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MOVING PROFESSIONALS BEYOND NATIONAL BORDERS: MUTUAL RECOGNITION AGREEMENTS AND THE GATS*

Executive Summary

When a professional activity is regulated in a country, it can only be practiced by those in possession of the necessary qualifications. It is therefore necessary to provide for mutual recognition, between countries, of each other's professional qualifications. Otherwise, foreign professionals would have to repeat in the host country many of the qualification requirements that they have already completed in the home country. The GATS allows Members to deviate from the MFN requirement and set up bilateral or plurilateral Mutual Recognition Agreements (MRAs). This reflects the assumption that MRAs hold great potential for facilitating the movement of professional services suppliers, are instrumental to policy reform, and represent powerful tools for economic integration, while maintaining the diversity of services that come onto the markets. However, if those agreements, instead of being trade-creating become mainly trade distorting, and if they become instruments that facilitate trade only or mainly among developed countries, their overall objective may be missed. At present developing country participation in MRAs is limited and concerns only the most dynamic among them. Lack of recognition of professional qualifications remains a major obstacle for developing country professionals willing to provide their services abroad. Some mechanisms should, then, be put in place to facilitate developing country effective participation in MRAs: market forces will not by themselves provide a solution to the problem. The ongoing GATS negotiations may provide an opportunity for developing mechanisms that would ensure that MRAs become effective tools for facilitating the international movement of professionals, including developing country professionals.

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Introduction

1. The difficulties that professionals face to have their qualifications recognized in foreign countries have often been mentioned as one of the key issues to be addressed in order to render horizontal and sectoral commitments effective, especially under the General Agreement on Trade in Services (GATS) Mode 4. On the other hand, the absence of relevant and commercially meaningful commitments on Mode 4 has been used as an argument for justifying the limited advances achieved in the field of mutual recognition of professional qualifications. Would it be possible and desirable, especially for developing countries, to break this vicious circle?

2. The area of mutual recognition of professional qualifications and international harmonization of standards, guidelines and best practices for specific professions exhibits a pronounced asymmetry between the situation of the developed countries — the main standard-setters for professional and academic qualifications and the drivers of most Mutual Recognition Agreements (MRAs), and the situation of the developing countries, which mainly play the role of standard-takers, and have a much more limited participation in MRAs. This situation reflects a lower level of development of the professional services sector and of professional associations in developing countries, and a consequent lower level of efficiency and competitiveness. The difficulties that developing country professionals face to obtain recognition of their professional qualifications abroad, however, limit their business opportunities and may, ultimately, have negative repercussions on the efficiency and competitiveness of the sector. Would it be possible and desirable for developing countries to become active players in the field of mutual recognition and international harmonization of professional qualifications? Which instruments could be used to achieve this result? Would the ongoing GATS negotiations provide an opportunity for enhancing developing country participation in MRAs? And if so, under which conditions? This paper attempts to provide some preliminary answers to those questions.

Mutual recognition and the professions

3. Mutual recognition (MR) may refer to both the recognition of academic qualifications, and the recognition of professional qualifications. Mutual recognition of academic qualifications, which basically concerns the recognition of curricula and degrees, can be conferred for academic purposes to allow students to further study, be eligible for training, or to confer the right to use a title or degree. Recognition of professional qualifications, on the other hand, refers to the decision concerning the evaluation of credentials for entry into and/or practice of a profession. Recognition of professional qualifications involves formal and informal education, work experience and expertise. It has two components: the content of the training and the certification of such training through the granting of diplomas or other evidence of qualifications[1] (see Box 1).

[1] Nicolaïdis, K., "Non-Discriminatory Mutual Recognition: An Oxymoron in the New WTO Lexicon", in Th. Cottier and P.C. Mavroidis (Edts), *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law*, The University of Michigan Press, 2000, pp. 267-301, on p. 299.

Box 1

Mutual recognition of professional qualifications: Why and for which occupations?

When a professional activity is regulated in a country, it can only be practiced by those in possession of the necessary qualifications. It is therefore necessary to provide for the mutual recognition between countries of each other's professional qualifications. Otherwise, foreign professionals would have to repeat in the host country many of the qualification requirements that they have already completed in the home country. A profession is regulated when the taking up or pursuit of the profession is subject to the possession of a qualification, for instance a diploma, a professional title, a period of certified professional experience, a State and/or professional examination. The benefits that mutual recognition of professional qualifications may bring about include providing services suppliers with enhanced business opportunities in foreign countries and consumers with a larger choice of services; institutions with an opportunity of learning from each other and exchanging regulatory experiences, the professions with a stimulus to make the necessary adaptations to remain competitive on the market and policy-makers with an opportunity for internal regulatory reform.

4. In common usage, professions have often been defined as the possession of a body of special knowledge, practice within some ethical framework, fulfillment of some broad societal need, and a social mandate which permits a significant discretionary latitude in setting standards for education and performance of its members.[2] Some of the distinguishing features of professions are, then, that they are based on intellectual specialized knowledge and skill, often associated with a university degree; the fact that the right to practice relies on competency testing; and the fact that they include a "general public interest", as well as an "ethical" component. Traditionally, a small number of occupations, by virtue of their educational breadth and their importance in satisfying some fundamental human needs, have been called professions. Medicine, law, ministry, and sometimes the military and the academic occupations enjoyed this status in the past. Nowadays, the number of professions is expanding — reflecting increasing educational opportunities, new technology and specializations — to serve complexly organized societies and diversified and growing societal and human needs.

5. Some professions – such as law, health care, engineering, architecture, and accountancy — fall into the category of "accredited" or "regulated" professions in most countries. In addition to those largely accredited professions, some emerging professions, e.g. financial advisor, urban planner or social worker, need accreditation in some countries. The number of accredited professions, then, may vary across countries and may change over time. Mutual recognition of academic and professional qualifications is of particular relevance for accredited professions.

6. If a profession is regulated, no one can practice it without a license. The licensing of professionals is aimed at protecting the public from physical or financial harm that may be provoked by incompetent or unethical professionals. The services of professionals such as doctors, engineers and lawyers are considered so sophisticated and specialized that consumers cannot distinguish between good and bad practitioners. Because incompetent professional

[2] Freidson E. *Profession of medicine: A study of the sociology of applied knowledge*. Chicago (IL): University of Chicago Press; 1988.

practice can lead to serious harm to health and safety, societies identify the reliable practitioners through licensing.[3]

7. Licensing, however, is attracting increasing criticisms. Opponents argue that the interests of licensing boards are nearly identical to those they regulate. They also claim that setting and preserving rigid educational and other entry requirements, contributes to the creation of an artificial scarcity of trained people which, in turn, leads to rising costs, anti-competitive behaviours and restricts consumer access and freedom to choose. Critics also charge that innovation and changes tend to be resisted by these boards.[4] Additionally, there are questions of accountability when licensing boards are known to be dominated by professionals. Critics contend that by concentrating on educational and examination criteria as the measure of competence rather than on consumer satisfaction and performance, licensing fails its main mission, namely the delivery of high quality services. Nonetheless, a growing number of occupational groups are asking governments to make them subject to licensure.[5]

8. The tension between the public purpose of licensing and its propensity to restrict or become exclusionary is particularly acute nowadays when consumers seek better, cheaper and more varied services, including by relying on foreign services suppliers, while incumbent providers may seek market segmentation and preservation of advantages and prerogatives through licensure.

