UNITED
NATIONS

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United Nations
Conference
on Trade and
Development

Distr.GENERAL
TD/B/CN.4/43
31 July 1995
Original: ENGLISH

TRADE AND DEVELOPMENT BOARD
Standing Committee on Developing Services
Sectors: Fostering Competitive Services
Sectors in Developing Countries
Third session
Geneva, 25 September 1995
Item 4 of the provisional agenda

IMPACT OF PROGRESSIVE LIBERALIZATION AND OF SERVICE IMPORTS ON THE DEVELOPMENT OF COMPETITIVE SERVICES SECTORS, AND THE DIFFICULTIES FACED BY DEVELOPING COUNTRIES WHICH PREVENT THEM FROM INCREASING THEIR PARTICIPATION IN WORLD TRADE IN SERVICES

Report by the UNCTAD secretariat

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GE.95-52615

Introduction

1 Item 3(g) of the work programme instructs the Standing Committee to "assess the impact of progressive liberalization and of service imports in the development of competitive service sectors; and examine the difficulties faced by developing countries which prevent them from increasing their participation in world trade in services".

2 The secretariat has prepared this report with the objective of providing elements which could assist the Standing Committee in its further consideration of this issue.

3 International trade in services has been both a product of, and a contributing factor to, the process of globalization. Transportation, communications and financial services have supported international trade in goods for centuries. However, in more recent years a major stimulus was given to increased trade in services by the phenomenon of service firms following their transnational clients around the world. More service firms were encouraged to offer their services to foreign clients and enter international markets. Developments in communications and information technology greatly accelerated this process, facilitating the operations of transnational service firms and provided a major impetus to the process of globalization.

4 There has been an increasing awareness in developing countries of the importance of a efficient services sector, particularly the producer service sector in the efficient production of goods and other services, the ability to attract foreign direct investment and overall efficiency of the economy as a whole. Many countries, both developed and developing have taken steps to liberalize the service sector by opening up previously protected sectors to foreign competition, a process which has been facilitated by the inclusion of trade in services in the Uruguay Round negotiations and in regional and sub-regional agreements. At the same time there had been a rapid growth of the percentage of the services sector in the GDP and employment in developed countries. One major factor contribution to this growth was the "externalization" of services in the production process. In more recent years, this externalization at the international level has provided a future impetus to the globalization of the production of services and may provide new opportunities for developing countries.

5 On the other hand, developing countries have been preoccupied by the weakness of their service firms, particularly vis à vis enterprises from developed countries which dominate international trade in a wide range of services sectors. The strength of these enterprises in terms of their financial strength, their access to technology, their possession of world wide corporate networks supported by sophisticated information technology provided them with a overwhelming competitive advantage. Furthermore, this advantage was often enhanced by their access to subsidies from their home countries and their perceived resort to anti-competitive practices. The concern of the private sector service firms in many developing countries that they could not compete in the world services market led to their resistance to initiatives to liberalize services at both the multilateral and regional levels. A further concern arose from the increasing recognition of the various strategic aspects of the services sector, and the role of the knowledge-intensive producer service as a mechanism for organizing human capital in such as way as to adapt technological advances to commercial needs and other national objectives. Studies had also clearly indicated that unless liberalization were accompanied by appropriate supportive measures, the knowledge intensive services would tend to concentrate their locations around certain decision making centres.

6 The General Agreement on Trade in Services, incorporated as Annex 1:B to the WTO Agreement was acceptable to developing countries mainly due to its overall structure, which was deemed to respond to their needs. It covers all services and modes of supply for services (i.e. including FDI and the movement of persons), and is so structured that concessions can be made in sectors where liberalization, especially of access through FDI is judged desirable, and traded off for reciprocal concessions in other areas. It also permits developing countries to qualify such liberalization by maintaining control of strategic sectors, and making market access and national treatment conditional upon the foreign firms benefiting from market access, such as by accepting additional development oriented responsibilities in such areas as transfer of technology and access to information networks and distribution channels. However, Article IV states that such benefits in favour of developing countries will be implemented through "negotiated specific commitments". Thus, given the difficulty in formulating such requests and the imbalance in negotiating strengths, in many cases, developing countries have had difficulty in effectively benefiting from the provisions of GATS in their favour. This may impede the ability of developing countries to fully reap the benefits of globalization and liberalization.

7 This note addresses those elements of the dilemma faced by developing country policy makers. That is (a) what steps should be taken to create an efficient services sector and attract investment to those sectors where such efficiency is deemed most essential, (b) how to ensure that this process is consistent with the strengthening of domestic services firms in sectors deemed strategic or those of potential export strengths, (c) how to overcome difficulties in penetrating world services markets and increasing their share in world trade in services by overcoming current difficulties that prevent developing countries from expanding their participation in world trade in services.

8 Foreign direct investment in services has increased as developed country firms have penetrated and consolidated their position in world markets for services and goods. It would appear, that while, a few developing country firms have been able to expand their participation in world markets in few services sectors through foreign investment, in most cases their participation in the world market for services will have to be accomplished through other modes of supply, notably the movement of persons and through cross-border supply of services through information networks. The former mode is examined later in this paper while the issues relating to access to networks are discussed under agenda item 3 in a separate document.

I. EFFICIENT SERVICE SECTORS AND COMPETITIVE SERVICE FIRMS

9 Governments have become increasingly aware of the costs of an inefficient service sector for the development process. At the same time, the strategic role of services for the development process, involving such elements as national sovereignty, identity and security, a basic infrastructure, the development of human capital and the upgrading of employment opportunities, the competitiveness of national firms in the world market, the location of production and of decision-making functions, has become more evident.

10 Although the situation varies according to different services sectors, developed country firms dominate world trade in services, while most developing countries have not been able to build up a productive and competitive capacity, or to overcome barriers to entry to world markets. The increased participation of developing countries in trade in services would enable them to benefit from their comparative advantage in a number of service sectors and would contribute to their development and to their ability to derive benefits from the

globalization process.

A. Competitiveness and efficiency

11 The various policy measures for strengthening of the services sectors in the developing countries have been examined in the documentation prepared under item 3(a) of the work Programme for the second session of the Standing Committee. These following paragraphs build on this documentation and the subsequent discussions to examine in greater detail the role of liberalization and related policy measures in developing (1) efficient services sectors,(2) competitive services firms.

12 When applied to a firm, the notion of competitiveness refers to the ability of a firm to defend its market or, even better, to expand it through new sales, due to superior products or services, competitive pricing, and an ability to innovate, introduce new technology and bring out new products. The ability of the firm to export and expand its exports might be a strong indication of its competitiveness. However, the domestic market may be growing sufficiently fast for a competitive firm not to be concerned with external markets. On the other hand, the inability to export, or even to compete in their own market may not indicate necessarily that the firms are necessarily inefficient, but that a variety of exogenous factors are placing them at a disadvantage vis à vis foreign firms. Some of these, such as access to technology, and to information networks and distribution channels, and the liberalization of market access in sectors and modes of supply of export interest have been explicitly recognized in Article IV of GATS.

13 When applied to a sector, the notion of competitiveness is more related to the concept of efficiency, it implies that producers of goods and other services can generally count on receiving efficient service inputs from the firms in the sector concerned, permitting they are able to respond reasonably rapidly to new demands from users and consumers and to contribute to a relatively robust growth of the market in part through their ability to innovate and push prices down. The ability of the firms in the sector to compete in the world market is usually viewed as a sign of the efficiency of the sector as a whole. However, the sub-sectors which are most efficient may not be oriented toward exports, but to providing inputs into production in the agricultural, manufacturing or other services sectors. Earlier UNCTAD documentation demonstrated how such producer services in industrialized countries were first externalized into separate entities and then became export oriented, often by following their clients, including their parent firm in their global operations.The conditions for such spontaneous evolution may not be present in many developing countries, so that efficient producer services may have to be obtained from abroad or developed domestically through specific policy measures to this end. Earlier UNCTAD documentation supported by studies by the EC FAST programme and the U.S. Office of Technology Assessment stressed the importance of the "knowledge-intensive" service sector in developing the capacity to innovate and as a source of growth of human capital.

14 Efficiency of the service sector as defined above does not imply anything about the ownership of the firms that occupy the domestic market. However, for a variety of reasons, not the least being the desire to maintain and strengthen indigenous technology, human capital and innovative capacity, governments will endeavour to promote the competitiveness of nationally-owned or controlled firm even vis-a-vis foreign-owned firms located in their territory. In this context, It should be noted that the inclusion of the "commercial presence" mode of supply in the definition of trade in services which provides the basis for the obligations and commitments of GATS, departs from the "residence criterion" of

the IMF, and considers sales of foreign-owned and controlled firms in the host country market as "exports of services". The Commitments of each WTO member with respect to commercial presence contained in the GATS schedules, specified the degree to which such "foreign" firms will be permitted to enjoy "access" and "national treatment", for the sectors or sub-sectors included in the Schedules.

