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**Liberalization and Regulation of the  
Movement of Service Suppliers:**

**Comparing the Provisions for Labour Mobility in the  
General Agreement on Trade in Services,  
the North American Free Trade Agreement,  
and the European Union**

**by**

**Allison Marie Young**

**Submitted in partial fulfillment of the requirements  
for the degree of Doctorate of Philosophy**

**at**

**Dalhousie University  
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August 27, 2001**

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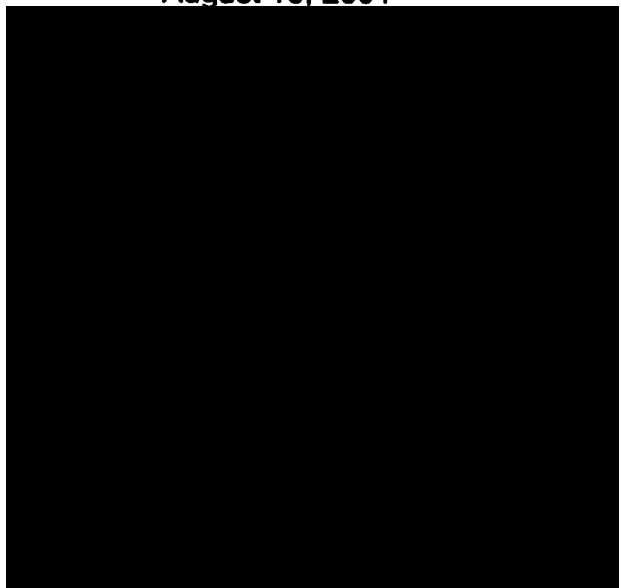
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AUTHOR: Allison Marie Young

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To Sue...

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## **Abstract**

This thesis explores the relationship between liberalization and regulation with regard to labour mobility. To do so, it first situates labour mobility historically within the international trade agenda for the period 1918 to 1951. It does this to demonstrate how international labour mobility had its roots in politically sensitive domestic employment concerns as well as in international trade matters related to investment.

From there, labour mobility or 'movement of service suppliers' is identified as an important services trade issue in the contemporary period. It is demonstrated not only that the movement of service suppliers is required by multinational corporations to be competitive in trade in services, but also that this movement is a development issue particularly as it relates to foreign direct investment, technology transfer, and remittances. It is further demonstrated that the movement of service suppliers raises sensitive domestic regulatory issues concerning immigration, labour market development, and accreditation.

The thesis then examines the provisions for movement of service suppliers within the General Agreement on Trade in Services (GATS). It is demonstrated that the developed-developing country tensions surrounding these provisions were temporarily resolved during the negotiations by largely carving out regulatory concerns at the same time that accommodation between liberalization and regulation were pursued both formally and informally from within the agreement. As the comparison with the EU shows, this accommodation has integrative effects.

The discussion of Chapter 16 of the North American Free Trade Agreements (NAFTA) shows that despite the narrow economic objectives to which the NAFTA aspires as well as its weak institutional arrangements, the provisions for temporary entry in Chapter 16 try to account for regulatory concerns. In comparison with the EU, it is shown that providing rough policy accommodation between liberalization and regulation through Chapter 16 produces integrative effects.

In examining the post Uruguay Round phase and the current round of GATS services negotiations, it is shown that a policy nexus is developing between trade policy-makers and regulatory officials who manage the temporary entry of service suppliers.

Finally, this thesis concludes by putting the policy accommodation required of services trade liberalization in the context of the post World War II trading system. In explaining the development of trade policy for goods, it points to the necessity of direct policy accommodation for services trade between liberalization and regulation. In the case of movement of service suppliers, it identifies developing country participation and integration as products of this accommodation which will require future attention.

## List of Abbreviations and Symbols Used

|            |   |
|------------|---|
| APEC       | - Asia-Pacific Economic Cooperation                     |
| ASEAN      | - Association of Southeast Asian Nations                |
| CIC        | - Citizenship and Immigration Canada                    |
| DOL        | - Department of Labour                                  |
| ECOSOC     | - Economic and Social Council of the United Nations     |
| EEC Treaty | - Treaty Establishing the European Economic Community   |
| ENTs       | - economic needs tests                                  |
| EU         | - European Union  |
| FDI        | - Foreign Direct Investment                             |
| FTA        | - Free Trade Agreement                                  |
| GATS       | - General Agreement on Trade in Services                |
| GATT       | - General Agreement on Tariffs and Trade                |
| GNS        | - General Negotiation on Services                       |
| ILO        | - International Labour Organization                     |
| IMF        | - International Monetary Fund                           |
| IMP        | - International Metropolis Project                      |
| INS        | - Immigration and Naturalization Service                |
| ISCO       | - International Standard Classification of Occupations  |
| ITO        | - International Trade Organization                      |
| LDCs       | - less developed countries                              |
| MAI        | - Multilateral Agreement on Investment                  |
| MFN        | - most-favoured-nation                                  |
| MNCs       | - multinational corporations                            |
| MRAs       | - mutual recognition agreements                         |
| NAFTA      | - North American Free Trade Agreement                   |
| NT         | - national treatment                                    |
| OECD       | - Organization for Economic Cooperation and Development |
| RTA        | - Reciprocal Trade Agreements Act                       |
| TEWG       | - Temporary Entry Working Group                         |
| TRIMS      | - Trade-Related Investment Measures                     |
| TRIPS      | - Trade-Related Intellectual Property Rights            |
| UN         | - United Nations  |
| UNCTAD     | - United National Conference on Trade and Development   |
| UNCTE      | - United Nations Conference on Trade and Employment     |
| WPDR       | - Working Party on Domestic Regulations                 |
| WPPS       | - Working Party on Professional Services                |
| WTO        | - World Trade Organization                              |

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## **CHAPTER 1:**

### **Introduction**

#### **Section I: General Overview**

In the late 1970s, it became apparent to developed countries that international trade in services was beginning to assume much greater economic importance than it had in the past. The statistics measuring international trade in services, however, were notoriously suspect making it difficult to identify greater trade flows in services.<sup>1</sup> Nevertheless, the growth of employment in export-oriented service industries, increased development of infrastructure for the delivery of services, and a general perception that more and better services were becoming available internationally all combined to heighten the interest in international services trade.

The growth in importance of international trade in services has been attributed by scholars to many different factors. The primary factor appears to be advancements in technology, particularly in the telecommunications and transportation sectors. These advancements have allowed

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<sup>1</sup> A detailed discussion of the quality of the statistical data concerning the movement of service suppliers follows in Chapter 3. For general information on statistics concerning trade in services that were collected in the 1970s and 1980s, see, Sapir, 1985; Stern and Hoekman, 1987.



companies to segment their production processes worldwide in order to take advantage of the international division of labour, institute new management techniques such as "just-in-time inventory" thereby cutting down on production costs, promote new value-added service products for internationally traded goods, and create entirely new stand alone services for the international market.<sup>2</sup>

Services have always been of fundamental social and strategic importance for both developed and developing economies. Services are considered to be the glue of any economy since they are embodied not only in the latest technological developments, but are also present in so-called basic social and economic activities like education, child-care, housework, and health-care. 'Infrastructure services' such as transportation services and telecommunication services are fundamental to any kind of modern economic activity an economy may undertake. The higher profile that the service sector began to attain in the 1970s in developed countries was directly related to the new prospects for growth, competition and international

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<sup>2</sup> For more information on these developments and a look at the role of services in the international economy generally, see: Feketekuty, 1988; Inman, 1985; Nusbaumer, 1987; Piore and Sabel, 1984; Riddle, 1986; Shelp, 1981. For more general information on the service sector and its relationship to the knowledge economy, see: Drucker, 1993; Marshall and Tucker, 1992.

trade which arose from the innovations mentioned above.

These innovations were buttressed by other structural changes that occurred in the 1970s such as the development of new international markets created by rising incomes in industrialized countries and in some developing countries, and intensified competition from certain developing countries, particularly those in Asia. All of these factors focused more attention on the growth potential of international trade in services and its amenability to development in various industry areas such as telecommunication services, financial services, transportation services, professional services, distribution services, environmental services, health services, tourism services, construction services, audiovisual services, and so on.

As the secondary literature on trade in services demonstrates, international trade in services has occurred in four, not necessarily mutually exclusive, ways: 1) those services delivered on a cross-border basis without face to face contact and often using electronic telecommunications equipment (also known as "disembodied" services<sup>3</sup>), for example, architectural services delivered by fax; 2) those

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<sup>3</sup> This term was initially developed by Bhagwati (1984). For more information on disembodied trade in services see Krommenacker, 1986.

services where the consumer moves across an international border to consume the service, for example, tourism services; 3) those services where commercial presence or foreign direct investment (FDI) are generally needed before a service can be supplied, for example, distribution services; 4) those services where the supplier moves across an international border to supply a service, for example, nursing services.<sup>4</sup>

The focus of this thesis is on the movement of suppliers across borders to deliver services, particularly as it is organized through certain regional and multilateral trade agreements. Because this movement is often, though not exclusively, associated with FDI, this thesis will also give some attention to investment issues when discussing movement of service suppliers.

One of the traditional and primary functions of the state is to control the movement of people across its borders. By doing so, the state achieves several security-related objectives: it decides who may enter, for how long, and for what purpose and it protects those already living

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<sup>4</sup> A reading of the secondary literature on trade in services describes how trade in services occurs. See, Bhagwati, 1987; Feketekuty, 1986, 1988; Giarini, 1987; Gibbs, 1987; Bressand and Nicolaidis, 1989; Hindely and Smith, 1984; Inman, 1985; Lanvin, 1989; Messerlin and Sauvart, 1990; McCulloch, 1990; Riddle, 1986; Sapir, 1985.

within the state from those not permitted to enter. Controlling the movement of people crossing its borders represents one way in which the state acts to limit the impact of those seeking entry on domestic policy areas such as standards setting and labour market development among others. The control of the border in this way is fundamentally political in nature since it reveals political decisions not only about who may enter, but also about who within the border will be affected by new population intake. These decisions generate either political resistance or support for this intake by affected population groups living within the state.

In the past 15 years, pressure has mounted to liberalize the conditions under which services suppliers are permitted to cross borders to deliver or trade services.<sup>5</sup> This pressure represents a fundamental challenge to the state in the domestic policy areas of immigration, labour market development and professional accreditation. In effect, then, when we speak about liberalizing the movement of service providers, we are also speaking about potentially changing regulatory policies concerning immigration, labour

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<sup>5</sup> When someone travels to a foreign country to provide or supply a service, they are "trading" that service because they are not a resident of that foreign country. A more detailed definition of trade in services is provided in Chapter 3.

market development, and accreditation issues. The pressure for that change generates political resistance among a wide variety of domestic interests. The manner in which the state is attempting to negotiate the relationship between liberalizing the movement of service suppliers through trade agreements on the one hand, and immigration, labour market development and professional accreditation issues on the other, is the broad subject matter of this thesis.

The formal link between international trade policy and domestic regulatory issues has been a topic of discussion in international trade policy circles since at least the completion of the Tokyo Round of multilateral trade negotiations in 1979. This discussion has intensified significantly since the completion of the Uruguay Round in 1993 which included agreements on Trade-Related Intellectual Property Rights (TRIPS), Trade-Related Investment Measures (TRIMS), and a General Agreement on Trade in Services (GATS). At the regional level, this discussion has been going on since the 1980s with respect, for example, to the Free Trade Agreement (FTA) between Canada and the United State and the North American Free Trade Agreement (NAFTA) and for several decades within the European Union(EU) context. The most recent foray into this discussion has taken place between 1995 and 1998 at the Organization for

Economic Cooperation and Development (OECD) where member states have tried (unsuccessfully) to negotiate a Multilateral Agreement on Investment (MAI).

As various studies have shown, the international trade agenda is no longer dealing only with at-the-border trade issues like tariff reductions, but is now focusing on behind-the-border domestic policy issues which affect both trade *and foreign investment flows*.<sup>6</sup> The flow of foreign investment comes into contact with domestic policy because it is about foreigners wanting to operate directly in a domestic market organized and regulated by the state through domestic policy. The reality of this contact means that a wide variety of domestic policy issue areas are now the subject of international discussion and negotiation. The question is, how are these domestic policy issues discussed in relation to trade flows and to what end(s)?

In the case of the movement of service suppliers impacting directly on immigration, labour market development, and professional accreditation issues, states have entered into negotiations to, in effect, simultaneously liberalize and regulate the conditions under which this movement can take place. That is, efforts are being

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<sup>6</sup> For in-depth discussions of how domestic policy may impact on trade and investment flows see, OECD, 1995; Sauvé and Schwanen, 1996; OECD, 1996.

directed at making this movement sufficiently free to encourage business activities, while at the same time continuing to allow the state to regulate this movement in order to achieve certain economic and social goals concerning immigration, labour market development, and accreditation.

As one might imagine, achieving both liberalization and regulation objectives simultaneously is a very complex goal for many different reasons. First, at the domestic level, states must figure out how to modernize domestic regulation to allow in international competition while continuing to achieve regulatory objectives. Domestically this is complex and politically difficult because it spawns a discussion about the merits of international competition and the legitimacy of domestic regulatory objectives. Second, states all possess different immigration, labour market development and accreditation regulations which reflect particular domestic economic, social, and political cultures.