9. A distinction could be made among three forms of professional entities, namely regulatory bodies, professional bodies or a combination of both. A regulatory body is normally established by a statute or law by governments to protect the public interest. That is the sole or main purpose of statutory bodies. On the other hand, a professional association composed only of professionals, is often just a voluntary association, and is established as a learned society to advance professional knowledge and to protect the interests of the professionals. Professional associations may have ethical standards that require looking after the public interest, but they are not established solely or mainly for that purpose. In some cases, professional associations can be regarded as political bodies developed to defend the interests and preserve the scarcity of their members' labour. There are also examples where professional associations promote their members' private interests, by advocating policy measures that will advance their own members' interests at the expense of those of other bodies representing the same profession. Therefore, national professional bodies and the national regulatory bodies have different responsibilities in their pursuit of professional and public interests.

10. Different relationships may exist between the professional associations and the national regulatory bodies. First, there may be a situation where there is no organized professional body. Secondly, there may be primarily a governmental regulatory body that also may include control

[3] Licensing may be defined as "the process by which an agency of government grants permission to an individual to engage in a given occupation upon finding that the applicant has attained the minimal degree of competency required to ensure that the public heath, safety and welfare will be reasonably well protected" (US Department of Health, Education and Welfare, 1977).

[4] In the health sector, for instance, psychiatrists have bitterly resisted incursions by psychologists and other mental health providers into their field; dentists have tried to stop dental hygienists from expanding their practice.

[5] See on the issue of the pros and cons of licensing in the health professions: Shannon, J.M. and C.K. Dietz, "Licensing Health Professionals: Quality, Competitive Health Care", *The Journal of State Government*, May/June 1989, pp.121-123.

of the education system for a specific profession. Thirdly, a national government may delegate the responsibility to a specific body for education, licensure registration and professional development, e.g. the professional orders. Fourthly, a completely independent professional body may assume responsibility for a specific profession. Fifthly, a combination of the above systems may exist. Through those examples, we have therefore moved from a situation where the professional bodies are absent and the position of the regulatory bodies is predominant, to the opposite situation whereby an independent professional body assumes full responsibility for a profession.

11. The idea behind mutual recognition (MR) of professional qualifications is that if a professional can provide services lawfully in his/her own country, s/he can do the same in any other country, without having to comply with the regulations applied in that country. The regulations applied in the home country, though not identical to those applied in the host country, are nevertheless regarded as equivalent to the latter. A professional services supplier who satisfies the requirements established in his/her home country should not be requested to comply with the requirements in force in the host country, since the two sets of requirements are deemed to be equivalent. A Mutual Recognition Agreement is one in which the respective authorities accept, in whole or in part, the regulatory authorizations obtained in the territory of the other Party(ies) to the agreement in granting their own authorization.[6]

12. While mutual recognition of professional qualifications and international harmonization of standards for specific professions are particularly relevant for the provision of services through GATS Mode 4, they may have an impact as well on the other modes of supply. Arguably, a company may feel more comfortable to offshore (Mode 1) its, say, accountancy or architectural services to professionals whose academic and/or professional qualifications are in adherence with international standards or have been scrutinized during the process of negotiation of an MRA. Along the same lines, if a patient decides to go for medical treatment abroad (Mode 2), s/he may prefer to be treated in a foreign country whose hospitals, for example, have received some kind of international certification and whose medical and paramedical staff have been trained according to internationally-agreed best practices. Lack of compliance with internationally-agreed practices or lack of participation in regional/bilateral mutual recognition exercises might affect the reputation of some professionals and related institutions and diminish their credibility vis-à-vis potential consumers. In the case of professionals providing services through foreign commercial presence (Mode 3), mutual recognition issues seem to be less relevant than for Mode 4, considering that in most cases the requirement imposed by the host country is that a local professional sign or certify the final output of a professional activity, though professionals from different origins and backgrounds may have contributed to it. In the case of lawyers, the requirements imposed by the host country may be stricter, for example they may require that a foreign lawyer should be assisted by a local lawyer when representing and defending clients in court. In certain cases, however, mutual recognition may become a crucial issue even for Mode 3. Accreditation may be required not only for individual professionals, but for companies as well; one example of this is the case of firms providing environmental auditing or certifying compliance with certain rules such as products being produced according to organic farming

[6] Nicolaïdis K., *Managed Mutual Recognition: The New Approach to the Liberalization of Professional Services*, found at http://users.ox.ac.uk/.

criteria. Lack of accreditation would make the certificates issued by such companies irrelevant and deprive their activities of most of their value.

Different approaches and types of MRAs

13. Approaches to mutual recognition and MRAs' coverage may vary to a great extent, however, two basic approaches can be singled out as the basis for MR. According to the so-called *vertical approach*, recognition is provided on a profession-by-profession basis, and as a result of the harmonization or coordination among the parties to an MRA of the education and training required by each profession (harmonization-based approach). In the case of a *horizontal approach*, on the other hand, MR is provided without prior harmonization of curricula and training requirements, on the basis of a broad equivalence of qualifications (equivalence-based approach).

14. While the vertical approach normally leads to unconditional market access, experience has shown that the process of comparing educational and training systems, agreeing upon the details of each profession and implementing specific rules for each profession is a long and laborious process and usually requires significant time and efforts. Conversely, the horizontal approach leads to reduced automaticity of market access and is often accompanied by a system of compensation to offset possible gaps among existing education and training systems (which have not been harmonized) of the countries parties to the MRA. The partial lack of predictability and automaticity of market access conditions and the risk of arbitrary behaviours by host authorities represent limiting factors of the horizontal approach. However, this approach has been shown to lead to much faster and concrete results than the vertical approach and this is the main reason why countries are increasingly relying on it as the basis for their MRAs.

15. Another useful distinction may be made between the *substantive requirements* that are contained in MRAs and those related to *conformity assessment procedures*. Under the former, MR involves an agreement on one or more of the following elements: professional qualifications, the content of studies and licensing examinations. Under the latter, MR refers to the procedures by which individuals are made to conform and comply with requirements, including through examination, and the process by which the institutions that certify them are themselves accredited.[7] The farthest reaching kind of MRA would imply both components, namely the recognition of the equivalence of the substantive requirements, as well as the recognition of the home country's authority to certify such training through the granting of diplomas.

16. In almost all cases, MRAs fall short of granting automatic access to foreign professionals. Instead, they usually leave residual powers to the host State and involve mutual monitoring between regulatory authorities and reversibility clauses. Some MRAs do not go much further than referring to exchanges of information and dialogue.[8] The two examples presented below are of MRAs based on the vertical approach (Box 2 - MERCOSUR) and the horizontal approach (Box 3 - TTMRA), respectively.

[7] Nicolaïdis, K., "Non-Discriminatory Mutual Recognition: An Oxymoron in the New WTO Lexicon", *op.cit.*, on p. 278.

[8] For an in-depth discussion of those issues, see OECD, Trade Directorate, Trade Committee, *Services Providers on the Move: Mutual Recognition Agreements*, TD/TC/WP(2002)48/FINAL, 6 February 2003.

Box 2

Mutual recognition of academic qualifications in MERCOSUR

Members of MERCOSUR signed the Protocol on Services of Montevideo in December 1997 (Decision 13/97) in order to extend the coverage of the MERCOSUR agreement to services trade. For the time being, the Protocol has been ratified only by Argentina and, therefore, has not yet entered into force. Inspired by the GATS, the MERCOSUR services agreement is based upon progressive liberalization. It covers the offering, receipt, purchase, and use of any type of service (except those provided in the exercise of governmental authority) by a service provider from a MERCOSUR country in another member State. Like the GATS and unlike the NAFTA, the Protocol of Montevideo only authorizes the liberalization of services specifically included in the Annexes. Four sectors are singled out for special consideration and rules in the Protocol — namely financial services, maritime transport, land transport, and the movement of natural persons. Article XI of the Protocol addresses the question of recognition: it encourages member States to develop norms and mutually acceptable criteria for the exercise of services professions through the granting of licenses, registrations, and certificates to services providers and to propose recommendations on mutual recognition. Bolivia and Chile, as associated countries to MERCOSUR, benefit from the same regime.