Trade and/or Investment

In the preparatory period leading to the launching of the Uruguay Round in Punta del Este, many developing countries firmly opposed the inclusion of trade in services within the agenda of the planned multilateral trade negotiations. The concern was that the inclusion of "trade in services" would be a means of bringing investment policy under GATT rules, linking it to trade concessions, and thus opening the way for possible retaliatory action against their exports in response to certain investment policies. This concern increased with the passage of the 1984 Trade Act in the United States which defined "trade" to include investment for the purposes of Section 301 action. These countries dropped their opposition when it was decided that the negotiations on goods and services would be separated, and governed by different principles. The framework of GATS, in which the commitments for access and national treatment do not extend beyond those listed in the Schedules, has enabled investment to be brought into the trading system in a structured manner.

The question of whether factor movements could be considered as "trade in services" was heatedly discussed during the initial stages of the Uruguay Round, the decision reached at the Montreal Mid Term Ministerial meeting led to a symmetry being established between movement of capital and of persons. The definition of "trade in services" as included in Article I of the GATS includes "commercial presence in the territory of any other member" as a mode of supply of services(as well as the movement of natural persons). The structure of the Schedules of Commitments permits countries to make separate commitments with respect to access and national treatment with respect to such commercial presence on a sectoral or sub-sectoral basis. Thus, according to GATS (notably Article XXVIII(f)(ii) and (m)(ii), purchases of services from enterprises which are owned and controlled by persons of another WTO member in the market of the host country are considered "imports" of services.

This framework has the advantage of permitting countries to structure their concessions to favour FDI in services by liberalizing only the commercial presence mode of supply, generally accompanied by movement of intra-corporate transferees.

Regional groupings, however, have taken a different approach by treating investment globally to apply the same principles to govern investment in both goods and services. In the European Union for example, services are defined residually, as activities which are not covered by the provisions relating to the freedom of movement for goods, capital and persons. The NAFTA approach is less ambitious; exceptions to the rules on investment are stated in a negative list, obligations on services largely deal to what would be considered as "cross border" services in GATS. The obligations with respect to the movement of persons are limited to specific provisions for narrowly defined categories.

The Concluding Remarks of the Chairman at Marrakesh listed among the issues which had been suggested as possible items on the future work programme of the WTO: the relationship between immigration policies and international trade, and trade and investment, suggesting a possible expansion of the scope of the WTO Multilateral Trade Agreements to cover factor movements *per se*. the TRIMs Agreement also foresees a possible extension of its scope to cover investment and competition policy.

B. Dimensions of service competitiveness

15 **Access to productive resources** (financial capital, machinery and technology, human resources and organizational skills), and **Exposure to competition** are critical determinants of competitiveness and efficiency.

16 Access to productive resources can be a function of the restrictions placed on the functioning of the market that might prevent the optimal flow of resources -- financial, technological, human or organizational. Barriers to competition, may starve sectors for financial capital, technology, human resources or organizational know-how whereas open-market policies might alleviate some of these bottlenecks. Conversely, limitations on market access to productive resources resulting from certain rules and regulations, by impeding access to new productive resources, may have a negative impact on the long term rate of accumulation. On the other hand, the asymmetry in the resources available to domestic firms in developing countries compared to foreign enterprises which enter the market may be such, as the former have no possibility of competing effectively in their own market let alone in world markets. For this reason corrective action may be necessary in the form of specific policies, some of which may be linked to market access, in order to ensure that liberalization effectively leads to access to resources for the domestic services sector. Some of these take the form of general policy measures which are listed in the GATS Schedules. Developing countries' right to attach such conditions are spelled out in Article XIX of GATS.

17 Competition may be furthered by addressing **barriers to market access**, including: (a) those which discriminate among operators based on the origin of their ownership or their geographical location - these are the measures subject to negotiation under Articles XVI (market access) and XVII (national treatment) of GATS, and (b) barriers imposed on the degree to which competition is allowed to occur within a given market irrespective of the origin of economic operators. The latter category may be the result of policy decisions that favour some economic actors over other by restricting the number of operators which are permitted (e.g. licensed) to participate in the market. They may also be the result of deleterious concentration tendencies or anti-competitive behaviour on the part of economic actors (e.g. restrictive business practices (RBPs)) addressed under the agenda of competition policy.

18 The gains from liberalization in terms of contributing to an efficient service sector, stimulating the development of competitive domestic firms capable of competing in the world market can be frustrated, unless complementary actions are taken. It may be necessary to put in place a minimum package of macro-institutional reforms, including (a) an investment code (or an equivalent set of laws and regulations) that defines the country's priorities regarding services activities to be developed, and that provides foreign service investors well-defined protection; and facilitates the flow of FDI (this can be supported by the binding of the treatment of foreign investors in various services sectors as commercial presence commitments in the GATS Schedules), (b) revision of the tax regime that is consistent with the aims of the investment code; (c) an adequate degree of liberalization of foreign exchange regulations (on both the current and the capital accounts) to allow for the repatriation of earnings and the possible withdrawal of investment by foreign service providers; (d) a set of immigration regulations consistent with the needs of foreign service providers to recruit transfer of their personnel; (e) the strengthening of intellectual property laws and their enforcement in line with the TRIPs Agreement (including

measures to prevent the anti-competitive abuse of such rights).

19 The national studies, conducted by UNCTAD, have presented the framework for a review of the extent to which some of the components of the macro-institutional suggested are missing, or are weak, or, in the case of services, tend to inadvertently discriminate against domestic service production. The experience of studies carried out by UNCTAD, including both the CAPAS and the EFDITS projects suggests that imperfections in the macro-institutional framework, including the tendency to discriminate against service providers, are quite frequent and call for attention.

C. Competition policy reform

20 A further consideration, drawn particularly from some of the case studies carried out under the EFDITS project, is that a relatively liberal investment and trade environment does not yield the expected benefits without adequate competition policy in place. Distorted competition in their domestic market closes down access to new entrants (be they foreign or even new domestic operators.) Collusive practices, highly-cartelized industries or distribution systems, differences in performance requirements resulting from public policies (e.g. tax policy or regulatory policy) favouring some providers over others (not necessarily based on the nationality of their ownership), as well as others anti-competitive barriers to entry may simply limit the contestability of markets to the point of undoing the potential effects of liberalization. Domestic competition policy is likely to have a major impact on the extent to which liberalization will bear fruit in the domestic markets of developing countries; while, the competition policies of their trading partners will have a major impact on the effectiveness to which their service exporters are able to enter foreign markets.

II. FOSTERING COMPETITIVE SERVICE SECTORS

21 In the context of its technical assistance programmes at the national and sub-regional levels, UNCTAD undertook a major effort to assist developing countries to conduct economic and policy audits of service sectors. The national study exercise can serve both to address the extent to which inefficiencies in the service sectors are being transmitted to users in the services, manufacturing and agricultural sectors, so as to reduce their competitiveness. The national studies conducted by UNCTAD have given considerable emphasis to the results of questionnaires sent to users as an input into effective policy formulation, including the position to be taken in services trade negotiations. One approach has been to focus on both the supply of services and the demand of services by some goods-producing sector. The aim of the interviews was to assess the organization and operational characteristics of the enterprise, its supply and demand of services, the degree of externalization, its insertion in the national and international markets, and the impact of existing policies and the liberalization and deregulation process. The main questions of these surveys included: (a) the extent to which services had been internalized and externalized; (b) the recourse by the firm to imported services at different stages of production; (c) the services with key incidence in the competitiveness of the firm in national and international markets, economic policy instruments and (c) other factors contributing to the competitiveness of the firm.

22 Some studies prepared by UNCTAD concentrated on the supply and demand of producer services in order to determine: (a) the role of services in the national economy; (b) use and recourse to producer services by the domestic industry; (c) the supply of producer services; and (d) development perspectives of producer services. On the demand side, the survey focused on the identification of main factors determining the use of producer services by the different size of

enterprises from the domestic industry in selected sectors. The services demanded were grouped in five categories namely: administrative services, technical services, market-related services, computer-related services and training services. The main questions of the survey were related to inquire the degree of internalization and/or externalization of those services, main obstacle to its efficient delivery and, the characteristics of the externalized demand including through imported services and other mechanisms such as DFI, franchising, intra firm trade, etc. On the supply side the surveys were oriented to determine the main problems facing services suppliers and the impact of ongoing policies in their development and in capitalizing export opportunities.
23 Another recent example are the studies conducted in ten African countries in the context of the UNCTAD CAPAS programme. The outcome of this programme should lead to concrete proposals for domestic policy reforms for strategies to include services in regional integration schemes, and negotiating positions, in the context of the WTO. Special attention is given to a few strategic service areas in all CAPAS counties, because of the role of those sectors as infrastructure to development or because of their importance for export earnings. These are: trade infrastructural services, financial services, telecommunications services, and labour services. The programme is intended to encourage the development of a policy formation process that stresses consultation with and participation from actors outside Government.

