policies which discriminate against foreign service providers. More stringent qualification requirements imposed upon foreign service

providers or eligibility conditions requiring citizenship or residency are examples of such discrimination. While recognition related barriers are well known and widely discussed, there are many other discriminatory policies that restrict trade in services through mode 4, which are not as well recognised.

There is differential treatment in the context of social security taxes and benefits. For instance, temporary service providers in the US economy are required to make social security payments like Mediclaim and FICA taxes to the US government in the absence of tax treaties between the home country and the US. These contributions are required despite the fact that the service provider is on deputation abroad for a period which is less than the period of stay required to avail of social security benefits in the future (ten years in the US). The service provider not only pays social security taxes in the US, but also continues to make his contributions back home and does not recover his contributions upon returning to the home country. In effect, there is double taxation of earnings.

For example, Indian software professionals are subject to such double taxation. Indian companies execute many software consultancy and development activities on-site in important markets such as the US. While on deputation to work at the client's site, their wages are paid in Indian Rupees in India and the professionals continue to pay employment taxes in India under Provident Fund and Public Provident Fund requirements. However, these professionals are also liable to pay social security taxes in the US on gross wages.[17] The objective of this tax is to provide for the employee's old age, sickness, and disability. There are no exemptions, regardless of citizenship or visa status of the employee or employer and whether or not the employee qualifies for any of the benefits available under the laws. It does not matter if the person is a consultant or contractor or agent as he is deemed to be an employee under the US laws.[18] The social security contributions are like trade taxes on Indian software professionals deputed abroad and erode their cost advantage relative to US software professionals.

Another common source of discrimination against foreign service providers is government procurement and sourcing policies. Although the latter is not

[17] There are three types of social security taxes. These include FICA at 12.4 percent of the employee's wages, Medicare at 2.9 percent of the employee's wages, and FUTA at the rate of 6.2 percent of employee's wages). The cumulative impact of all these deductions as a percent of total wages works out to be 21.5 percent.

[18] A person needs to cross the age limit of 62 in order to claim benefits.

covered at present under the GATS framework, such policies require mention as they play an important role in defining the scope of activity for foreign service providers. It is common for the government in many countries to give procurement preferences to domestic suppliers of a services, for instance in contracts for construction and consultancy services. In the UK, 30 percent of management consultants are engaged in government work and there is a clear preference for domestic over foreign consultants. Discriminatory government procurement regulations and price-based preferences granted to domestic suppliers are common in areas such as education, data processing, and non-medical professional services.[19]

Another policy-based source of discrimination between foreign and domestic service providers is the requirement of government approval for entering certain service activities. There may also be authorisation requirements on acquisition and remittance of foreign exchange, restrictions on the nature of the legal entities, and on establishment of local offices. Such procedures tend to favour domestic service providers and in some cases, there may be an outright ban on entry by foreign service providers.

Government subsidies may also be used to treat domestic and foreign service persons differently. Although there are no strong general disciplines on subsidies under GATS and such policies are allowed if countries have included them in their Article 17 commitments, subsidies like government procurement policies can significantly tilt the playing field towards domestic service providers. Such policies are common, explicitly or implicitly in certain service sectors such as construction, communication, and transport or for purposes such as research and development. Again, in some cases these subsidies are not meant to restrict foreign professionals from entering the sector but are introduced for the sake of national interest.

Finally, there are many policies which although really meant to protect consumers and to reduce the scope for professional misconduct and liability, may have a side consequence of restricting the flow of professionals across countries. These are mentioned here not as barriers but as indicative of various public policy regulations which indirectly do limit the role of foreign service providers in the host country. Such regulations include rules with regard to accounting or advertising practices, restrictions on the use of international and foreign firm names, prior residence,

[19] This is an area that should be included under the GATS and countries should seek to liberalise constrains to professional movement arising from government procurement policies. This issue is discussed in more detail later in the paper.

permanent residency, or domicile requirements, establishment requirements, consumer protection laws, restrictions on the areas of practice within the overall sector. Policies in some sectors may also be more liberal towards foreign professionals who share principles and approaches within the field similar to what is practiced in the host country, such as in the case of legal services for foreign professionals belonging from countries that belong to the same legal family as the host country (Civil and Common Law).

3.4 Restrictions on commercial presence

Since movement of natural persons often complements trade through commercial presence in services, restrictions on foreign direct investment in services may also translate into barriers to temporary labour movement in services. For instance, restrictions on foreign equity participation in services, exclusion of certain service sector activities from foreign commercial presence, conditions relating to staffing and management by local persons, nature of incorporation, and geographic and branching restrictions limit the scope for movement of natural persons as a complement to the movement of capital associated with foreign commercial presence.

It must be pointed out that certain restrictions on commercial presence, including the type of commercial entity (incorporation, partnership) or prior approval from host country professional associations are meant to address issues such as professional liability and misconduct and are not necessarily barriers to professionals. Similarly, requirements for prior approval from institutions such as the Central Bank for establishing commercial presence may be meant to address foreign exchange and remittance and profit repatriation type concerns and are again not necessarily to be viewed as barriers.[20] However, indirectly, by affecting the scope for commercial presence, they also limit the scope for movement of professionals which accompanies the flow of capital.

Thus, there are numerous regulations and policies which affect the movement of natural persons in services. Many of these regulations affect

[20] For instance, legal services in the OECD countries are typically restricted by conditions on the type of legal entity. Most OECD countries limit the choice of legal form to sole proprietorship or partnership and often exclude the possibility of forming partnerships with foreign lawyers and firms. Similarly, requirements for discretionary consent of the local bar association to set up commercial legal presence in some developed countries, or to receive the approval of the Central Bank also restrict the movement of natural persons in the context of establishment-based service trade.

developing country's trade in service sectors where they have export potential. The direct or indirect effect of these regulations is to raise costs of entry and operation for service providers, reduce the scope for technology and skill transfer, and force substitution of domestic with foreign service personnel.

4. GATS and the Movement of Natural Persons: An Assessment

The Uruguay Round of multilateral trade negotiations incorporated services into the world trading system in recognition of the growing importance of services in international trade and investment transactions. The resulting General Agreement on Trade in Services or GATS aims to liberalise trade in services under conditions of transparency and progressive liberalisation. The GATS establishes multilateral rules and disciplines for policies affecting trade in services. The principles of most-favoured nation treatment, [21] non-discrimination[22], and transparency are integral to the GATS framework. In addition to these general obligations, GATS also introduces a market access obligation which is applicable in sectors that have been scheduled by GATS member countries.

As noted earlier, GATS has been designed on a mode of supply basis. Liberalisation of service trade under the GATS framework is undertaken through horizontal (cross-sectoral) and sector-specific commitments with regard to market access and national treatment obligations. These commitments are made for each of the four modes of supply for trade in services. Therefore, there are eight entries in each schedule, one entry each for market access and national treatment for each mode of supply. Countries have either made a binding commitment to place no restrictions on market access and/or national treatment for a mode of supply ("none"), or have made a partial commitment by limiting market access and national treatment in line with various conditions listed in their schedule, or have left

[21] MFN is applicable to all services that have been scheduled by a member except those sectors for which an MFN exemption has been taken by the member. MFN exemptions can be in place up to a maximum of ten years from entry into force of the agreement, with a review in the interim.

[22] The principle of non-discrimination or national treatment is reflected in Article 17 in Part 3 of GATS. This article says that "each member shall accord to services and service suppliers of any other member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers." See the GATS document for further details.

the entry "unbound", i.e., made no commitment.[23] Typical formats for horizontal and sectoral commitments are provided in Tables 5 and 6.

The following discussion first highlights the various disciplines and provisions under GATS which are relevant to the movement of natural persons. It then discusses specifically the nature of the commitments that have been made for mode 4 and the basic problems characterising these commitments. The discussion makes evident the fact that liberalisation in mode 4 has been very limited but that this is not a problem with the general GATS framework but a problem with the commitments that have been filed in this mode.

