

**United Nations
Conference
on Trade and
Development**Distr.
GENERALTD/B/COM.1/EM.25/2
25 November 2004

Original: ENGLISH

TRADE AND DEVELOPMENT BOARD
Commission on Trade in Goods and Services, and Commodities
Expert Meeting on Trade and Development Aspects of
Professional Services and Regulatory Frameworks
Geneva, 17-19 January 2005

Item 3 of the provisional agenda

**Trade and Development Aspects of Professional Services and
Regulatory Frameworks***

Note by the UNCTAD secretariat

Executive summary

Professional services comprise a variety of heterogeneous activities presenting different features. These services are currently at the core of the emerging world knowledge economy. Adequate provision of such services is crucial for economic development as they contribute to creating an efficient business infrastructure, including its fiscal and legal aspects, and ensuring the competitiveness of firms. Market developments, technological innovation and regulatory changes are radically transforming the content of professional services and the manner in which they are supplied to markets worldwide. The world market of some professional services is dominated by large professional services firms from developed countries experiencing a process of accelerated internationalization. Developing countries are confronting the challenge of strengthening their domestic supply capacity in these services and enhancing their contribution to economic growth and development. Adequate domestic regulatory frameworks and active public policies, including trade policy, can contribute to achieving their development objectives. A supportive international environment allowing the potential in developing countries in many professional services to be realized would greatly contribute to the achievement of those countries' development objectives. Regional initiatives and development-friendly rules and disciplines in the multilateral trading system on the recognition of qualifications and commercially meaningful commitments on the temporary mobility of professionals could significantly contribute to increasing the participation of developing countries in international trade in professional services and implementation of GATS Article IV.

* The document was submitted on the above date for technical reasons.

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Introduction

1. This note examines factors affecting trade in professional services and conditions under which developing countries could increase their contribution to global services trade. A number of emerging trends can be observed in professional services, including the impact of new technologies on business and regulatory frameworks, outsourcing, externalization and internationalization of production, and the importance of regional trade and South-South trade and of competition-related issues. Developing countries are seeking to ensure that their professional service providers are able to move to provide these services abroad under a contract or on a temporary basis and that such movements are not undermined by any excessive visa, work permit, economic needs tests (ENTs), recognition of qualifications, licensing, administrative or procedural requirements in foreign markets. Progress on recognition of qualifications of professionals from developing countries would be one of the building blocks for increasing their contribution to trade in professional services. Bilateral agreements and regional processes of trade liberalization demonstrate that progress in this area could be achieved. Meanwhile, cross-border trade through global outsourcing of services to developing countries and economies in transition has been increasing in scope. Markets should be allowed to operate more freely within appropriate policy and regulatory framework in this area so as to avoid erecting unnecessary barriers to trade in professional services. The General Agreement on Trade in Services (GATS) could prove its relevance in delivering meaningful progress in the negotiation of specific commitments in professional services of export interest to developing countries across all modes of supply and in the area of disciplines of domestic regulations and recognition. In making the regulatory environment transparent, effective, flexible and simplified, Governments could help maximize the contribution of professional services to development by targeting national policy objectives such as protection of consumers, access to essential services and selecting best practices for monitoring and ensuring the implementation of such objectives.

I. Professional services and development

2. Professional services have come to represent services, which require large amount of training and expertise and are usually associated with accredited professions, such as lawyers, doctors, accountants, architects and engineers, and non-accredited or free exercise professions. The main development impact of professional services is in their contribution to knowledge generation and its diffusion to other productive activities and social endeavours. They contribute in creating efficient business and investment infrastructure, including fiscal and legal aspects, as well as in achieving good corporate governance. Economists have found a strong link between human capital and economic growth, where human capital is measured according to economically relevant skills. The growth in labour productivity and overall benefits to society has been particularly pronounced in the case of women since with skills they tend to move into jobs with higher economic benefits instead of staying in manual jobs. Most professional services in developing countries are characterized by dual markets, where a small number of modern and qualified professional services firms, usually linked with international networks, are catering to large domestic and international clients, while a large number of professional small and medium-sized enterprises (SMEs) and individual practices continue to attend to the needs of other SMEs in the domestic economy and individual consumers. Regarding trade patterns, most developing countries are net importers of professional services.

3. In terms of growth, employment in professional services has been growing at a faster pace compared with other sectors of the economy. For example, in Kenya it exceeded by 0.4 per cent economy-wide employment creation where employment in professional services reached 40 per cent by the end of the 1990s, up from 27 per cent in the 1970s. Leading services sectors were in the traditional areas of the medical, teaching, accounting and management, consultancy professions.

However, ICT-related services, including data processing, have exhibited the most remarkable growth. These sectors usually command a higher than average wage and are important factors in promoting savings and consumption-led growth.

4. As host countries, many developing countries with a relatively open trading environment and proactive policies in attracting investment have a foreign presence of some sort in nearly all of their professional services. The competition from international services firms is likely to continue to grow in developing countries, with further regulatory reform removing barriers to foreign services. In a number of developing countries, particularly LDCs, there is an absence of necessary regulatory frameworks and relevant institutions. The challenge to developing countries is in putting in place a regulatory framework that would respond to the growing complexities of the market and provide for domestic capacity development and competitive exports. With the overall aim of striking a balance between economic efficiency and development needs, any regulatory reform should be paced and sequenced so as not to lose sight of the need to institute complementary policies and instruments to ensure the translation of economic gains into the attainment of social goals benefiting the poorer and weaker sections of society. Foreign firms, which have gained expertise in many new and complex areas through their accumulated experience in other markets, would have an initial competitive advantage over domestic ones. Having the necessary regulatory and institutional framework for ensuring competition among international professional firms and also between international and domestic suppliers would be one of the ways to benefit the domestic market by lowering prices and enhancing the variety of products. Adopting measures including training in business and project management, information and communication technology, international standards and quality assurance and export promotion to support domestic providers, particularly SMEs, in developing experience and expertise on a cost-competitive basis would be the best response in ensuring competitive advantage of domestic firms, particularly in the traditional or niche markets. Promoting cooperation and partnerships including through joint ventures between local and foreign firms would seem to be a good way of ensuring that both indigenous and world-level services are available to domestic clients.