24 The various national studies underlined the fact that many services are consumed as packages of services rather than in isolation. Accordingly, it is important to review the efficiency with which a particular service that enters the package is provided in relationship to the efficiency, with which others that contribute to the same package are offered. The studies should identify the extent to which policies carried out in one sub-sector of the complex may end up undermining the objectives of the policies established in other subsectors.

25 The national study exercise also takes account of the views of domestic private firms as to the policy actions that are required to allow them to more effectively confront foreign competition in their home market and to developed the capacity and corporate structures to penetrate export markets. These largely involve questions of financial resources, market mechanisms, macro economic policies, with respect to monetary, trade, fiscal and credit policy; policies to develop human capital through public education, on-job-training; policies to modernize and upgrade basic infrastructures, such as transportation and communications infrastructures, creation of entities to provide essential services not available in the country; changes in the institutional and regulatory framework (taking in account the fact that some regulations inadvertently favour foreign over domestic suppliers); specific export strategies, resources development, access to technology, and the role of foreign providers. Some of the corrective mechanisms which have been identified and translated into policy measures such as: (a) direct financial support, (b) fiscal and credit incentives, (c) modification of the regulatory system, (d) incentives for the externalization of locked-in-knowledge and, (e) the establishment of service centers and/or training centres.

26 One objective is to ensure that FDI in the service sector not be simply a result of seeking "bargains" as governments privatize formerly state-owned services, nor buying up distribution networks in order to control the market for goods or services, nor "cream skimming" by concentrating on high profit niches of the market. The challenge is to orient it to establishing new and more efficient service production that will have a positive effect on the efficiency of other sectors, secure to transfer technology to domestic firms, and open new distribution networks abroad for their exports.

Service liberalization and regulation

27 Liberalization does seek to lower barriers to competition on efficiency grounds, but it does not deny the existence of conditions that call for regulatory intervention. Article VI of GATS recognizes this even where specific commitments have been made.

28 Two primary economic conditions justify regulatory intervention: *natural monopoly or asymmetric information.* Natural monopoly may be the result of very large costs of entry in the industry or of a special advantage acquired through access to a uniquely strategic location (e.g. harbours). Asymmetric information is the second major reason for regulation. The objective is to protect the least informed (usually the final user or the consumer) from the best informed (usually the producer) and from the monopoly power the latter can extract from this in-balance. Banking, professional, medical, educational services are classic examples of industries where regulation is justified on this ground. Improved approaches to regulation may protect consumer interests at lower costs than in the past and may open up wider opportunities for more extensive competition within a regulated environment.

29 The challenge for policy-makers when pursuing liberalization is often to find the proper balance between greater competition and sufficient regulation. This is particularly true in the case of services which are most of the industries where situations of natural monopoly or imperfect information exist. Of particular importance in this context is the issue of what economists call "public goods" i.e. those goods or services for which the benefits derived by users (other firms or consumers) during their consumption far out-pace the return derived from their production and sale by their producers. By virtue of its position in the market, a monopolist (whether deriving its position from a situation of natural monopoly or imperfect information) is in a position of moving up the demand curve and, accordingly, pricing out certain consumers. Regulation may be particularly needed in such cases.

30 Developing countries have embarked on domestic reform and liberalization in some of their service sectors characterized by natural monopoly and/or asymmetric information and have had to confront some of these issues. This is illustrated, for example, by the case of telecommunications in the ten countries that participate to the CAPAS project (Benin, Burundi, Ghana, Guinea, Kenya, Nigeria, Senegal, Tanzania, Uganda and Zimbabwe), several of which are LDCs. By now, seven out of ten countries have separated postal services from telecommunications services. The other three are planning to do so. Four countries have separated the regulatory functions from the public telecommunications operator. The other six countries are planning to do so or are in the midst of doing so. Seven of the ten countries have opened part of the sector to competition. The choices made by the countries range from joint-venture with private sector firms, with the public operator remaining as the majority stake-holder, all the way to fully-owned private ventures. Three of the countries have let in foreign providers. What the experience of these countries shows unambiguously is that domestic reform and liberalization go hand in hand with the establishment of a strong regulatory framework.

III. DIFFICULTIES IN EXPORTING SERVICES: MOVEMENT OF NATURAL PERSONS

31 Among the difficulties faced by developing countries which prevent them from increasing their participation in world trade in services are the regulations which affect the temporary movement of persons as service suppliers, as recognized in item 3(h) of the Work Programme.

32 As has been noted above the process of globalization and liberalization places a premium on skill, knowledge, and information tending to exacerbate

inequalities in that those lacking these factors are penalized more severely than in the past and tend to be marginalized from the benefits of globalization. The acquisition, deployment and use of human expertise has become increasingly necessary in the production and trade in goods and services. The globalization of production has prompted a global search for expertise, and has created pressures for the liberalization of regulations restricting the temporary movement of highly skilled persons, primarily within the international network and career system of TNCs or for involvement in specific projects of limited duration. This phenomenon is apparent in national immigration legislation and legislation as well as the Commitments made with respect to this mode of supply in the GATS Schedules. The Schedules of both developing and developing countries indicate a willingness to enter into commitments with respect to the movement of persons in the professional, managerial and technical category. This approach is also reflected in those regional agreements, such as NAFTA, which do not provide for the free movement of persons in general, but facilitate for entry of skilled persons and intra-corporate transferees. At the national level,

recent amendments of immigration legislation has tended to provide additional opportunities for the temporary entry, and even the permanent immigration of highly skilled persons. On the other hand, the entry of low and unskilled labour is becoming increasingly restricted, although, there are important temporary movements of such workers.

33 The participation in the exchange of high level skills which takes place routinely among developed countries, is a manner for developing countries to derive greater benefits from the globalization process. It provides access to technology and a means of developing competitive strengths for increasing their share of world trade in services. It is essential that skilled persons from developing countries and firms from developing countries are able to participate in this process on the same basis as those from developed countries.

34 At the Second Session of the Standing Committee, based on the note presented by the secretariat and the ensuing debate, the secretariat was instructed to continue to focus on barriers to trade in services carried out through the temporary movement of natural persons, including identification of specific entry requirements and criteria and how economic needs tests and other screening procedures can be made more predictable both in order to protect the integrity of specific commitments in this area and to enhance the ability of developing countries to take advantage of specific commitments with respect to this mode of supply.

35 The movement of natural persons has been recognized in the WTO General Agreement on Trade in Services (GATS) as a "mode of supply" for trade in services as defined in the Agreement, specific commitments with respect to this "mode" have been included in the Schedules of Commitments annexed to GATS, the context for the negotiations on movement of persons has been laid out in the Annex (to the GATS) on the Movement of Natural Persons Supplying Services under the Agreement. In addition, the Ministerial Decision on Movement of Natural Persons provides for the continuation of negotiations on further liberalization of natural persons to be concluded six months after the entry into force of the Agreement Establishing the WTO (i.e.by 30 June 1995). The objective of these continued negotiations is to achieve higher levels of commitments under GATS and to provide for a balance of benefits.

MODES OF SUPPLY

As described above, the "modes of supply" approach was designed to bring what was essentially factor movement within trade obligations. At the insistence of developing countries, the GATS Agreement was structured so as to provide a degree of symmetry in the obligations as between the movement of capital and the movement of labour, thus ensuring a balance in the concessions for the countries interested mainly in the latter factor and to ensure that the movement of persons would be covered by the provisions on progressive liberalization.

The draft of the Annex on Movement of natural persons was prepared in Mexico in April 1990. It was circulated among like minded countries and a revised version was submitted to the Group of Negotiations on Services as MTN/GNS/W/106 jointly by Argentina, Colombia, Cuba, Egypt, India, Mexico, Pakistan and Perú.

Questions are being raised as to whether the mode of supply approach is conducive to further liberalization, the negative list structure of NAFTA is presented as an alternative approach to further liberalization, (although the negative list approach had been proposed and rejected during the Uruguay Round). Another approach would be that adopted within the European Community where services is considered as a "residual" sector in the sense that it deals with activities that are not covered by the rules on the free movement of persons and capital, i.e. the modes of supply approach could be discarded if there were multilateral rules governing the movement of persons or investment. The negative list approach in NAFTA does not apply to the movement of natural persons; unlike the EU, where services are "residual", there is no commitment to the eventual free movement of persons. One of the main arguments for not applying the negative list in the GATS was that governments were unwilling to make open-ended commitments since the number of regulations and commitments would make it difficult for most governments to analyze the potential impact of market access and national treatment commitments for all such regulations. In addition, there is the sheer volume of the material that would have to be listed. NAFTA has only three members, notwithstanding which the negative lists constitute several hundred pages of text. To apply this method to the over 120 members of the WTO, would dramatically increase the 27,000 pages of the Marrakesh Final Act. In addition, these legislations do not exist in the official languages of the WTO. Future negotiations would be facilitated, however, by a database on legislation and regulations affecting trade in services, such as MAST.