At the international level, liberalization negotiations are about agreeing on the international rules or disciplines by which barriers can be minimized and trade and investment can occur. Somehow, a way must be found to allow states to achieve the myriad of regulatory objectives they have

identified in their own jurisdictions while also ensuring that the regulations themselves adhere to liberalizing disciplines or, in other words, are made "trade friendly". Clearly, making the liberalization of conditions regulating the movement of service suppliers and the domestic regulation of immigration, labour market development, and accreditation issues somehow accommodate one another is a complex and potentially contentious process.

There are three well-developed trade agreement fora where states have attempted and are attempting to negotiate the conditions under which the movement of service suppliers can be simultaneously liberalized and regulated. These include the GATS, the NAFTA, and the treaties making up the European Union (EU). Each of these agreements contains provisions which speak expressly to the issues of movement of service suppliers making them obvious candidates for investigation.

This thesis will demonstrate that the participants in these agreements have liberalized the movement of service suppliers in such a way that simultaneously allows them to address regulatory issues relating to immigration, labour market development and professional accreditation issues. This thesis will also demonstrate that, despite the different levels of social and economic integration to which



these agreements aspire, the challenges states face in attempting to simultaneously liberalize and regulate the movement of service suppliers within the various trade fora and the strategies they employ to achieve these objectives are similar. Further, this thesis will demonstrate that the ability to simultaneously address trade and regulatory issues from within trade agreements is creating a new policy nexus. Finally this thesis will show that the manner in which the movement of service suppliers is dealt within within these agreements raises complex questions about developing country participation as well as about their integrative effect.<sup>7</sup>

### **Methodology**

This thesis will use various historical documentation including League of Nations Conventions, International Labour Organization Conventions and documentation, International Trade Organization negotiating documentation and the Havana Charter, as well as the GATS, the NAFTA, relevant EU treaties, resolutions, directives, and case law, and confidential interviews as its main sources of primary

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<sup>7</sup> It is not the purpose of this thesis to define or speculate about the nature of the "integration" that might come about due to the integrative effects that the trade agreements in question may have. Information about the categorization of integration schemes can be found in UNCTAD, 1992.

research.

In the period between 1918 and 1951, the primary historical documentation mentioned above as well as supporting secondary material will be used to situate international labour mobility within the international trade agenda. Then, in order to identify the importance of the movement of service suppliers in the contemporary period, secondary material from both a developed and developing country perspective will be examined.

In the GATS context, the primary research will examine the negotiating history as well as the relevant provisions for liberalizing the movement of service suppliers including the scheduling of liberalization commitments. This examination will be carried out using the GATS itself, the General Negotiation on Services documentation, examples of countries' schedules of commitments, and confidential interviews conducted in 1998 and 1999.

In the NAFTA context, the primary research will examine the legal text of Chapter 16 and its relevant annexes. An examination of the negotiating history of Chapter 16 will take place mainly through the use of confidential interviews conducted in 1998 and 1999. Secondary research material, though limited in availability, will also be used to understand the negotiating context of the NAFTA.

The EU context will be used as a comparative counterpoint for examining the GATS and the NAFTA. In the case of the EU, relevant Directives, Resolutions, and Court cases which deal with implementation and regulatory issues concerning movement of service suppliers will be examined. Confidential interviews conducted in 1998 will also be used to explore both the negotiation and implementation processes of the relevant provisions.

Finally, documentation from the World Trade Organization (WTO), the United Nations Conference on Trade and Development (UNCTAD), the International Labour Organization (ILO), the United Nations Statistical Division, and Asia-Pacific Economic Cooperation (APEC), as well as confidential interviews will be used to discuss the current round of GATS negotiations.

### **The Literature**

The secondary material dealing with the movement of service suppliers, with the exception of the literature concerning the EU, is not well developed. Most of the material that exists was written in preparation for and during the Uruguay Round in order to convince negotiators that it was a legitimate topic for the GATS negotiations and to identify and describe which types of services and their

delivery might be of interest to the negotiating parties. Not surprisingly, the literature emanating from the South and from the United Nations Conference on Trade and Development (UNCTAD) differs somewhat from the literature written by those in developed countries.

The developed country literature has focused mainly on business services, particularly accounting, advertising, management consulting, and legal services, outlining why such services are tradeable and identifying which countries possess a comparative advantage in them (Noyelle and Dutka, 1988). Notably, this literature associates labour mobility with foreign direct investment (FDI). The attention given to business services by this literature is not surprising given that the comparative advantage in these services is overwhelmingly held by developed countries, particularly the United States. Related issues which have also received attention include recognition agreements for licensing and qualification issues (Nicolaidis, 2000). Generally speaking, this literature has not promoted nor discussed in any detail the movement of non-professional or lower-skilled service suppliers. Moreover, the literature has focused primarily on developed country export needs and has not focused on the need of developed countries to import service suppliers, such as software engineers.

UNCTAD focused a fair amount of attention on the movement of service suppliers during the Uruguay Round. It identified sectors of service provision such as construction, transportation, computer software, and health services where developing countries might have a comparative advantage in exporting services via the movement of service suppliers (UNCTAD, 1989). It also surveyed these sectors on a regional basis (particularly in the Association of Southeast Asian Nations [ASEAN]) in order to find out what arrangements were in place regionally for the movement of service providers and if these arrangements could be applied in other fora such as the GATS (UNCTAD, 1990). This work proved to be important because it helped negotiations from less developed countries to use the logic of comparative advantage to push for liberalization of the movement of service providers (particularly non and semi-professionals) vis-a-vis developed countries. It also helped them to conceptualize this movement as distinct from FDI. The UNCTAD material therefore helped to open up the debate in the GATS negotiations on the movement of service providers which, in turn, has raised new conceptual issues about how that movement can be perceived, liberalized and regulated. These conceptual issues were not discussed in the secondary literature during the Uruguay Round either from the

perspective of developed or developing countries.

In the post Uruguay Round years (1995-1999) and now during the new round of services negotiations currently taking place at the WTO, there has not been a great deal of secondary work done on the movement of service providers either in retrospect or in preparation for the new negotiations. One of the few books to be published on this topic calls for the creation of a trade-related visa regime for all service providers as a response to OECD member fears concerning migration for employment or permanent settlement (Ghosh, 1997). Exactly how this would be deployed, particularly in light of immigration, labour market development, and accreditation policies receives less attention. Similarly, Mukherjee (1996) proposes a Multilateral Labour Treaty to regulate the export of labour-intensive services in various industries. Again, how this would be deployed in a satisfactory manner, particularly where developed countries are concerned, is not discussed. The WTO Secretariat released an assessment of country commitments for movement of service suppliers under the GATS, but its analysis was necessarily narrow leaving out, as it did, an investigation of the domestic regulatory challenges posed by further liberalization in this area (WTO, 1998: "Movement of Natural Persons").

UNCTAD has begun preparation for the new round of services negotiations at the WTO by focusing on sector specific analyses of country commitments in the GATS schedules with regard to the movement of natural persons. For example, it published "International Trade in Health Services" which attempts, among other things, to identify whether or not developing countries have a comparative advantage in the movement of health service providers and, if so, how this advantage can be realized in the current GATS negotiations (UNCTAD, 1998a). UNCTAD has also undertaken some analysis of barriers to services suppliers such as economic needs tests (ENTs), but this analysis does not touch upon domestic regulatory issues such as immigration, labour market development, or accreditation (UNCTAD, 1999c).

Very little material analyzing Chapter 16 (Temporary Entry for Business Persons) of the NAFTA has been published. Burns (1989) provides some background on the negotiations for Chapter 15 of the FTA (Temporary Entry for Business Persons) briefly identifying the private sector as the main motivator of the chapter. Next to no secondary material exists concerning Chapter 16 of the NAFTA, either with regard to its negotiation, the legal text, its implementation, or the ongoing functioning of the Chapter 16

Working Party. Exceptions include Cassise (1996) and Vazquez Azpiri (2000) but these are primarily descriptive in content.

As might be expected, there is a fair amount of material about the movement of service suppliers within the European Community. This material derives from examination of cases decided by the Court of Justice of the European Communities, Council Regulations, Commission Directives and the various treaties constituting the EU. Given the integration ambitions of the European Community, the literature looking at the movement of service providers has focused on a wide variety of issues arising from this movement including accreditation, right of entry, and access to social security systems, terms and conditions of employment, and so on (Commission of the European Communities, 1989; Tiedje 1988; Robin, 1996; Grey, 1989).

The literature on migration contains a fair degree of research about migration via multinational corporations and about the temporary migration of both skilled and unskilled workers (Tzeng, 1995; Salt, 1997). However, nothing connects this movement to its management within trade agreements. Rather, this literature attempts to theorize this movement using ideas like skill selectivity (Findlay, 1987), circulatory skill flows (Gould, 1988),



spatial divisions of labour (Salt, 1987), and so on. Indeed, it is interesting to note that there is virtually no overlap between the migration literature and the trade in labour services literature though they are dealing with the same broad topic, albeit from different perspectives.

### **Chapter Outline**

Unlike the literature briefly summarized above, this thesis looks at the movement of service suppliers in a comprehensive and comparative fashion and begins to position it as an important trade issue alongside goods and capital. By focusing on the relationship between liberalization and regulation in the areas of immigration, labour market development, and professional accreditation, this study is able to comment on how state relations within the context of trade agreements, including relations between developed and developing countries, have developed in order to respond effectively to this issue.

The thesis will proceed in the following manner. Section II of Chapter 1 will provide a historical summary of the international economic situation surrounding the development of the international trading system beginning in the 19<sup>th</sup> century and ending with the beginning of the preparatory negotiations to create an international trade

organization in 1945. In particular, it will serve to identify how the relationship between the international trading system and the state's control over domestic policy areas like employment evolved during the period in question.

Chapter 2 will historically situate international labour mobility within the international trade agenda and demonstrate how the issue of international labour mobility had its roots in politically sensitive domestic employment concerns as well as in international trade matters related to foreign direct investment (FDI).

Chapter 3 will identify how the movement of service suppliers is part of the trade in services agenda both with regard to the needs of multinational corporations from developed countries and the needs of developing countries. At the same time, and cognizant of the terminological instability surrounding movement of service suppliers, this chapter will demonstrate how the movement of service suppliers implicates sensitive domestic regulatory areas like immigration, labour market development, and professional accreditation.

Chapter 4 will examine those negotiations of the GATS which led to provisions providing for the movement of service suppliers. This examination will consider coverage, architecture, scheduling design, immigration, labour market

development and professional accreditation. In order to begin to consider what the liberalization of service suppliers within the GATS means in terms of the evolving nature of inter-state relations, this chapter will compare what has been accomplished in the GATS context with what the EU has accomplished regarding labour mobility.

Chapter 5 will examine Chapter 16 of the NAFTA concerning Temporary Entry for Business Persons. It will include a contextual discussion of the FTA negotiations concerning temporary entry as well as a discussion of the NAFTA negotiations which led to the inclusion of temporary entry provisions. The chapter will then describe the coverage of the NAFTA provisions for temporary entry and provide a brief analysis of the agreement's architecture where Chapter 16 is concerned. It will then examine how Chapter 16 addresses domestic regulatory issues like immigration, labour market development, and professional accreditation. From there, implementation issues will be examined with a view to commenting on the institutional provisions of the NAFTA concerning Chapter 16. Finally, this chapter will compare NAFTA Chapter 16 with the EU context in order to provide preliminary comments on what Chapter 16 means for the evolution of state relations.

Chapter 6 will examine how the discussion concerning

mode 4 liberalization has evolved since the Uruguay Round. In particular, it will look at this discussion in the context of the post-Uruguay Round services work programme, the assessment phase, relevant trade policy and domestic regulatory discussion in other fora, and the prospects for further mode 4 liberalization in the current round of multilateral services negotiations.<sup>3</sup> The main point that will be made in this chapter is that the evolution of this discussion points to a policy nexus that is developing between trade policy-makers and those officials who manage the temporary entry of service suppliers.

Chapter 7 will situate the movement of service suppliers in the context of the development of the international trading system in the post World War II period. This context will serve to highlight the developmental policy differences of goods and services trade. Through a chapter summary, it will also point to the emerging need for and evidence of a new policy of accommodation which states are implementing via trade agreements. Chapter 7 will end by identifying the challenges and new research areas that arise from this new policy of accommodation, namely developing country

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<sup>3</sup> This discussion of the current round of multilateral services negotiations will cover the period from February 2000, when the negotiations began, to December 2000.

integration.

## **Section II: Historical Context**

### **Introduction**

This section provides an historical overview of the development of the international trading system from the 19<sup>th</sup> Century to 1945 when negotiations to establish the International Trade Organization (ITO) began. It serves as an historical backdrop to Chapter 2 which covers almost the same period, but focuses more closely on the relationship between labour mobility and international trade. This section also serves to outline how the relationship between the state's domestic policy, particularly with regard to employment, and the international trading system changed over the period in question.

Prior to the First World War, states promoted liberalization while reserving domestic policy issues like employment for the domestic arena. After the First World War, they became much more active in discouraging liberal international trade until it became apparent in the 1930s that such policies were detrimental to both the international and domestic economies. Meanwhile, some conceptual effort was made in the interwar period to consider domestic employment policy as an issue with important international linkages, particularly where trade

liberalization was concerned. Initial efforts by states to liberalize international trade therefore accompanied the end of this period while the relationship of domestic employment policy to liberalization remained hotly contested.