4.1 GATS framework and the movement of natural persons

Movement of natural persons is defined in Article 1:2 of GATS as "Supply of a service…by a service supplier of a member through presence of natural persons of a member in the territory of any other member". It thus includes both service providers who are working overseas in an individual capacity and service providers who are part of a home, host, or third country commercial establishment. There are several provisions and general disciplines within the GATS framework that are pertinent to the movement of natural persons and the kinds of regulatory barriers that affect service trade via this mode of supply.

One of the most important general provisions in GATS with respect to mode 4 is Article 6 on domestic regulation. Article 6 requires members to ensure that in sectors where specific commitments are undertaken "*measures of general application affecting trade in services are administered in a reasonable*, *objective*, *and impartial manner*." It further specifies that "*measures relating to qualification requirements and procedures, technical standards, and licensing requirements do not constitute unnecessary barriers to trade in services… and that such requirements are, (a) based on objective and transparent criteria…;* (b) *not more burdensome than necessary to ensure the quality of the service;* and (c) *in the case of licensing procedures, not in themselves a restriction on*

[23] A binding commitment under the GATS schedules indicates that no new measures will be imposed that would restrict entry or operation in violation of the commitment. A country may withdraw or change its commitment provided there is an agreement on compensatory adjustments with the affected countries and no earlier than three years after the agreement is in force. Limitations on market access include limits on the number of service suppliers, the value of service transactions, the number of service operations or quantity of the service output, the number of natural persons employed, on foreign equity participation, and on the type of entity or venture.

the supply of the service". The article also obligates members to "*maintain or institute …judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, …, appropriate remedies for administrative decisions affecting trade in services*" and further, that such procedures ensure an "*objective and impartial review"*. Given that domestic regulations constitute the main source of constraints to the movement of natural persons, these provisions are very strong and recognise the need for transparency and objectivity in the criteria, nature, and the administration of relevant domestic regulations.

Article 7 on recognition is also a strong general discipline that is pertinent to the movement of natural persons. This article grants members the discretion to recognise the education, experience, and licensing and certification of a foreign service provider either in whole or in part, and either autonomously or by mutual agreement or by harmonisation. However, while granting flexibility to members in the way they accord recognition, it also obligates members to apply the criteria or standards for authorisation, licensing, or certification equally across all countries and not to use the latter as a "*disguised restriction on trade in services*". [24] In addition, this article requires members granting recognition based on mutual agreements to provide opportunities to other interested members to frame similar arrangements, and requires members according recognition autonomously to provide adequate opportunity to other countries to demonstrate that education, experience, licenses, or certifications obtained or requirements met in the latter countries should be recognised. Article 7 also stresses the need for recognition based on multilaterally agreed criteria and for the adoption of common international standards and criteria for recognition in relevant service sectors. It thus provides the basis for further negotiations on recognition disciplines in various sectors (as in accountancy services).

A third important provision under GATS is the obligation of transparency, under Article 3. This article requires members to publish "*all relevant measures of general application which pertain to or affect the operation of this agreement*" including relevant international agreements to which the country is a signatory. Members are also required to inform the Council for Trade in Services of any new laws, regulations, and administrative guidelines or amendments to the latter as relevant to the specific commitments filed by the member. The transparency provision also obliges

[24] There are also general obligations requiring that qualification requirements, technical standards, and licensing procedures be based on objective and transparent criteria, not be more burdensome than needed to ensure the quality of the service, and not constitute restrictions on the supply of the service.

members to respond to requests for specific information on any measures affecting its commitments and to establish one or more enquiry points to provide this information to other members.

GATS also contains a separate annex on the movement of natural persons. The annex defines the scope of mode 4 to cover *persons who are temporarily working in another member country*. It is *not applicable to individuals who are seeking access to the employment market of another member on a permanent basis or for citizenship or residency purposes*. Two categories of service persons are covered. These include independent and self- employed suppliers who get paid directly by their customers and natural persons who are employed by their service suppliers in the host, home, or a third member country in respect to the supply of a service. The annex states that countries can regulate entry and stay of natural persons provided they do not apply these measures in such a manner as to nullify or impair the benefits granted to members under their specific commitments.

While the general provisions and the annex constitute a strong framework for mode 4 based trade in services, some important regulations pertinent to this mode are not covered by GATS and need to be noted. A case in point is government procurement. Article 13 rules out the application of MFN, market access, and national treatment obligations to government procurement, meaning that government procurement is not covered by GATS. In some cases, the existing obligations under GATS are very weak. A case in point is the provision on subsidies under Article 15. This article only requires members to enter into negotiations to develop multilateral disciplines on subsidies in recognition of the fact that subsidies have distortionary effects on trade in services. Countries are recommended to exchange information on subsidies and to engage in consultations on subsidies if there are adverse effects on trade.

GATS provisions also allow for exceptions to be made for measures which are meant to protect public order and morals, to protect individuals, and to check professional misconduct, among other concerns. Thus, regulations and policies which are meant to address public concerns (as discussed in the preceding sections) are exempt from market access and national treatment obligations, subject to the condition that they are used in a non-discriminatory manner and are not used as disguised restrictions on trade in services.

Overall, given the nature of regulations that affect trade via mode 4, the GATS framework contains very important general provisions.

Transparency, recognition, and domestic regulation related obligations are quite strong in their wording and intent while also safeguarding domestic concerns. Taken in conjunction, these disciplines greatly reduce the scope for discretion in applying measures to restrict service trade through the movement of natural persons. This is particularly relevant in the case of mode 4 where administrative and regulatory constraints are the main barriers. In addition, members can seek recourse to the dispute settlement mechanism if these provisions are violated. The main gaps in the framework are with regard to subsidies and government procurement policies as noted above, though with the proviso of moving towards strong multilateral disciplines in these areas in future rounds of negotiations.

4.2 Commitments on the movement of natural persons

While the GATS framework adequately addresses regulatory barriers that concern movement of natural persons, the commitments that have been made in this mode are very limited in nature. Horizontal as well as sectoral commitments filed by countries have been the most limited in the case of movement of natural persons relative to the other modes of supply. There are three main problems with the nature of liberalisation that has taken place in mode 4.

The first problem is the limited sectoral coverage of commitments. High income countries have scheduled 50 percent of service sectors while developing countries have scheduled only 11 percent of all service sectors. In both cases, these commitments remain subject to restrictions on market access and national treatment. Overall, only 28 percent of the universe of services have been scheduled without restrictions by developed countries.[25] But more importantly, it is sectors such as health services, legal and accountancy services where professional movement is important that have not been scheduled by many countries. Thus the exclusion of important professional service sectors from the liberalisation process means that the extent of liberalisation in mode 4 has been very limited in the first round of negotiations.

A second major problem with the commitments filed in mode 4 is that in most cases they do not provide for unconditional liberalisation. An analysis of the profile of horizontal and sectoral commitments in mode 4 indicates that countries have on the whole not made comprehensive commitments in this mode. Market access and national treatment are subject to the

[25] See Hoekman (1995).

fulfilment of additional conditions and limitations which usually relate to functional or hierarchical criteria, length of stay, labour market and economic needs tests, etc. Moreover, in many of the schedules, the conditions are not clearly specified in terms of their criteria and procedures creating some scope for non-transparency and subjectivity in their application.

The third main problem is with the nature of the mode 4 commitments themselves. Market access and national treatment obligations in mode 4 are mostly unbound in the sectoral schedules and refer to the horizontal commitments. The latter in turn are bound for only a small subset of service personnel, typically at the higher level, and in categories that are related to commercial presence abroad, and subject to the limitations noted above. The following section discusses in detail the latter two problems with the existing commitments.