36 As has been noted, the liberalization of the movement of persons has not been treated as a component of "trade in services" in the context of most regional integration agreements, many of which treat factor movement separately and sometimes in a symmetrical manner. The experience with more intense liberalization within regional agreements provides useful guidance as to how certain problems may be overcome in efforts to liberalize trade in services conducted through this "mode" in the multilateral context of GATS.

37 The discussion presented in this note is supported by four analytical

tables summarizing the bindings offered by selected industrialized countries, (Australia, Canada, the European Communities and its Member States, Japan, New Zealand, Sweden, Switzerland and the United States): respectively for business visitors, personnel engaged in setting-up a commercial presence, intra-company transferees, and personnel in specialty occupation (Tables 1 through 4). These tables were prepared using the schedule of commitments of each country, supplemented by information additional information on the temporary migration regime (laws and implementing regulations) in force in eight developed countries: Australia, Canada, the Federal Republic of Germany, Japan, Sweden, Switzerland, the United Kingdom and the United States. Additional research was conducted to update that earlier information for several of these countries (especially the United States, Canada, Australia, Japan, Sweden, Switzerland) or to obtain information for countries not researched earlier (New Zealand).

A. Regulating temporary entry

38 UNCTAD documentation has noted that in regulating the entry of persons who fall in the category of natural persons supplying services as defined in the GATS Annex, most countries distinguish between (a) business visitors, who stay for a duration ranging up to a few months maximum, who are not gainfully employed in the host country, and (b) and temporary workers who receive payment from an individual or organization in the host country. Highly skilled persons can, of course fall into either category.

39 Regardless of the terminology used, the main differentiating factor is whether or not the person involved will be receiving remuneration from an entity resident in that country, a factor which will generally call for his or her obtaining a work permit, even if the person remains employed by a foreign firm. The issuance of visa is conditional upon obtaining such a work permit, which in turn, is subject to a series of conditions which have to be met by the employer and by the foreign employee. These can relate to the qualifications and skills of the persons concerned, duration of entry, levels of payment, respect of social obligations, etc. In most cases, however, these conditions are subordinate to an employment condition, (i.e. "economic needs", "employment" or "labour market" test) under which temporary entry is conditioned upon a determination that no resident of the host country is available and qualified to carry out the same assignment.

B. Economic needs tests and quotas

40. All countries use economic needs test to limit access of specialty personnel and some even for intra-corporate transferees. Furthermore, a number of them use quotas for that same category. Economic needs tests or quotas would not appear to be applied to business visitors. Countries generally exclude the recruitment of foreign workers if they are to be used to replace nationals in a situation of labor strike or lock-out.

41. Economic needs tests are drafted with differing degrees of precision, are applied with different degrees of transparency and are administered by different entities. The following examples illustrate this situation.

42. Under subsection 19 (1) of **Canada**'s Immigration Regulations, 1978 (Revised 1 November 1984), the Immigration Office must issue an employment authorization to all applicants seeking temporary entry except those listed under that same subsection of the regulations. Employment authorizations are issued following the issuance of an employment validation by Ottawa's Department of Human Resources Development (HRD). The process involved in obtaining an employment validation from HRD is *not the object of a published regulation* but, rather, comes in the form of *unpublished administrative policy guidelines*. While such policy guidelines must be applied fairly to all applicants and are explained in

a booklet on the hiring of foreign workers made available to any potential employer of foreign workers, they can be reviewed and changed at the discretion of the Administrative authority (in this case HRD.) The guidelines that are presently applied were last reviewed three years ago.

43. Canada's guidelines for employment validation of temporary entrants work as follows: Employers wishing to hire foreign workers must provide Canada Employment Center (CEC) with details of the job offer and of the reasonable efforts they have made to identify suitably qualified and available Canadians (This includes proof of having advertised the job, having liaised with the usual occupational associations and hiring halls where such workers might be found, as well as indications of low unemployment level in that occupation in the geographical area where the job will be located.) In addition, the wages and working conditions must be at a level which Canadians would normally accept. Finally, employers must demonstrate to the CEC that the foreign worker can create and maintain employment in Canada, provide training or transfer specialized knowledge to Canadians, or help to strengthen the company's competitive position in the international market place. Canada approved roughly 24,000 requests for temporary work permits in 1993. This is somewhat less than the total number of applications filed -- approximately 35,000. The difference between the two numbers is nearly all accounted for by applications discontinued typically because the hiring process was ended or the application was not a bona fide application.

44. Employment certification by the Department of Labor is required in the **United States** for applicants under the H1A, H1B, H2A and H2B categories. In addition, under U.S. law, the H1B, H2B, and Ps visas are subject to numerical quotas. To obtain an employment certification, the employer must submit a labor condition application to the Department of Labor. Regulations of the labor condition application process are published in *Consolidated Federal Regulations, 20 CFR Ch. V* (4-1-94 Edition) and where updated most recently on January 13, 1992 *(Federal Register, Vol. 57, No.8,* Monday January 13, 1992, pp.1316-1338).

45. A labour condition application for H1-B applicants is shown in Appendix I. On the whole the employer's petition for labor certification requires that the applying employer attests that "(1) the employment of the alien will not adversely affect wages and working conditions of similarly employed U.S. workers and (2) that there are not sufficient U.S. workers who are able, willing qualified, and available at the time of an alien's application for a visa and admission to the United States and at the place where the alien is to perform the work.

46. The labour certification process used by the United States does not require that the Department of Labor verifies the truth of the statement attested to by the employer in its application. It is a complaint-driven enforcement process. The applying employer must maintain sufficient documentation proving that its application is consistent with the relevant law and regulations. However, only if a complaint is filed by a presumably injured party does the Department of Labor take step to verify the truth of the statements made by the employer. (The law sets penalties in case the employer is shown to have violated the intent of the law and implementing regulations.)

47. Thus far, quotas for H1-B applicants have never been fully met. In 1992, 57,125 H1-B new admissions were approved; in 1993, 61,591; and in 1994, 60,179. Few bona fide applications are turned down.

48. As a result of NAFTA, the U.S introduced a new TN professional visa classification for Canadian and Mexican Professionals (For Canadians, the TN category replaces the TC professional visa classification that had been introduced as a result of the Canada U.S.FTA) provided that the professional meets the criteria laid out in Appendix 1603.D.1 of the NAFTA, visas are issued without applying an economic needs test. There are no numerical limits on the number of TN visas issued each year to Canadians. For Mexicans, there is an annual limit of 5,500 new TN professional visas. Renewal and extension of TN visas do not count, only new ones are counted. If the limit is reached before the end of the calendar year, applications are turned down. So far this has not happened. Also, the quota for Mexicans is to disappear over time and to be replaced by unlimited access. There is no restriction on a Mexican whose admission under a TN visa might have been turned down because the full quota has been reached for that year to seek entry under an H1B visa; or simply to wait until the beginning of the following year to enter under a TN visa.

49. Employers sponsoring people for entry as specialist in **Australia** are required to provide documentary evidence of having tested the labour market without success except under special circumstances. The latter mostly are situations where the Department of Employment has determined that there is an occupational shortage in Australia. The requirements to meet a labour market test are not unlike those laid out in the Canadian and U.S. systems including respecting prevailing wage rates and working conditions and proving that the sponsor has tested the labour market for available Australian workers. The relevant regulatory text is reproduced in Appendix II to this report. Like the Canadian system, the burden of proof is on the employer at the application stage and the documentation provided is subject to a verification by the Commonwealth Employment Service. In Australia, 19,258 visas were issued to specialty personnel in 1991-92.

50. In **France**, work permits are issued by the Prefect of the department in which the foreigner wishes to carry out the activity; who must consider the present and future employment situation in the occupation requested by the applicant and in the geographical area where the applicant wishes to carry out the occupation in question. However, citizens of a number of countries in addition to EU member states are exempt for work permits. The employment test is grounds for refusal of work permits for most categories (e.g. seasonal workers, employees on secondment, researchers, entertainers, fashion models etc) with few exceptions (e.g. trainees, installers, cinema artists etc.).