MERCOSUR members are trying to operationalize Article XI by developing agreed requirements and standards for the recognition of diplomas and the right to practice. More specifically, a working group was established in 1998 to facilitate the development of a system of curricula accreditation aimed at facilitating the recognition of degrees. The group decided to form a Consulting Commission of Experts to support its work. The Commission, which embraced national experts, carried out two main tasks, namely analysing and taking stock of the specific teaching content and method in each of the MERCOSUR countries; and analysing the "state of professional exercise", meaning which kind of specific activities professionals in each of the four countries could carry out after getting an university degree. On the basis of this preliminary work, the Commission started defining baseline Quality MERCOSUR Standards for three selected careers – agronomy, engineering and medicine. The draft standards were sent to the National Accreditation Agencies for evaluation and were subsequently modified to reflect the comments provided by the Agencies.

In order to formalize and consolidate this process, the MERCOSUR Experimental Mechanism for Career Accreditation (MEXA) was established. The goal was to set up a mechanism for the recognition of the university degrees granted by those institutions whose curricula had been accredited on the basis of agreed standards. The recognition of degrees would, in turn, make it possible for professionals to move within the region, would enhance the quality of high education and make the teaching and training systems of the concerned countries more comparable. The overall process is coordinated by the Council of the Ministers of Education of MERCOSUR. The National Accreditation Agencies are responsible for carrying out the accreditation process in their respective countries and report to the Council on the implementation and evaluation of the mechanism.

At the time of writing, 14 curricula had been accredited in the field of agronomy, while work is in progress in the fields of medicine and engineering. The recognition of the degrees does not imply, however, an automatic right to exercise a profession.

In conclusion, the MERCOSUR system is based on the mutual recognition of degrees, which itself is made possible by harmonization and accreditation of curricula. While governmental authorities are ultimately responsible for the system, private sector representatives play a key role in the development of the common criteria that are the basis for accreditation. The MERCOSUR process is a typical example of a vertical approach to MR. The initiative is advancing at a slow pace and has only had limited practical results; this is also true of several similar initiatives based on thorough harmonization of education requirements on a discipline-by-discipline basis. Nevertheless, the whole process is regarded as positive by the participating countries, since it has facilitated an exchange of views and experiences among the national institutions in charge of education, professional associations and public and private universities, and is regarded as a tool for enhancing the overall quality of high education in the region.

Box 3

Mutual recognition of professional qualifications under the Trans-Tasman Mutual Recognition Arrangement (TTMRA)

The TTMRA builds on, and is a natural extension of, the 1992 MRA between Australia and New Zealand. It entered into force on 1 May 1998. The purpose of the TTMRA is to implement mutual recognition principles relating to the sale of goods and the registration of occupations. Regarding occupations, the TTMRA covers all registrable occupations, except medicine (for doctors trained in Australia and New Zealand mutual recognition-type arrangements already applied prior to the TTRMA). It provides that a person registered to practise an occupation in Australia is entitled to practise an equivalent occupation in New Zealand, and vice versa, without the need for further testing or examination. More precisely, individuals with overseas academic qualifications need to have their qualifications recognized by the appropriate professional association or governmental regulatory authority of the other country. The legislation governing the TTMRA contains provisions enabling registration authorities to impose conditions on registration to achieve equivalence between occupations. The relevant registration authority determines what conditions should be imposed based on its assessment of whether the activities authorized to be carried out under registration in the respective jurisdictions are substantially the same. These conditions may comprise the limiting of activities authorized by registration subject to the completion of further relevant training. For instance, this training may be supervised practical training to a defined duration to enable the person to gain familiarity with local laws, ethics and procedures followed by a satisfactory interview by an approved practitioner. In Australia, in the case of the self-regulating professions — such as accountancy and engineering — professional associations determine whether an applicant's qualification is comparable to an Australian Qualifications Framework (AQF) qualification, and whether s/he meets the requirements for professional practice in Australia. For those professions regulated by law, e.g. architecture and dentistry, the assessments of overseas qualifications is made by the registration boards, which are established under State and Territory authorities. Governmental authorities and professional associations' decisions are generally informed by guidelines developed by the National Office of Overseas Skills Recognition (AEI-NOOSR), an office of the Department of Education, Science and Training.

The TTMRA is often presented as the best and most effective example of an MRA on goods and registered occupations. It would be interesting to explore whether this example may be replicated in other geographical areas, or whether the very deep level of economic integration attained by Australia and New Zealand – consolidated in the Australia New Zealand Closer Economic Relations Trade Agreements (ANZCERTA) – and their cultural and linguistic affinities make their experience and achievements in the field of MR rather unique or possible to replicate only between countries which enjoy similar conditions.

Source: Council for Australian Governments, Committee on Regulatory Reform, *A Users' Guide to the Trans-Tasman Mutual Recognition Arrangement (TTMRA)*, May 1998; James, M., *Quality Assurance and Recognition of Qualifications in Post-secondary Education in Australia*, OECD/CERI, OECD/Norway Forum on Trade in Educational Services - Managing the internationalization of post-secondary education, 3-4 November 2003, Trondheim, Norway*;* WTO, Working Party on Domestic Regulation, *Communication from Australia – Professional Recognition Arrangements,* JOB(04)/137, 24 September 2004.

17. Negotiating MRAs, even those with a limited scope, requires considerable time and efforts. The main precondition for a country to be in a position to negotiate an MRA on professional qualifications is the existence of a domestic system for regulating the profession, usually aimed at ensuring both the quality of the service and sufficient supply. Such a domestic system may be lacking or be poorly developed . Even when domestic systems are well developed, the task of comparing them and assessing their potential equivalence is not a

straightforward exercise. Education and training systems, as well as licensing requirements tend to be complex and opaque, and are therefore difficult to evaluate and compare.

18. As a general rule, the more a profession is linked to cultural and societal circumstances, the harder it is to develop harmonized standards or establish partial or full equivalence between systems. On the other hand, education and training systems related to professions that are based on universal knowledge are more easily comparable. If we take the example of the EU, we see that MR based on harmonization of curricula has gone furthest in the health sector because professional requirements, and especially training courses, did not vary much from one country to another.

19. For other professions, on the other hand, the major differences between national rules have made the harmonization process more complex and slower. Two directives regulate the movement of lawyers between member States. Under the so-called legal services directive (Directive 77/249 of 22 March 1977), which entered into force in 1977, lawyers can provide their services in other EU countries under the home country title and without having to register in the host country. This directive covers legal services provided occasionally, outside of establishment. The second directive (Directive 98/5 of 16 February 1998), on the other hand, concerns lawyers who wish to establish themselves in another member State of the EU to pursue their profession. This directive states that lawyers must register in the host country and for the first three years practice under their home country title. The host country can require them to be assisted by a local lawyer when representing and defending clients in court. After three years, however, lawyers can fully exercise their profession under the host country's title without having to take a qualifying examination. It is worth noting that the present discipline, which has been in force since December 1999, represents a significant step forward as compared to the previous regime according to which lawyers had either to sit an aptitude test or complete an adaptation period before they could establish themselves in another EC member State on the basis of recognition of diploma.[9]

20. Both directives have had a major impact on the actual movement of lawyers within the EC, including lawyers moving from one large European city to another, but also as lawyers established in border areas and practising their profession in two neighbouring countries. Though the directives were negotiated at the governmental level, national bar associations strongly supported and encouraged the process. The way in which the movement of lawyers is taking place may become the basis for regulating the movement of other professionals within the EU. In other words, the principle that professionals can practice their profession in the host country using their home country title — without any need for harmonizing curricula, training and registration — may be expanded to other professions, especially those that are not based on universal knowledge and where, therefore, the process of harmonization is more difficult. This would create a parallel with the principle that regulates the movement of goods within the EC.