(i) Commitments with limitations

The sectoral commitments in mode 4 are not meaningful in themselves since, as noted above, for most countries they are unbound and refer to the commitments filed under the horizontal schedules. The horizontal commitments in turn are subject to many kinds of conditions and limitations. For instance, horizontal commitments in mode 4 are subject to limitations in the case of 100 countries as opposed to only 4 countries for mode 2 (consumption abroad). The significantly more restrictive nature of the commitments in this mode reflects the sensitivity of this mode of supply. It reflects a concern among developed countries that increased market access for skilled and semi-skilled labour would lead to an influx of immigrants into developed country markets, given the comparative advantage of developing countries in exporting labour-intensive services.

Table 7 provides a summary of the nature of commitments in selected service sectors where movement of natural persons is important. These include sectors such as accountancy services, legal services, medical and dental services, or broadly, important professional services. The information provided clearly indicates that there are fewer full (no restriction cases) commitments under mode 4 relative to all other modes of supply, both for market access and national treatment. The percentage of partial commitments, i.e., commitments with limitations as well as no commitments (or unbound) are far greater under mode 4 relative to the other modes of supply. Thus, the extent of liberalisation in mode 4 is quite limited given the fact that not only have important sectors (where

professional movement is important) been left out by many countries in their scheduling exercise, but that even when such sectors have been scheduled, liberalisation in mode 4 is conditional.

Limitations that are quite common in the commitment schedules relate broadly to the four categories of constraints discussed earlier, i.e., immigration laws and regulations, recognition related regulations, policies favouring domestic service providers, and restrictions on investment. As noted earlier, some of the conditions listed in the schedules are related to public policy concerns while some others are truly barriers to entry and practice by foreign service providers. The main conditions include:

Entry restrictions for certain sectors and categories of personnel;
Limits on the duration of stay of natural persons;
Quantitative restrictions by numerical quotas for persons who can enter, specifications on the proportion of total employment that can be met by foreigners, specifications on the proportion of total wages;
Pre-employment conditions and other related requirements;
Economic needs, labour market, and management needs tests;
Requirements for technology and skill transfer (training local staff);
Discriminatory tax treatment;
Requirement of government approval;
Requirement of work permits, residency, and citizenship in certain sectors;
Recognition of professional qualifications by the importing country;
Restrictions via minimum investment requirements;

The most problematic limitations among those listed above include restrictions to entry and stay of natural persons due to immigration laws and procedures, citizenship requirements for practice in several service sectors, requirements such as labour market, economic needs, and management tests, and restrictions on investment and commercial presence. The latter are more problematic as it is harder to justify them on public policy grounds and because the criteria for their use and their procedural details are not always clearly specified by countries in their commitment schedules.[26]

[26] It should be noted, however, that the transparency provision in Article 3 ensures that countries can obtain necessary information on such limitations, on what criteria they are based, and how they are to be administered. It is for individual member countries to seek this information from other members, to establish mechanisms and enquiry points to provide such information to other members, and to seek recourse to the dispute settlement mechanism in case this provision is violated.

Under the existing commitments on mode 4, the most prevalent market access and national treatment limitations relate to the type of service provider and the reason for his movement (such as negotiating sales, delivery of specialised skills, or commercial presence, etc.) and corollary restrictions on duration of stay, eligibility conditions, and additional requirements that he must satisfy. Pre-employment is the most important criterion and is referred to in over 100 cases. There are some 80 cases where there are limitations in the form of numerical quotas and 50 cases where there is a requirement of an economic needs test. In the case of 46 countries there are horizontal limitations with respect to real estate. Thus, a large number of countries have included in their schedules the more problematic limitations noted above, in particular, those relating to immigration laws (quotas and pre-employment conditions), additional tests, and investment restrictions.

In addition, fifty countries have scheduled conditions relating to domestic minimum wage legislation along with additional conditions on work hours and social security. There are also horizontal limitations with respect to geographic and sectoral mobility, mobility across firms, foreign exchange related restrictions, non-eligibility of foreign service providers for subsidies, and other government regulations. Many countries have also indicated that their commitments would be suspended in the case of labour-management disputes.[27]

Further to the existing limitations on commitments, there are also MFN exemptions by countries in selected sectors. Although these exemptions are not mode-related, by their very nature they tend to have a greater impact on the movement of natural persons and on commercial presence. There are 38 such exemptions, mainly of a preferential sort.

(ii) Bias towards higher level service personnel

There is a clear bias in the horizontal commitments towards liberalising the movement of higher level service personnel. Entry requirements are bound

[27] Such limitations are in contrast to commitments on commercial presence where few countries have placed such restrictive conditions on capital mobility although there are some limitations in the form of foreign equity ceilings, requirements on the nationality of board members, sector-specific conditions on foreign investment, and economic needs test requirements for establishing commercial presence. However, on the whole commitments are far more liberal for capital movement in services. In contrast, it is common to apply very stringent conditions on the entry to almost all categories of labour.

for three main categories of service providers. These are business visitors, personnel engaged in setting up commercial presence, such as intracorporate transferees (ICTs), and personnel in "speciality occupations". The commitments on ICTs come closest to full bindings. More than one third of mode 4 entries refer to intracorporate transferees. Out of a total of 328 total entries, 240 relate to executives, managers, and specialists and 135 deal with intracorporate transferees. Only 17 percent of all horizontal entries cover low skilled personnel. Sectoral commitments similarly facilitate the entry of only higher level personnel in professional, managerial and technical categories as specified in the horizontal schedules.

A striking feature of the commitments is that only 10 countries have allowed restricted entry to "other level" personnel. There are also very few commitments for qualified specialists. Even where there are commitments for individual specialists and other personnel, they are not permitted to move in an individual capacity but must be working for a specified duration for a juridical person in another country. This means that liberalisation of movement of natural persons is linked to commercial presence abroad.

Tables 8 to 11 provide detailed information on the profile of the horizontal and sectoral commitments on movement of natural persons. They indicate the types of natural persons covered by the horizontal commitments and the nature of limitations placed on such persons.[28]

4.3 Overall assessment of GATS commitments in mode 4

To summarise, commitments that have been made in mode 4 in the first round of negotiations essentially maintain the status quo and in some cases are even a step backward.[29] (1) There is poor coverage of sectors where mode 4 is important. (2) There are few sector-specific entries for mode 4 and the horizontal entries stand for the sectoral commitments in this mode. (3) There are conditions attached to the horizontal commitments. (4) The commitments are too skewed towards skilled and qualified labour and on labour that is tied to commercial presence.

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[28] Based on a review of existing horizontal schedules of commitments for a wide range of countries.

[29] The GATS commitment structure takes the current level of restrictions and adds limitations and additional restrictions to them. In effect, the structure binds the status quo or makes it more restrictive.

The overall significance of the commitments is quite limited for developing countries especially due to the coverage of mostly higher level personnel who are typically associated with foreign commercial presence with high capital requirements. Since most developing countries are capital-poor and recipients rather than sources of foreign direct investment in services, there is little impact of such liberal commitments for higher level staff for their own potential in supplying services through the movement of natural persons. Furthermore, even the commitments on select categories of personnel get diluted by limitations on commercial presence. In general, one finds that the more restrictive commitments are in sectors and modes where developing countries have a comparative advantage, i.e., in low and medium skill related labour-intensive activities. Thus, a major failing of the first round of commitments is that they do not recognise the movement of natural persons at all the different levels where WTO member countries participate and where there is trade in services.

A fundamental problem is that there is no separation of temporary and permanent labour under the existing framework of commitments, even though GATS is meant to cover only temporary labour flows in services. This is reflected in the fact that most limitations that have been filed fall under the purview of general immigration legislation and labour market regulations which also affect permanent movement of labour. This limits the scope for liberalising movement of natural persons via GATS.