51. The restrictive impact of economic needs tests is apparent from the increases in temporary movement that take place when they are not applied. For example, in the United States entries under the H1 visa,(i.e. persons of "distinguished merit and ability") quintupled between over 1978-88, (it was subsequently revised and divided into sub-categories). The inflow of temporary workers from Canada has increased from 13,000 to 23,000 since the signing of the Canada/United States Free Trade Agreement.

52. Economic needs tests could thus present a less onerous barrier to trade in services if:

(a) their scope were reduced, i.e. that fewer occupational categories were made subject to the test, this might be accomplished by adding further sectoral or occupational specificity to visa categories,

(b) the criteria were made more transparent, so that rejections could be challenged,

(c) that legal provision be made for such challenge both at the national level and in GATS (GATS Article VI:2 would seem relevant in this context)

(d) these criteria were bound in the GATS Schedules to ensure against more stringent criteria being introduced in the future.

(e) they were supplemented by a "minimum access commitment" in the form of a quota under which the economic needs test would not apply, additional entries could be made above the quota but subject to the test, "current access commitments" could preserve the levels negotiated.

(f) it should be recalled that the GATS safeguard clause remains to be negotiated (Article X:1), such safeguard mechanism could be designed to replace economic needs tests.

53. Transparency is a prerequisite to being able to assess more fully if and how certain economic needs test may be made more predictable, more stable and less burdensome.

C. Binding economic needs tests

54. The above analysis would suggest that in cases where the requirement of an economic needs tests is indicated in the Schedule of Commitments, future negotiations could aim at ensuring that the criteria would not become more restrictive in future. There would also be a need to remove any possible ambiguities about the nature of such scheme and its bound status. For example, schemes that fall under the rubric of "policy guidelines" would have to be described in the Schedules of Commitments.

55. Even if the economic needs tests were bound in the Schedules against being more restrictive, such tests would remain subject to some administrative authority deciding at some point whether efforts of the employer to identify a qualified national have been sufficient and/or unemployment rates in the occupation and geographical area of the applicant are sufficiently low to warrant its hiring of a foreigner. The issue then is how to reduce the degree of subjectivity associated with that decision process. Binding "trigger" unemployment rates does not seem a very realistic option as usually applications are judged against occupational unemployment rates measured at the sub-national (e.g. a French "Department") or even municipal level. The approach used in the United States, based on a post-complaint verification system used under the U.S. labour certification process removes the need for any Administrative authority to decide on these issues until the relatively rare instance when the Administrative authority is called upon to investigate a complaint.

56. The effect of labour market tests is not unlike that of quotas. The difference with a traditional quota, however, is that the quota value of the labour market test is not immediately known (though its quota-equivalency might be computed), can change with general economic conditions of the importing country, and can be adjusted continuously and unpredictably by the Administrative authority of the importing country. The next step to stabilize the conditions of temporary entry for categories subject to labor market tests then might be to provide for quotas below which the economic needs test would not be applied (i.e. analogous to a tariff quota), such quotas might be fixed at current access level.

57. The level of quotas could be based on factors that take into account the current level of temporary entries in each country. Under such system entry permits delivered under a quota would have to be issued by the competent Administrative authority on a first-come-first-serve basis or some similar non-discriminatory scheme. "Minimum access" quotas could be applied for specialty

categories under which no economic needs test would be imposed, any entries in excess of the quotas would be subject to the economic needs test. Where relevant bilateral or regional agreements existed, these could be preserved as "current market opportunity" quotas.

D. Other criteria for temporary entry

58. In addition to the employment or labour test, a variety of other conditions associated with the granting of work permits could present barriers to access to markets of service suppliers.
These include:

(a) Restrictions on eligibility of firms to obtain work permits

59. This is essentially a national treatment issue, it appears that in some countries foreign firms, even when established in the importing country) are not allowed to recruit foreign labour in certain instances, it could be examined in the context of "commercial presence" commitments.

(b) Short duration of validity of permits

60. In some cases, the duration of work permits has been considered to be too short. The discretionary power left to the administrative authorities when issuing visa might permit discrimination among nationals from various countries by granting different lengths of stay among different applicants otherwise equally qualified.

(c) Ambiguous definitions of categories

61. This has been considered to constitute a problem in certain regimes. Some countries impose additional skills and competency requirements for various types of temporary entry permits based on educational level of the applicant and/or the length of working experience in the occupation. As schooling and training systems differ from country to country - with some countries emphasizing longer formal education and others more extensive company-based vocational education - these may favour access for certain countries' suppliers.

(d) Minimum wage requirements, and overlapping social legislation

62. These refer to a different aspect of national treatment requirements, in the sense that the employers of foreigners have to conform to a variety of statutory requirements of an essentially social nature. In some instances, particularly when applied to specialists entering for short periods, such requirements are perceived as protectionist in that they artificially undermine the advantage of using foreign personnel for such tasks even when otherwise in conformity with immigration regulations.Requirements on the employer to pay the minimum wage, (even when the employment contract had been entered into in another country) as well a social and other charges, could undermine the competitive position of developing countries suppliers.

63. In the case of intra-company transferees or personnel in specialty occupations, nearly all countries require that the level of remuneration be "comparable to that of wages and salaries prevailing in the country for like national employees." This might be seen as undercutting one of the key comparative advantages of developing countries - namely labour costs. Particularly at current exchange rates, salaries in some developing countries are such that senior staff are paid at levels that might be considered below the poverty level in some European countries, such requirements could restrict trade and discriminate in favour of developed countries.

64. There is also a reverse aspect of the problem where limitations apply primarily to either intra-company transferees or personnel in specialty occupations, in terms of their access to social benefits. They include limitations with regards to access to medical care insurance schemes, old age insurance (pension) schemes, the right of temporary entrants to bring along their spouses and dependents, access to subsidized education schemes, subsidized housing schemes, income tax treatment and other benefits.

65. On the other hand, there is serious concern in developed countries that temporary entry provisions can be used to escape fiscal and social obligations. The EU has devised the concept of "posting", under which an employee working in another member state or his employer, is issue a certificate by his national authorities certifying that he continue to be subject to the national laws of his home country until the end of his posting; thus the social charges are paid in his member state and not in the host state. The "posting" concept, however, could be applied in other circumstances.

(e) Fees and charges

66. Other measures affecting temporary entry are fees and charges that are made, either directly to the business visitor, or on the employer seeking work permits. The use of requirements that are less easy to assess are filing requirements asked from individuals upon application for temporary entry. It is possible that some countries may apply requirements that are either unduly burdensome or discriminatory with respect to nationalities of the persons concerned.

(f) Licenses and recognition of qualifications

67. The acceptance of the entry of a person based on the skills indicated in the immigration regulation does not provide the supplier with access to the market where such is regulated by professional licensing in the case of accredited professions. This is less of a problem to access when the person concerned is proving services to his own firm, which would have locally licensed persons to provide the accredited service;however, in other occupations, such as nursing, physical access is meaningless, and may even not be permitted without the recognition of qualifications.
68. The criteria for the assessment of whether a person has the skills and qualifications necessary to conform to those specified in the particular immigration category would seem to be a major issue warranting more discussion.

69. Other requirements might include processing time of applications. Excessively lengthy periods might undermine the ability of applicants to seize upon a business opportunity. Dealing with these types of requirements will demand first much greater transparency on the part of countries regarding not only published immigration laws and implementing regulations but also unpublished or unadvertised administrative rules. Once such requirements become better known, it should be relatively easy to deal pragmatically with burdensome requirements. Again, implementing a mechanism for reporting and negotiating away such excessive requirements would seem the most appropriate to dealing with this issue.

E. Reflection of commitments in national regulations

70. The document prepared for the Second Session of the Standing Committee under item 3(h) of the work programme addressed the characteristic of national regimes governing the temporary movement of persons. The following paragraphs examine the extent to which these have been reflected in the multilateral GATS Commitments. For a select group of countries, the corresponding national

legislation and regulations have been examined.

71. The Commitments on the movement of natural persons normally include entry requirements for three main categories of personnel -- business visitors, personnel engaged in setting-up an establishment presence, and intra-company transferee -- and, a fourth category, namely personnel in specialty occupations. In other words, for persons who are in demand internationally. Only a few countries, thus far, have made commitments in the area of personnel in specialty occupations.

(a) Business visitors

72. Commitments with respect to business visitors tend to be far more limited than the regimes currently in place in individual countries. The more restrictive nature of the binding originates from the definition used to describe "business visitors" (a few countries are also slightly more restrictive in the duration of the temporary stay for business visitors.) All countries use a definition of business visitors in their schedule which reads like "persons not based in the territory of the country and receiving no remuneration from a source located within that country, who are engaged in activities related to representing a service supplier for the purpose of negotiating for the sale of the service of that supplier where: a) such sales are not directly made to the general public and b) the salesperson is not engaged in supplying the service". In contrast, most countries have a current statutory definition of business visitor, which, when applied to service providers, allows for a wider range of activity and, in effect, some degree of direct provision of a service to the public. For example, lawyers, accountants, management consultants, software specialists, installers of industrial machinery, and countless others routinely travel on business visitor visas to perform short term assignments for clients. As such, they would meet the source of remuneration requirement, when there is one. Their firms are paid for the services rendered, but the service-person himself or herself receive no remuneration from a local source while visiting the importing country. Furthermore the statutory definition of the business visitor is usually sufficiently broad or sufficiently vague to allow this type of short-term service delivery.