### **Economic Liberalism in the 19<sup>th</sup> and Early 20<sup>th</sup> Centuries**

The role of the state vis-a-vis the international economy was an important political topic in the 19<sup>th</sup> Century. The repeal of the *Corn Laws* in 1846 meant that Adam Smith and David Ricardo's theories about trade and the market had triumphed in the minds of British politicians and their middle class business supporters. In 1776, Adam Smith had argued in *Wealth of Nations* that a competitive market equilibrium could be achieved by harnessing individual self-interest to provide the products desired by society according to demand and the price it was willing to pay. The achievement of competitive market equilibrium constituted the "invisible hand" of the market. This theory of the invisible hand could be applied to economic relations among states by abolishing the monopolies granted to national producers which excluded foreign goods from entering a country at competitive prices (Smith, 1991:407). In effect, Smith argued that states needed to reduce their control over the market in order to allow it to operate more

efficiently. In turn, the market would create employment and raise living standards.

The ability to achieve market efficiency was enhanced by the concepts of comparative advantage and the international division of labour developed by David Ricardo. In *The Principles of Political Economy and Taxation*, originally published in 1817, he argued that even if a country had an absolute advantage in the production of all products, it should specialize in the products it produced most efficiently for only then could it maximize revenue earnings, create employment, raise wages, and be assured of economic growth (Ricardo, 1973:80-81). Indeed, all countries could benefit from employing comparative advantage in international trade regardless of whether they had an absolute advantage in anything. Ricardo termed the results of an international economic system employing comparative advantage the "international division of labour".

Ricardo believed that the prerequisite for prosperity and economic growth was less government use of tariffs to protect the domestic market and more use of the concept of comparative advantage in international trade. He therefore advocated that the Corn Laws be abolished since protectionist trade barriers prevented comparative advantage from being employed.



In 1798, Robert Malthus published the first edition of *An Essay on the Principle of Population*. In this work he argued that because population tended to increase geometrically, whereas food supplies could increase only arithmetically, the obstacle to prosperity was the tendency for population to outrun food supplies. If the supply of labour was not controlled, then, competitive wage levels would be driven to a point where they could not assure physical survival (Malthus, 1958a). Although Malthus' long term solution for this problem centered on the notion of sexual abstinence, he acknowledged that in periods where great economic stimulus were followed by an abrupt cessation of that stimulus, such as in the termination of a war, emigration would prove to be a useful, if temporary, form of relief (Malthus, 1958b:37). The state could use emigration to redistribute labour from places where natural resources and capital could no longer absorb it to places where the need for labour was high. He emphasized, however, that such emigration would only be successful if sufficient resources were made available by the state to ensure that the emigres found employment. His views on state sponsored emigration would later prove to be influential in the periods immediately following both the First and Second World Wars.

Unlike Ricardo, Malthus was in favour of the passage of

the 1815 Corn Laws. Although he supported freedom of trade in theory, in particular for its ability to promote the equitable distribution of capital, he feared that it could never be realized in reality because of the problem of price instability inherent in the trade cycle. Moreover, because Malthus believed that population tended to out run food supplies, he concluded that the social problems created by unstable trade cycles would only be made worse.

Consequently, he argued that the state had an active role to play both in curbing population growth and in protecting society from the instability of the trade cycle.

However, it was Ricardo's ideas about limiting the state's use of protectionist tariff barriers which triumphed in the 19th Century. The dominance of Ricardo's ideas shaped the kinds of options, both political and economic, perceived to be open to states when deciding how to deal with the political and economic pressures placed on national economies in the years leading up to the First World War and in the decades which followed.

In the period between 1846 and 1914, the relative free movement of goods among states interested in international trade was guaranteed by the freedom of British trade and British naval dominance. Prices and production were continually adjusted by the market to meet changes in world

demand (Wilcox, 1972:4-5). This adjustment process influenced and was influenced by domestic economic conditions. Just as the initiative for international trading came from the private sector, property and production were both privately owned and managed at the domestic level.

In the 19<sup>th</sup> Century, free international trade guaranteed by the state was regarded as a positive force for solving poverty, serving liberty, and achieving peace (Keynes, 1933b:756). The international division of labour espoused by Ricardo was viewed as a sensible way to efficiently organize global productive capacity, create employment and thereby raise living standards.

Prior to the First World War, states which participated in international free trade accepted the tenets of Smith and Ricardo. This acceptance laid the basis for those who would later argue that increased international trade free of state influence led to full employment. However, although free international trade, prior to the First World War, appeared to be a panacea for *improving* economic conditions, states, in terms of policy-making and implementation, did not directly connect it to *causing* domestic problems like unemployment.

### **The Weakening of Economic Liberalism in the 1920s**

The devastation wrought by the First World War profoundly weakened the principles of economic liberalism which had shaped the 19<sup>th</sup> Century. The European economy was left with ruined productive facilities, heavy debts, high unemployment, rampant inflation, and broken trade channels. Nationalism and protectionism as well as a strengthened labour movement in many European countries stepped in to fill the political and economic vacuum. Nation state capabilities, so greatly enhanced during the First World War, focused more directly on the link between domestic and international economies. The result was an increase in protectionist trade barriers and bilateral trade relations.

Almost immediately after the First World War, American farmers experienced serious price declines due to surplus crops and a drop in European demand. The latter problem was a direct result of the war. Heavy debt loads, mainly owed to the United States, meant that Europe had no money to buy agricultural products. Consequently, American farmers lost markets and agricultural unemployment rose. The response of the United States to the effects of the credit imbalance on its agricultural sector was to pass, in 1922, the *Fordney-McCumber Tariff Act* which raised tariffs on agricultural products to the highest level known up to that time (Kaplan,

1996:1-2). The purpose of this Act was to prevent cheap imports from entering the American market, to promote prosperity by raising farm prices, and to protect jobs and wages (Kaplan, 1996:11-14).

The response to this Act from abroad was to retaliate with similar tariffs. By 1925, Canada, Australia, New Zealand, Europe and Latin America had erected comparable tariff barriers. In effect, states had begun to perceive that international economic conditions directly influenced domestic economic conditions *and* that this influence could be mitigated by state interference in international trade flows. Whereas prior to the First World War, states focused largely on domestic reasons for internal economic and social problems, now they were willing to expand the scope of their concern and its effective reach to the international economy. The isolationist, retaliatory, and generally unproductive way in which this response came about in the early 1920s was attributed by John Maynard Keynes to the triumph of Ricardo's ideas with its emphasis on limited state intervention in the international market (Keynes, 1933a:144). Having little experience with incremental and preventative intervention (such as taking steps to influence money supply) to achieve certain domestic objectives such as employment creation, states reacted with a heavy hand to

extreme economic circumstances in the international economy. Ricardo's ideas did not prepare states to react to such circumstances in a more constructive manner, particularly where domestic social policy was concerned.

Notwithstanding Keynes' opinion about nascent interventionist policy, it is clear that the erection of trade barriers in response to international economic conditions began a debate about how states and their domestic economies should interact with the international economy, particularly where trade was concerned. This debate took shape in a context where monetary expansion was not assured by the United States and where, despite strenuous British efforts, the gold standard had not been firmly restored (Tumlir, 1981). This latter point was particularly significant because it meant that international economic stability and the free flow of goods was not assured through freely convertible currencies tied to gold. Consequently, states drifted toward what they perceived to be more stable bilateral trade relations over which they had direct control. Here, the availability of money or credit was not a necessary precondition for trade since goods were exchanged or bartered bilaterally on the basis of an agreement negotiated by the two states in question. Although bilateral agreements provided some insulation from

an unstable international economy, they were criticized from a Ricardian laissez-faire perspective for applying inefficient state planning methods to international trading relations which, in turn, held back economic growth and employment, ultimately preventing living standards from rising (Wilcox, 1972:18; also, Gardner, 1956 and Tumlrir, 1981). After Britain formally abandoned the gold standard in 1931, bilateral trade arrangements became the norm.

The absence of monetary expansion was also very important because it placed pressure on the process of industrialization in Europe. Without capital investment, industrialization slowed and unemployment rose. Traditionally, unemployment and population pressures stemming from uneven industrialization had been reduced in the 19<sup>th</sup> and early 20<sup>th</sup> centuries through emigration (Meade, 1940:154). This strategy followed a Malthusian approach to achieving economic equilibrium in which surplus labour could be moved by the state to develop potential wealth elsewhere. However, in 1924, the United States passed the *Immigration Restriction Act*, cutting the number of immigrants by over one half what it had been just before the start of the war (League of Nations, 1939:165-166). This Act grew out of popular anxiety over the effects that poor international economic conditions and consequential immigration would have

on American culture, wages, and employment. The latter was particularly a concern in the agricultural sector.

### **The Great Depression and the International Trading System**

International economic instability came to a head in 1929. Overinflated stock and bond prices crashed on the New York Stock Exchange, business confidence plummeted, and unemployment soared. International trade contracted as prices and investment dropped. At the same time, unable to repay debts incurred during the First World War, Europe could not absorb the agricultural surplus that American farmers were producing. Consequently, food prices fell, placing increased recessionary pressures on American farmers who had been struggling since the early 1920s. In 1930, the American Congress passed the *Hawley-Smoot Tariff* mainly in reaction to the decade-long recession in agriculture (Kaplan, 1996:21). This bill was originally designed to provide relief for farmers from low prices by raising the tariff on farm goods. Political pressure caused it to expand to include necessities such as clothing and shoes. Congressional supporters of the bill actively sought labour support in getting it passed arguing that high tariffs were essential for maintaining American employment and wage levels consistent with the American standard of living



(Kaplan, 1996:24).

The reaction to the *Hawley-Smoot Tariff* from abroad was very similar to what had occurred in 1922 after the passage of the *Fordney-McCumber Tariff Act*. In addition to tariff retaliation from countries in Europe and Latin America, Britain and its Dominions set high tariffs on all imports from the United States. Canada responded to the *Hawley-Smoot Tariff Act* by passing an *Emergency Tariff Act* in 1930, imposing high duties on American goods ranging from agricultural products to jewelry and gasoline.

The collapse of prices and the rise in tariffs was compounded by the financial crisis of 1931. The structure of international finance broke down completely causing serious balance of payments problems for many countries. Britain consequently went off the gold standard in 1931 followed by the United States in 1933. Both allowed their currencies to be depreciated, albeit with free exchanges. Other states in Europe and Latin American pursued different policies including the formation of gold blocs with full convertibility (France, Switzerland, and the Netherlands), the maintenance of artificial parity by means of exchange control (Germany), and currency depreciation with controlled exchange (Latin America) (League of Nations, 1942:137). This mishmash of financial policies created an uncertain

environment for international trade since some states with overvalued currencies were forced to resort to extreme trade restriction measures (League of Nations, 1942:138).

In the ensuing decade-long depression, it became obvious that high tariffs contributed in some way to low prices, low wages, and rising unemployment. Since high tariffs clearly caused international trade to contract, unemployment and declining trade were also linked together in the minds of those people who felt that prosperity, including rising levels of employment, flowed from liberalized trading conditions. Cordell Hull was one of these people.

In 1933, Hull was chosen by President Roosevelt as Secretary of State. He believed that high tariffs not only weakened economies and lowered living standards, but also threatened international peace by encouraging international economic warfare (Hull, 1948:364). As Secretary of State, Hull devoted himself to liberalizing trade, successfully persuading President Roosevelt and Congress to support the *Reciprocal Trade Agreements Act* (RTA) of 1934. The RTA gave the President the power to negotiate, on a bilateral basis, the reduction of tariff rates of up to 50%, provided that reciprocal arrangements were made for American products. Each agreement was to be conducted on an unconditional most-

favoured-nation (MFN) basis so that agreements made between either party with a third party would automatically apply to the trade of the other party.

In promoting the RTA, President Roosevelt declared that it would create employment, raise wages, and elevate the standard of living in the United States (Hull, 1948:356-357). By 1940, the United States had negotiated bilateral agreements with 21 nations accounting for 60% of American foreign commerce. These agreements brought international trade back to 1920 levels (Kaplan, 1996:49).

In the context of the Depression, the RTA served two functions: it won back the political goodwill of Europe, Canada, and Latin America which had been lost after the passage of the *Hawley-Smoot Tariff* (Kaplan, 1996:52), and it helped to generate debate about what measures were needed to stimulate an economic recovery. This goodwill would become particularly important during the planning and implementation of postwar reconstruction plans to create the ITO. It provided political space for the United States to credibly remind its trading partners of its commitment to liberal trade policy even in difficult economic circumstances. In turn, this allowed the United States to persuasively argue that increased international trade was a prerequisite for prosperity and rising levels of employment.