21. In addition to technical problems, there are also systemic obstacles to be overcome in order to negotiate an MRA. There are concerns that professionals less qualified than domestic professionals may be allowed to provide services in the host country. There is also the

[9] European Parliament Fact Sheets – 3.2.3. - *Freedom of establishment and provision of services and mutual recognition of diplomas*, found at http://www.europarl.eu.int/factsheets/3_2_3en.htm.

preoccupation that foreign professionals may saturate the host country market and compete with domestic providers and/or lowering the overall level of remuneration for the services provided. The former concern relates to the State's responsibility to determine the quality of professional services that it is willing to enforce within its territory. The latter concern is linked to domestic professionals' strategy to control the market and keep it as far as possible for them.

22. Because of the above-mentioned technical and systemic difficulties, MRAs cannot be negotiated in a vacuum. Many of them are undertaken by neighboring countries and represent a component of broader regional cooperation initiatives (see Box 3 above on the TTMRA), sometimes including both developed and developing countries (see Box 5 on accountancy in NAFTA). Others are part of cultural agreements and often reflect linguistic and other kinds of cultural affinities between the involved countries. The European Union (EU) was the first regional grouping to apply MR to professionals and its system still represents one of the most well developed experiences in this field (see Box 4).

Box 4

Mutual recognition of professional qualifications in the EU

The 1957 Treaty of Rome called for the adoption of directives on the MR of diplomas, certificates and other evidence of formal qualification aimed at facilitating freedom of establishment and free movement of services among the EC member States. The implementation of this principle proved to be particularly challenging and required the EC institutions, including the Court of Justice, and the member States to adopt different approaches. During the first phase (until the mid-1970s), far-reaching harmonization of professional standards made MR of diplomas possible. On this basis, very specific training requirements were set out for about 20 professions. A second approach was followed starting in the mid-1970s, according to which MR was based on comparability of diplomas. Instead of specific and quantitative requirements, broad guidelines for the content of curricula were spelled out. However, the tremendous efforts aimed at harmonizing on a Community-wide basis the curricula led only to a very limited number of approved directives (for doctors, general care nurses, dentists, veterinary surgeons, midwives, pharmacists and architects). The lack of substantive progress in the field pressed the EC to follow another path. By the early 1980s, the EC switched to a horizontal approach. MR was delinked from harmonization of curricula and from the need to enter into the complexity of each profession.

The horizontal approach to professional services liberalization was embedded in the General System Directives (GSDs). The GSDs is based on the length and character of study or training required to have access to a profession, but it does not set the prior criteria for accreditation in the home country and is not based on harmonized standards. It leans on the assumption that every person who has obtained a complete professional qualification in a member State has the necessary qualifications to exercise the same profession in another member State. To make up for the lack of harmonized standards, the GSDs allows for reduced automaticity of access under MR (contrary to the previous approach based on harmonization) and introduces a system of compensation based on requirements to offset differences among different degree-granting systems (i.e., adaptation period, aptitude test). The underlying rationale of this approach is that national qualifications should be considered by and large as equivalent. However, where significant knowledge gaps or deficits remain, they have to be compensated on a case-by-case basis. The GSDs encompasses sector-specific directives covering particular professions and a more general approach covering those regulated professions which are not the subject of specific directives.

The EC approach evolved, therefore, from unconditional market access based on MR of diploma that was made possible by harmonization of curricula, to conditional market access based on broad equivalence of qualifications and customized recognition accorded to individual professionals. In 2002, the European Commission tabled a proposal for a directive (COM(2002)119-Final) to clarify and simplify the rules in order to facilitate the free movement of qualified people between the Member States, particularly in view of an enlarged European Union. The proposed Directive would replace fifteen existing directives in the field of the recognition of professional qualifications. These include twelve sectoral directives covering the professions of doctor, nurse responsible for general care, dentist, veterinary surgeon, midwife, pharmacist and architect, as well as three further directives which have set up a general system for the recognition of professional qualifications and cover most other regulated professions. A number of changes are proposed compared with the existing rules, including greater liberalization of the provision of services, more automatic recognition of qualifications and increased flexibility in the procedures for updating the directive. In 2004, the Commission presented an amended text (COM(2004)317-final), which includes suggestions made by the European Parliament. Those suggestions aim, above all, to defend the interests of the consumer and reinforce the exchange of information between member States.

The tremendous efforts made by the EC institutions and individual member States to achieve MR of professional qualifications mirror the importance that MR holds as an effective tool to facilitating the movement of services suppliers and as a powerful factor for economic integration. However, language and other cultural diversities between member States, ignorance of the principle of MR and of its operational consequences on the part of the users of the system, be they member States or economic operators, as well as limitations on transfer of pension rights and differences between tax systems are proving equally powerful in making the movement of professionals within the EC rather limited. The EU system of MR does not extend to third country nationals.

In parallel with the initiatives taken in the field of the movement of professionals, since 1999 EC member States and additional European countries have started cooperating with the aim of establishing a European area of higher education by 2010. The aim of the process (the so-called Bologna process) is to make the higher education systems in Europe converge towards a more transparent system whereby the different national systems would use a common framework based on three cycles, Degree/Bachelor, Master and Doctorate. This would make academic degrees easier to compare; facilitate the mobility of students, teachers and researchers; secure mutual trust between national education systems; insure quality of higher education; and, ultimately, contribute to the movement of professionals. 40 countries are at present involved in the Bologna process.

Source: *Mutual recognition*, found at: http://europa.eu.int/comm/internal_market/en/goods/mutrec.htm; *Mutual recognition in the context of the follow-up to the Action Plan for the Single Market*, COM(1999)299 final; Communication from the Commission to the European Parliament and the Council, *The Mutual recognition principle in the Single Market*, found at: http://europa.eu.int/scadplus/printversion/en/lvb/l21001b.htm; *Reform of the system for the recognition of professional qualifications*, found at: http://europa.eu.int/scadplus/printversion/en/cha/c11065.htm; Schneider H., *The recognition of diplomas in the European Community*, found at: www.fdewb.unimaas.nl/eurecom/PDF/Paperschneider.PDF; *The Bologna Process – Next Stop Bergen 2005*, found at: http://europa.eu.int/comm/education/policies/educ/bologna/bologna_en.html.

Box 5

Mutual recognition of accountants in NAFTA

In NAFTA countries public accountancy is among the professions that require a professional diploma and a license to practice. The representatives of the US, Canada and Mexico relevant professional bodies signed in September 2002 a MRA on Principles for Professional Mutual Recognition. This agreement enables certified accountants to practice the profession in all NAFTA countries. The MRA was approved by the NAFTA's Free Trade Commission in October 2003. The Free Trade Commission urged the different State boards to adopt the MRA. The negotiation of the agreement lasted for more than a decade, the main obstacle for its conclusion being that, Mexico on one side and Canada and the United States on the other, had in place different systems for acceding to the profession. In the United States and Canada access to the profession is based on an examination organized by the professional associations. In Mexico, the system was also based on an examination, but it was the responsibility of the government that was using for this purpose the universities. In order to make its system compatible to the ones of the partner countries, in July 1995 the Mexican Institute of Public Accountants, a federation of 60 professional associations, became the body responsible for organizing the examination and granting the license to practise the profession. The new system established in Mexico very much resembles those of Canada and the United States.