(b) Personnel engaged in setting up an establishment

73. Commitments with respect to persons engaged in setting-up a commercial presence tend to be somewhat more limited than the regime in force in individual countries under existing laws and implementing regulations (not unlikely the duration of stay is shorter). However, it is not clear that, in practice, this presents significant scope for increasing the restrictiveness of the regulations.

(c) Intra-Corporate Transferees

74. Commitments with respect to intra-company transferees come the closest to constituting full bindings of the regime currently in place in each country. However, a few countries require a longer period of prior employment with the firm for an employee to be eligible as an intra-company transferee compared to that they use under their current statutes.

(d) Specialist Personnel

75. All developed countries have provisions under their current immigration regime (laws and implementing regulations) allowing for the temporary hiring and residency of foreign specialist personnel by local firms (domestically- or foreign-owned) irrespective of the fact that such personnel may or may not

already be employed by the firm in another country (i.e. qualifies or not as an intra-company transferee.) However, among the countries examined, only Australia and the United States offer a full binding of their current regime with respect to at least one major category of such type of personnel: in Australia, this is a binding of the laws and regulations that apply to the so called "Specialists"; in the United States, of the statutes for "Professionals Performing Services in Specialty Occupations".

76. The New Zealand Commitment contains a partial binding of its current regime and allows for intra-company transfers of "Specialist Personnel" above and beyond the usual categories of intra-company transferees (i.e. executives, senior level managers and senior specialists). As Australia and the United States, those are subject to an economic needs test (see below). However, this particular commitment is limited to specialists transferred as intra-company transferees whereas the Australian and U.S. offers allow for straight temporary hiring of non intra-company transferees (as do New Zealand current statutes). New Zealand also makes a commitment for intra-corporate "installers and servicers", which extends the definition of business visitors to a specific group of individuals. Specifically, entry is limited to three months, there are no explicit limitations on the source of income for business visitors, which, otherwise might restrict the scope of this particular offer.

77. Japan, like New Zealand, binds the intra-company transfer of specialist personnel in six professional occupations (four classes of law professionals, accountants, and tax specialists.) But this binding is limited to intra-company transfers whereas the existing Japanese regime for these classes of specialists is not restricted to such movements.

78. Under the rubric "Professionals", Canada makes a commitment allowing a limited list of professionals to deliver services for a period of up to 90 days. Like New Zealand, this is little more than an extension of the definition of Canada's 'business visitor' category, which Canada was able to accommodate without needing to make any change to its current statutes (immigration law and implementing regulations). Similarly, Canada's statutes do not have explicit limitations on sources of income for business visitors which, otherwise, might restrict the scope of this particular offer.

F. Improvement of commitments

79. In this context, it should be noted that, the commitments of the countries selected for study fall short of constituting binding of statutes (immigration laws and implementation regulations) currently in force in those countries with respect to the temporary movement of natural (service-providing) persons. There is thus some margin for improving the concessions without actually modifying the relevant regulations. Of particular interest here would be a deeper binding of commitments with respect to business visitors and to specialty occupation categories.

80. First, in the case of business visitors the key issue is to ensure that the bound commitments provide the ability of delivering a relatively wide range of services through short term business visits,(as have as Canada and New Zealand). This could largely be achieved by removing limitations that have been introduced by way of the particular wording used to define business visitors, from the schedules of commitments

81. Second, in the case of specialty occupations,some countries (e.g. Australia and the United States) have been able to bind their current statutes for a major category of specialty personnel. This approach might be followed by other countries, which all have relatively similar statutes in effect. Some

bindings could be extended beyond one category of specialty personnel to cover other categories applicable to service providers and covered under current immigration statutes.

82. Nearly all the countries studies have provisions regarding the temporary entry of corporate trainees, in many cases not subject to the employment test, these provision might also be bound.

83. In addition, in many of the countries, temporary entry for various kinds of specialty personnel (in addition to high-level managers and specialists qualifying under the intra-company transferee category) fall under more than one category, each with its own set of statutes. Thus, for example:

- In the United States, there are temporary entry regimes for nurses (H1A visas), for temporary agricultural workers (H2A visas), for temporary non-agricultural workers (H2B visas), for representatives of information media (I visas), for "aliens" of extraordinary ability or achievement (01 and 02 visas), for athletes and entertainers (P 1, P2 and P3 visas) all of which are relevant under the GATS agreement.

- In Australia, of the 24 major classes of temporary resident visas and entry permits at least nine (including Class 414 tabled by Australia) are relevant to the temporary entry of specialty (service-providing) personnel. These are: Class 418 (Educational Personnel), Class 419 (Visiting Academic), Class 420 (Sports people), Class 422 (Medical Practitioner), Class 423 (Media and Film Staff), Class 424 (Public Lecturer), Class 428 (Religious Worker).

- In Japan, in addition to persons setting up a commercial presence and intracompany transferees, employment permits for temporary working visas can be issued to 13 categories of persons including: professors for research and teaching at the college-level; artists; religious workers; journalists; legal and accounting service providers (provided they qualify under the appropriate laws defining the scope of their activities); providers of medical services; researchers; certain primary and secondary school teachers; engineers; specialists in humanities and social sciences; entertainers and sports people; a selected list of skilled workers including cooks, architects and civil engineers, and crafts workers;

- Switzerland has a system of temporary work permit including so-called year-permits (so-called B-Permits), short-term permits and seasonal permits (so-called A-Permits). Each makes use of quotas. Their scope is not limited to inter-corporate transferees but applies also to what might be defined as "specialty personnel."
- The United Kingdom has a regulatory regime that allows the issuance of work permits to licensed professionals, administrative and executive staff, highly qualified technicians with specialized experience, key workers with expert knowledge, entertainers and sports people, certain personnel in hotel, catering, household worker, and hospital auxiliary occupations. These categories are subject to a labour market needs test and, in the case of the latter group (hotel, catering, household worker and hospital auxiliary occupations), to quotas;

84. The same applies to other developed countries; greater security for trade in the services in question could be achieved through a binding of all categories relevant to the movement of specialty personnel, not only the selected categories

contained in the scheduled by a few developed countries.

G. Commitments offered by developing countries

85. All developing countries have made horizontal commitments on movement of natural persons. The market access offered by developing countries through this mode of supply is often wider than that offered by developed countries. The categories of natural persons included in the offers usually cover business visitors, intra-corporate transferees (i.e. directors, managers, specialists and technicians) and persons responsible for establishment. The presence of the intra-corporate transferees is often extendable for periods up to 5 years. Some offers include additional categories of persons, in particular professionals (e.g. Argentina (independent professionals), Brazil (highly qualified professionals working for a local or foreign company), India (professionals engaged by a juridical person in India as part of a service contract in the field of physical sciences, engineering or other natural sciences), Philippines (foreign natural persons may supply a service subject to labour market test), Malaysia (professionals recognized and registered by Malaysian professional bodies). A few of the horizontal commitments cover access of all types of personnel on the basis of a determination of non-availability of suitable local personnel e.g. Philippines, Cyprus, Jamaica, Sri lanka. The independent or contract based natural persons are usually granted visas of short periods up to a maximum period of one year.

86. Many of the commitments stipulate limitations to market access by setting a quota, requiring an economic needs or labour market test. The quota is usually expressed as a limit on the percentage of foreign personnel that may be employed in an enterprise and sometimes it is accompanied by a percentage restriction on the overall share of total wages paid by an enterprise (this percentage varies between 15 to 30 percent of the total wages paid by an enterprise).The quota on the number of foreign employees is usually generous and ranges between 10 percent (i.e. Egypt) to 50 percent (i.e. Pakistan)of the employees of an enterprise or a certain category of personnel. The quotas sometimes distinguish between the ordinary and highly skilled employees e.g. the Columbian offer provides that 10 percent of the ordinary employees and 20 percent of the skilled employees could be foreigners. Many schedules provide for training, or employment of local personnel, or provision of new technology and increase in productivity, in particular as a counterpart for increasing the quota for foreign employees e.g. Malaysia, Ghana, Guatemala, Brazil, Cuba.