II. Global market trends

5. It has been estimated that the global market for all professional services totalled over \$1 trillion in 2002. Professional services are one of the fastest growth sectors in economies worldwide, achieving double-digit growth rates; however their relative importance for the services trade of developing countries has been declining (see table 2), contrary to developed economies, which saw their firms dominating in all global professional services markets as illustrated below. Exports of professional services reached \$270 billion in 2002: developing countries accounted for 15 per cent of total exports, with China, Brazil, the Philippines, Argentina and Egypt as the leading exporters. A number of factors account for the expansion of professional services, among them the widespread externalization of functions by firms, particularly in developed countries. However, as seen in

Table 1

Trade in professional services as:				
Export as % ratio to GDP		Import as % ratio to GDP		
Countries	1995	2003	1995	2003
Developed economies	0.7	1.0	0.6	0.9
Developing economies	1.0	0.6	1.0	0.7
South-East Europe & CIS	0.6	0.7	1.1	1.2
World	0.7	0.9	0.7	0.9

Source: UNCTAD secretariat's calculations based on IMF BOP and UNCTAD ETS database. Professional services here are part of the "Miscellaneous business, professional and technical services" that also include R&D, architectural and engineering, agricultural, and mining services.

table 1, this did not happen in developing countries, whose GDP grew at a rate exceeding that of trade in professional services, resulting in a relative decline in the contribution of professional services to GDP.

6. At the sub-sector level, total worldwide revenues for the accounting industry are estimated at around \$142 billion for 2002. In the case of management consulting, revenues were estimated at

Table 2

Trade in professional (narrow)* services as per centage of:					Trade in professional (broad)** services as per centage of:				
Export as % of total exports of services			Import as % of total imports of services		Export as % of total exports of services			Import as % of total imports of services	
Countries	1995	2003	1995	2003	Countries	1995	2003	1995	2003
Developed economies	2.6	4.7	4.0	6.3	Developed economies	18.1	20.3	17.4	19.7
Developing economies	7.0	2.2	3.7	2.2	Developing economies	24.3	13.5	19.8	13.5
South-East Europe and CIS	0.6	4.1	3.5	5.7	South-East Europe & CIS	14.8	11.6	16.8	17.3
World	2.7	4.5	4.0	5.9	World	18.7	19.3	17.7	18.9

Source: IMF Balance of Payment Statistics.

Weighted averages based on available data.

*Legal, accounting & auditing, advertising, market research and public opinion polling, management consultancy.

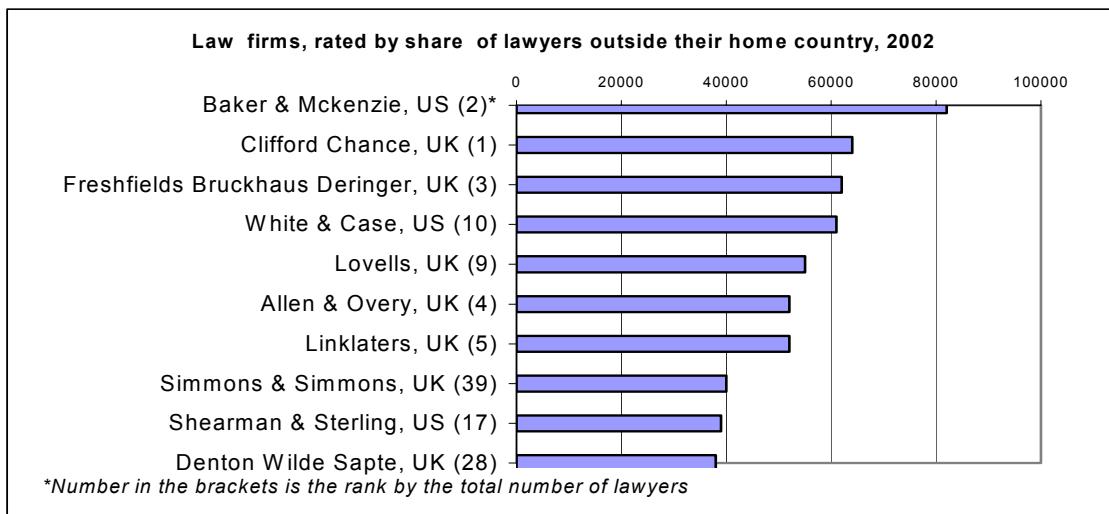
Source: IMF Balance of Payment Statistics.

Weighted averages based on available data.

**Part of the "Miscellaneous business, professional and technical services" that also include R&D, architectural and engineering, agricultural, and mining services.

around \$70 to 80 billion for 2000, and for engineering at around \$170 billion. The main markets for these professional services are concentrated in developed countries, generating almost 85 per cent of total revenues. The world's most profitable top ten law firms are all from the United States, while only three are among the top most international firms.

Table 3



Source: The Economist, 26 February 2004

7. There is an increasing internationalization in the supply of professional services. Trade in these services has traditionally been conducted through different forms of commercial establishment

abroad. In business, professional and technical services 71 per cent of US imports were intra-firm, and 56 per cent of exports were intra-firm in 2002. Recently, growing trends of global outsourcing have become drivers of trade, from which both exporters and importers are gaining. Of the approximately \$1.45-1.47 of value derived from every dollar spent offshore, US firms receive \$1.12-1.14, while supplying firms receive 33 cents of the value.¹ In addition, the importance of high-skilled migration in OECD countries is growing. According to 1998 data² for EU countries, 3.1 per cent of all employed persons in professional and associate occupations were non-nationals of the host country; of this, 0.6 per cent were from developing countries, representing 254,000 persons. In these EU countries, and also in the United States, around 30 per cent of annual migration flows into employment are professionals going into various occupations. The number of people in managerial and professional positions in the United States alone has risen by 1.5 million since 2000 to more than 47 million. With a net of 22 million such new jobs expected in the United States by 2010, the number of jobs exceeding the number of available workers may reach 10 million.³

8. A trend towards concentration in many professional services is emerging at the firm and country level. In the management consulting industry large firms represent more than 51 per cent of the European market. The “Big Four” accounting firms account for a third of the industry’s worldwide revenues in accounting and auditing, and in auditing they generate 67 per cent of global revenues. They audit the bulk of publicly listed companies in developed countries: 78 per cent in the United States, 80 per cent in Japan, 90 per cent in Italy and the Netherlands, and between 95-98 per cent in the United Kingdom. Their combined revenues amounted to 84 per cent of the total revenues of the largest accounting firms in 2003. In the advertising industry the share of billings received by a limited number of top agencies is substantial, representing between 30 and 60 per cent of the market, depending on the country. In the United States, the hundred largest legal firms generated revenues of 41.7 billion in 2003, representing more than 60 per cent of total revenues of the profession. In the United Kingdom the top six firms generated in 2003 almost 40 per cent of the top one hundred law firms.