Mutual recognition and the GATS

23. Mutual recognition has been incorporated in the international trade regime through the reference made to it in three WTO agreements, namely the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), the Agreement on Technical Barriers to Trade (TBT Agreement) and the GATS. Article VII of the GATS allows WTO members to reach MR with regard to "education or experience obtained, requirements met, or licenses or certificates granted". Recognition may be based upon an agreement among the interested parties - the GATS allowing Members to deviate from the MFN obligations of Article II and set up bilateral or plurilateral MRAs - or granted autonomously. Recognition may be achieved through harmonization or otherwise.

24. GATS Article VI.6, on the other hand, addresses the evaluation of qualifications in the absence of MRAs, the current situation for many countries. More specifically, Article VI.6 requires that, in sectors where specific commitments regarding professional services are undertaken, each member shall provide for "adequate procedures" to verify the competence of professionals of any other Member.

25. Thirty-nine notifications have been communicated under Article VII by 19 WTO Members covering 144 agreements. However, additional agreements may have been notified in the framework of the transparency obligations included in Regional Trade Agreements (RTAs). MRAs concluded as part of RTAs may be covered by the discipline on recognition (Article VII), as well as by that on economic integration (Article V).[10] Since there are equally valid arguments to support either option, some countries have notified MRAs included in RTAs under Article V (e.g. ANZCERTA and the EU), while others have notified them under Article VII. Agreements

[10] Nielson J., "Trade Agreements and Recognition", in *Quality and Recognition of Higher Education – The Cross-Border Challenge*, OECD, 2004, pp. 155-203, on p. 167.

concluded by professional associations are seldom notified. Moreover, it seems that the notification obligations under Article VII are not always complied with. As far as the content of notification is at stake, a standard notification format has been developed by WTO Members for such notifications; this extends to the questions of: Member notifying; article under which notification is made; date of entry into force and duration; agency responsible for enforcement of the regulation; and contact from whom the text is available. Despite the existence of such a form, the actual content of notifications varies greatly, going from just listing the name of the agreements, to providing a short summary of their content. As a result, it is very hard to get a complete picture of the number and content of existing MRAs.

26. GATS Article IV may be highly relevant in the field of MR. More specifically, Article IV.1(a) - relating to strengthening developing country domestic services capacity, efficiency and competitiveness, and Article IV.1(c) – relating to the liberalization of market access in sectors and modes of supply of export interest to developing countries – may be used to justify special efforts, including technical assistance, aimed at facilitating the recognition of the academic and professional qualifications of developing country professionals and the inclusion of developing countries in MRAs. This in consideration of the potential role that MRAs hold as tools for enhancing business opportunities for services providers, as well as improving domestic services capacity through exchanging regulatory experiences between institutions, stimulating the professions to make the necessary adaptations to become/remain competitive on the market, and providing policy-makers with an opportunity for domestic regulatory reform.

27. Article IV.1(b) - relating to the improvement of developing country access to distribution channels and information networks - may be the basis for a call for increased transparency in the negotiations of MRAs and for the possible development of some multilaterally-agreed guidelines related to developing country access to existing and forthcoming MRAs (see section below under *(ii) What are the rights of third countries that may be interested in joining a MRA?*).

28. Article IV.2(a),(b) and (c) call upon developed country members to supply, through the establishment of contact points, information to developing country members concerning commercial and technical aspects of the supply of services, registration, recognition and obtaining of professional qualifications and the availability of services technology. The contact points established by developed countries may, *inter alia*, play the role of facilitators of MR of professional qualifications of developing country professionals and developing country participation in international standard-setting activities (see below under *(iii) Would the development of international standards represent a desirable solution for facilitating the conclusion of MRAs?*).

29. In their schedules of GATS commitments, and more specifically in the column on additional commitments, both developing and developed countries could mention that they strongly encourage negotiations of MRAs for specific professions. These specifications would be instrumental to achieving the objectives referred to in GATS Article IV.

Addressing three specific questions related to mutual recognition

30. Three aspects of MR seem to be particularly relevant to address: (i) What is the legal status of the entities that negotiate MRAs and of the MRAs?; (ii) What are the rights of third countries that may be interested in joining a MRA? (iii) Would the development of international standards represent a desirable solution for facilitating the conclusion of MRAs?

(i) What is the legal status of the entities that negotiate MRAs and MRAs?

31. GATS Article VII, as well as Article 3 of the annex on Financial Services, refer to agreements between WTO members. However, MRAs are negotiated by an array of bodies with different legal structures, e.g. central government authorities, sub-federal government authorities, as well as professional associations who may, or may not, have been empowered by the State to negotiate on its behalf. Moreover, within the same country, only one among several associations representing a specific profession may have delegated authority. Professional associations may therefore be entities established and governed by public law, or private entities controlled by the government, or they may be purely private sector bodies.

32. The legal status of the professional associations involved in MRAs negotiations has important implications for the legal status of the agreements. It is worth recalling that, according to Article I.3(a), GATS applies to "measures by Members"; those are "measures taken by: (i) central, regional or local governments and authorities; and (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments and authorities". If MRAs are negotiated by bodies which have not been approved by government authorities, the agreements will not be binding on States nor will they be held accountable for the implementation and the agreements will not fall under the transparency and accession obligations spelled out in GATS Article VII.

33. It is worth noting that "measures" encompass the conduct of any State organ, regardless of whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.[11] Given this comprehensive coverage, the requirements which are set forth in legislation (statutory instruments), as well as those embedded in rules, procedures, decisions, and administrative action taken by subordinate authorities are subject to the disciplines of the GATS.

34. It could be claimed that the legal form in which government action is taken would not be of decisive importance. Rather, evidence that the conduct in question is attributable to the Government would play a central role in ascertaining the applicability of the GATS.

[11] This definition refers to the attribution of conduct to a State for purposes of State responsibility under international law. Cf. Article 4, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, adopted by the International Law Commission at its fifty-third session (2001) ("Report of the International Law Commission on the work of its Fifty-third session", *Official Records of the General Assembly*, Fifty-sixth session, Supplement No. 10 (A/56/10), chp.IV.E.1).

35. The notion of "measures" also includes conduct by non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities, provided the person or entity is acting in that capacity in the particular instance.

36. Professional associations, with or without delegated governmental authority, perform a number of functions related to capacity building, development of curricula, accreditation, licensing and MRAs. The fact that MRAs negotiated by bodies with no governmental authority are most likely non-binding on States, does not mean that the agreements and other initiatives taken by such entities do not have an impact on the market. On the contrary, they usually are powerful tools to regulate market entry. As it is the case for trade in goods, market entry barriers may hamper international trade in services as much as market access impediments.

37. Box 6 shows the example of professional associations in the engineering sector that act at the domestic and international levels with delegated authority.

Box 6

Professional associations in the engineering sector in Canada

In Canada, the regulation of the engineering profession is a provincial and territorial responsibility. This responsibility has been delegated to engineering's 12 regulatory associations or "ordre" by provincial and territorial statute (e.g., the *Engineers and Geoscientists Act* for British Colombia; the *Professional Engineers Act* for Ontario). The Canadian Council of Professional Engineers (CCPE), established in 1936, is the national organization of the 12 provincial and territorial associations or "ordre" that regulate the practice of engineering in Canada and license the country's more than 160,000 professional engineers. CCPE revitalized its federal government relations programme in 1999, with the goal to actively pursue positive relations with the federal government, and to have a direct influence on federal public policy, legislation, regulations and actions that have the potential to affect public safety or the profession of engineering in Canada. CCPE is one of the signatories of the Washington Accord (www.ccpe.ca)
(see Box 8).