### **Linking Full Employment Policies to Preparations to Establish a Multilateral Trading System**

Given the economic events of the 1930s, both the Americans and the British were interested in establishing an agreement or organization for the post-war period which would promote world trade. The different economic and political positions of these two nations during and immediately after the war meant that the role of the state in society vis-a-vis the international economy was hotly debated between them in the lead up to the negotiations to establish an ITO. On the one hand, the United States, with some stumbling, was committed by 1945 to the elimination of trade barriers as the primary route to economic expansion and increased employment. The American strategy for achieving reduced trade barriers was, as we shall see, more or less multilateralism. On the other hand, Britain's precarious economic situation brought on by war-time difficulties made it interested not only in the reduction of trade barriers, particularly where the American market was concerned, but also in maintaining imperial preference and in achieving full employment at home. It was not greatly interested in any trade negotiations which did not accommodate these two latter objectives. Neither country

was particularly successful in achieving the upper hand before preparatory negotiations for an ITO began in 1945 with the American issuance of "Proposals for Expansion of World Trade and Employment" (United States, 1945).

In 1941, President Roosevelt and Prime Minister Churchill met to outline their vision of the post-war world. They issued a "Declaration of Principles", known as the Atlantic Charter, which contained commitments to both non discrimination in trade and maintaining imperial preferences (Crawford, 1958:9). The British position at this point in the negotiations was largely constrained by its political commitments to its Commonwealth allies and to the difficult balance of payments situation it knew it would be facing at the end of the war. With regard to its balance of payments problem, it required American commitments to both freer trade and full employment to maintain effective demand so that it could earn the money necessary to correct this problem. To this end, it needed assurance that its exports would not be constrained by high tariff barriers or low demand from the American market (Penrose, 1953:14-17). Although Britain was successful in gaining American commitments to lower trade barriers, the Americans made no explicit commitment in this document to full employment nor, therefore, to maintaining effective demand. Britain

therefore began to see imperial preferences as a fall-back option in future negotiations should the Americans not be able to maintain full employment in the long run, either via deficit spending or simply as the result of post-war economic expansion and prosperity.

The Americans, particularly Secretary of State Hull, were disappointed with the British commitment to imperial preference in the Atlantic Charter. Hull believed that the reduction of tariff barriers through multilateral negotiations would not only automatically solve Britain's economic problems brought on by war-time spending but would also serve as a viable alternative to counter cyclical deficit spending (Woods, 1990:188).<sup>9</sup> Here, the elimination of trade barriers and the observance of non discrimination would lead directly to increased employment, higher living standards, and social stability both at home and abroad.

For these reasons, the United States pressed for the elimination of imperial preferences in the next round of discussions about constructing a post-war trading system. In 1942, the two countries signed the *Mutual Aid Agreement* in which Britain agreed to abandon reference to imperial preferences. In Article VII of this document, however,

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<sup>9</sup> Counter cyclical deficit spending was an idea explored by John Maynard Keynes in "The General Theory of Employment, Interest and Money" 1936.

Britain managed to achieve wording which supported the reduction of United States tariff protection and linked the expansion of employment to trade:

...they shall include provision for agreed action by the United States of America and the United Kingdom...directed to the expansion, by appropriate international and domestic measures, of production, employment, and the exchange and consumption of goods, which are the material foundations of the liberty and welfare of all peoples; to the elimination of all forms of discriminatory treatment in international commerce, and to the reduction of tariffs and other trade barriers... (quoted in Crawford, 1968:9).

However, in linking employment and trade, it was not clear in the text which one was a prerequisite for the other. This ambiguity was symbolic of the fundamentally different views held by the Americans and the British on the relationship between trade and employment.

Despite President Roosevelt's interest in the 1930s and early 1940s to employ counter cyclical deficit spending to maintain employment and therefore effective demand, he realized by 1944 that it was not a politically feasible strategy in the American context. FDR's administration turned to multilateralism as a viable alternative. Here the idea was that by reducing trade barriers through multilateral negotiations and practicing non-discrimination in trading relations, the United States could raise employment levels and living standards at home and abroad.

At the same time, the State Department was pushing for the establishment of an international trade organization under which to organize such multilateral negotiations. Congress, however, was lukewarm to the idea and was even balking at the thought of supporting a three year extension of the RTA. Consequently, the President instead focused on RTA extension, which he achieved in 1945, though without the authority for a simultaneous across-the-board tariff cut or the establishment of an international trade organization (Aaronson, 1996:44-47; Woods, 1990:212-243). The authority he did achieve was solely to conduct bilateral tariff reduction negotiations which could then be applied on an MFN basis to other countries. This meant that any maneuvering by the State Department to achieve multilateralism or an international trade organization would have to rest on the legislative foundation of the RTA.

The British view on the relationship between trade and employment was quite different from the American one. This difference stemmed from the fact that the British were much more open to state sponsored full employment policies. The experience of the war raised British public consciousness and forged a consensus about what the state could be expected to provide for all its citizens with regard to health care insurance, employment security, and food (Woods,



1990:193). This consensus was underpinned by the 1942 Beveridge Report on Social Security which recommended, among other things, a progressive social policy to provide for the maintenance of employment as well as universal healthcare. However, although this report provided a detailed plan for the provision of healthcare, it was less specific about how to achieve full employment.

The articulation of a full employment policy was taken up by James Meade as advisor to the British War Cabinet. Along with other elite policy-makers who espoused a more liberal *cum* socialist approach to the economy, Meade believed that the state should intervene in the economy to maintain full employment. In 1940 he argued that the best method of dealing with an economic slump was not to erect protective tariffs but to stimulate internal demand for goods by increasing state spending on public construction (Meade, 1940:17). Through this spending, employment and wages would rise leading to the restoration of private capital construction, effective demand, and increased international trade. It was necessary, therefore, for states to coordinate their national full employment legislations in order to ensure a long term increase in international trade.

Many of Meade's colleagues urged international

cooperation to regulate the movement of commodity trade and capital. Meade, however, envisioned a formal international organization which would regulate the movement of population in addition to commodities and capital (Meade, 1940:10). For Meade, heavy population pressures on available natural resources and capital equipment resulted in unemployment. Meade's solution, reminiscent of Robert Malthus' approach, was for states to redistribute populations thereby maximizing the exploitation of natural resources and labour productivity worldwide (Meade, 1940:142-145). Meade recognized, however, that the national interests of countries promoting emigration and immigration would neither necessarily nor immediately coincide. He therefore argued that an impartial "International Authority" was needed to regulate and encourage migration (Meade, 1940:146). For Meade, then, labour migration would lead to less unemployment, increased productivity and, in conjunction with other policies like the reduction of trade barriers, would increase international trade and raise living standards worldwide. Meade was the first upper-level British policy-maker in the 1940s to suggest that the reduction of trade barriers, monetary policy and migration policy needed to be coordinated internationally.

In 1944, the British White Paper on Employment was

issued at the same time as the publication of William Beveridge's book "Full Employment in a Free Society". The White Paper accepted that it was the responsibility of the state to maintain a high level of employment, retrain workers when necessary, manipulate interest rates, and fund public works in order to ensure effective aggregate demand within the domestic economy. Beveridge's book gave more attention to exploring the implications of a full employment policy on international trade. Here Beveridge agreed that a multilateral trading system had to be developed in order to raise living standards worldwide. However, it could only be successfully developed if all participants achieved full employment without relying on export surpluses. That is, participants could not view the multilateral trading system only from the point of view of self-interest, but had to accept it as a system of mutual advantage. Exports, then, were desirable only as a means of paying for imports and not to be used as a strategy of exporting unemployment (Beveridge, 1944:218-220). It fell to the state to ensure that effective demand through employment was maintained without relying on export surpluses.

Along with Britain's policy commitment to maintaining full employment as a prerequisite for increased international trade, other European countries, and to a

lesser extent Canada, developed national full employment policies in 1945. Australia, too, made full employment a central part of its approach to economic and social policy in the post-war era, especially when it came to trade policy (Crawford, 1968:17). In particular, it stressed that, in its view, an international understanding on full employment was a pre-condition for negotiations on commercial policy. Its commitment to achieving such an international understanding stemmed from its fear that the United States and Britain could very easily fall into an economic slump after the war ended, passing on unemployment and economic depression to Australia by generating export surpluses, particularly in the commodities sector (Crawford, 1968:19). Australia would persistently press for an international commitment to employment at the various post-war reconstruction and international institution building negotiations that took place immediately after the war ended.

Consequently, when it came time to begin preparatory negotiations for an ITO in 1945, Britain and the United States did not hold the same view on how best to approach international economic recovery and expansion in the postwar period. Britain was much more focused on the importance of full employment policies than was the United States, and was

interested in making the achievement of full employment a cornerstone of any negotiated trade agreement. Moreover, it was not happy with the rather lukewarm American support of multilateralism in international trade negotiations and doubted that the RTA could provide the negotiating framework needed to achieve a viable agreement. However, because of its inflation and balance of payment problems, and because the Americans were pressuring Britain to accept free convertibility after the war ended, Britain needed to pursue any avenue available which would open the American market to British exports and assure some prospect of British economic recovery (Woods, 1990:242). It was therefore with British support that the State Department issued its "Proposals for Expansion of World Trade and Employment" in November of 1945 (United States, 1945). This document was the first substantive piece from which the ITO negotiations would begin. Perhaps predictably, given the stronger American economic position, this document played down the importance of obtaining full employment as a prerequisite for increased international trade. However, this orientation ensured that the ensuing "multilateral" negotiations at London, New York, Geneva, and Havana would not be uneventful when it came to pinning down the relationship between trade and employment.

## CHAPTER 2:

### **International Labour Mobility and the International Trading System Between 1918 and 1951**

#### **Introduction**

A primary political issue to emerge from the 19<sup>th</sup> Century concerned the role of the state vis-a-vis the international economy. Between 1918 and 1950, one of the main ways this issue expressed itself was via a debate over the relationship between international trade and full employment. The debate defined itself in the following manner: *full employment is a prerequisite for increased international trade versus increased international trade leads to full employment*. International labour mobility represents one issue area where this debate was reflected. This chapter serves to situate labour mobility historically within the international trade agenda and to demonstrate how the issue of international labour mobility had its roots in politically sensitive domestic employment concerns as well as in international trade matters related to foreign direct investment (FDI).

Although the argument that increased international trade would lead to full employment ("trade-first" argument) gained the upper hand by 1950, it did not easily dominate in

the 1920s, 1930s, or even 1940s. It shared significant political space with those who argued that full employment was a prerequisite for increased international trade ("employment-then-trade" camp). Here labour mobility was included in international trade negotiations and trade-related initiatives as one strategy for maintaining effective demand and achieving full employment. This was particularly apparent in British Empire development strategies, International Labour Organization (ILO) initiatives regarding international public works, employment services, and the creation of a *Migration for Employment Convention*, as well as the negotiations leading up to the Havana Charter for an ITO. On the other side of the debate, the League of Nations attempted to use labour mobility to promote FDI and international trade by creating a *Convention on the Treatment of Foreign Nationals* while the American Government and the International Chamber of Commerce lobbied for labour mobility provisions in the ITO Charter which would enhance the proposed FDI provisions.

Despite the arguments put forward to establish full employment as a prerequisite for increased international trade, this approach ultimately failed to be accepted within international trade negotiations. This meant that strategies to help achieve full employment through

international cooperation on labour mobility also faded from the trade agenda whether in the GATT or in organizations dealing with related issues such as the Economic and Social Council of the United Nations (ECOSOC) and the ILO.

The ascendancy of the trade first argument occurred because of the preponderant American influence on post-war reconstruction efforts, particularly with regard to multilateral trade negotiations as well as the "embedded liberal compromise" (Ruggie, 1982) that resulted from these efforts. However, this influence did not extend to establishing international rules for FDI as the absence of such rules in the GATT attests. The fact that FDI was not included within the international trade agenda by 1951 meant that related international labour mobility issues like the treatment of foreign nationals were also excluded from this agenda. However, because the multilateral trade negotiations were premised on the notion of stabilizing the international trading system using comparative advantage, related business needs for FDI rules including those pertaining to international labour mobility could conceivably be worked into international trade negotiations at a later date.



**Connecting International Labour Mobility, Employment, and the Economic Development of the British Empire in the 1920s**

Hoping to protect itself from the domestic repercussion of international economic instability, the United States, in 1924, cut its immigration quotas by one half thereby rejecting the argument that employment, trade and labour mobility policies could be deployed together in a productive manner. The result was a 40% decline in emigration flows worldwide (League of Nations, 1927:8).

Britain, however, did perceive that employment, trade, and labour mobility policies could be made to work together to achieve particular goals, especially when it came to Empire development. In 1917, the British Imperial War Cabinet committed itself to a proactive empire development strategy. This strategy involved two interdependent policies: empire settlement and preferential tariffs. The War Cabinet anticipated that it would have difficulty absorbing demobilized soldiers into the labour force particularly in the absence of international monetary expansion and uncertainty about the state of trade in the postwar period. Emigration to other parts of the Empire seemed an appropriate solution because it would allow Britain to keep its labour power within the Empire, develop the natural resources of the Empire, and maintain a long term defensive capability (Drummond, 1974:35). Preferential

tariffs could ensure that emigration lowered unemployment both in Britain and the Dominions by guaranteeing markets for raw materials being sent from the Dominions to Britain and for processed goods being sent to the Dominions from Britain.