Table 4
Top 10 international design firms
(by international revenues in 2004, millions of dollars)

Rank		Firm	Country	Type*	Revenue	Foreign %
2004	2003					
1	1	SNC-Lavalin International Inc.,	Canada	EC	1 411.9	56
2	2	ABB Lummus Global	USA	EC	1 178.7	98
3	5	Fluor Corp.	USA	EC	1 053.7	55
4	13	KBR	USA	E	975.3	77
5	3	Fugro NV	Netherlands	GE	817.0	87
6	7	AMEC plc	UK	EC	704.0	59
7	12	ARCADIS NV	Netherlands	E	613.0	71
8	4	Bechtel	USA	EC	573.0	34
9	10	Jacobs	USA	EAC	564.2	30
10	25	Parsons	USA	EC	491.6	32

Source: Rank is according to the *Engineering News Record* ranking of companies.

A=architect; E=engineer; EC=engineer-contractor; AE=architect-engineer; EA=engineer-architect; ENV=environmental; G=soils or geotechnical engineer; P=planner.

9. Developed country firms, as seen from table 4, dominate market for architectural and engineering services. Only seven developing country international design firms that are ranked in the world’s top 200 have worked in developed country markets in 2004: Africon, South Africa (in the United States,

¹ McKinsey Global Institute, *Offshoring: Is it a win-win game?*, San Francisco, August 2003, p. 9.

² OECD, International mobility of the highly skilled, 2001.

³ A special report by the Chamber of Commerce of the United States, “Jobs, trade, sourcing and the future of the American workforce”, April 2004.

Ireland, Australia and New Zealand); TCE Consulting Engineers Ltd, India (in Italy, the United Kingdom and Japan); Dar Al-Handasah Consultants, Egypt, ranked 17 in the world (in the United States and the United Kingdom); CWE, China (in the United States and Canada); SEI Engineering Inc., China (in the United Kingdom); Otepi Consultores SA, Venezuela (in Spain). Among the 200 top world international design firms ranked on the basis of international revenues in 2003, 23 are from 10 developing countries.

III. Scope and importance of professional services

1. Definition of professional services

10. Most of the services regarded as highly skilled professional either have no manual labour component or are associated with established professions. More restricted definitions of professional services incorporate the requirement of licensing or accreditation to provide the services as a crucial element defining these services. For example, in the NAFTA professional services means services, the provision of which requires specialized post-secondary education, or equivalent training or experience, and for which the right to practise is granted or restricted by a Party, but does not include services provided by tradespersons or vessel and aircraft crew members. Clear definition is needed for policy formulation, for developing comparable indicators to assess professional services across countries and to measure trade in professional services. It must be recognized that the category of professional services cannot be static since with time different occupations can achieve that status or be recognized as professional.

11. In the GATS Services Sectoral Classification List (MTN.GNS/W/120) professional services are classified as sub-category of business services encompassing a heterogeneous range of activities, not all of which are usually regarded as business services, for example health-related services mainly consumed by households. These services include: legal services, accounting, auditing and book keeping services, architectural services, engineering services, integrated engineering services, urban planning and landscape architectural services, medical and dental services, veterinary services, services provided by midwives, nurses, physiotherapists and para-medical personnel, other services not defined explicitly. It is not clear why some services corresponding to the same Division 86 of the UN Central Product Classification were placed under "professional services", and some under "other business services". No indication is given as to what should be considered under the category "other professional services". The Negotiating Group on Services (NGS) during the Uruguay Round highlighted the fact that the provision of professional services generally depends on the experience of the supplier; this is understood to mean the employment of proven knowledge and abilities to address the needs of the clients. The NGS also highlighted the personal contact that must exist between the supplier and recipient of the service. The combination of qualification level and occupational category could be useful for analytical purposes, to further refine the classification of professional services, and in terms of scheduling specific commitments under the GATS. Some countries have made proposals suggesting alternative definitions and classification of professional services under the GATS, for example in legal services, implications of which would need to be further analysed and discussed.

2. Main features and characteristics

12. The regulatory approach differs between the *accredited professions*, such as lawyers, doctors, accountants, architects and engineers, and non-accredited or *free exercise professions*. In the first case the right to practise is granted or restricted, and the profession is subject to accreditation requirements and procedures, licensing or authorization. The professional is expected to maintain high professional conduct and standards and to uphold the welfare of clients and society over and above pursuing pure

profit maximization. In the second case the practice of the profession is simply based on market acceptability. These professions are, with exceptions such as advertising services, subject only to general business regulations. In some professional services such as laboratory-testing, environmental auditing and risk analysis, and certification of organic production, firms are the ones that need to obtain certification to provide services.

13. The same professional service can be supplied either through the individual practice of the profession or through professional service firms. Large professional services firms tend to internationalize their activities, and in the case of accredited professions, usually do so by means of global partnerships; independent local firms agree by contract to exploit a single services trademark and be subject to a common set of rules and standards.

14. Professional services present significant differences concerning the provider-client relationship. They tend to develop long-term provider-client relations, since they are associated with high initial costs of building trust, which makes supplier shifting onerous. This is the case, for example, in auditing and management consulting services where learning about clients' systems and processes and involving clients are necessary. This is also true where maintenance and upgrading are required, as in the case of software and computer-related services. Other professional services are supplied in discrete bundles as projects, for example, in architectural and engineering services. Other business services such as advertising face high client turnover and long-term relationships tend to be the exception rather than the rule.