38. Regional professional associations discharge, *inter alia*, functions related to capacity building and harmonization of education across the region, as it is shown by the example below of the ECSACON (Box 7).

Box 7

The East, Central and Southern African College of Nursing

The East, Central and Southern African College of Nursing (ECSACON) is a regional professional body that serves as a technical advisory group to the Commonwealth Regional Health Community composed of 14 member states (ESCA countries). ECSACON was established in 1988 at the Conference of Health Ministers under the auspices of the Commonwealth Regional Health Community Convention. It has carried out capacity-building initiatives in nursing management and leadership as well as the strengthening of nursing education, practice and research. In particular, ECSACON has undertaken a harmonization project on basic nursing and midwifery education across the region. In an initial review of the basic education programs across the countries, it was found that there were more similarities than differences and that the core dimensions of the programmes were alike. The ECSACON reviewed the scope and standards for nursing and midwifery practice, core competencies, core content and standards of education across the region and launched in December 2001 a set of standards as a baseline for use in the region.

Source: Ndlovu R., M.L. Phiri, O.K. Munjanja, S.K. Kibuka, J.J. Fitzpatrick, "The East, Central, and Southern African College of Nursing: A Collaborative Endeavor for Health Policy and Nursing Practice", *Policy, Politics and Nursing Practice*, Vol.4 No.3, August 2003, pp. 221-226.

39. Increasingly, and in parallel with the globalization of professions, professional associations have entered into broad international agreements for the development of best practices and standards, as well as the conclusion of MR of academic and professional qualifications. Box 8 shows a number of international initiatives taken by several professional associations in the engineering and architectural sectors.

Box 8

Mutual recognition of engineers and architects

As early as the 1960s, registering and licensing engineers became rather common, as engineers were held accountable for their actions, and the focus was placed on public health and safety. Apart from the mobility restrictions placed by governments through immigration controls and other limitations included in domestic regulations, the mobility of engineers was restricted by professional associations concerned about the wide variation of professional standards. Engineering is a *regulated* profession, this means that no one can practice it without a license. Licensing in many countries is carried out by professional associations who set standards and regulate the profession.

Most countries divide the development of an engineering professional into two stages, namely acquisition of academic qualifications, and professional development and registration. International efforts made in the field of mutual recognition reflect these two distinct stages. The existence of several bilateral MRAs on academic qualifications prompted six countries to develop the so-called Washington Accord in 1988. The purpose of the accord is the recognition of the equivalence of accredited engineering education programmes leading to the engineering degree. It is essentially a quality assurance process based on world best practice. It recommends that graduates of programmes accredited by the accreditation organizations of each member nation be recognized by the other countries as having met the academic requirements for entry to the practice of engineering. It covers professional engineering undergraduate degrees, while engineering technology and postgraduate-level programmes are not covered by it. The present signatories of the Washington Accord — Australia, Canada, Ireland, New Zealand, the United Kingdom, United States, South Africa, Hong Kong - China, Japan, Malaysia, Singapore and Germany (the last four are provisional members) have agreed to make their respective accreditation procedures comparable; accept one another's accredited degrees; agreed to identify and encourage the implementation of best practices; accepted mutual monitoring; and recognized the need to encourage domestic authorities in charge of licensing and registration to apply the agreement. Signatories of the agreement are the bodies responsible for accrediting professional engineering degree programmes in each of the signatory countries.

At the October 1997 meeting of the signatories of the Washington Accord, it was agreed to establish an independent forum called the Engineers Mobility Forum (EMF). Its objectives are to: facilitate the international movement of professional engineers; establish an International Register of Professional Engineers; promote best practices; assess and remove existing barriers to the international movement of engineers; and lastly, to encourage governments and licensing authorities to adopt the EMF agreement. EMF is, therefore, an international effort aimed at dealing with the second stage of the development of an engineering professional, namely professional development and registration. EMF's membership includes professional associations from Australia, Canada, Hong Kong - China, Ireland, New Zealand, South Africa, the United Kingdom, United States, Japan, Malaysia, and Korea. The professional associations of Bangladesh and India are provisional members, while the Federation of European National Engineering Associations and the APEC Engineer Coordinating Committee have observer status. The EMF International Register of Professional Engineers is intended to provide a framework for the recognition of experienced professional engineers by the responsible bodies in each country. Professionals included in

the register are exempted from or get a streamlined access to licensing or registration in the other participating countries. However, as far as the right to practice is at stake, domestic regulations may restrict it.

Further to the Washington Accord, a similar agreement was developed for engineering technologists or incorporated engineers, called the Sidney Accord, which was signed in 2001 by the professional associations of Australia, Canada, Ireland, New Zealand, United Kingdom, South Africa and Hong Kong - China. Another similar accord, the Dublin Accord for engineering technicians, was signed in May 2002 among the professional associations of Canada, Ireland, the United Kingdom, and South Africa. The Engineering Technologists Mobility Forum emerged from the Sydney Accord and was modeled upon the EMF agreement. Interest in those initiatives is growing internationally.

Some lessons emerge from the experience of mutual recognition for engineers and related professions. A key precondition has to be in place in a country for the corresponding professional association to request membership in a MRA, namely, an accreditation system independent from the educational institutions being accredited, in the case of the Washington, Sidney, Dublin Accords and similar agreements, and a national register in the case of the EMF and related agreements.

The International Union of Architects (UIA) was founded in 1948 as a federation of national professional organizations. It now represents some 1,300,000 architects in more than 100 countries. The UIA established the Professional Practice Commission that has developed the "UIA Accord on Recommended International Standards of Professionalism in Architectural Practice" (the Accord) and nine related Accord policy guidelines. The Accord was adopted in 1999 as a global standard for the profession. It is an advisory document that defines what is considered as best practice for the profession, and defines the standards to which the profession aspires. UIA interest in establishing recommended standards of professionalism grows out of the increasing globalization of architectural practice. The UIA encourages governments and regulatory agencies to adopt the policies of the Accord as the basis for reviewing and making appropriate revisions to their own national standards and as the basis for negotiating MRAs.

It is the intention of the UIA that the Accord and policy guidelines will provide practical guidance for governments and agencies entering into mutual recognition negotiations on architectural services. UIA recommends maintaining the concept of equivalency of professional qualifications as the basis for MRAs. The UIA considers it important that professional/registration or accreditation bodies should have a leading role to play in the MRA process and encourages the involvement of governmental bodies. According to the UIA, no agreement should come into effect if all these parties are not involved. While the Council of Europe, representing all of the UIA member sections within the European Union, and the Architects Council of Asia have formally adopted the UIA Accord, it seems that African professional associations are not particularly aware of it. Moreover, governmental authorities in UIA countries are usually only kept informed of the activities of UIA.

Source: A.J. Hay and P. Greenwood, "International Mutual Recognition of Engineers", *Civil Engineering: Magazine of the South African Institution of Civil Engineering*, Vol.12, Issue 2, February 2004; web site: www.washingtonaccord.org; and www.AIA.org.

40. In conclusion, professional associations play an increasingly active role at the regional and international level in the field of developing best practices, harmonizing standards, concluding MR on academic and/or professional qualifications. While those activities are meant to facilitate the international movement of professional services suppliers, the whole phenomenon is for the time being, by and large, limited to the professional associations of developed countries and to those of a very limited number of developing countries. While the initiatives taken by

professional associations deprived of delegated authority would, in principle, not be covered by the GATS disciplines, they may, nevertheless, have a significant effect on the actual opportunities that professionals may enjoy in foreign markets.