Interestingly, though the Board of Trade fully supported the passage of the 1922 *Empire Settlement Act* committing Britain to funding an emigration assistance programme, the Treasury was strongly opposed to it and only showed lukewarm support for preferential tariffs (Drummond, 1974:72, 78). It was not convinced that more government borrowing and investment for empire development, specifically for emigration, would generate more employment and higher income for Britain let alone the whole Empire (Drummond, 1974:127). In the Treasury's view, the unemployment of the early 1920s was due to credit contraction, uncertainty over the gold standard, and, increased international tariffs. Emigration and employment would revive when these problems were corrected, not before. By borrowing more gold to finance emigration, the Treasury felt that the British government was raising the cost of borrowing for private investors and therefore discouraging trade and employment recovery.

This debate reflected an emerging debate within the

British bureaucracy and within economic thought generally about whether the state should focus on maintaining employment or trade in the first instance. On the one hand there was the argument that exporting labour through emigration would ease unemployment in Britain, employ more people abroad and therefore improve trade flows by enhancing valuable markets. Here, employment was seen as a prerequisite for increased trade, and labour mobility was identified as an effective strategy for achieving this policy. On the other hand, the traditional laissez-faire approach espoused by the British Treasury stressed that unemployment would disappear after tariffs were reduced and the gold standard was restored leading to increased international trade. From this perspective, increased international trade would solve domestic problems like unemployment and encourage Empire development.

In the 1920s, the employment-then-trade school possessed at least as much political currency as the trade-first camp which had traditionally been more dominant (Tumlir, 1981:154-156). The British Parliament therefore passed the *Empire Settlement Act* and went about preparing to implement an imperial preference policy, all with little enthusiastic support from the British Treasury. Both of these initiatives were designed to create a coherent Empire

development policy. The aim of Imperial Preference was to increase intra-Empire trade by imposing protective tariffs and giving preferences to Empire suppliers on a bilateral basis. In this way, economic recovery would be stimulated by guaranteeing markets for raw materials and processed goods. However, this policy was not fully employed until 1932, ten years after the *Empire Settlement Act* had been passed. The lateness of its implementation reflected the protracted discussion concerning the relationship between employment, trade and Empire development which occurred within the British bureaucracy and within British political institutions in the 1920s (Drummond, 1974).

The debate about the best approach for achieving economic recovery in the 1920s - whether a focus on employment or trade in the first instance - is well reflected in the debate about British Empire development policy. Using emigration to solve unemployment at home while increasing trade within the Empire caused labour mobility to become tightly tied to sensitive domestic unemployment issues for both emigrant and immigrant countries. The debate surrounding imperial preferences, meanwhile, represented a trade oriented approach to economic recovery in which the state either encouraged or discouraged tariffs to achieve higher employment levels. The intensity

of these debates would continue to grow at the international level in the 1930s and 1940s.

### **The League of Nations' Convention on the Treatment of Foreigners**

While the British were busy debating how labour mobility and preferential tariffs fit into their Empire development strategy, the League of Nations was focusing on implementing Article 23 of its Covenant whereby members committed themselves to "make provision to secure and maintain equitable treatment for the commerce of all Members of the League." Accordingly, the League of Nations made various attempts in the 1920s to achieve agreements on extending the code of international commercial law and arbitration, the restoration of pre-war tariff practices, the general reduction of tariff levels, and the restoration of multilateral trade by removing discrimination and applying widely the most-favored-nation principle. Here the League believed that increased international trade would help solve problems such as rising unemployment caused by economic instability. The League's efforts were largely unsuccessful despite the fact that they were strongly recommended and supported by the majority of state participants at multiple international conferences between 1922 and 1929 (League of Nations, 1942:101-102).

In attempting to implement Article 23, the League also tried to construct international agreements concerning FDI. These efforts also failed because they linked the needs of international commerce directly to domestic concerns in ways which revealed their daunting technical complexity and politically sensitive nature, especially where protecting state sovereignty was concerned. One example of such an attempt was the League's *Convention on the Treatment of Foreigners* which represented an effort to regulate certain aspects of FDI including related labour mobility.

At the Genoa Conference of May 1922, League members agreed that certain topics relating to national treatment<sup>1</sup> offered the best prospects for achieving international agreement. It is unclear why League members felt that negotiating topics relating to national treatment offered the best prospects for agreement. The application of national treatment to such policy areas as customs formalities or the treatment of foreign nationals and firms would likely raise sensitive and complex domestic policy questions. One can only speculate that their inexperience in applying national treatment to these topics caused them to set unrealistic negotiating goals. In any case, the

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<sup>1</sup> "National treatment" referred to the equal application of a state's laws toward foreigners and nationals undertaking investment.

Economic Committee of the League of Nations was charged with studying and making recommendations to member states about the unjust or oppressive treatment of foreign nationals and firms (League of Nations, 1923:954). In this context, "foreign nationals" referred to business persons travelling to a foreign country to undertake FDI or those employed by a corporation in a foreign location where that corporation was undertaking FDI. This link to people movement was not immediately obvious to the Committee because other issues concerning FDI were of more immediate concern and because labour mobility had not been previously explored in such a context.

The committee's primary goal was to define the legal and fiscal regime "to be applied to foreign persons and organizations duly authorized by law to carry on their occupations within a State" (League of Nations, 1928:5). By May 1923, it had drawn up ten recommendations which it submitted to all state members of the League advising that they should be guided by them in their internal legislation and in their international agreements (League of Nations, 1923:955-956). The committee's ten recommendations had little to do with labour mobility, concerned as they were with issues like possession and disposal of property, taxation, defense of rights, and so on, but they served to

generate wider interest in issues which were related to labour mobility, namely, the terms on which foreigners residing in a country could be allowed to engage in a particular profession, industry, or occupation.

Consequently, at the behest of the Japanese delegation, the Economic Committee began to study this new problem in February 1924.

In drawing up these recommendations, the committee sought to assure members that it was not attempting "to lay down rules with regard to the conditions of foreigners and their enterprises or with regard to the industry and occupations which they should legally be permitted to follow" (League of Nations, 1923:954). In other words, members could still decide who they would let in to conduct FDI. What they were agreeing to conform to were international rules about how investors would be treated once they were allowed in. On the face of it, this assurance appeared politically astute. In fact, it revealed that the committee did not realize how difficult it would be to separate these two issues and still end up with a meaningful agreement. Here, states were unable or unwilling to acknowledge that as the state apparatus grew in the 1920s, it would become less possible to negotiate rules for FDI by working on issues in isolation.



Between 1925 and 1928, the Economic Committee studied the rights accorded to foreigners who had been legally admitted into countries to exercise an occupation or profession. In doing so, it identified four categories of occupations for consideration: open occupations such as managers, liberal professions such as scientists, occupations restricted for the protection of national interests, and occupations which were the subject of monopolies such as medical practitioners or lawyers (League of Nations, 1925:6). It then produced a country survey listing any restrictions in each category. From this survey it derived some general principles members should observe about the treatment of foreign nationals seeking occupational opportunities. It recommended mutual national treatment for open occupations. For liberal professions, it recognized the right of states to impose standards of qualifications, but advised that where standards were similar, mutual recognition should apply.<sup>2</sup> Interestingly, it did not recommend the establishment of any bureaucracy to determine the equivalence of qualifications, since this was considered to be too delicate and complex (League of Nations, 1925:7). However, clearly the committee was aware

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<sup>2</sup> "Mutual recognition" referred to the concept of accepting other states' qualifications as proof of competence.

of the fact that the movement of professionals raised standards and regulatory issues which would need to be addressed in any multilateral agreement.

This work was expanded by the International Chamber of Commerce into two draft conventions at the 1927 World Economic Conference in Geneva. These draft conventions recommended the abolition of passport visas, freedom of residence and establishment, and equal treatment for foreigners with regard to professional occupations, fiscal treatment, and civil status (League of Nations, 1928:7). Clearly the business community wanted labour mobility for professionals to be as smooth and supportive of FDI as possible.

Having by this time heard all the concerns of national delegations and organized business interests, the League of Nations was then charged with drafting a convention on the basis of national treatment which addressed the conditions of residence, establishment, removal, and circulation of foreigners admitted to a state to carry on industry, trade, or other activities. Accordingly, in 1928 the League of Nations produced a Draft Convention on the Treatment of Foreigners to be considered and adopted at an international diplomatic conference on the subject in 1929.

With respect to labour mobility, Article 7 of the Draft

Convention stipulated that foreigners were to be placed on terms of equality with nationals for the exercise of occupations but qualifications would be subject to review. In other words, holding employment - an immigration issue connected to residency - was separated from carrying out the professional activity in question. Mutual recognition of qualifications was therefore not accepted as a principal though it was recognized in the Protocol to the Convention that mutual recognition was desirable and should be pursued bilaterally (League of Nations, 1928:16). In addition, certain occupations would be reserved for nationals such as public functions, those in the national interest, those located in national monopolies, fishing in territorial waters, and so on (League of Nations, 1928:10).

Article 8 stated that,

nationals of one of the High Contracting Parties established in the territory of another High Contracting Party or who, without being established in that territory, do nevertheless conduct their business therein, shall be free to appoint, at their discretion, for the management of their establishment and for the transaction of their business, such persons as they may judge fit and proper without being obliged to take into account the nationality of such persons and without being obliged either to employ in an administrative or technical capacity or to take into partnership persons of any given nationality (League of Nations, 1928:11).

In effect, foreign investors could appoint whomever they needed to run their investments without being subject

to the rigidities of any local labour market development policies at the managerial, administrative or technical levels. Of course, any other professional activities would still require a review of qualifications. Here the thinking was that any jobs that investors created would not have been created without their investment and therefore any foreign employees brought in by the investing company were not taking jobs from the local labour market.

However, despite this interpretation of labour market development, both Articles 7 and 8 were subject to much debate, especially with regard to the ability of states to protect their home labour markets from foreign workers. This debate was reflected in the text of the articles. Article 7 of the Protocol to the Convention emphasized that it was not the Convention's intention to "lay down any decision as to the measures which certain states are obliged to take to protect their home labour markets" (League of Nations, 1928:16). However, the remaining commentary on Articles 7 and 8, in a somewhat contradictory manner, stressed that any measures to protect domestic labour markets constituted an obstacle to production and trade which should be removed (League of Nations, 1928:26-27). Here, it was intended that the Convention would lay the groundwork for understanding that production and trade were

hindered by state measures intended to protect home labour markets and that the free exchange of labour was desirable in the long term. Clearly immigration and domestic employment issues were clashing with the national treatment intent underpinning the whole convention.

Moreover, the Economic Committee made a recommendation in the Final Article of the Draft Convention to:

- a) abolish the restrictions which at present prevent the exchange of technical experts, employees and workers constituting the skilled staff of undertakings and which prevent practitioners or other persons from going abroad in order to complete their professional training;
- b) establish adequate regulations for the transfer from place to place of itinerant and seasonal labour, and;
- c) to consider the most effective means of protecting the workers against the malpractices of intermediary agents (League of Nations, 1929:68).

Here the committee was wading into new territory concerning education, unskilled labour, and worker protection. This demonstrated that the committee was beginning to become aware of the kinds of linkages to domestic employment policy that an FDI agreement which included labour mobility could potentially produce. The Economic Committee acknowledged that if these recommendations were to be implemented, it would require a supplement to the Draft Convention which focused on specific guarantees for the exchange of labour. Such a supplement was never written by the Economic Committee, but the recommendations were addressed by the

International Labour Organization (ILO), albeit from a different angle, during the 1930s.

Operationalizing national treatment in a Convention on the Treatment of Foreigners gradually revealed to League members the technically complex and politically sensitive nature of how the state operated to form domestic employment policy, to oversee standards setting and regulatory behavior, and to protect its borders through immigration policy. The inability to address these areas in an international negotiating forum contributed significantly to the failure of the Convention. States were unwilling to liberalize their existing legislation substantially in order to extend the application of national treatment to foreign workers. Such comprehensive incursion into the domestic context was perceived as not only technically complex but also politically and economically risky given the pressures of the 1920s. Here, states which had reached a particular level of economic development were becoming "more conscious of the risks inherent in unstable demand, the risks of depressions and unemployment, and of the obligations which those risks imposed on them" (League of Nations, 1942:132). Even in the best of economic circumstances, this endeavor by the League of Nations would have faced significant barriers. In the unstable international economic environment of the

1920s, it understandably failed.

The focus of the League of Nations on extending national treatment to labour mobility-related issues reflected not only the League's desire to engage states collectively in solving the problem of international economic instability; it also reflected its belief that making FDI more efficient and equitable would increase the level of international trade which in turn would help to stabilize the international economy. Social benefits would then flow from this stability, for example, an increase in the level of employment. The League's approach did not reflect an initial appreciation of the far-reaching implications for national sovereignty of extending national treatment within an FDI agreement to an issue like labour mobility. The fact that the League's approach failed here and with respect to other tariff reducing trade agreements in the 1920s and 1930s weakened the arguments of those who contended that trade-first was a prerequisite for successfully addressing social and economic problems like unemployment. If international cooperation to bring about growth in international trade was not possible, the possibility for it to improve social and economic problems like unemployment also appeared remote. This reality provided more discursive and political space, in the 1930s,

for those who argued that full employment was the prerequisite for increased international trade and rising living standards.

**The International Labour Organization and its Work on International Labour Mobility Issues in the 1920s and 1930s**

In the 1930s, the ILO developed many programmes to coordinate state efforts to create employment. The ILO argued that international employment creation would stimulate trade and promote economic recovery. The discussion below describes these programmes with particular attention to their focus on promoting labour mobility as a way to stimulate international trade and economic recovery.