In addition, the existing commitments suffer from lack of clarity and uniformity in some aspects. For instance, at present there is no uniformity in the definition and coverage of the various categories of service persons. The personnel categories are not well defined either in the schedules or in the overall agreement. Thus, they are subject to arbitrary interpretation by immigration officials and consular offices. Likewise, additional requirements such as economic needs and labour market tests that are listed in many of the schedules, have not been clearly specified and defined in terms of the relevant criteria based on which they are to be used and how these tests are to be administered. Lack of specificity in definitions and some of the conditions lend themselves to administrative discretion, discriminatory practices, and reduced predictability. Such ambiguities have been compounded in some cases. For instance, while economic needs tests has been required by most countries for the category "other persons", it has not been specified in the schedules as to what kind of service providers fall under this category. Thus the scope for discretion in terms of the coverage of personnel within a category and also in terms of the use of additional tests and requirements, further reduces the value of the existing commitments.

If one compares the commitments on labour mobility with those for capital mobility, one finds that the GATS bindings are at a lower level overall for labour, denial of entry is the norm. Access is denied to most categories of personnel excluding higher level persons. Market access is generally discouraged and barriers such as economic needs tests and labour market tests and standards are common. There is a greater use of qualitative restrictions in the case of labour movement.

Thus, an overall assessment of GATS commitments on the movement of natural persons indicates that liberalisation has been marginal in this mode. Commitments are not sectoral but horizontal which detracts from their effectiveness and relevance to the needs of a particular sector. They are formulated to cater to a wide range of sectors where movement of service providers is important. The commitments are further limited by other qualifications and conditions relating to domestic laws, labour market conditions, and standards, some of which are not clearly spelt out. They are applicable to a very broad category of service providers without details on what is covered by these categories and without reference to the classification needs of a particular sector.

5. Proposals for improving commitments on the movement of natural persons

If the movement of natural persons is to be liberalised under the GATS, then existing commitments in this mode have to be significantly improved in future rounds of service sector negotiations. This can be realised through country-country negotiations by sector and also through the introduction of multilaterally accepted horizontal formulae on issues such as classification of service providers and the separation of temporary and permanent labour, within the existing framework of GATS. Thus, a two-pronged approach is required to further liberalisation in mode 4. The following discussion highlights the main issues for multilateral negotiation.

5.1 Improving the structure of commitments in mode 4

The horizontal and sectoral commitments in mode 4 and to an extent in mode 3 have to be improved. There are two aspects to this improvement. The first is to move from horizontal to bound sectoral commitments in mode 4 and to fulfil conditions of specificity and detail in the sectoral commitments. The second aspect is to multilaterally negotiate horisontal

formulae on several issues to deepen and broaden the scope of the horizontal commitments.

Improving sectoral and horizontal commitments in mode 4

It has been noted earlier that most of the commitments in mode 4 are horizontal in nature. The sectoral commitments are mostly unbound in this mode except for the categories of persons listed in the horizontal schedules and subject to limitations. Therefore, all liberalisation is on the basis of the horizontal commitments. The latter is problematic as the horisontal commitments cannot address the specific needs of individual sectors.

One main problem with horizontal commitments in mode 4 is that only broad categories of service providers such as ICTs and business visitors are covered. But these may not be equally relevant to all sectors or subsectors. Likewise, the duration of stay where specified for certain categories of service personnel in the horizontal commitments may not be appropriate for individual sectors and subsectors. Thus the use of horizontal commitments in mode 4 limits the flexibility of the commitments that have been made and also their relevance to the needs and characteristics of individual sectors or subsectors .

Multilateral discussions during the next round should aim at moving away from the reliance on horizontal commitments in mode 4 to *sector-specific commitments* in this mode, especially in sectors such as professional and business services where mode 4 is important. Horizontal commitments should not be used as a substitute for sectoral commitments in mode 4. In addition, these sectoral commitments must be *detailed and specific,* in terms of the measures that are applicable to individual sectors and in terms of the service personnel categories that are pertinent to each sector.

Countries need to make unambiguously worded and well-defined sectoral commitments with clearly outlined criteria for application of any limitations, for all subsectors within the sector that has been scheduled. All limitations, conditions, exceptions, etc. should be clearly laid out in the sectoral schedules, both for market access and national treatment, rather than being broadly outlined in the horizontal schedules. Countries must also take the necessary steps to furnish information on these measures as per the provisions of Article 3.

Specificity and detail will also require improved targeting of categories of service providers to whom the commitments and limitations are applicable. This can be done by introducing more disaggregated categories of service providers in the sectoral schedules which fit within the broad categories of intracorporate transferees, business visitors, specialists, and other persons referred to in the horizontal commitments. A finer classification of service personnel categories would facilitate more clear and detailed sectoral commitments which are relevant to the particular sector or subsector under consideration. It would also remove ambiguities about the treatment of certain classes of service providers and thus the scope for discretionary action and discrimination in implementing the commitments. For instance, in the case of software services, finer categories such as programmers, systems analysts, consultants, technicians, could be introduced explicitly into the sectoral schedules.

Thus the sectoral commitments need to be more *transparent and objective* with respect to the applicable terms and conditions for the particular sector and with respect to the categories of service providers covered within each sector. All limitations and exceptions should be specific to individual subsectors and to the more detailed subclassification of service providers. However, the proposed modifications would also need to be supported by improvements in the existing framework of horizontal commitments and by introducing multilateral guidelines on issues that cut across many sectors. These supporting horizontal measures are discussed below.

Horizontal formula for classification of service providers

If the sectoral commitments are to be more specific and detailed with regard to personnel categories, it is important that the scope and coverage of service personnel be widened and, more importantly, be uniform in terms of their definition and coverage across countries and be correspondingly reflected in the horizontal schedules. Firstly, all members should agree on the coverage of professionals and activities within the personnel categories that are included in the horizontal schedules (ICTs, business visitors, specialists, other personnel). They must also agree on the minimum criteria to be used in determining whether an individual service provider fits into a particular category or not. There must also be a broad consensus on categories/subcategories and circumstances under which additional limitations such as economic needs tests and residency requirements may be allowed and when such conditions should be barred altogether. Thus, binding sectoral commitments can only be significant if

the coverage, definition, and criteria for service providers, and applicable measures and their associated criteria are common across all countries.

The multilateral discussions could also focus on expanding the categories of service providers covered by the horizontal commitments to remove the current bias towards higher level personnel. It is important to include middle and low-skill level providers and make the commitments more relevant to the interests of the developing countries with expertise in these categories. The coverage can be expanded in two ways. It can be expanded by explicitly introducing new categories such as technical support personnel, which would for instance include personnel such as systems analysts and programmers in the case of software services. Alternatively, it can be expanded by defining the coverage of categories of "other persons" and "specialists". This expansion should allow for the inclusion of middle and lower level personnel in these latter categories by specifying relevant criteria and by modifying/removing certain conditions relating to skills, pre-employment and job responsibilities that tend to favour higher level persons. Perhaps it would be easier to address this problem by expanding the coverage of the "other personnel" category so as to include middle and lower level positions explicitly. At present, the extent to which such positions can be covered is not clear from the more broadly defined categories. In this context, common coverage and definition of the broader categories proposed earlier would help.

The main idea underlying the suggested improvements in the sectoral and the horizontal commitments, is that the overall framework of commitments has to be improved for mode 4. *Complementarity rather than substitutability* is required between the sectoral and horizontal schedules. The horizontal commitments should provide the broader umbrella within which the sectoral commitments would fit while the details provided in the sectoral commitments should buttress the horizontal commitments and formulae agreed upon. The horizontal commitments should establish a common working definition and coverage of personnel categories and also attempt to cover a wider range of provider categories than at present. The sectoral commitments should build on this wider scope and provide more detailed provisions and conditions, making them as relevant and specific as possible to individual subsectors and individual classes of service providers within the overall sector. It is also important that horizontal commitments by their very non-specificity, not dilute the commitments offered in the sectoral schedules.