41. GATS Article IX - which refers to business practices, other than monopolies and exclusive services suppliers, that may restrain competition and thereby restrict trade in services - may be of some benefit to help addressing this issue. According to Article IX, each WTO Member shall, at the request of any other Member, enter into consultations with a view to eliminating the above-mentioned practices.

42. Addressing these issues, a comparison between GATS and the TBT Agreement seems possible and may prove useful. The Code of Good Practice for the Preparation, Adoption and Application of Standards (Annex 3 to the TBT Agreement) refers to the activities carried out by any standardization body, including non-governmental bodies, which develop standards, i.e. rules, guidelines or characteristics for products and related processes and production methods with which compliance is not mandatory. The Code is open for acceptance to any standardizing bodies, whether central government, local government or non-governmental and regional standardizing bodies. The Code seeks to bring all standards within its purview and provides for transparency in the preparation, adoption and application of standards. Standardization bodies adhering to the Code of Good Practice have to notify at least twice a year the existence of their work programme, and where details of this programme can be obtained. Notifications have to be sent to the ISO/IEC Information Centre in Geneva. Moreover, standardization bodies have to allow a period of at least 60 days for the submission of comments on draft standards and allow time for consultation, and make objective efforts to solve any problem. WTO Members are responsible for the acceptance and compliance with the Code of Good Practice by their central government standardizing bodies. Furthermore, they are required to take such reasonable measures as may be available to them to ensure also that local government and non-governmental standardizing bodies within their territories, and regional standardizing bodies of which they are members, accept and comply with the Code.

43. A quite active debate took place in the 1990s regarding the use of the Code of Good Practices, especially with reference to voluntary eco-labelling schemes. The preoccupations which prompted this debate were somehow similar to those related to voluntary standards, best practices and MRAs developed by private professional associations, namely, that those measures, by being voluntary and often developed by private bodies, would to, a large extent, escape from multilaterally agreed trade obligations. Nevertheless, they would have a significant impact on trade flows. In the case of eco-labelling, WTO Members reached the agreement to make efforts on a voluntary and non-binding basis to maximize the use of the Code of Good Practice and to apply the notification obligations meant for mandatory measures to voluntary measures, including those developed by non-governmental bodies.

44. A similar approach could be adopted for MRAs and other measures affecting the international movement of professionals that are developed by private associations. In other words, in consideration of the actual or potential trade impacts that such measures may have, Members may agree to voluntary apply to them the same principles and rules that apply to measures developed by governmental bodies or bodies enjoying delegated authority, such as those on transparency and third party access.

(ii) What are the rights of third countries that may be interested in joining an MRA?

45. Parties to a MRA are subject to notification and reporting requirement to be submitted to the WTO secretariat "as far in advance as possible" of recognition negotiations (Article VII. 4(b)). Countries which are parties to an existing or forthcoming MRA "shall afford adequate opportunities for other interested Members to negotiate their accession to such an agreement or arrangement or to negotiate comparable ones with it" (Article VII.2). The rationale behind those provisions is to balance the freedom of countries to enter into bilateral or plurilateral MRAs – in consideration of the potential that those agreements held for facilitating the free movement of professionals - with offering fair opportunities to other countries to join such agreements.

46. Ensuring transparency during MRA negotiations may prove a hard task, since negotiations can last a long time and may go through different phases, some of which may be confidential, or may even end without any agreements. In fact, it may even be difficult to assess when negotiations have properly started and have properly been concluded. Ensuring access to existing MRAs is equally a challenging goal and the obligations that parties to an MRA have vis-à-vis non-Parties are unclear. Is a party to a MRA obliged to negotiate with another country interested in joining the agreement? What does it mean" to afford adequate opportunities"? If a party refuses to negotiate, would this constitute a refusal? Would the lack of human resources to be devoted to negotiating with a new party be an acceptable reason for refusing to do so? Could the refusal to negotiate be brought to the attention of the WTO dispute settlement body? The need to clarify those issues is particularly pressing, considering that virtually all bilateral and regional agreements which cover the services sector contain provisions identical to those included in GATS Article VII.

47. There may be a need to develop multilaterally-agreed guidelines on how to address these issue in order both to avoid MRAs to be used as a means of unjustified discrimination or as a disguised restriction on trade in services, and to put an excessive and unnecessary burden on countries which are already parties to a MRA or are actively engaged in its negotiation. The guidelines could single out some preconditions that countries should satisfy in order to be considered as eligible partners for new negotiations, e.g. the existence of a domestic system for regulating the profession at stake; the existence of an accreditation system not linked to the educational institutions being accredited; a national register of professionals; the existence of a pool of professionals who may be willing to provide services abroad; the existence of cultural or linguistic affinities with a specific country/region which may encourage the movement of professionals towards that country/region. This kind of "screening" would ensure that negotiations are extended to additional parties only when there are realistic chances of successfully including them in the agreement. In this case, negotiating with a new party would be regarded as an obligation. Guidelines could also clarify at which stage of the negotiations the transparency obligations ex Article VII.3(b) would apply. This to avoid countries to be obliged to notify talks which may later on prove inconclusive and not leading to any MRA.

(iii) Would the development of international standards represent a desirable solution for facilitating the conclusion of MRAs?

48. According to Article VII.5, "Wherever appropriate, recognition should be based on multilaterally agreed criteria. In appropriate cases, Members shall work in cooperation with relevant intergovernmental and non-governmental organizations towards the establishment and adoption of common international standards and criteria for recognition and common international standards for the practice of relevant services trades and professions". Article VI.5(b) states that, in determining whether a Member is applying licensing and qualification requirements and technical standards in a way to nullify or impair the specific commitments it has taken, account shall be taken of international standards of relevant international organizations applied by that Member. As in the case of the TBT Agreement, "relevant international organizations" are international bodies whose membership is open to the relevant bodies of at least all Members of the WTO.

49. International/regional federations of professional associations are increasingly formulating harmonized standards, best practices and guidelines for specific professions (Box 8 provides examples on engineers and architects). In this connection, it would be relevant to assess whether those federations may be regarded as truly inclusive and representative of the interests of countries at different level of development. This assessment would then help in finding out whether they may be regarded as "relevant international organizations" and whether the standards they develop may be regarded as those to which Article VI.5(b) refers to.

50. The existence of harmonized international/regional curricula for specific professions and their wide utilization would greatly reduce the need and use of MRAs for such professions, or would reduce the scope of the MRAs to the recognition of the authorities granting the diplomas. On the other hand, partial harmonization of standards and processes makes MRAs still useful and may facilitate their conclusion.[12]

51. International/regional harmonization of standards, both for goods and services, entails major benefits: it promotes market efficiency and expansion; fosters international trade, including at the regional level; encourages competition and lowers barriers to market entry; provides the basis for establishing domestic regulatory requirements; diffuses new technologies; protects consumers against unsafe or substandard products/services; and reduces disputes. Conversely, the divergence of standards creates costs and unpredictability for international trade. Nevertheless, in some cases, these costs are justified, as they arise from legitimate differences in societal preferences, technological developments, environment and other conditions. In these cases, standards harmonisation would not be a desirable solution, while equivalence of measures would provide a better option. The benefits of harmonization may be impeded if the process is captured by special interests in order to exclude market participants or if it is not adequately transparent. The adoption of consultative and participatory procedures in professional standards setting, in some cases envisages the participation of non-traditional stakeholders, makes the development and adoption of international standards more complex and time consuming. While harmonization of substantive requirements and conformity assessment procedures would likely be the most effective instrument for ensuring the free movement of professional services suppliers,

[12] Beviglia Zampetti, A. "Market Access through Mutual Recognition: the Promise and Limits of GATS Article VII", in *GATS 2000 – New Directions in Services Trade Liberalization*, P. Sauvé and R.M. Stern (Eds.), Brookings Institution Press, 2000, pp. 283-306, on p. 301.

equivalence is the best option when harmonization is lacking, is too difficult to achieve or would be inappropriate.