In 1933, the ILO began to focus on the coordination of international public works as a way to help stimulate economies hit hard by the Great Depression (Tumlir 1981:166). In that year, it passed a resolution to begin considering "...the question of the organization and coordination of national and international public works with a view to combating unemployment and regularizing the volume of employment worldwide" (International Labour Organization, 1933:688). By 1934, it had resolved to work with the League of Nations to restore the circulation of idle capital by drawing up programmes for large scale public works, conditions of recruitment and employment in national and



international public works, and the effects of public works on labour markets (International Labour Organization, 1934:663). In 1937, the ILO began to act as a locus of information on public works especially with regard to the expenditures involved, the methods of financing projects, and the number of workers employed (International Labour Review, 1937b :334).

In 1938, the ILO formed an International Public Works Committee which concerned itself with the cyclical causes of unemployment. It attempted to determine the most appropriate time when public works should be undertaken in coordination with other countries in order to diminish the effects of international economic fluctuations on employment. The committee pursued both a national and international approach to public works. It argued that to conduct only nationally oriented public works could have no influence on demand for a country's products in foreign markets. In addition, it was concerned that stimulating business investment in isolation from other countries would sustain prices at home while they were still being forced down elsewhere. This would result in a decrease of exports and increasing demand for imports leading to disequilibrium between imports and exports and a disturbed balance of payments (International Labour Review, 1938b:744). It was

therefore necessary to coordinate public works internationally and to organize international public works projects such as the construction of roads, bridges, railways, canals, dams, ports, and so on, requiring the exchange of labour and labour mobility. In effect, this cooperation would sustain effective demand internationally and promote increased international economic activity. Here, the ILO was clearly of the view that sustaining effective demand through employment was a prerequisite for increased international trade.

The ILO's international public work schemes were about paying workers to move temporarily to another country to complete a public works project. The employer would be the worker's home state. Here states would be agreeing to contribute to an international public works scheme via sponsorship of workers in order to stimulate economic recovery. Ultimately, the idea of international public works failed because, like the League of Nation's *Convention on the Treatment of Foreigners*, it required a level of international cooperation regarding employment policy that states were not willing or able to undertake.

The ILO also worked extensively on promoting permanent and temporary migration of workers to foreign countries which were experiencing labour shortages. Here the ILO

wanted to stimulate economic activity like trade by helping labour flow to areas where it was needed and away from areas where it was not. In this situation, the employer would be the receiving state or a private employer in the receiving state. The ILO was focused on ensuring worker participation by establishing international rules for recruitment and conditions of work for foreign workers. The manner in which labour mobility was carried out, then, was seen as important for supporting the strategy of maintaining effective demand, via employment, in order to improve trade flows and maintain an equilibrium in the balance of payments.

As early as 1919, the ILO adopted recommendations on "the conditions of recruiting foreign workers and on reciprocity of treatment of national and foreign workers in respect of labour protection and the right of association" (Varlez, 1929a:319). Throughout the 1920s, the ILO studied the international coordination of migration laws in order to develop a universal code for foreign workers (Industrial Labour Information, 1929:404-406). In the 1930s, the ILO turned its attention to establishing internationally agreed upon conditions under which international labour mobility for both permanent and temporary purposes would be undertaken. The result was the establishment of a Permanent Migration Committee in 1933, an Organization for Settlement

in 1938, and the passage of a *Migration for Employment Convention* in 1939. These are described below.

In the 1930s, Latin American states encouraged agricultural labourers from Europe to migrate to Latin America in order to settle land (International Labour Review, 1937c:733). The goal was to bring land and labour into closer adjustment to help remedy the perceived economic imbalance which was retarding social progress worldwide. Accordingly, the ILO formed a Permanent Migration Committee in 1933 and an Organization for Settlement in 1938 to help ensure that the conditions of migration provided migrants with adequate protection and a reasonable prospect for success. This help amounted to providing a framework for international information exchange concerning migration conditions as well as helping to coordinate the financial resources, particularly international credit operations, needed for successful migratory movements (International Labour Review, 1938a:582).

Throughout the 1930s, bilateral treaties were being made to facilitate the exchange of workers in order to alleviate unemployment and labour shortages. Treaties were made to regulate the presence of Belgian frontier workers in France, the exchange of workers between France and Spain, and the organized exchange of workers among Denmark, Sweden,

Norway, and Finland as part of a policy of commercial collaboration (International Labour Review, 1937c:731). The ILO sought to create international standards for such labour movements via an internationally agreed upon convention known as the *Migration for Employment Convention* which was completed in 1939. This Convention dealt with interstate cooperation concerning the regulation of recruitment and national treatment for foreign and national workers. The latter referred to the commitment of governments to apply to foreigners treatment no less favourable than that which they applied to their own nationals with respect to the areas being negotiated (International Labour Review, 1939:475).

The Convention's negotiated provisions on recruitment and national treatment had the effect of shifting the focus from the old system of individual migration, which, previous to the First World War, had primarily been undertaken with a view to overseas settlement, to the collective recruiting of workers by the state for temporary employment contracts in other countries (Varlez, 1929c:663). This shift helped member states to become aware of the technically complex nature of negotiating and organizing such movements and the extent to which they concerned both immigration and domestic employment policies. To resolve this overlap with immigration and domestic employment policies, the Convention

attempted to work in exceptions to national treatment whereby members would have "the right to interrupt recruiting according to the state of the labour market" (Varlez, 1929b:476) if importing workers should have an "unfavourable influence on the growth of unemployment" in the receiving country (Varlez, 1929b:476).

Although the negotiators were able to draw on some previous ILO negotiating success concerning workman's compensation, the right of association, and accident insurance which guaranteed national treatment for foreign workers (Varlez, 1929a:320), new issues such as wages, employment taxation, union dues and legal proceedings relating to contracts of employment proved to be difficult negotiating challenges (International Labour Review, 1939:475). Moreover, with regard to the selection of workers, the negotiators had trouble writing meaningful provisions identifying who would carry it out and on what basis it would to proceed. The negotiations therefore revealed potential problems that might arise when sending unqualified workers abroad with no provisions for return. Consequently, examinations were proposed regarding occupational qualifications but no agreement was reached on who would carry out the examinations. Even the process of comparing qualifications across borders proved to be an

overwhelming task. Indeed, the ILO did not establish a workable system to facilitate job comparisons until 1954 (Carpenter, 1954).

These problems, in addition to the deteriorating economic and political conditions of the later 1930s, meant that no ILO members ratified the *Migration for Employment Convention* of 1939 (Landy, 1966:214). This led to the ultimate failure of ILO efforts to regulate the conditions of international labour mobility in order to help address the problem of unemployment and to thereby stimulate international economic activity. The ILO's *Migration for Employment Convention* fell through because it reached, via national treatment, into domestic employment issues which were too technically complex and politically sensitive to resolve.

To sum up, neither the ILO's international public works schemes nor its *Migration for Employment Convention* were successful. Both attempted to use labour mobility to promote employment and thereby to stimulate economic activity like trade. Both failed because states were not willing or able to surrender the amount of sovereignty necessary to coordinate such domestic areas like immigration and employment policy.

Although the ILO's work on labour mobility was not

directly connected to negotiations concerning international trade, it is dealt with here because it reveals how this international organization attempted to use labour mobility to deal with international economic problems which were ultimately trade related. Moreover, its work in this area helped to inform the intense debate over international trade negotiations and full employment which would characterize the immediate postwar period. As we shall see, the ILO would continue to pursue its strategy of promoting labour mobility to achieve full employment after war's end.

#### **Preparations for the United Nations Conference on Trade and Employment (UNCTE) (1945)**

After having struggled in both the Atlantic Charter of 1941 and the Mutual Aid Agreement of 1942 to come to some agreement regarding imperial preferences and the linking of employment to increased trade, Britain and the United States approached the negotiations to establish an International Trade Organization with caution. Both were aware that they continued to hold different views about these issues, particularly concerning the relationship between trade and employment. With British policy-makers like Beveridge and Meade promoting domestic employment policies and the international coordination of employment, trade, and migration policies, Britain believed that achieving



increased international trade required that such policies be included within an international trade agreement. The United States, however, believed that an international commitment to lowering trade barriers would be enough to assure economic prosperity and increased employment in the postwar period. The US was uncomfortable with any domestic or international policy interfering with the market economy to the extent full employment policies required. It was not surprising, therefore, that it also opposed the inclusion of international labour mobility provisions in a proposed ITO. However, as we shall see, the Americans were initially very supportive of measures regulating the treatment of foreign investors by states, including those which concerned labour mobility.

In November 1945, the U.S. State Department issued "Proposals for the Expansion of World Trade and Employment" which represented not only the substantive starting document for the ITO negotiations, but also another British and American compromise regarding the relationship between trade and employment. This compromise, however, favoured the Americans, which was not too surprising given the economic and political preponderance of the United States in the immediate post-war period. The "Proposals", as the document came to be known, did not include provisions stating that

maintaining full employment was a prerequisite for increased international trade. Instead, the introduction of the document emphasized that "trade connects employment, production and consumption and facilitates all three" and consequently excessive restrictions, whether by governments or private cartels, on exchange and trade needed to be reduced, and fair rules established within which the remaining restrictions could be confined (United States, 1945:2-3). The introductory discussion went on to say that where states did possess full employment policies, domestic programmes to increase employment should be consistent with international trading principles and should not create unemployment elsewhere (United States, 1945:6,9-10). Specific mention was made that the design of these programmes should be left to individual states in accordance with their particular political and economic institutions (United States 1945:9). There was no mention made of coordinating these programmes at the international level using labour mobility or any other strategy. Interestingly, none of these points appeared in the proposed framework of the document.

However, the Proposals did suggest that international rules be negotiated for the treatment of FDI. Article 6 recommended that negotiations be conducted for,

"international agreements designed to improve the bases of trade and to assure just and equitable treatment for the enterprises, skills and capital brought from one country to another, including agreements on the treatment of foreign nationals and enterprises, on the treatment of commercial travelers, on commercial arbitration, and on the avoidance of double taxation" (United States, 1945:24).

As we saw in the League of Nations *Convention on the Treatment of Foreigners*, mention of the treatment of foreign nationals includes issues relating to labour mobility, particularly regarding the treatment of professionals.

In all instances where employment was actually mentioned in the proposed framework for an ITO, it was always positioned as something resulting from business and trading activities or as something which could facilitate how business and trade was carried out. The reappearance of the treatment of foreign nationals as necessary to facilitate business investment was the first reference to a related labour mobility issue appearing in the framework for the ITO.<sup>3</sup> Employment creation was not included in this document as something which the state needed to maintain in order that international trade be increased. This was not surprising given that the document was primarily American in origin.

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<sup>3</sup> As previously discussed, the treatment of foreign nationals had been considered by the League of Nations in the 1920s. See, League of Nations, 1928.

However, by September 1946 and after much discussion with the British, the references to employment which had not been included in the framework for an ITO but were mentioned in the Proposals introductory section, had been collected together to form Chapter 3 of the "Suggested Charter for an International Trade Organization of the United Nations" (United States, 1946). These employment provisions still did not advocate the need for full employment to increase international trade but they did serve to position it as a negotiating issue rather than as something only alluded to in the introduction. Employment issues relating to labour mobility were not included in this chapter at this time, but labour mobility issues relating to FDI were still present elsewhere in the document. Put out by the U.S. State Department, the Suggested Charter was presented and accepted as a basis for discussion at the first London Preparatory meeting to the United Nations Conference on Trade and Employment in October of 1946.

From this point on, the Draft Charter went through three subsequent negotiations before reaching the Havana Conference in November 1947 where the ITO was finalized and signed by delegates. The debate about including employment in a charter for an ITO focused predominantly on the best way for a country to maintain effective demand, or to

protect itself from countries which did not. Employment issues, including international labour mobility, arose in six different areas in these negotiations: (1) Chapter 3 on Employment; (2) restrictions to restore the balance of payments; (3) nullification and impairment; (4) functions of the organization including the subject of FDI (United Nations, 1946b:27-28); (5) industrial development, and; (6) freedom of transit. Interestingly, these issue areas were not consistently raised and negotiated at London, New York, or Geneva. There does not appear to be any obvious reason for this inconsistency except that they must have depended on delegate input and organization as well as what were very tightly packed agendas. Their discussion below proceeds chronologically and is an attempt to identify linkages among the issue areas as the negotiations progressed.

#### **The London Preparatory Meeting (October 1946)**

To summarize, when the Suggested Charter arrived at the London Preparatory meeting, it contained an employment chapter which recognized that the maintenance of full employment was essential for the aims of the organization to be realized. It recognized further that measures to attain full employment in each state had to be appropriate for its political and economic institutions; that no measures

adopted to expand employment should create unemployment elsewhere or hinder the expansion of trade and investment; that members would consult and exchange information on employment problems; and that the Economic and Social Council of the United Nations, not the ITO, was responsible for furthering these objectives and supervising the exchange of information on employment problems (United States, 1946:2-3).

However, many members of the Preparatory Committee on Employment and Economic Activity which dealt with Chapter 3, felt that these provisions needed strengthening. The Committee wanted to see them connected to Article 30 on nullification and impairment and to Article 20 on restrictions to restore equilibrium to the balance of payments in which members would be allowed to take protective action against other members who did not maintain effective demand through full employment (United Nations, 1946b:27-28).