To summarise, improvements in the existing framework of commitments would require the following:

(a) Sectoral and subsectoral commitments in mode 4 in addition to horizontal commitments in this mode;
(b) Introducing a finer classification categories for service providers in the sectoral commitments on mode 4;
(c) Providing specific and detailed sectoral and subsectoral conditions to narrow the scope for discretion and discrimination;
(d) Agreeing on uniform definitions and coverage of the broader service personnel categories included in the horizontal schedules; and
(e) Expanding the scope of the categories covered by the horizontal schedules to allow for commitments on middle and lower level professionals under mode 4.

5.2 Broadening the GATS framework on movement of natural persons

In addition to working within the existing framework of commitments, it is also necessary to establish multilateral guidelines on some issues, to strengthen some of the existing GATS provisions, and overall, to broaden the reach of the GATS framework with respect to the movement of natural persons. The relevant issues to be addressed in this context include: (a) the separation of temporary from permanent labour flows; (b) wage parity; (c) social security taxes and benefits; (d) recognition; and (e) economic needs and other tests. It is important to note that for these norms to be effective, they must also be supported by specific and detailed sectoral commitments and uniform horizontal commitments, as discussed above.

Separating temporary from permanent labour flows - GATS visa

A major issue that should be discussed multilaterally is the separation of temporary movement of labour from permanent movement of labour whenever a service sector has been scheduled.[30] Temporary service providers should be treated separately from permanent migrants. They should ideally fall outside the purview of immigration-related laws and labour market regulations and their entry and stay should be treated under a separate set of regulations. Alternatively, given the difficulties that are likely to arise in convincing countries in this matter, temporary service providers could be covered by a special subset of regulations within the

[30] Note the importance of having sectoral commitments. Only when a country has scheduled a sector, can this separation of temporary and permanent labour be made for foreign service providers seeking to enter the country in that sector. A binding sectoral commitment in mode 4 as opposed to a general horizontal commitment would make this distinction of temporary and permanent labour even more significant.

overall immigration policy framework, with more liberal conditions for entry and stay. In either case, service providers delivering services overseas on a temporary basis should not be subject to the usual immigration rules and procedures, the usual visa categories, and work permit related requirements. This would reduce the administrative burdens, delays, and costs they face in entering the foreign market. It would also make it easier to address issues such as social security, wage parity, and recognition by allowing for more liberal treatment in the case of temporary service providers.

It is proposed that a separate class of visas, a **GATS visa** be established for service professionals temporarily working overseas. This visa would be applicable for service providers who are covered by the sectoral and horizontal commitment filed by a GATS member country. It would serve to streamline the implementation of these commitments by taking the administrative procedures and formalities outside the domain of normal immigration procedures and reducing the scope for discretion and uncertainty. The GATS visa would be like a passport for service providers whenever there is a sectoral commitment filed by the host country for modes 3 or 4 that is relevant to that category of service personnel. The latter complementarity between the GATS visa and the commitment schedules would only be possible if the aforementioned recommendations on specificity, finer classification of provider categories, wider coverage of categories, and transparency are reflected in the sectoral and horizontal commitments. An important point to note in this context is that the GATS visa would require countries to make more generous and binding sectoral commitments in mode 4 which do not back track on the status quo, as many countries have done in the first round of commitments. If the GATS visa is to be issued on the basis of mode 3 and 4 commitments, it would only liberalise market access if the commitments are liberal and binding. Once such offers are forthcoming, the GATS visa would facilitate uniformity in market access procedures as opposed to the current situation of very divergent immigration standards and procedures in different countries.

The GATS visa need not be unrestricted in nature. Conditions may be attached to the issuance of the GATS visa but these should not be more onerous and restrictive than those already specified in the sectoral and horizontal schedules of commitments. They should also be consistent with the information on relevant rules and regulations provided in the attached annexes proposed earlier for increasing the transparency of the system.

There should also be multilateral guidelines governing the granting and use of the GATS visa. These include guidelines concerning the time frame from filing to receipt of the visa, administrative procedures involved, costs, renewal procedures, transferability of jobs under the visa, recognition, and treatment in terms of taxes, subsidies, government procurement. There should be a prescribed time limit within which the GATS visa should be granted, say 2 to 4 weeks from receipt of the application. There should also be provisions for granting the visa within a day, particularly for business visitors and senior management professionals who may need to go on short notice and for whom a delay may mean loss of the business opportunity altogether. The latter cases can be treated in a manner analogous to the single window clearance system that is applied to foreign investment proposals in priority sectors in many countries. Consideration should also be given to issuance of GATS visas at the port of entry under special circumstances. Thus, there should be flexibility in the time frame guidelines to address special cases and different kinds of needs of service personnel. These time limits should be supported by a set of permissible administrative formalities and requirements in terms of application procedures, paperwork required, verification norms, etc.

The GATS visa system should also include mechanisms for finding out the status of applications at each stage of the visa and work permit issuance process, to notify delays and additional formalities, to question the grounds for rejection, and to have easy access to information on all administrative procedures and formalities involved in the application process. Establishment of a separate body relating to GATS visas within the overall immigration framework of a country may be useful as a contact point for such redress and information needs. The applicant company or professional should use the WTO's dispute settlement mechanism to file complaints in the case of inordinate and unjustified delays in issuing the GATS visa (beyond the prescribed time limits agreed upon multilaterally), additional requirements imposed by the host country (beyond the permissible formalities and requirements agreed upon), unjustified rejection of the GATS visa, and lack of timely response from host country authorities. In this context, the contact points for enquiry required under the transparency provisions of Article 3 would be very important.

There should also be simple mechanisms for renewing the GATS visa once the person is within the host country as opposed to the current immigration systems which require the service provider to undergo all the formalities, delays, and costs once again. Renewal fees should only cover administrative costs rather than working as a deterrent. Sectoral, geographic, and inter-firm mobility should be eased as long as the provider

remains within the GATS visa category. The idea should be to facilitate the transferability of jobs that fall under the GATS visa category so as to promote skills transfer, trade, and benefits to the host and home countries.

Safeguard mechanisms can also be introduced to prevent misuse of such visas and entry into the permanent labour market of the host country. This can be done by having more stringent requirements for first time applicants and by making it very difficult to transfer from the GATS visa to the other visa categories which permit working on a permanent basis and later transferring to permanent residence and citizenship status. It is evident that the establishment of such multilateral guidelines and safeguard mechanisms can only be effective if individual member countries file detailed and transparent sectoral commitments in mode 4 to which they can be held accountable.

Consideration should also be given to having, within the overall GATS visa category, a company specific-GATS visa which can be easily assigned to personnel working in those companies. Such visas could be given to well known and reputed companies with an established record of sending service personnel for on-site delivery of services to other countries. These visas could be issued on shorter notice than the individual-specific GATS visas, further streamlining the administrative formalities involved for such employees. In such cases, multiple entry visas could also be issued to avoid administrative hassles of renewal and repeated filing requirements.

The introduction of the GATS visa would require extensive multilateral negotiations. Its main features can be summarised as follows:

(i) Permission to work overseas on a temporary basis if the service provider is covered by sectoral and horizontal commitments on modes 3 and/or 4;
(ii) Strict time frame within which visa must be granted (2-4 weeks maximum);
(iii) Flexibility for visas on shorter notice for select categories of providers and border availability of visa;
(iv) Transparent and streamlined application process;
(v) Mechanisms to find status of application, rejection, requirements;
(vi) Multiple entry visas for senior executives and CEOs;
(vii) Easier renewal and transfer procedures;
(viii) GATS visas for select companies for use by its employees deputed abroad;
(ix) Safeguard mechanisms to prevent entering permanent labour market;

(x) Challenging rejections, delays, and unfair practices under the dispute settlement mechanism.