IV. Professional services and regulatory frameworks

15. Regulation of business activities has emerged over time; through it societies have sought to accommodate different public and private concerns, a fact which makes it difficult to argue for changing national legal systems exclusively in the name of regulatory efficiency. On the economics side, regulation is usually explained in terms of the need to correct market failures and to seek efficient outcomes by addressing various externalities, including social and public policy considerations, as well as information asymmetries between providers and consumers of services. In regulating professional services which are provided to individual consumers, for example medical services, issues of quality of service and protection of consumers are the main considerations. Where professional services are provided to business, the independence of providers (avoiding a conflict of interest) and ensuring competition are the main regulatory objectives. In addition, Governments may need to address concern that foreign professionals, who may be less qualified than domestic ones, may displace domestic providers, thus lowering the overall level of remuneration for the services provided.

16. All regulatory frameworks address to a greater or lesser degree various aspects of starting business operations, provide for ways of enforcing contracts, regulate bankruptcy and liability, define labour and employment conditions and requirements, and ensure protection of consumers, quality of services and access to essential service. Enforcement as well as administrative and institutional capacities are areas where developing countries are often disadvantaged or the cost of monitoring and implementation is prohibitive.

17. Where the supply of services is based on the entry of natural persons, the latter are subjected to immigration and labour laws and related procedures. Persons entering for temporary or contractual supply of services often face the same type of market access requirements as those seeking employment or permanent entry. Such entry conditions are typified by ENTs or labour market tests,

onerous and lengthy visa procedures, the requirement to obtain work and residence permits, and licensing requirements, even when the supply of a service is of a temporary or contractual nature.

18. The choice of a regulatory approach and enforcement depends on the type of activity and on country circumstances, including administrative capacity. Standardized services are the only ones where quality standards can be set. Because of the difficulty in assessing the quality of services, regulations may aim at establishing *who* could qualify for supplying professional services. Registration, certification and licensing are the usual approaches to regulating professions, with licensing being the most stringent since it would limit entry to only those professionals holding

Box 1. Movement of Nurses and Regulatory Frameworks

Many developing countries have a comparative advantage in professional health services, notably due to the availability of skilled health professionals. In recent years, the international movement of nurses has been steadily increasing. The pattern of movement, which basically involves nurses from the South moving to the North, can give rise to brain drains and regulatory problems related to worker protection rights, recognition of qualifications and wages, among others. This has led to tensions between the need for Governments to regulate the health sector so as to achieve public health and other objectives (including universal service obligations) and trade liberalization in this area. Nurses' associations have identified the following areas of concern with regard to GATS and trade liberalization:

- Downward harmonization of recognized professional qualification,
- Threat to quality and universal access to health care,
- Deteriorating work conditions and wages, and
- Lack of transparency and of participation of relevant stakeholders in negotiations.

The International Council of Nurses (ICN), representing both developed and developing country members, calls for the promotion of equity, sound regulation, advancement of the nursing profession and participation in decision-making. The right of the individual nurse to move is recognized. However, the ICN also strongly emphasizes the need for ethical recruitment, policies on definition, scope and protection of title, and discourages the practice of nurse recruitment from countries without sound human resource planning and governance frameworks, e.g. high standards for personal/professional growth and performance, participation of the profession in public policy, accountability to the public, and proper recognition and remuneration, as well as ensuring adequate supply at home and providing incentives for return.

Source: Based on International Council of Nurses, International Nursing Review 49

licences. The concern that emerges in this case is how to ensure that competition is maintained in the market. It would be important to consider limited licensing system for foreign professional services providers as a trade facilitating measure. In its recent report on competition in professional services in the European Union,⁴ the European Commission found numerous incidences across the wide range of professions of anti-competitive practices and price-fixing which resulted from outdated rules, including restrictions on advertising, recommended fee scales, and restrictions on entry into professions, and which have continued over the last 10 years. All of this has accounted for higher costs for professional services by all domestic firms and negatively influenced their export cost competitiveness.

19. At the same time, ensuring flexibility in regulations to accommodate technology-driven changes and changes in the type and mode of services provided by professions would ensure the continued effectiveness of regulatory frameworks. Technology in itself has been replacing some of the professional services, making their regulation redundant. In regulating the profession, government should aim to shape and influence the profession, its evolution and its future competitiveness.

⁴ COM(2004) 83 final, Brussels, 9.2.2004.

20. The role of professional associations has been changing over the years. Professional associations act as self-regulatory bodies enjoying delegated governmental authority or co-exist with government regulations as private or public associations. There may be few associations in one profession with one having delegated government authority. At the same time, many developing countries still do not have professional bodies in some professions or their professional associations are not members of the international professional bodies, which are often involved in standard setting. For example, out of 53 countries in Africa only 21 have professional bodies that are members of the International Federation of Accountants. In the self-regulating case, professional associations would not only be involved in standard setting, professional development and accrediting, but also provide for enforcing those standards and conducts. The credibility of self-regulation has become questionable owing to the tensions between private and public interests. In many countries, where there is extensive public attention to the regulatory side, tolerance and support for self-regulation have disappeared. This has

Box 2. Regulating entry to professional services in Kenya

All professions in Kenya have their own professional associations, the status of which ranges from that of pure voluntary association with no impact on market entry (as in medical services) to mandatory registration for practice (as in the case of law). Apart from meeting non-discriminatory criteria of having professional qualifications from recognized institutions and proven experience, registration with the relevant board and sitting an examination are usually required for being able to practise an accredited profession in Kenya. The Government regulates through these boards the quality of services and protection of consumers, and ensures public health and safety. Some professions are not represented on the board (medical) and members are mainly government-appointed, but in some cases boards are independent (law), include associations (architects) or work together with them (law or engineering).

Kenya Medical Association (KMA) has no impact on the terms of entry into profession and is counting only half of doctors among its members. It is estimated that a quarter of doctors in Kenya are from other developing countries while Kenyan doctors are working in South Africa, Botswana and Swaziland as employees since establishing practice is difficult. Access to EU and USA markets remains restricted at large due to the lack of recognition and entry visa requirements coupled with the lack of market information. In neighbouring countries, requirement to work in the public hospitals prior to establishing private practice has been acting as a deterrent to trade.