In discussions on Chapter 3, the link between maintaining effective demand, full employment and international labour mobility could be clearly seen. India, for example, felt that the employment provisions were inadequate because they ignored the demand problems of developing countries, particularly the need for the incomes

of primary producers to be maintained (United Nations, 1946b:18). Australia agreed with this point and suggested that it was necessary to include provisions in the Charter which would allow countries to take action if other countries did not chose, or were unable, to maintain full employment (United Nations, 1946b:22-24). India supported this suggestion and used it as an opportunity to argue that

...effective demand can only be maintained when there is a balance between manpower and resources.

Just as the barriers to the movement of goods and services and so on is one of the objectives of this organization, it should also be possible to remove, as far as possible at least, unreasonable restrictions on the movement of labour.

...it is equally clear that no permanent progress can be obtained, no permanent improvement in the welfare of the common man in the whole world can be effected until the impediments to the free flow of labour from one country to another are mitigated (United Nations, 1946b:53-53A).

Here, India was supporting Meade's approach to global welfare whereby labour could flow to where it was most needed without being hindered by state borders. Unlike the labour mobility required for FDI, this movement of labour would include both skilled and unskilled workers and would not be employed by interests in the sending state but in the receiving state. However, this too would raise labour market concerns in the receiving state since incoming labour migrants would presumably be filling available jobs in the receiving state's labour market. It also raised broader

concerns about the obligations of wealthier states to promote development in poorer states through international labour mobility.

Brazil also wanted a provision in which surplus labour resources would be redistributed to countries with low labour resources by the utilization of refugees in immigrant countries (United Nations, 1946b:12, 19). This wish was consistent with earlier attempts by Latin American countries in the 1930s to increase their immigration levels in order to secure economic development (International Labour Review, 1937a; also, International Labour Review, 1935).

At this point, Britain, very concerned about its balance of payments problems and the high level of inflation plaguing the world economy in 1946, issued a memorandum to establish a separate Convention on International Employment and Trade Policy (United Nations, 1946c). This document stated, among other things, that international action to promote full employment should not be the sole responsibility of one specialized agency of the United Nations. Rather, it should include the ITO since efforts to coordinate, for example, the use of international capital for international public works, required broad institutional support (United Nations, 1946c:18, 22). This memorandum



further stated that full employment in major industrial nations was a prerequisite for the expansion of international trade and for economic development.

With the support of France, Brazil and Australia, this memorandum came to form the basis of a new section in Chapter 3 on International Action to Maintain Employment. Interestingly, though this memorandum included many suggestions for international action to maintain employment which were well received by members of the committee, it was decided that they should be included in the Draft Charter only for referral to the Economic and Social Council of the United Nations. This Council had recently created a Sub-Commission on Employment and Economic Stability whose mandate was, in part, "to study national and international full employment policies and fluctuations in economic activity" (United Nations, 1946a:1). Committee members felt that the Sub-Commission was well suited to deal with the proposal. Consequently, suggestions such as the synchronization of credit policies and the timing of expenditure by states on international capital projects were referred to ECOSOC's sub-commission through a *Draft Resolution on International Action Relating to Employment* to be adopted later at the Havana Conference (United Nations, 1946d:5-6).

Here we begin to see the negotiators, in 1946, backing away from having the ITO deal with international labour mobility issues. It is unclear why this came about but one might speculate that they began to realize the ITO was not equipped to deal with such complex issues, that richer states could not face the potential political reality of mass migration from poorer countries. Coordinating international labour mobility raised all the difficult issues that the ILO had failed to address successfully in the 1920s and 1930s such as minimum wages, social insurance, qualifications, and so on. It was these questions which made the Economic and Social Council seem like a better place to coordinate international public works despite the link between such initiatives and securing effective demand to maintain employment and expand international trade flows.

By the end of the Preparatory Meeting in London, the Draft Charter contained stronger commitments to full employment, but weak commitments to international action to maintain employment. It also created clear linkages between employment concerns and the nullification and impairment Article, and with the correction of maladjustments in the balance of payments (United Nations, 1946d:4-6, 12-13). This meant that the view that full employment was a prerequisite for increased international trade and the view

that increased international trade led to employment were both included in the Draft Charter since the additions to Chapter 3 were simply that: additions to the initial American position that increased trade led to increased employment. One might speculate that these additions were successfully added at the London Preparatory Meeting because it was the first truly international meeting concerning trade in which all concerns and viewpoints were to be aired.

At the same time as labour mobility related programmes like the international coordination of public works were referred to the Economic and Social Council, other international labour mobility related articles were kept within the purview of the ITO. For example, the article referring to Functions of the Organization made recommendations that the ITO should work on securing agreements on the treatment of foreign nationals and enterprises. The rationale for this provision was that the ITO should "...endeavor to bring about international agreements on matters within its competence..." (United Nations, 1946d:22). Here the negotiators considered that FDI related issues like labour mobility were within the ITO's competence while labour mobility issues related to achieving full employment were not.

Notably, Section F of the new section on Industrial

Development encouraged businesses in highly industrialized countries to "associate" with businesses in less developed countries by transferring technicians and skilled artisans, either permanently or temporarily, to less developed countries (United Nations, 1946d:7). This article implied a connection between the objectives of development and FDI which could be facilitated by labour mobility.

The American role in these negotiations at London was clearly very important. Because its RTA authority permitted only bilateral negotiations to be applied on an MFN basis, the American negotiators were already coming close to overstepping their authority in negotiating an ITO, let alone supporting a document which positioned full employment as a prerequisite for increased international trade and potentially encouraged unmanageable levels of international migration. At the very least, the Americans needed to ensure that their view on increased trade as the route to more employment was included in the Draft Charter and that other international organizations were charged with the main responsibility of dealing with what the Americans considered to be less obvious trade related issues like international labour mobility. The final wording of Chapter 3 coming out of the London negotiations achieved these goals.

What's more, in the document issued by the State

Department discussing the Draft Charter coming out of London, the responsibility of the Economic and Social Council for employment was emphasized, while the escape clause connecting employment to the balance of payments as well as the nullification and impairment provisions was de-emphasized (United States, 1947a:iv, vi). Despite this tactic, considerable ideological discomfort was shown by the American business community and by Congress about these latter two articles because they appeared to sanction rigid state controls over the international trading system rather than leave its development to private initiative and competition (Feis, 1948:41; also, Diebold, 1952). This criticism prompted the State Department later to release another document entitled "The Geneva Charter for an ITO: a Commentary", playing down these articles to an even greater extent (United States, 1947b:7-8).

Meanwhile, the American negotiators continued to support the idea that the ITO needed to establish rules for the treatment of FDI, including those concerning labour mobility. Clearly, investment issues were seen as important for the expansion of trade and therefore within the purview of an ITO.

The perception that the ITO negotiations would only become more bogged down by issues states were not willing or

able to support caused the American negotiators to devise a fall-back strategy. Chapter 4 of the "Suggested Charter" concerned general commercial policy. At the London Preparatory meeting, attended by 14 countries, the Americans proposed that this chapter could be used to create a general agreement for tariff negotiations to proceed alongside the negotiations for an ITO.<sup>4</sup> The proposal was accepted by the Preparatory Committee at London as part of the negotiating framework for the second official preparatory meeting scheduled to begin in Geneva in April 1947. By promoting a two-track approach to the negotiations, the Americans were able to negotiate bilateral agreements for tariff negotiations as mandated by the RTA, while simultaneously working toward a multilateral trade accord to include all the bilateral agreements, and continuing on with the negotiations for an ITO (Hart, 1995:39). In effect, this meant that the Americans had successfully established a fall-back strategy for tariff reductions in the event that the negotiations for an ITO failed.

For the British, this was both bad and good news. On the one hand it gave the Americans a way to avoid a commitment to full employment policy. This alarmed the

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<sup>4</sup> This Chapter represented the precursor of what would later become the General Agreement on Tariffs and Trade.

British since they could not be sure that the American demand for imports would be maintained. On the other hand it realized that the fall-back strategy meant that American tariff reductions were more likely to occur which was also very important for British exports and British economic (and world) recovery. Given the preponderant American economic position at this time, Britain supported the American fall-back strategy.

**Preparation at New York for the Second Preparatory Meeting (Jan-Feb 1947)**

From January 20<sup>th</sup> to February 25<sup>th</sup>, 1947, a Drafting Committee selected from representatives of the London Preparatory meeting met in New York to prepare a report to guide the upcoming Second Session of the Preparatory Committee at Geneva. A notable change where labour mobility was concerned was the Article on Freedom of Transit. In the Suggested Charter, baggage, goods and persons had been deemed in transit when they crossed to the territory of another member (United States, 1946:5). It was unclear in the Suggested Charter if "persons" meant with regard to means of transport or if it referred to traffic in persons. The Drafting Committee in New York cleared this up by referring to goods and means of transport only. Its rationale here was that the transit of persons was not

within the scope of the ITO and that traffic in persons was subject to national immigration laws. This was the first indication within the context of the ITO negotiations that any provision regulating the movement of persons across borders for business purposes could be too domestically sensitive or complicated for the ITO to tackle at this time.

On Article 35 on Nullification and Impairment, the link to employment was weakened by removing explicit reference to Chapter 3 on Employment. Here, support for maintaining employment in other parts of the Charter was being slowly eroded.

In addition to getting the ITO document ready for Geneva, the Drafting Committee also put together a draft text of the General Agreement on Tariffs and Trade (GATT) (United Nations, 1947:65-80). This text was to service the parallel negotiations on tariff reductions that the Americans had argued for at London. Most of its articles were drawn verbatim from the Commercial Policy Chapter of the ITO, including the provision mentioning employment in the Article on Restrictions to Safeguard the Balance of Payments. The Chapters in the Charter on Employment and Functions in which the ITO was supposed to recommend agreements on investment issues like the treatment of foreign nationals, were omitted. So too was the provision



for the transfer of skilled personnel for development purposes (United Nations, 1947:75-79).

The GATT came out of the New York meeting as a workable draft agreement with or without the establishment of the ITO. Since its main focus was the expansion of trade to create prosperity and employment, and not vice versa, the GATT did not speak to employment related issues like full employment policy or the international coordination of public works. Moreover, the connection of trade to FDI and related issues like labour mobility were also omitted. It is unclear why FDI was left out of the draft GATT at this time. Certainly, it was an element which went beyond the scope of the RTA under which the President had negotiating authority. Moreover, FDI may have been viewed as too political, technically complex, and as opening the door to other issues beyond its competence such as development, for which the GATT would become responsible.

### **Second Preparatory Meeting at Geneva ( April-October 1947)**

Despite continued debate at the Geneva Preparatory meeting concerning the connection of the maintenance of full employment to the Balance of Payments Article and the Nullification and Impairment Article, the Draft Charter was not altered significantly with respect to employment and

related labour mobility issues except for the expanded investment provisions. Here, "foreign nationals who have supplied enterprise, skills, capital, arts or technology to the developing country" were protected from "unreasonable" or unjustifiable" action which might injure their rights or interests (United States, 1947b:13). It was unclear what impact this might have on qualifications, salaries, labour market restrictions, and so on, but it again underlined the legitimacy of including FDI issues like labour mobility in the Charter.

Because the RTA was expected to expire in 1948, the Geneva meeting was the last chance to secure final agreement on the GATT. This meant that the GATT had to be negotiated in such a way that it could fit into the Charter when and if the Charter was ratified or work as a stand alone agreement in such a way that was acceptable to the signatories, particularly the United States. To this end, the Employment provisions in Chapter 3 of the Draft Charter as well as the Balance of Payments Article were only to be included as they were in the Draft Charter if the Charter was ratified. Otherwise, should the GATT stand alone, the Employment Chapter and the Balance of Payments Article were subject to amendment. (Britain, 1947a; Britain, 1947b). This did not bode well for those arguing that increased international

trade could only be achieved by securing full employment.

Subsequent amendments to the GATT would retain the provision preventing contracting parties to be required to change domestic policies directed at full employment should these policies create the need to impose restrictions to prevent balance of payments problems (GATT, 1986:19).

**ILO's Post-War Reconstruction Efforts and its Relationship to the United Nations Conference on Trade and Employment (UNCTE)**

In 1942, the ILO began to prepare for post-war reconstruction by considering how improved international cooperation could bring about full employment. One of its main strategies to achieve this objective was to continue its work from the 1930s on the development of international public works. It did so by creating an International Employment Service and revising its *Migration for Employment Convention* in light of the Mexico-United States migratory experience concerning agricultural workers. This work continued to shore up the arguments of those who believed that increased international trade could only be achieved if full employment was secured (International Labour Review, 1942a:20-21; also see, Thomas, 1948). At the same time, this work made the ILO another place of referral for the labour mobility issues which arose during the Draft Charter

negotiations.

In considering how to organize international public works, the ILO focus on creating an International Employment Service was intended to help determine the skills of workers, their distribution, and their movement across borders to work (International Labour Organization, 1944:373, 377).<sup>5</sup> Here, the ILO believed that maximizing the use of human resources would promote the growth of international trade and maintain equilibrium in the balance of payments (International Labour Review, 1942a:20-21; also see, Thomas, 1948).