The introduction of a GATS visa and having policies that separate temporary from permanent labour would also facilitate the adoption of norms on the other issues, as pointed out in the following sections.

Introducing norms to address social security taxation

It was noted earlier that one problem faced by temporary service providers in the absence of totalisation agreements is social security taxation. This is the requirement to pay social security taxes in the host country and to make similar contributions in the home country, although one is not eligible to receive the benefits accruing from the social security contributions in the host country. Since such double taxation is simply unfair, it must not be permitted under GATS.

The proposed separation of temporary from permanent labour flows would facilitate the removal of double social security taxation. Any service provider who is eligible for the GATS visa should be given the following options with regard to social security taxes and contributions in the home and host countries.

(i) Temporary service professionals qualifying for the GATS visa and who are subject to home country social security taxes would be exempt from similar taxes and contributions in the host country as long as their deputation period is less than the period required to obtain benefits in the future. For instance, if a professional is deputed to the US for a period of 3 years, he should not be subject to social security taxes as he would require to make contributions for at least ten years so as to recover the benefits in the future. In the case that the service provider becomes part of the permanent labour market or seeks residence, past contributions would be calculated and deducted with interest, at the appropriate time.

(ii) Social security and like taxes would be deducted from earnings in the host country as long as the service provider (mainly professionals) remains in the host country. The deducted earnings would, however, be reimbursed at the time of the professional's return to the home country. This would safeguard against cases where the person might become a part of the permanent labour force. In such a case where the professional takes up residence in the host country or transfers his visa to a job where permanent residence is imminent, the social security contributions made during the deputation period would not be returned.

(iii) The service person would have the choice to select the country where his earnings would be deducted. Bilateral totalisation agreements or some regional agreement would be required for exercising this choice. As with many of the double taxation avoidance treaties that exist among the developed countries today, if the service provider is sent abroad temporarily, he would be subject to the laws of only the first contracting state as long as his deputation is less than five years. Furthermore, there would be specified rules on the provision of benefits in the future, on the eligibility period and conditions attached to receiving benefits, pro rating issues, etc. and mutual co-operation between the authorities of the two signatory countries would be essential.

As already noted, the multilateral framework concerning social security taxation can only be effective if it is part of a broader agreement on the GATS visa and movement of natural persons and lies outside the domain of normal immigration and labour market rules and regulations. If the GATS visa proposal is implemented, then all foreign service personnel present in the host country under the GATS visa (individual or company-related) should not be required to pay double taxes or should be given the above options.

Introducing norms to address wage parity

It is difficult to establish multilateral norms on wage parity since one gets into issues of fair wages, welfare, and exploitation of cheap foreign labour. However, conditions on wages do affect the comparative advantage of many developing countries in some labour intensive services where there is body shopping. To address both these concerns, multilateral discussions are required to establish a horizontal formula on wage parity. This formula should address: (a) what constitutes "comparable wages"; (b) how comparability and parity is to be determined; (c) under what conditions (sectoral, personnel categories, and local market and economic conditions) wage parity must hold and when deviations from wage parity can be permitted and to what extent when employing a foreign service provider; and (d) how to link wage parity conditions to entry conditions and formalities. Again, the distinction between temporary and permanent labour flows as permitted by the GATS visa would be helpful. The horizontal formula that is developed for wage parity can be used only for those service providers qualifying for a GATS visa.

It is proposed that employees deputed abroad for less than a specified period not be subject to wage conditions that lead to wages in excess of what they receive in their home countries plus costs due to living and other expenses (to be explicitly specified) needed to ensure a fair standard of living for that specified time period in the host country. This time period could be decided mutually by the concerned countries under bilateral wage agreements, given the needs of the sector, the category of the service provider, and the nature of the job.

One of the main objectives of the discussion on wage parity would be to remove the cumbersome preconditions wage parity places on the issuance of visas. The earlier recommendation for specifying a maximum time frame for issuing GATS visas and notification requirements for delays and additional conditions should take into account wage related and corresponding labour certification requirements. Delays and rejections on account of wage conditions should be open to challenge at the dispute settlement forum of the GATS. Thus, the aim would not be to eliminate wage parity as a condition, but to make it a transparent requirement and to de-link it from visa procedures.

Strengthening GATS norms on recognition

GATS already contain a strong provision for recognition under Article 7. This provision addresses issues of transparency, non-discrimination, and objectivity in the granting of recognition and also encourages countries to enter into mutual recognition agreements or to extend recognition autonomously to other member countries.[31] The discussions that have taken place in the accountancy sector under the Working Party for Professional Services are indicative of the broad supporting framework that is provided by Article 7. However, it would be useful to strengthen the recognition provisions by establishing detailed norms for four issues that concern recognition and to evolve multilateral disciplines and some minimialistic guidelines to facilitate mutual recognition agreements among member countries.

[31] Mutual recognition is a contractual norm between governments or bodies with delegated authorities. It transfers the regulatory authority from the host to the home country. Recognition tests the equivalence or compatibility or acceptability of the other country's regulatory system. The reallocation of authority is reciprocal and simultaneous. Regulatory authorities accept in whole or in part the regulatory authorisations in the other country when giving their own authorisation. The benefits of mutual recognition are that the importing country can make better use of imported skills and can increase its comparative advantage in certain professional areas. Regulatory bodies can save time and resources by working together. Mutual recognition enhances mutual learning, transmission of regulatory experience, improvements in professional standards, and access for professionals.

(i) Norms for non-accredited sectors/activities

first concerns professional services where there are no formal accreditation or licensing procedures, such as in software services. In such cases, norms are required regarding the criteria to be used in according recognition to professionals, for instance, in terms of minimum professional education as sanctioned by a diploma, formal licensing or certification requirements, and minimum professional experience. These criteria should also be reflected in the sectoral and horizontal commitment schedules. In addition, wherever countries have included recognition requirements in their commitment schedules, there should be mechanisms under GATS to enable countries to engage in bilateral discussions to compare qualifications across home and host states and to assess the extent of equivalence based on bilaterally determined criteria. The enquiry points required under Article 3 can provide useful information on recognition criteria and equivalence procedures to make possible such discussions.

(ii) Norms concerning equivalence of work-related and academic qualifications

The second issue concerns equivalence between on-the-job experience and academic qualifications. Many countries do not consider on-the job experience to be equivalent to an advanced degree and do not convert work experience to academic qualifications. Norms must be established that specify the kinds of jobs/positions and the kinds of academic qualifications that may be considered equivalent and substitutable for meeting entry requirements and also specify the sectors where such equivalence is difficult to establish. The latter will require the participation of professional bodies and associations in member countries to provide the criteria for equivalence along with names of well recognised training and higher education institutes in the respective countries to better assess the quality of professional qualifications. GATS disciplines on recognition should further discourage differential treatment of the value of work experience and qualifications between foreign and domestic service sector professionals. [32]

[32] For instance, a software professional applying for an H-1B visa in the US may be more qualified academically than a domestic professional but may still be treated as displacing the latter. This effectively translates into differential treatment of the work experience of the foreign and domestic professionals. Multilateral guidelines on equivalence should curtail the scope for such differential treatment.

(iii) Norms concerning temporary licensing

Disciplines governing licensing should allow for temporary licensing of foreign service professionals when such licensing procedures are absent in the home country of the professional. For instance, in many developed countries, there are licensing requirements for practicing engineering specialities. However, such requirements are often absent for engineering services in many developing countries. The lack of licensing procedures in certain sectors should not constitute a barrier to the movement of the professional. Procedures could be developed for temporarily licensing engineers to practice in the speciality area. Countries could bilaterally negotiate areas which could be given priority for temporary licensing. Multilateral discussion on the sectors and procedures concerning temporary licensing is required.