The Architectural Association in Kenya (AAK) and the Institution of Engineers (IEK) set standards for professional education, training and practice, establish and accredit professional development programmes, market professional services, establish codes of conduct, facilitate research and dissemination of information, and liaise with regulatory agencies for licensing and other considerations. AAK is seeking to strengthen its self-regulation through the Government empowering it to discipline members. IEK is charged with policing the industry and disciplining members. Both professions adhere to a market-based pricing of their services, including foreign suppliers, although a legislated pricing schedule exists. Among architects and quantity surveyors 5 percent are foreign. Kenya imports services from South Africa, Europe and China while is also exporting them to Dubai, Namibia, Swaziland, Zimbabwe, Botswana, South Africa, Eastern African countries, Rwanda, etc. but still supply of professionals exceeds own market needs. Partnerships with foreign architects are required in cases where foreign architects do not have registration in Kenya, but not for engineers for whom temporary licenses exist for trade purposes. Despite established linkages between regional professional associations, these have not helped to facilitate trade. Only in case of surveying professionals under an East African Community arrangement, are surveyors in Kenya, Uganda and the United Republic of Tanzania are able to provide services throughout the Community.

Two thirds of accountants are registered members of the Institute of Certified Public Accountants of Kenya, a standard-setting body which not only disciplines its members, but also enforces accounting standards. Applicants with qualifications from recognized professional bodies can be exempted from having local CPA qualifications. A Mutual Recognition Agreement has been concluded in auditing between Kenya, Uganda and the United Republic of Tanzania. The sector is dominated by “Big Four”, which control 90-95 per cent of the large private and public sector consultancies.

Source: Ikiara, G.K. “Professional services in Kenya: Constraints and opportunities for trade”, study prepared for UNCTAD, 2000.

led to the public interest side of regulation being transferred from professional bodies to the government-instituted independent regulatory bodies⁵. The optimum solution is not either nor, but coexistence, allowing for different functions to be performed by different bodies.

V. Professional services in regional trade agreements

21. Trade and regulatory frameworks in professional services have been addressed in the context of most regional trade agreements; however, treatment significantly varies between agreements. In addition, a significant number of stand-alone agreements provide for the free exercise of professions among signatory countries.

1. Labour market integration approach

22. These arrangements have the ultimate objective of achieving the full integration of labour markets and are usually, but not necessarily, associated with the establishment of a common market. The Nordic countries' common labour market (created in 1954) is the best example of an arrangement of the kind contemplated by Article V bis of the GATS. The arrangement allows all Nordic citizens to work in another Nordic country without a work permit. This also covers unemployment and social security benefits. A Nordic citizen receives in principle the social benefits of the country in which he or she lives, without regard to his or her nationality.

23. The experience of the European Community is another example of every citizen of a member State of the Community having the right to reside and work in the territory of another member State either on a temporary or a permanent basis. The EC approach to facilitating movement of professionals evolved from harmonization of professional standards based on mutual recognition of diplomas that was made possible by harmonization of curricula, to market access based on broad equivalence of qualifications and customized recognition accorded to individual professionals. While pursuing the integration of markets for professional services, the EC experience suggests that implementing the right of establishment and free movement of natural persons, and allowing for the recognition of qualifications and licensing might not be sufficient to guarantee the smooth functioning of an integrated market for these services and that competition issues in professional services need to be addressed. Furthermore, language and other cultural diversities as well as limitations on transfer of pension rights and differences in tax systems are contributing factors to limiting the movement of professionals within the EC to less than 2 per cent.

2. Services-based liberalization

24. Liberalization of trade in professional services in this case is achieved as part of the regional liberalization of trade in services. NAFTA addresses professional services in an annex to the chapter on cross-border trade in services setting out general provisions and addressing licences and certification issues, aiming to ensure that national authorities process applications within a reasonable time frame; establishes criteria for the development of professional standards in different areas,⁶ and encourages relevant professional bodies to develop mutually acceptable standards and criteria for licensing and certification and to submit recommendations in that regard to the Free Trade Commission for its consideration. In addition, it establishes special provisions relating to foreign legal consultants and temporary licensing of engineers. These provisions are reflected in other NAFTA-type agreements.

⁵ Financial Times, 13 September 2004.

⁶ Education, examinations, experience, conduct and ethics, professional development and recertification, scope of practice, local knowledge and consumer protection.

25. Among the NAFTA-inspired agreements, the agreements signed by the United States with Singapore and with Chile provide for a yearly quota of 5,400 for Singapore and 1,400 for Chile for preferential entry to the United States in certain professions established in a non-exhaustive list. The United States-Singapore agreement encourages relevant bodies to develop mutually acceptable standards and criteria for licensing and certification of professional service providers and to develop procedures for their temporary licensing. Bilateral agreements between the United States and Australia and the agreement between the United States and Morocco have no market access commitments with respect to professionals and no chapter on temporary entry of businesspersons, which is present in NAFTA and in the Chile and Singapore agreements.

26. ANZERTA, an agreement between Australia and New Zealand, provides for an open market for professionals and is supported by the mutual recognition agreement of professional qualifications, and the Trans-Tasman Travel Arrangement allowing for nationals of these countries to reside and work in each other's territory, resulting in the integration of markets for professional services. Professionals registered to practise an occupation in one country can practise the same occupation in the other, with the exception of medical practitioners. SAFTA, signed between Singapore and Australia, has promoted significant liberalization of professional services through the elimination, or easing, of residence requirements for professionals such as architects, engineers, accountants and auditors, and has improved the market access conditions for legal services. Under SAFTA countries will encourage their relevant professional bodies to enter into negotiations on mutual recognition of professional qualifications and/or registration procedures, starting with engineering, accountancy professions and pharmacists. Negotiations on an Mutual Recognition Agreement (MRA) for architects have been concluded.⁷

3. Mixed approach

27. This approach follows a dual track of labour market integration and services trade liberalization in parallel. With the objective of achieving full labour market integration, CARICOM is progressively implementing free movement of people for an initial list of categories granted the right to move. CARICOM nationals who are university graduates, as well as artists, sportspersons, musicians, and media workers, are allowed to move freely in the region for work purposes.⁸ Initial entry of six months is granted on the basis of the certificate issued by the home country, and during that period the host country reviews qualifications, and upon approval grants definite entry. However, the issue of recognition of licences and qualifications for the accredited professions to allow the free exercise of those professions is still pending.

28. The Andean Community (AC), while aiming for labour market integration as a final objective, is seeking liberalization of trade in services through successive rounds of negotiations. Important commitments have been made with respect to intra-corporate transferees, and "individually moving workers", including professionals, who have the right of free movement for work in any Andean country. Consequently, markets have been opened for professionals in the non-accredited professions under intra-corporate transfer. Member countries, which apply a ceiling for hiring foreign workers per enterprise, geographical region or activity, insofar as the number of workers or remuneration is concerned, grant national treatment to AC nationals. Work is underway to achieve recognition of licences, certifications and degrees in services.