52. The reference to international standards included in GATS Articles VI and VII is not as strong as that contained in other WTO Agreements. Article 3 of the SPS Agreement puts an obligation on Members to use international standards as the basis for their domestic regulations and allows countries to introduce measures which result in a higher level of protection than that which would be achieved by measures based on international standards only if there is a scientific justification or where a country determines on the basis of an assessment of risks that a higher level of sanitary and phytosanitary protection would be appropriate. In the case of the TBT Agreement, domestic measures developed in accordance with relevant international standards are rebuttably presumed not to create unnecessary obstacles to international trade (Article 2.5). Because of the rather strong provisions included in the TBT and SPS Agreements on the use of international standards, an active debate has been taken place in that context on the legitimacy of international standardization organizations and on the transparency and openness of the international standard-setting process.

53. The most serious constraint to effective participation by developing countries in international standard-setting refers to the lack of capabilities at the national level for the evaluation of draft standards and the formulation of positions in consultation with all interested parties; in other words, adequate and effective participation of developing countries relies on their technical capacity to contribute to the standard-development process by proposing solutions and criteria. Costs of direct participation in standard setting meetings pose as well a constraint to developing country involvement in the process.

54. Contrary to the SPS and TBT Agreements, the GATS does not contain provisions meant to facilitate developing country participation in international standard-setting activities. However, it may be argued that the letter and spirit of GATS Article IV suggest that developing country participation in such activities should be facilitated and supported, in consideration of their actual and/or potential relevance for strengthening developing country domestic services capacities and enhancing their export opportunities.

55. International standardization may also be of relative relevance to developing countries, since standards may be developed for professions that are not of export interest to them. An effort should therefore be made to tackle professions which are of immediate relevance to developing countries and that can facilitate their services exports.

56. The WTO Guidelines on Mutual Recognition in the Accountancy Sector (S/L/38, 28 May 1997), produced by the Working Party on Professional Services, represent an example of efforts carried out by WTO Members under Article VII.5.[13] The Guidelines are voluntary and non-binding and are aimed at facilitating the negotiations of MRAs in the accountancy sector and the accession of third parties to existing ones. The intent is to assure that foreign qualifications are

[13] The establishment of guidelines for the recognition of qualifications was one of the three pillars of the Working Party's mandate. The Working Party on Professional Services was replaced by the Working Party on Domestic Regulation in April 1999.

evaluated in a non-arbitrary, non-discriminatory way, and to make sure that the process is fair and open. The guidelines cover both the process for negotiating and the substance of the agreements.

57. Despite of some initial discussions about extending the discipline included in the Guidelines to other professions, no concrete results have so far been achieved. Professional associations have not been involved in the work of the WTO Working Group on Domestic Regulation. Their reporting on the functioning of the MRAs they have concluded and some clarifications about the conditions for joining such agreements could, however, be beneficial for members, especially developing members, which plan to join the agreements.

Conclusions

58. Professional and academic standards, guidelines and best practices are increasingly being developed by national regulatory bodies and professional associations and included in bilateral, regional or plurilateral MRAs.

59. The GATS allows Members to deviate from the MFN obligations of Article II and set up bilateral or plurilateral MRAs. This reflects the assumption that MRAs hold great potential for facilitating the movement of professional services suppliers, are instrumental to policy reform, and represent a powerful tool for economic integration. However, if those agreements, instead of being trade-creating become mainly trade-distorting and lead to the fragmentation of professional markets, and if they become instruments which only facilitate trade among developed countries, their overall objective may be missed and the breaking of the MFN principle not be any longer justified.

60. Depending on the legal nature of the institutions that have been involved in the negotiations of the MRAs, those agreements may or may not be binding for the States. In all cases, however, MRAs have an impact on the markets for professional services and on business opportunities for professionals willing to provide services abroad.

61. Lacking MRAs, foreign professionals would have to repeat in the host country many of the qualification requirements that they have already completed in the home country. Moreover, professionals who are unable to prove compliance with internationally agreed professional/academic standards or best practices might look less credible and reputable in clients' eyes. Participation in MRAs would, then, be instrumental to facilitate market access for foreign professionals and ensure quality of services.

62. The negotiations of MRAs, however, are very often a long, complex, costly and time-consuming exercise. A country that wishes to be party to an MRA, first of all, has to meet some basic requirements, such as to have in place a domestic system for regulating the profession at stake, an accreditation system, and a national register of professionals. In addition, it must have the capability to evaluate draft standards, compare education and training systems, and formulate positions. It has also to have the human and financial resources needed to take part in the negotiations that may last for several years. The fulfilment of all these conditions may prove particularly difficult for developing countries. In fact, their present participation in MRAs is limited and concerns only the most dynamic among them.

63. Considering, however, the benefits that MRAs may bring about and their proliferation, it seems that it would not be in the interest of developing countries to keep themselves out of those agreements. On the other hand, some conditions should be put in place to facilitate developing country effective participation in MRAs. The ongoing GATS negotiations may provide an opportunity for reaching this goal.

64. Increased transparency in the negotiations of MRAs and clear rules regarding third party rights represent crucial steps towards making the overall process of MR of academic and professional qualifications more responsive to developing country expectations and needs.

65. In consideration of the actual or potential trade impacts that MRAs negotiated by professional bodies deprived of governmental authority may have, countries may agree to voluntary apply to those agreements the same principles and rules that apply to measures developed by governmental bodies or bodies enjoying delegated authority, such as those on transparency and third party access. The provisions of GATS Article IX may also prove useful in dealing with practices by professional associations that restrict market access for foreign professionals.

66. Both developed and developing countries, when opening their professional services markets, could include in the schedules of specific commitments reference to the suitability of concluding MRAs on professional qualifications.

67. GATS Article IV may be highly relevant in the field of MR. It may be argued that the letter and spirit of the article suggest that developed countries should make efforts aimed at facilitating the recognition of the academic and professional qualifications of developing country professionals, and developing country effective participation in MRAs. This in consideration of the actual and/or potential relevance that MR has for strengthening developing country domestic services capacities and enhancing export opportunities for them.

68. Technical cooperation and capacity building - through government-to-government, government to private sector and private sector-to-private sector assistance – would increase the efficiency and competitiveness of the professional services sector in developing countries. This, in turn, would enhance business opportunities abroad, and make developing country institutions more interested in and more able to participate in MRA negotiations.

69. Procedures to develop MRAs should be streamlined and made more expeditious to facilitate broader country participation.

70. Professional associations which have played a key role in the development of major MRAs could be invited by the WTO Working Group on Domestic Regulation to share their experience, provide information on the functioning of the MRAs, and on the procedures and pre-conditions for third party access to those agreements.

71. In the case of MRAs, as well as in many other cases under the GATS, external factors may, however, jeopardize the achievement of the goals included in the MRAs. Potential obstacles include practices of professional associations which may disregard the MRAs, especially if the MRAs were negotiated without their direct involvement; domestic regulations which may make it

difficult for consumers to change services providers; lack of adequate publicity and transparency on the MRAs which may make private companies and the public at large reluctant to rely on the services provided by foreign professionals.

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