H. Taking advantage of specific commitments

(a) Transparency in commitments

87. Tables 1 through 4 summarizes the bindings offered by the countries selected for this analysis. This is done in terms of six specific market access criteria plus one residual "other limitations" criterion. The six specific market access criteria are: definition of the class of temporary entrants, duration of temporary entry, source and/or level of wages and remuneration, limitations relating to the displacement of nationals (economic needs test), numerical quotas, and additional skill levels and competencies requirements. The residual "other limitations" applies to any other market access criteria such as application filing requirements (application fees, birth certificate, proof of income tax filing, letters of endorsement, etc.) as well as national treatment limitations.

88. Typically, offers of individual countries with regards to the temporary entry and stay of natural persons read "unbound except for measures concerning

the temporary entry and stay of nationals of another member who falls into the following categories" (or some variation thereof). Thereupon, countries list the specific categories of temporary personnel for which the temporary entry regime is bound together with some explicit limitations bearing upon their entry. In other words, countries bind entry requirements for each designated category at the level of restrictions and limitations at which entry is currently in force in the country, save for additional restrictions made explicit in their schedule. The latter may further narrow the scope of the offer compared to the regime in force in the country for the particular category.

89. This approach to the scheduling of commitments would not seem to provide adequate transparency. Except for the definition of the category of personnel and perhaps restrictions with respect to duration of stay and/or remuneration, the offers are generally silent on other conditions and limitations that might apply to a particular category of personnel -- particularly those pertaining to the displacement of nationals, the use of quotas, additional qualifications with respect to skills and professional competencies or other market access and national treatment limitations. Only by gaining direct knowledge of individual national immigration legislation, relevant implementing regulations and administrative rules and procedures can anyone be in a position to truly assess the value of the commitment.

(b) Transparency in national laws and regulations

90. Beyond the obvious language barrier, access to legal and regulatory texts of individual countries can be painstaking. These are recorded in National Gazettes and Registers which may not be easily accessible to the public, especially in a foreign. Furthermore, printed laws or implementing regulations are not always sufficient to define the current level of requirements, conditions and limitations applying to a given type of entry. Some (or much) discretionary power might be left in the hands of the Administrative authorities (typically Immigration and Customs, Justice, Labor, possibly Health) to set rules. More often than not Administrative authorities refuse making such rules available in writing.

91. Such information is less difficult to obtain in the case of some countries, (notably Australia, Canada, New Zealand, United Kingdom, United States in this sample) which tend to be explicit and detailed in their legislation and published implementing regulations with respect to the scope of coverage and relevant limitations and conditions. This may suggest that the discretionary power left to Administrative authorities tends to be narrower, than in other countries which tend to be less explicit in their published laws and implementing regulations.

92. Some countries provide detailed publications outlining the immigration laws and regulations extended to assist the person concerned or his employer. The series of publications provided by the Australian Department of Immigration provide an excellent example of how governments can provide transparency.

93. The integrity of specific commitments in the GATS would thus be enhanced through greater transparency in both the drafting of the Commitments themselves and in the application of the relevant laws and regulations. The effective implementation of GATS Article III could contribute to this objective, notably if, pursuant to GATS Article III:4. Members could request the published relevant legislation, implementing regulations, and administrative rules that define conditions of entry and national treatment. Publications of administrative rule is particularly important in this respect. Failure to do so simply leaves discretionary power to a country to change rules over time allowing it to tighten up entry requirements at will, making it difficult for exporting countries to defend their rights under the Agreement. Furthermore, failure to make explicit

the full universe of conditions applying to temporary entry and stay that a country has bound under the GATS allows it to apply different rules for nationals from different countries. This, in turn, could result in de facto departures from the most-favoured-nation obligation, although GATS recognizes that the sole fact of requiring of visa for natural persons of certain Members and not for those of others, shall not be regarded as nullifying or impairing benefits under a specific commitment.

94. One of the problems faced in the negotiation of GATS in the Uruguay Round was the lack of an information base on barriers to trade in services anywhere comparable to that which had been developed for trade in goods. The MAST data base being developed by UNCTAD could assist in future negotiations, however, it might also be useful for individual countries to supplement this information by following the approach adopted by some contracting parties in GATT for drawing up the original GATT Inventory of Non-Tariff Barriers, i.e. by seeking information from the private sector, in this case business persons, who could to report to their Trade Authorities specific examples of difficulties encountered, which have frustrated their ability to supply services, as they seek temporary entry under the conditions set out in the GATS Annex.

95. The "enquiry points" to be established under Article III of GATS should provide a means for obtaining more information on the various regulations governing the movement of natural persons. Of potentially greater significance are the "contact points" to be established by developed countries under Article IV:3 which will respond directly to requests from the private sector, it would appear crucial that such contact points provide information on regulations affecting the temporary movement of persons as well as the on the occupations where a demand for such services is deemed to exist in the country and where employment or labour market tests can be expected to be applied in a liberal manner. Furthermore, the provision for tribunals for the review of administrative decisions affecting trade in services could make a major positive contribution in this context, if immigration regulations governing the temporary movement of persons were effectively brought under its scope.

(c) Service teams and project personnel

96. Although, the emphasis, both in the GATS commitments, at the regional level and in national legislation has been on facilitating the temporary movement of skilled persons, there is still a significant movement of lower skilled workers, particularly on a seasonal basis, and often in the form of service teams. Historically the use of the temporary movement of complete service teams from exporting to importing country as a means to deliver a service has been one way by which countries have secured needed services. Schemes involving the temporary entry of service teams into Western European countries, usually from developing countries, have been used mostly in agriculture (seasonally), and construction and as well as shipping services. Germany, in particular, has a system allowing it to enter into agreements with service firms from a number of Eastern European countries. Entry under those agreements is normally limited to two years. In the United States, such schemes have been most important in agriculture. Japan is now making some use of service teams in the construction industry. In the Gulf countries, such schemes tend to cover an even wider range of sectors including education, medical services, private security, construction, manufacturing and yet other industries. As of the late 1990, Egypt had nearly two million workers in that region, many employed under such schemes.

97. The benefit of schemes permitting temporary entry of service teams are numerous. From the point of view of exporting countries, they allow entry irrespective of skill level in contrast to the entry visa schemes discussed earlier in this report. From the point of view of the importing country, they

are an alternative to other recruiting schemes that might be more prone to a large amount of slippage from temporary to permanent migration. One of the main impediment to progressive liberalization under this mode of supply, particularly when lower skilled persons are involved, is the concern that such liberalization measures could lead to abuse, either by the employers who might use these provisions to circumvent other obligations, i.e. such as minimum wage or social security obligations, or by the persons moving across borders who might seek to remain in the host country illegally. The experience with the application of regional and bilateral agreements could be instructive in this case.

98. It could be helpful to identify effective safeguards that can be used to protect importing countries against permanent and/or illegal immigration. These may be safeguards that are imposed on firms from the importing country that hire the services of foreign-originating service teams (e.g. sanction and penalty schemes) or safeguards placed on exporters of service teams (e.g. safety bond schemes). The experience of regional and bilateral agreements would also be instructive in this regard, with a view to identifying selectively sectors where countries might make a GATS commitment to carefully crafted schemes allowing for the temporary entry of service teams.

IV. CONCLUSIONS AND OBSERVATIONS

99. Liberalization of trade in services is an essential prerequisite for the participation of developing countries and countries in transition in international trade in services and their integration into the trading system.

100. Liberalization measures would be more effective towards achieving these goals if they were preceded by a national study or "audit" which would identify priority sectors and assess the potential impact of liberalization. Such liberalization should be accompanied by a package of supporting measures to attract investment to those sectors identified as priority in the sense that efficiency, stimulated by competition, would have the greatest positive impact on the competitiveness of other sectors and firms. Such liberalization could eventually be bound into the GATS Schedules of Commitments, if possible, in return for reciprocal commitments by other countries.

101. The national study should also identify the policy measures needed to assist domestic firms to develop the capacity to compete and to negotiate with foreign firms, such as in the context of joint venture. Accompanying legislation could set out the regulatory framework for such supportive measures and, in particular, seek to eliminate aspects of regulations which may discourage the development of competitive service firms.

102. Governments may wish to bring to the attention of the Standing Committee case studies of experiences with liberalization and its translation into competitive service firms and increased service exports.

103. Most developing countries may find it difficult to derive the expected benefits from Article IV of the GATS given their weak negotiating position in dealing with developed countries and with TNCs. Therefore, it would seem appropriate that the international community accept certain additional principles which would provide for supportive actions to assist the developing countries to acquire a competitive capacity in the production and export of services and to overcome difficulties in penetrating world markets for services. To this end, such supportive actions could include the following:

(a) developing countries undertaking programmes to liberalize their services sectors would be provided with financial and technical assistance to enable their firms to acquire the capacity necessary to compete in the

domestic and export markets;

(b) a set of principles could be drawn up to set out how the objectives of Article IV of the GATS could be achieved in practice, including guidelines for foreign enterprises.