⁷ Also, in the FTA between New Zealand and Singapore a priority list has been identified for work towards mutual recognition of qualification in 10 sectors, including engineers and doctors.

⁸ All CARICOM Members with the exception of Montserrat and Suriname have enacted legislation implementing this obligation.

29. ASEAN is pursuing a two-tier liberalization of services trade which allows for accelerated trade liberalization among a few members, with others following at a slower pace. It envisions the free flow of “skilled labour and talents” and the facilitation of movement of businesspersons. Complemented by the ASEAN Framework Agreement on Services, skilled-labour mobility constitutes a parallel process to implementing the movement of professionals, self-employed or otherwise. A sectoral approach has been adopted in developing MRAs for each professional service.

VI. Recognition of professional qualifications

30. In terms of professional qualifications, recognition has two components: the content of the training (diplomas, qualifications or experience); and in the accredited professions obtaining the home country’s authorization to practise. The idea behind mutual recognition (MR) of professional qualifications is that if a professional can provide services lawfully in his/her own country, he/she can do the same in any other participating country. MRAs are often concluded by neighboring countries and represent a component of broader regional cooperation initiatives. Others are part of cultural agreements and often reflect linguistic and other kinds of cultural affinities between the countries concerned.

31. The most far reaching MRA would imply the recognition of the equivalence of the content of the training, as well as of the home country’s authority to certify such training through the granting of diplomas, and would therefore lead to an unconditional and open-ended right for foreign professionals to provide services in the host country. Less ambitious kinds of MRAs would include only a partial recognition of the content of the training or be limited to the recognition of the authorities certifying the training and would imply that the host country sets additional requirements for granting access for foreign professionals, usually by requiring compensatory measures. Some MRAs do not go much further than referring to exchanges of information and dialogue.

Box 3. The case of MERCOSUR

MERCOSUR is proceeding with mutual recognition of degrees based on broad harmonization and accreditation of curricula. While governmental authorities are ultimately responsible for the system, private sector representatives play a key role in the development of the common criteria that are the basis of the accreditation.

Initially, a Consulting Commission of Experts, which comprised national experts, was set up to analyse and take stock of the specific teaching content and method in each of the MERCOSUR countries, and to analyse which kind of specific activities professionals in each of the four countries could carry out after obtaining a university degree. On the basis of this preliminary work, the Commission started defining baseline Quality MERCOSUR Standards for three selected careers – agronomy, engineering and medicine. The draft standards were sent to the national accreditation agencies for evaluation and were subsequently modified to reflect the comments provided by the agencies.

In order to formalize and consolidate this process, the MERCOSUR Experimental Mechanism for Career Accreditation (MEXA) was established. The goal was to set up a mechanism for the recognition of the university degrees granted by those institutions whose curricula had been accredited on the basis of the agreed standards. The National Accreditation Agencies are responsible for carrying out the accreditation process in their respective countries and report to the Council of the Ministers of Education on the implementation and evaluation of the mechanism. The recognition of the degrees does not imply, however, an automatic right to exercise a profession. At the time of writing, 14 curricula had been accredited in the field of agronomy.

Despite limited practical results, the whole process is regarded as positive by the participating countries, since it has apparently facilitated an exchange of views and experiences among the national institutions in charge of education, professional associations and public and private universities, and is regarded as a tool for enhancing the overall quality of higher education in the region.

32. While international harmonization of standards and processes is likely to be the most effective instrument for ensuring the free movement of professional services suppliers, equivalence is the best option when harmonization of standards is lacking or is too difficult to achieve.

33. Negotiating MRAs is a task requiring considerable time and effort. To negotiate an MRA on professional qualifications countries must have in place a domestic system for regulating the profession, which may be lacking or be poorly developed in developing countries. Even when domestic systems are well developed, the task of comparing them and assessing their potential equivalence is not straightforward. Education and training systems, as well as licensing requirements, tend to be complex and opaque, and therefore difficult to evaluate.

34. External factors might undermine the effectiveness of the negotiated MRAs. Potential obstacles include practices of professional associations which may disregard the MRAs, especially if the MRAs were negotiated without their direct involvement; domestic regulations which may make it difficult for consumers to change services providers; and lack of adequate publicity and transparency regarding the MRAs, which may make private companies and the public at large reluctant to rely on the services provided by professionals who have foreign qualifications.

VII. Professional services in the GATS and developing countries

35. In the context of the GATS negotiations, a number of countries have signalled their interest in making progress on professional services. So far, 48 (the EU counted as one) out of 148 WTO members have presented their offers, with changes made to professional services in two thirds of them. These changes include: (a) undertaking commitment in new sub-sectors (e.g. engineering services, urban planning and architectural services, software consulting services); (b) full commitment by eliminating all restrictions; (c) removal of market access limitations such as numerical ceilings, foreign equity limitations, forms of legal entity (e.g. joint venture requirements), authorization, qualification and registration requirements,⁹ and providing description for ENTs; (d) elimination of national treatment limitations such as residence and nationality requirements, local training requirements, and prior professional practice/employment requirement. The initial offers provide very modest progress in respect of Mode 4, particularly for independent professionals and contract-based movement of export interest to developing countries. Many developing countries and, most importantly, least developed countries face challenges in presenting their own requests and offers owing to the lack of resources, technical expertise and the capacity to conduct assessment of trade in services at the national level in order to identify areas of interest to them. Commercially meaningful commitments by developed countries in the professional services of interest to developing countries would be a contribution to the effective implementation of Article IV of GATS.

36. There are differences, however, between developed and developing countries in terms of their specific interests in liberalizing professional services. These differences are with respect both to the particular professional services targeted for liberalizations, and to the mode of supply of services and the type of movement of natural persons that they would like to see incorporated in the specific commitments. Regarding particular professional services, developed countries' negotiating proposals and requests cover a wide range of professional services or activities, including legal services, computer and related services, management consulting and related services, architectural services, engineering services, scientific and technical services, technical testing and analysis, accountancy, and

⁹ This way, members would still be able to maintain those measures but make them compatible with GATS Article VI provisions instead of using them as a way of limiting market access.

educational services. Developing countries concentrated their requests on a more limited number of professional services, in particular computer and related services (negotiating proposals made by Costa Rica, India and MERCOSUR), and on activities related to engineering, integrated engineering and architectural services, construction, tourism, accounting, auditing and bookkeeping, and in some cases in health-related professional services. These requests cover particularly mode 4 liberalization commitments. Developing countries have also expressed interest in recognition of qualifications for their professionals.