(iv) Norms concerning broad-based equivalence in recognition

Multilateral discussions should focus on a system of granting recognition through *broad-based equivalence* of qualifications and standards. It would be useful to establish bridging mechanisms where there is a divergence of requirements and standards between home and host countries. The GATS framework should encourage discussions on a compensatory system of granting recognition, whereby local adaptation periods and aptitude tests for foreign service professionals can be used to offset differences among national systems and standards.[33] The EU has used this compensatory approach though its General System of Directives where professionals from other member countries who fall short in their qualifications and standards are permitted to qualify following a local training and adaptation period. The European experience shows that it is possible to adopt this approach without requiring extensive previous harmonisation of qualifications across borders. Within this framework of broad-based equivalence, countries can bilaterally negotiate recognition agreements to suit their particular needs. The GATS provisions on recognition should also facilitate transitivity of mutual recognition agreements, especially within integrated areas, and enable their multilateralisation across other member countries.

Finally, there should be mechanisms under GATS to facilitate regulatory co-operation among bodies concerned with recognition in member

[33] The General System of Directives of the EU does away with case by case negotiated convergence and follows the compensation approach to mutual recognition.

countries. This would help minimise the risk of disruptive conflicts and enable systematic exchange of information, mutual monitoring, and co-operative enforcement.

Introducing norms for economic needs and other tests

The scope for discrimination through the use of economic needs, local market needs, and management needs tests needs to be reduced. This can be done by laying down clear criteria for applying such tests, by establishing norms for the administrative and procedural formalities associated with such tests, and by specifying how the results of such tests are to be used in restricting entry to foreign service providers (e.g., translating the findings to quantitative limits on foreign personnel). Requirements and decisions made on the basis of such tests should be subject to challenge under the WTO's dispute settlement mechanism.

Fewer occupational categories should be subject to such tests. A consensus is required on these categories. Rules on recognition should encourage exemptions of highly qualified service professionals from economic needs tests. At present, in some sectors such as software services, professionals are exempt from various additional provisions only if their academic degree in a speciality is directly related to the employment. Again, the determination of such direct applicability of the academic qualification to the employment has scope for discretion. It must be accepted that if the professional is highly qualified and also has an advanced degree in some specialisation, then his qualification for entry should not be restricted to the nature of the job. Similarly, the provisions should also encourage the exemption of all professionals from additional conditions and requirements when they are deputed by companies with well established reputation in the home and host countries and with sound recruitment policies. This would amount to some sort of accreditation of the larger and well established companies by facilitating entry of their professionals (in line with the recommendation for multiple entry and blanket company visas made earlier).

In addition to the five proposed areas for stronger and more effective multilateral norms, disciplines are also required on subsidies and government procurement policies. For instance, countries could be required to make explicit the existence of government procurement policies and subsidies in all relevant sectoral commitments schedules and also provide information on their nature, their magnitude, how they operate, and other relevant parameters. Where such policies are present and countries

have scheduled commitments, any limitations on foreign service providers due to these policies should be clearly specified. These limitations could take the form of ceilings on the percent of contracts or value of transactions to be procured from domestic sources, the number of local service persons employed, and the extent of preference to be accorded to domestic contracts. In the case of subsidies, limitations could be filed on the maximum extent of subsidy as a percent of total value of transactions in the sector. But it is important to have transparency in the use of these practices even if these policies are not presently covered by the GATS articles.

The various elements that should constitute the demand by developing countries for increased labour mobility are summarised in Noyelle et. al (Dec. 1991). The latter highlights the market access and national treatment conditions to be accorded to different groups of temporary service persons, including business visitors, intracompany transferees, sales persons, and company trainees. The discussion proposes terms and conditions for the nature of employment, eligibility conditions, remuneration source and nature, duration of stay, mobility within the host country, and various benefits, among other issues. Noyelle (1991) suggests the need for transparency, predictability, and binding commitments as has also been proposed in this paper.

6. CONCLUDING REMARKS

The GATS framework has made little progress in liberalising trade in services through the movement of natural persons. Several proposals have been made in this paper for (a) improving upon the existing commitments and commitment structure under the current GATS framework and (b) improving the GATS framework by introducing multilateral norms on important regulatory aspects concerning the movement of natural persons. Both of these approaches must be taken in conjunction. The multilateral norms would have little significance unless accompanied by the proposed modifications in the commitments. Likewise, the latter would not be as relevant unless there were broad principles to facilitate their implementation.

The proposed changes in GATS would also need to be supported by domestic measures and reforms at the individual country level. Several of the recommendations involve amendments in domestic legislation and regulatory frameworks. It is important to highlight some of the main reforms

and measures that would be required, especially in developing countries, to benefit from the proposed recommendations.

Recognition is one major area where reforms and measures would be required. Countries would need to evaluate the standard of domestic training and certification systems for individual service sectors and ensure some degree of uniformity in standards within the country. Simultaneously, they may also need to raise their domestic standards to internationally acceptable levels when there is a major divergence. Professional bodies would need to be established in some countries for certain sectors and to be made more proactive so as to constantly monitor and regulate standards within the country and abroad and cooperate with similar bodies abroad. Licensing and certification procedures may need to be established in certain services where currently absent to facilitate movement of professionals abroad.

Other areas for measures and reforms concern policies relating to immigration and taxes, among others. In the case of immigration legislation, countries will need to establish a subset of immigration legislation to deal with temporary migration and the guidelines concerning the GATS visa. In the case of tax policy, countries would need to enter into bilateral totalisation agreements with markets that are important destinations for their professionals. Most importantly, countries would need to be more transparent about their domestic regulations. Without increased transparency on the part of individual countries, most of the proposed recommendations would not be enforceable or effective.

Table 1. World trade in commercial services, 1985-96

	Value in 1996		Share in 1985		Share in 1996	
	Exports	Imports	Exports	Imports	Exports	Imports
World	1,260	1,265	100.0	100.0	100.0	100.0
North America	225	167	18.9	17.4	17.9	13.2
United States	202	135	16.6	14.3	16.1	10.7
Latin America	47	57	4.6	5.5	3.7	4.5
Western Europe	603	573	50.7	41.3	48.0	45.2
EU (15)	538	530	44.7	37.0	42.8	41.8
Africa	---	---	3.0	5.2	---	---
Asia [1]	286	354	16.1	20.4	22.7	27.9
Japan	66	129	5.4	8.7	5.3	10.2

Source: WTO, Council for Trade in Services, "A Review of Statistics on Trade Flows in Services", Geneva, Nov. 1997, Table A 2, p. 27.

1. Excludes the Middle East

Table 2. Direction of labour-related transfers and income flows, 1980-1990

(US $ million)

	1980	1985	1990
Net Workers' remittance			
LDCs	20110	19387	33737
Credit	25336	23444	38599
Debit	5225	4057	4862
DCs	-10607	-10107	-18230
Credit	3760	2941	5213
Debit	14367	13047	23442
Net migrant's transfers			
LDCs	-147	-94	43
Credit	230	131	212
Debit	377	225	168
DCs	1092	804	3326
Credit	1946	1807	5225
Debit	854	1003	1899
Net labour income			
LDCs	1161	1756	2923
Credit	3713	4056	7144
Debit	2551	2300	4220
DCs	-1874	-2686	-10243
Credit	7366	6642	14748
Debit	9240	9328	24992
Net total labour-related flows			
LDCs	21125	21049	36704
DCs	-11389	11988	-25147

Source: UNCTAD, The World Bank, Liberalising International Trade in Services, A Handbook, 1994, Table 1.11, p. 19.