104. The freer international movement of personnel from developing countries is essential to their effective participation in the globalization process and their integration into the world economy and the international trading system. Governments should accept a set of principles aimed at addressing specific problems hindering such movement, within the context of existing immigration laws and regulations and the GATS Schedules of Commitments. The MAST data base should concentrate on including measures affecting temporary movement and member States should consider active collaboration to this end.

105. The experience with the liberalization of the movement of persons within regional integration schemes should be studied in detail, as a possible guide to future action at the multilateral level.

106. Governments may wish to undertake surveys in order to identify the problems met by their service exporters with greater precision so that remedial action could be proposed.

107. On the bases of this information, a consolidated study on regimes for temporary access of services suppliers could be prepared.

1. See discussion in UNCTAD VIII, Analytical Report by the UNCTAD Secretariat to the Conference TD/358, January 1992 UN sales Publication E.92.II.D.3

1. See document TD/B/CN.4/42.

1. Notably in TD/B/CN.4/23; the more theoretical aspects of liberalization were examined in UNCTAD/DTC/7 prepared in collaboration with the World Bank.

1. See TD/B/CN.4/23.

1. Notably TDR/8.

1. The CAPAS programme is a capacity-building programme of technical assistance to African countries focusing on services, initiated by UNCTAD in 1992. Presently, ten African countries benefit from this programme: Benin, Burundi, Ghana, Guinea, Kenya, Nigeria, Senegal, Tanzania, Uganda and Zimbabwe.

1. EFDITS is a joint project on the Expansion of Foreign Direct Investment and Trade in Services initiated by the Programme on Transnational Corporations of the United Nations Conference on Trade and Development and the World Bank to assist developing country policy makers in the area of services.

1. Telecommunications,transport, ports, warehousing, customs, utilities.

1. Exchange rate, fiscal treatment, trade laws, customs control, support to exports, image of the country as exporter and financing.

1. Investment capacity, technological capacity, research and development of products, production capacity, entrepreneurial capacity, training of personnel, volume of the supply of exports, price, quality and timely delivery.

1. See for example, Bonamy J. and Catrice F. "La dynamique des services aux producteurs dans le développement économique tunisien", August 1989. Mexico, Una Economia de Servicios, UNCTAD/ITP/58.

1. Included, textile, construction, chemical products, metal mechanics and food-processing industry.

1. The following national studies have been carried out: Les services au Benin; Les Services au Burundi; Services in Ghana; Les Services an Guinee; Services in Kenya; Services in Nigeria; Les Services au Senegal; Services in Zimbabwe. (Reference to document numbers)

1. See, for example, Simon Moshiro and Brahima Sanou, *Telecommunications Policy and the GATS Negotiations: Methodological Note for a Case Study of Selected African Countries*, a report to CAPAS and ITU presented at the CAPAS Phase II Kick-off Meeting, Harare, 16-17 March 1995.

1. These negotiations have been extended to 28 July 1995.

1. The idea of negotiating commitments with respect to Modes of Supply (or "delivery") was developed in UNCTAD/TDR/8 (1988). The idea seems to have been first mentioned in UNCTAD/RAS/CB.7.

1. See Cezar Feketukuty "International Trade in Services: An Overview and Blueprint for Negotiation", Ballinger, Cambridge, MA, U.S.A., 1988.

1. See Supporting Paper entitled "Information on the Temporary migration regime (Laws and Implementing regulations) in force in selected developed countries".

1. See TD/B/CN.4/24.

1. It should be noted that economic needs tests are not confined to this mode of supply but are used to limit both investment,(not only FDI) and trade in goods.

1. Based on information provided by the Canada's Department of Human Resources Development.

1. Data provided by the Canadian authorities.

1. Quoted from 20 CFR Ch. V (4-1-94 Edition) page 524.

1. Data provided by the U.S. Department of Labor.

1. The criteria relates to proof of citizenship and presentation of documentation demonstrating that the professional will be engaged in a business activity at a professional level and describing the purpose of entry.

1. *Procedure Advice Manual, Temporary Resident Visas and Entry Permits, Number 8: Specialists (Class 414)*, Department of Immigration, Local Government and Ethnic Affairs, 2nd Edition, March 1990, p. 6, item 5.3.

1. Data quoted in SOPEMI, *Trends in International Migration*, 1993 Annual Report (Paris: OECD Publications, 1994).

1. Source: OECD, The Temporary Employment of Foreigners in France and the United Kingdom, Note by the Secretariat, Paris, 1994.

1. Requirements such as whether applicants enter at prevailing wage rates and working conditions lend themselves relatively easily to objective analysis. Average occupational wage rates and working conditions are usually known through government surveys and those surveys can be used as objective reference points.

1. For example, using the figures quoted earlier in this section, somewhere in the vicinity of 65,000 in the United States for H1B visas; around 25,000 to 30,000 in Canada for work permits of specialty personnel; around 20,000 for Class 414 visas in Australia.

1. For example, the United States admits approximately 60,000 new H1-B applicants per annum and assuming that, on average, H1-B visa holders remain in the country three years, there is a total of perhaps, at most,

180,000 holders of H1-B visas in the country at any one time,i.e.about 1.5 tenth of a percentage point of a labour market of nearly 120 million employed.

1. Source: OECD, The Provision of Services and the Movement of Labour in the Countries of the European Community, Note by the Secretariat, Paris, 1994.

1. For example, fees as high as $65 for a three day visit have been reported.

1. For example, in France employers are required to pay a average fee of around FF970 for the granting of a work permit and an additional charge is imposed is the permit is extended.

1. This particular definition is drawn from the schedule of the United States, but those of other developed countries are similar.

1. For example, the Schedule of the United States provides that the intra-corporate transferee has had to have been employed at least one year by his company before transfer to the United States, in the current regulations, the employee has had to have been employed at least one continuous year during the previous three years preceding his/her entry into the United States.

1. (Class 414 in Australia's *Procedure Advice Manual* which is the reference document that summarizes Australia's 1958 Migration Act and its Implementing Regulations).

1. (HIB classification in the U.S. *Consolidated Federal Regulations,* 8-CFR Chapter 1, Part 214, 1-1-94 Edition).

1. Canada amended in Subsection 19(1) of its 1978 Implementing Regulations as revised on 1 November 1984) to explicitly accommodate the category of "service providers." Subsection 19(1) lists individuals allowed to temporarily enter Canada without needing an employment violation (from Immigration) and an employment authorization (from Human Resources), including individuals entering either as business visitors or as intra-company transferees. The old text in Subsection 19(1) made reference only to providers of goods, not services. The text was changed to read "providers of goods and services."

1. For a detailed discussion of these categories, see *Trade in Labor Services and Temporary Movement of Personnel, op.cit.* in footnote 1. There have not been any significant changes in U.S.law or regulations since that report was prepared. The categories are defined in the *Immigration and Nationality Act of the United States (Reflecting Laws Enacted as of April 1, 1982)* (Washington, D.C.: Government Printing Office, 9th Edition, April 1992). Implementing Regulations are summarized in U.S. *Consolidated Federal Regulations*, 8-CFR Chapter 1, Part 214, (Washington, D.C.: Government Printing Office, 1-1-94 Edition.)

1. These classes are defined in Australia's *Procedure Advice Manual* which is the reference document summarizes Australia's 1958 Migration Act and its Implementing Regulations. See also, *Trade in Labor Services and Temporary Movement of Personnel, op.cit.* in footnote 1. There has not been any major

changes in Australia's laws and regulations since that report was prepared.

1. See Visa Information (Ministry of Foreign Affairs, Foreign Nationals Affairs Division, January 1991.) This document is a partial English-language compilation of visa requirements under Japanese Immigration Law and Implementing Regulations provided by the Ministry of Foreign Affairs.

1. See, *Trade in Labor Services and Temporary Movement of Personnel, op.cit.* in footnote 1.

1. See Supporting Paper, op.cit..

1. Since December 1989, the Department of Immigration, Local Government and Ethnics Affairs of Australia issues a Procedures Advise Manual describing conditions of the entry of people to undertake business negotiations and discussions in Australia according to business classes. This manual describes the legislative framework, as well as the specific legislative provisions governing the grant of a visa or entry permits in the specific business classes.

1. See Supporting Paper.

1. Under NAFTA, Canada, Mexico and the United States have set-up a mechanism for bi-annual consultations among the trade and immigration authorities of the three countries to review possible frustrations encountered by business persons in their temporary movement and implement remedies that are consistent with the intent of the NAFTA agreement.

1. For more on this issue, see Thierry Noyelle and Beth Redfield, *Internationally Trade Labor Services in Africa*, a Report to UNCTAD (New York: Columbia University, The Eisenhower Center, Working Paper #91-05, May 1991).