1. GATS negotiations on disciplines in domestic regulation

37. Regulation of services is used for a variety of public policy objectives such as ensuring the development of services sectors, ensuring competition and consumer protection and safeguarding non-trade concerns such as universal service, protection and promotion of cultural diversity and practices, and environmental protection. The preamble of the GATS provides, *inter alia*, for the right of countries to “regulate and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right”.

38. Article VI provides for a number of basic disciplines on domestic regulation and negotiations to develop further disciplines. The purpose of the article is to provide predictability of market access for service suppliers and ensure the effective implementation of specific commitments. Article VI:4 disciplines are particularly important for the professional services sector, especially in the areas of qualification and licensing requirements and procedures and their link to the issue of recognition. In addition, there are specific provisions regarding professional services in Article VI:6 the effective application of which could be facilitated by establishing guidelines for recognition of qualifications.¹⁰

39. The work being undertaken on disciplines on domestic regulation revolves around developing disciplines relating to qualification requirements and procedures, licensing requirements and procedures, and technical standards as mandated by Article VI:4. These disciplines shall aim to ensure that such requirements are, *inter alia*, (a) based on **objective and transparent criteria**, such as competence and the ability to supply the service; (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 the supply of the service**. Aside from this, countries are also engaged in discussions relating to recognition issues, all of which relate to facilitating trade in professional services.

40. The Working Party on Domestic Regulation’s current work focuses on two broad headings: (1) discussion of concepts relating to the development of Article VI:4 disciplines, where the following issues are tackled: (a) transparency, (b) necessity, (c) examples of measures to be addressed under GATS Article VI:4; (c) other Article VI:4 issues, such as those relating to the scope of the possible disciplines and the relationship of such disciplines with national treatment; and (2) developments of disciplines for professional services, where the following issues are discussed: (a) recognition, and (b) the applicability of the accountancy disciplines to other professions.

41. Discussions and proposals submitted at the Working Party on Domestic Regulation point to an interest to move forward and make progress in fulfilling the mandate relating to domestic regulation disciplines by achieving some substantive outcomes on the issues covered below. While there is this

¹⁰ Article VI:6 provides that where specific commitments regarding professional services have been undertaken members shall provide for adequate procedures to verify the competence of professionals. See also Decision on Professional Services, 15 April 1994, LT/UR/D-5/7.

motivation, countries' varying priorities and sensitivities have served as stumbling blocks to reaching more conclusive outcomes.

42. Members are seeking to clarify *what specific measures could fall under Article VI:4* or are Articles XVI/XVII measures. The general understanding is that in principle, the obligations of Articles XVI/XVII and disciplines to be developed under Article VI:4 should not overlap in respect of their application scope. A way to address problems of delineation and relationship of regulatory disciplines with national treatment has been suggested through the incorporation of an element of national treatment in regulatory disciplines to be developed which indicates that countries should ensure the non-discriminatory application of regulatory measures unless and to the extent that any elements of inconsistency have been scheduled as national treatment restrictions under Article XVII. Visa application or entry permits and licensing and other administrative procedures have served as barriers to facilitating the movement of service providers and could nullify or impair the benefits accruing to WTO members. Thus some countries have shown an interest in addressing in particular whether administrative procedures relating to visas could be part of any possible Article VI:4 disciplines, or if not, in addressing which other GATS provisions might cover such issues. Such discussions could also tackle the possibility of developing less burdensome regulation that is equally effective for attaining some set objectives.

43. Consideration is given to operationalization of *transparency* through the publication of, or making readily available, information on measures pertaining to trade in services. Specific to professionals as service providers, some countries have suggested making readily available in a consolidated form (possibly electronically or on websites) details of all measures pertaining to the movement of natural persons, including relating to visa and work permit requirements and procedures. As regards *prior comment*,¹¹ there has to be appropriate flexibility to tackle the administrative burden and costs on developing countries of such a requirement, considering that many developing countries' legal systems do not provide for such consultations. Developing countries are likewise concerned about any undue influence that foreign companies and Governments could exert on their domestic regulatory processes if prior comment procedures are made compulsory.

44. Discussions on *necessity* are linked to achieving a balance between a WTO member's right to regulate and the requirement not to unduly restrict trade.¹² Developing countries need to ensure in any discussion on the necessity test that their flexibility to undertake regulatory reform to meet public policy objectives is not prejudiced. Any obligation to choose the least trade-restrictive measure among other available options has been mentioned as potentially problematic for developing countries as it also may entail taking into account different development priorities as well as additional administrative burdens. There is a need to understand what would fall under the concept of "legitimate policy objectives". Disciplines could opt for an open-ended list (like the Accountancy Discipline), or alternatively, use the term "national policy objectives" instead, which would leave the

¹¹ Allowing for prior comment would require WTO members to notify proposed laws and regulations and to solicit comments from interested parties and take such comments into account.

¹² A WTO Secretariat paper on necessity (S/WPDR/W/27, 02 Dec. 2003) was presented during the December 2003 meeting of the Working Party on Domestic Regulation. The paper looked at existing WTO jurisprudence relating to necessity tests and focused on three main components, namely the policy objectives intended, the measure being used, and the necessity link between the objectives and the measure (the determination that a measure was necessary, i.e., whether an alternative measure was reasonably available to the regulator and would have been less restrictive).

determination of such objectives to individual countries, and which already appears in the GATS preamble and is thus already accepted by WTO members.¹³

45. *Accountancy disciplines* could be used as a benchmark for developing future disciplines. Since specific professions have distinctive characteristics, these disciplines probably may not be applied in its entirety across various professions as the survey of professional associations conducted by the WTO has suggested.

46. Several other concerns were raised regarding any discipline's implications for the right to regulate, the difficulties in involving domestic regulators, the issue of federal versus sub-federal competence as well as devolved authority, and the relationship between possible disciplines and scheduled commitments.