Table 3. Shares in global service exports and revealed comparative advantage, 1980 and 1992

	Travel		Transport		All Other	
	1980	1992	1980	1992	1980	1992
Share in global trade :						
OECD members	75.0	79.1	79.8	80.5	81.4	85.2
Developing countries	25.0	20.9	20.2	19.5	18.6	14.8
RCAs:						
OECD members	1.01	0.96	1.10	1.02	1.13	1.06
Developing countries	0.93	1.12	0.65	0.82	0.65	0.74
Small LDCs (1 million people or less)	2.19	3.45	1.19	1.85	0.39	1.11

Source: Hoekman, "Assessing the General Agreement on Trade in Services", Chapter 10, Table 2, p. 332 in The Uruguay Round and the Developing Economies, (ed.) Will Martin and Alan Winters, World Bank, January 1995.

Table 4: Inflows of skilled workers as a percentage of total temporary workers in selected OECD countries, 1992-1996 (Thousands and per cent)

	1992	1993	1994	1995	1996
AUSTRALIA					
Skilled Temporary workers	14.6	14.9	14.2	14.3	15.4
% of total temporary workers	17.1	20.3	18.0	18.4	20.5
CANADA					
Skilled Temporary workers	81.8	68.1	60.6	59.9	-
% of total temporary workers	35.5	37.0	35.0	43.7	-
FRANCE					
Skilled Temporary workers	1.8	1.9	2.0	2.2	2.0
% of total temporary workers	5.0	5.6	6.5	7.3	6.6
GERMANY					
Skilled Temporary workers	115.1	63.3	48.4	56.2	47.3
% of total temporary workers	-	25.2	23.1	22.1	17.3
NETHERLANDS					
Skilled Temporary workers	1.9	1.8	2.0	1.5	-
% of total temporary workers	26.4	25.7	29.4	27.8	-
UNITED KINGDOM					
Skilled Temporary workers	12.7	12.5	13.4	15.5	16.9
% of total temporary workers	42.2	42.7	44.6	43.7	44.8
UNITED STATES					
Skilled Temporary workers	123.2	112.5	130.7	147.5	178.6
% of total temporary workers	70.1	61.7	62.0	66.8	70.2

Note: The categories of temporary workers and of skilled workers differ from country to country. Data and percentages are therefore not fully comparable. The figures for total temporary workers refer to the total work or residence permits issued in Canada, the Netherlands, the United Kingdom and the United States, to the sum of temporary programmes in Australia (excluding students), to the total provisional work permits issued plus seasonal workers in France and to guest workers and seasonal workers in Germany.

Source: WTO, Council for Trade in Services, Presence of Natural Persons, Background Note by the Secretariat, Geneva, December 8, 1998, Table 8, p. 26.

Table 5: Format and example of a schedule of horizontal commitments

Commitments	Mode of Supply	Limitations on Market Access	Limitations on National Treatment
Horizontal Commitments	Cross-border supply	None	None other than tax measures
	Consumption abroad	None	Unbound for subsidies, tax incentives, and tax credit
	Commercial Presence	Maximum foreign equity stake of 49 percent	Unbound for subsidies. Foreign investment policy guidelines apply.
	Movement of natural Persons	Unbound except for The following : executive and senior management as intra-corporate transferees, specialists subject to individual compliance with labour market tests, business visitors for periods of initial stay of 3 months.	Unbound except for categories of natural persons referred to in the market access column.

Source: Hoekman (1995), Table 3, p. 13.

Table 6: Format and example of a sector-specific commitment

Commitments	Mode of Supply	Limitations on Market Access	Limitations on National Treatment
Specific commitment	Cross-border supply	None	Unbound
	Consumption abroad	None	None
	Commercial presence	25 per cent of Senior managers should be nations	Unbound
	Movement of Natural Persons	Unbound except as indicated in horizontal commitments	Unbound except indicated in horizontal commitments.

Source: Hoekman (1995), Table 3, p. 13.

Table 7. Commitments percentage by sector and mode of supply (professional services)

(Percentages in each activity)

I. 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%
Architectural 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%	9%	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%
Architectural 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%

Note: Full = Full commitment (indicated by "None" in the market access or national treatment column of the Schedule)

Partial = Partial commitment (limitations are inscribed in the market access or national treatment column of the Schedule)

No = No commitment (indicated by "Unbound" in the market access or national treatment column of the Schedule)

Percentages may not add up to 100 due to rounding. Basis of total is listed sectors.

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

Table 8 : 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		13.7%	
	Managers	44		13.4%	
	Specialists	45	135	13.7%	41.1%
	Others	1		0.3%	
Executives		22		6.7%	
Managers		40	104	12.2%	31.7%
Specialists		42		12.8%	
Business visitors	Commercial Presence	30		9.1%	
				12.2%	
	Sale Negotiations	40	70		21.3%
Independent Contract Suppliers		3	3	0.9%	0.9%
Other		3	3	0.9%	0.9%
Not Specified		13	13	0.9%	0.9%
Total[a]		328	328	100.0%	100.0%

[a] Total number of entries by those 100 WTO Members that have included commitments on Mode 4 in the horizontal section of their schedules.

Source: WTO, Presence of Natural Persons, Background Note, Geneva, Dec 1998, Table 9, p. 27.

Table 9. Duration of stay by type of natural persons[a]

	Intra-corporate transferees							*Business Visitors*					
	E	**M**	**S**	**E**	**M**	**S**		**CP**	**SN**	**ICS**	**Other**	**NS**	**Total**
0-3 months				1	1	1	1	*11*	*20*	*1*			36
6 months								*1*	*1*	*1*			3
12 months			1	1									2
	(2)[b]	(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

[a] Unless otherwise indicated, the following periods are maximum periods which may be reached after an extension of the initial stay

[b]

E ⇒ Executives
SN ⇒ Sale negotiations
ICS ⇒ Independent contract suppliers
M ⇒ Managers
S ⇒ Specialists
⇒ Others

CP ⇒ Commercial presence
NS ⇒ Not specified

Source: **WTO, Presence of Natural Persons, Background Note, Geneva, Dec 1998, Table 10, p. 28.**

Table 10. Entry conditions/restrictions by type of natural persons[a]

		Intra-corporate transferees							*Business visitors*		ICS	Other	NS	Total
		E	M	S	O	E	M	S	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
Free 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	10	1	1	1		2	3	4		1		1	3	17
	≤ 20	1		1		2	2	2					1	9
	> 20	1	1			2	2	2						8
	Abs .figure			2		3	3							8
Senior Staff	15	1		1										2
	20						1	1				1		3
	50	2	1	1										4
	Abs.figure						2	2						4
Ordinary Staff	10					1	1	1						3
Payroll	15					1	1	2					1	5
	20					1	1	2		1				5
	30												1	1
Workforce[c]	50							1						1

Unspecified	2	2	2				1	1			8
Minimum Wage	15	15	15						1	1	47
Disputes[d]	4	5	4		2	2	2	2	1		22
Technology Transfer	1	1	1	7	8	12				2	32

[a] See Table 9 for the legend

[b] The person seeking access must have already worked for the current employer, the minimum period specified Schedules is generally one year.

[c] Total workforce of the country concerned

[d] Absence of labour-management disputes

Source: WTO, Presence of Natural Persons, Background Note, Geneva, Dec 1998, Table 11, p. 29.

Table 11 Other discriminatory treatment affecting work and living conditions

		Real Estate	Subsidy	Foreign Exchange	Borrowing	Taxation	Mobility Restrictions
Intra-company transferees	Executives	7	22			1	2
	Managers	7	22			2	2
	Specialists	8	22			2	2
	Others						
Executives		3	3	1		3	
Managers		4	4	1		4	
Specialists		2	4	1		5	
Business visitors	Commercial Presence	3	17			1	2
	Sales Negotiations	7	22			1	2
Independent Contact Suppliers		1	1				
Other		1					
Not Specified		3	1		1	1	
Total[a]		46	118	3	1	20	10

[a] Total number of entries by those 100 WTO Members that have included Mode 4 in the horizontal section of their schedules.

Source: WTO, Presence of Natural Persons, Background Note, Geneva, Dec 1998, Table 12.

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