2. Mutual recognition and the GATS

47. Article VII of the GATS allows WTO members to reach MR with regard to "education or experience obtained, requirements met, or licences or certificates granted". Recognition may be based upon an agreement among the interested parties, or granted autonomously, through harmonization or otherwise. MRAs are actually negotiated by an array of bodies with different legal natures: central government authorities, sub-federal government authorities and professional associations. Professional associations are behind a rather large number of MRAs, such as those for architects (e.g. the International Union of Architects, the Commonwealth Association of Architects), for engineers (e.g. the Washington Accord among nine professional associations, Fédération Européenne d'Associations Nationales d'Ingénieurs) and for nurses (International Council for Nurses). In other cases, professional organizations negotiate specific agreements which fall within the framework of broader MRAs, for example, the initiative taken by the nursing councils of Australia and New Zealand which falls within the Trans-Tasman Mutual Recognition Arrangement, which in turn is a by-product of a very broad integration agreement, ANZCERTA. So far, 39 notifications have been made under Article VII by 19 WTO members, covering 144 agreements. Agreements concluded by professional associations are seldom notified.

48. The legal status of professional associations may vary to a large degree. In some countries they enjoy delegated governmental authority (at the state or federal level), while in others they are purely private associations. For example, in India by statute/law professional associations relating to legal, accountancy, architecture and medical and dental services have been delegated authority by the Federal Government. Moreover, within the same country, only one among several associations representing a specific profession may have delegated authority. The legal status of the professional associations involved in MRA negotiations has important implications for the legal status of the agreements. If MRAs are negotiated by bodies without the support of governmental authorities, it seems that those agreements would not be binding for the States, the States would not be held accountable for their implementation and the agreements would not be under the transparency and accession obligations spelled out in Article VII.

49. The WTO Guidelines on Mutual Recognition in the Accountancy Sector¹⁴ represent an example of efforts carried out by WTO Members under Article VII:5. The Guidelines are voluntary and non-binding and are aimed at facilitating the negotiations of MRAs in the accountancy sector and the

¹³ "National policy objectives" also has the added advantage of having been interpreted quite broadly in relevant Panel and Appellate Body decisions.

¹⁴ S/L/38, 28 May 1997.

accession of third parties to existing ones. They cover both the process for negotiating and the substance of the agreements.

50. GATS allows members to derogate from the MFN obligations in signing up to the bilateral or plurilateral MRAs. However, if those agreements become instruments which facilitate trade only or mainly among developed countries, their overall objective may be missed and the violation of the MFN principle no longer be justified. Increased transparency in the negotiations of MRAs and clear rules regarding third parties' rights, support to developing country institutions to improve their ability to set up domestic systems for regulating the professions, and enhanced developing country participation in international standard-setting may represent preliminary steps to make the overall process of MR of professional qualifications more responsive to developing country expectations and needs.

VIII. Possible issues of interest to developing countries

51. Developing the market for professional services in developing countries is the first step in promoting domestic supply capacity building. Public policies need to recognize the importance of different professional services, for example accountancy as an essential strategic tool for furthering development and good corporate governance. Developing countries need to establish adequate regulatory frameworks for professions and support the role of professional bodies, through which Governments could shape and influence the profession, its evolution and its future competitiveness.

52. Adopting a participatory multi-stakeholder approach in the formulation of policies and appropriate regulatory frameworks and involving trade negotiators, regulators, legislators, professional associations and civil society would ensure that their particular concerns, including opening the market to foreign competition, are taken into account. This would ensure that consideration is given to the role of professional services in poverty reduction, environmental protection, and other social and development considerations, including social safety nets and gender empowerment, as well as ensuring access to basic services. It must be recognized that regulatory reform entails adjustment costs and necessitates regulatory capacity and institution building and technical assistance in this regard. Thus, proper pacing and sequencing of reform are essential.

53. Developing countries have a clear export interest in professional services through the movement of people, and more recently, have taken advantage of and benefited from the increasing recourse by foreign companies to outsourcing their activities. In facilitating the movement of professionals, issues relating to ENTs, burdensome administrative procedures relating to entry (visas and work permits) and the lack of transparency of regulations (by encouraging the publication of, or making readily available through a consolidated form, including electronically) affecting the movement of professionals need to be addressed. As recognition is crucial to facilitating such movement, appropriate means should be found to facilitate developing countries' accession to MRAs. Countries should also make progress and work towards the establishment and eventual adoption of common international standards and criteria for recognition as well as international standards for the practice of professions which fully take into account the interests and concerns of developing countries. As a way for trade facilitation, establishment of the limited licensing systems for foreign professional services suppliers could be promoted.

54. The challenge confronting many developing countries is identifying professional services in which they could benefit from further liberalization commitments by WTO members, and defining the kind of specific commitments, both horizontal and sector-specific, and additional commitments under Article XVIII in order to achieve the objectives of Article IV of the GATS. Commercially meaningful

multilateral commitments in the areas of export interest of developing countries would serve to increase their participation in trade in services.

55. Assessment of trade in services should make a contribution in providing insights into where the actual and potential demand is and how developing country professional services suppliers could capture strategic markets. For attracting foreign professional service providers, the availability of reliable and inexpensive infrastructure, including telecommunications as well as other ancillary services, is important. To promote South-South trade, developing countries could further explore possibilities for MRAs and deepening of their RTAs. In the case of professional services, the basis of competitiveness is in their intangible assets, such as brand awareness and providing "incumbency advantages". For this, international partnerships could also help in expanding the developing country's export markets, establishing credibility locally and with international clients. Lack of domestic capital could be addressed through access to international finance and by promoting cooperative arrangements and partnerships with foreign firms. This could lead to the strengthening competitiveness of the domestic market and transfer of knowledge, expertise and technology.

56. Multilateral regulatory disciplines that would eventually be developed under GATS Article VI.4 would need to allow for sufficient flexibility for the right to regulate as well as for the pacing and sequencing of regulatory reforms and experimenting with regulatory frameworks, provide for the pursuance of national policy objectives, including the provision of and ensuring access to basic services, and include provisions on transparency, particularly relating to administrative and regulatory procedures regarding the movement of natural persons. A horizontal approach using accounting disciplines as a benchmark for the development of such disciplines would be the first step before a deeper sectoral approach.