By 1947, the ILO had determined that acute labour shortages existed in Britain, France, Belgium, and Poland. At the same time, mass unemployment existed in Greece and Italy. This information led Italy to sign agreements in France, Belgium, Britain, and Poland through which workers from Italy would be temporarily moved to those countries to work in mines, on farms, as metal workers, and so on (International Labour Review, 1947:502; also see, United Nations, 1948). Work opportunities were identified by the Employment Service programme organized by the ILO and the living and working conditions under which workers were moved

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<sup>5</sup> The "Employment Service Convention" would eventually be passed at the International Labour Conference of 1948. By 1966, it had received 44 ratifications by Member states (Landy, 1966:215).

were outlined in employment contracts between the countries concerned. Enforcement of these conditions was provided by ILO Permanent Technical Committees or representatives of the two Governments as well as workers' organizations (International Labour Review, 1947:503). Unlike previous agreements to transfer workers which focused mainly on protecting the individual migrant, these agreements also contained an economic aspect. For example, the agreements between Italy and Belgium, Czechoslovakia, France and Poland provided that Italy was to receive certain quantities of coal. In addition, special arrangements were made to transfer workers' savings to their families in Italy (International Labour Review, 1947:504).

The level of technical and political organization required by these bilateral agreements served as proof for those who wanted to keep employment and labour mobility issues out of the ITO Charter and argue that other international organizations were better equipped to deal with these issues. This point was reinforced in 1948 when the ILO revamped the *Employment for Migration Convention* to make it easier for members to accept. Here, the ILO again attempted to use the principle of national treatment to come to agreement on issues including wages, workman's compensation, employment taxation, social security, family

allowances, hours of work, and overtime. Moreover, for recruitment, the ILO undertook to begin developing an international job classification scheme to make recruitment more efficient (International Labour Organization, 1948:50-51).<sup>6</sup>

In addition, the Convention also undertook to formulate basic principles for the protection of migrants as human beings. Here it drew on the 1942 and 1943 bilateral agreements concerning the temporary migration of Mexican agricultural and non-agricultural to the United States (International Labour Review, 1942b; International Labour Review, 1943). These bilateral agreements created temporary employment contracts between Mexican workers and American employers which paid the costs of transporting Mexican farm workers and their families to the United States, guaranteed a minimum wage and adequate working and housing conditions, safeguarded against displacement by other foreign labourers, and provided for an Agricultural Savings Fund to enable the braceros (contract workers) to set up small farms of their own upon returning to Mexico (International Labour Review, 1942b:470). It also provided for a grievance procedure and the right to elect Spanish-speaking representatives to speak

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<sup>6</sup> A (revised) *Employment for Migration Convention* was passed at the International Labour Conference of 1949. By 1966, it had received 21 ratifications by Member states.

on their behalf should any problems arise.

The ILO's work on developing the International Employment Service and the *Employment for Migration Convention* helped negotiators of the Draft Charter understand why these kinds of agreements were important to help increase international trade. It is not surprising, then, that Mexico and Italy lobbied for labour mobility provisions to be included within the Employment Chapter of the ITO Charter. However, these agreements also served to demonstrate the kind of complex and detailed issues which needed to be dealt with in order for related provisions to be successfully interated within the ITO. This reality strengthened the argument of those who wanted to shift responsibility for the labour mobility provisions to other competent international organizations like the ILO and ECOSOC, thereby further focusing the ITO only on tariff reductions to increase international trade and not on employment policies to increase such trade.

**The United Nations Conference on Trade and Employment at Havana (November 21, 1947 - March 23, 1948)**

The general support for a revised *Employment for Migration Convention* as well as the need for a number of bilateral labour mobility agreements in Europe and between Mexico and the United States created momentum at the Havana

conference to make reference to labour mobility issues in the Charter. It also created momentum to expand the *Draft Resolution on International Action Relating to Employment* which had come out of the London Preparatory meeting and was intended to be appended to the Charter. This momentum appeared to reflect increased support for the position that guaranteeing full employment using strategies like labour mobility would lead to increased international trade. However, in fact, it weakened this support by shifting responsibility for this position to other international organizations.

At the instigation of Italy and Mexico, consultation with ECOSOC was expanded in the Havana Charter to include studies "concerning international aspects of population and employment problems (Hart, 1995:177; also see, Interim Commission for the International Trade Organization, 1948:9). This addition was clearly related to the labour mobility issues with which Italy and Mexico were dealing at the time, and its appearance in the main body of the Havana Charter affirmed its importance to members of the international community.

Both of these additions to the Havana Charter were further supported in an expanded version of the *Draft Resolution on International Action Relating to Employment*.



Part of this expanded version appeared in the Havana Charter as the Resolution to the Economic and Social Council Relating to Employment.

In addition to suggesting that ECOSOC collect information regarding what action members were taking to achieve full employment, the Resolution connected labour shortages and surpluses to the attainment of full and productive employment and to the achievement of the aims of the ITO, namely growth of international trade. The Resolution was clearly advancing the view that the maintenance of full employment led to increased international trade. Moreover, by tackling the problem of labour shortages and surpluses simultaneously, the Resolution positioned the achievement of full employment as one requiring coordinated international action. The Resolution,

SUGGESTS THAT the Economic and Social Council initiate or encourage studies and recommend appropriate action in connection with international aspects of population problems as these relate to employment, production and demand.

Considers that, in relation to the maintenance of full employment, it is advantageous to countries which require or receive and to countries which supply workers on a seasonal or temporary basis to adopt regulations which will mutually safeguard their interests and also protect both the migrants and the domestic workers against unfair competition or treatment; and accordingly

SUGGESTS THAT the Economic and Social Council, in conjunction with appropriate agencies such as the International Labour Organization and its Permanent

Migration Committee, consider the problems of temporary seasonal migration of workers, taking into account existing treaties and long established customs and usages pertaining thereto, for the purpose of formulating, in consultation with Members directly affected, conventions and model bilateral agreements on the basis of which individual governments may concert their actions to ensure mutually advantageous arrangements for their countries and fair conditions for the workers concerned (reproduced in Hart, 1995:238).

However, as stated, this Resolution shifted responsibility for labour mobility to other international organizations like ECOSOC and the ILO. Mexico and Italy were particularly concerned that the ILO be mentioned in the Resolution given its work on the *Employment for Migration Convention* and on the *Employment Services Convention* (Interim Commission for an International Trade Organization, 1948:15). The Resolution therefore recognized that developing international policy on labour mobility was a complex topic which could best be studied and handled elsewhere.

Generally, the ITO Charter did not end up containing any concrete international obligations designed to achieve full employment. Rather, it urged consultation with ECOSOC and the ILO which it positioned as primarily responsible for the coordination of international action to achieve full employment. It was in connection with this consultation that international labour mobility arose as a strategy to

help achieve full employment. In particular, international public works, the redistribution of labour across borders, and the transfer of skilled personnel for development purposes were the ways in which international labour mobility was to be employed for these purposes.

International labour mobility was not relegated to ECOSOC and the ILO when it came to business requirements concerning FDI, such as the treatment of foreign nationals, but was retained in the Charter for future recommendations by the ITO.<sup>7</sup>

When the ITO Charter was finally accepted at the end of the Havana Conference, it was clear that those wanting the Charter to obligate Members to pursue full employment as a strategy for increasing international trade were not able to include many of the provisions necessary to make this happen, such as those concerning international labour mobility. However, they did retain the connection of employment issues to the Balance of Payments Article<sup>8</sup> as

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<sup>7</sup> Article 72 concerning Functions states that the ITO would "...undertake studies...make recommendations, and promote bilateral or multilateral agreements concerning measures designed...to assure just and equitable treatment for foreign nationals and enterprises..." (quoted in Hart, 1995:214).

<sup>8</sup> Article 2 on Restrictions to Safeguard the Balance of Payments state that:

...b. The members recognize that, as a result of domestic policies directed toward the fulfillment of a Member's obligations under Article 3 relating to the Achievement and maintenance of full and productive employment and large and

well as general support (though not the requirement) for domestic employment programmes in Chapter 3. This made those who argued that focusing the Charter primarily on reducing trade barriers to increase international trade and create prosperity largely successful at the end of the negotiations. The inclusion, therefore, of recommendations in the Article on Functions of the Organization to investigate business requirements concerning FDI, such as labour mobility, were deemed acceptable since the orientation of the Charter was pointed mainly in the direction of facilitating private efforts to conduct international trade and, by extension, FDI.

#### **Academic Debates Surrounding the Post-ITO Negotiations in Relation to Employment and International Labour Mobility**

As might be expected, the results of the Havana Charter negotiations did not resonate with harmony of thinking on the relationship between employment and trade either among the delegations at the conference nor, more broadly, among academics and policy-makers. Indeed, a rather lively debate existed in the late 1940s and 1950s about this relationship.

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steadily growing demand...i) no members shall be required to withdraw or modify restrictions which it is applying under this Article on the ground that a change in such policies would render these restrictions unnecessary" (reproduced in Hart, 1995:189).

It was carried on by both interested academics and, often retired policymakers who had been directly involved in the Charter negotiations. This debate helped to further reveal how international labour mobility might be conceptually connected to the agenda of multilateral trade liberalization.

The pro free trade American academic J.M. Letiche argued that the reduction of trade barriers did not guarantee high employment levels and therefore domestic stability; other strategies clearly needed to be explored (Letiche, 1948:42-43). Buchanan and Lutz argued that while the International Monetary Fund (IMF) provided international coordination to deal with exchange rate fluctuations, the same kind of international coordination was needed for employment policy. Otherwise, employment could only be maintained with quantitative trade controls, ultimately reducing trade flows and living standards (Buchanan and Lutz, 1947:281; also, League of Nations, 1945:280).

In his book on the structure and operation of the international economy, the American academic, P.T. Ellsworth, argued that the ITO Charter rightly gave precedence to domestic stability over freedom of trade, but did not provide the necessary international programmes to secure that stability. In particular, the achievement of

full employment was left largely at the domestic level with no corresponding international arrangements for "an International Development Board, to plan, on an international scale, public works offsets to a decline of investment" (Ellsworth, 1950:877). Consequently, for Ellsworth, the ITO Charter did not go far enough in promoting international coordination to secure stability. Ellsworth was much more optimistic about a possible European economic union in this regard because the gains to be derived from reduced tariffs and comparative advantage would also, it seemed, be supported by policies allowing for greater mobility of labour and capital (Ellsworth, 1950:729).

Clair Wilcox, as Director of the Office of International Trade Policy in the State Department and member of the American delegation to London, Geneva and Havana, believed that a reduction of trade barriers would lead to increased employment and prosperity. However, he realized that multilateral trade could not be achieved in the face of widespread unemployment, and so regarded the inclusion of employment provisions in the Charter as a compromise. Employment, however, was not to be regarded as an end in itself but as a means to achieving the stability necessary for multilateral trade to be carried out (Wilcox,

1952:131). For Wilcox, the fact that the ITO Charter did not provide for any concrete international action to stop a decline in employment reflected the dominant concern to maintain freedom of national action rather than to pursue international coordination. Wilcox expressed some disappointment that suggestions for international action to supervise domestic stabilization policies were not made, such as a counter cyclical international investment fund or the centralization of authority for the timing of national public works. Still, in the end, he did not regret this, nor the fact that the employment provisions in the Charter were limited. Wilcox did not want the ITO to be dragged down with administering programmes it could not adequately deploy. Furthermore, he regarded commitments to full employment largely as excuses for make work projects which disregarded the need for productive efficiency in employment (Wilcox, 1952:131-139).

This attitude was more broadly reflected by E.F. Penrose who, as advisor to the American Ambassador in Britain during the Charter negotiations, argued that the difficulty of restoring multilateral trade had been underestimated both by those with "an excessive faith in the 'price system' as a self-contained instrument of economic change and adjustment" and by those who believed that

domestic full employment policies combined with tariff reductions would create economic prosperity (Penrose, 1953:351). Penrose would have preferred a much more modest agreement as envisioned in the initial "Proposals" document, and which did not include employment in the main body of the agreement (Penrose, 1953:350-358).

In the academic debates surrounding the ITO negotiations, there is virtually no discussion of business investment needs or the impact of investment on local economies except to note the disappointment of the American Delegation with Article 12 regarding International Investment for Economic Development and Reconstruction. Article 12 was clearly more oriented toward development objectives in the first instance rather than addressing business concerns regarding the facilitation of FDI (Brown, 1950:152-153; also, Aaronson, 1996:85, 89-91). It is unclear why this was the case given that a certain sector of the business community was lobbying for investment provisions in the ITO negotiations (Aaronson, 1996:85). The fact that the RTA did not include investment rules as an objective is likely significant. Furthermore, since FDI was mentioned in the Charter as a subject of future discussion, this allowed the debate to focus on securing tariff reductions, while hinting that a return to future



discussions on FDI rules was possible. In any case, there was no analysis of the need of business investors for international labour mobility provisions.

Academics and policy-makers concerned about maintaining domestic stability through international action to maintain employment created conceptual opportunities for international labour mobility to be considered in some form, most often to relieve labour shortages and to run international public work schemes. Those who gave primacy to the reduction of trade barriers to create employment and prosperity did not promote international labour mobility because they did not discuss the nature of business requirements for investment provisions. The latter group gained the upper hand in the post-war era when it became clear that the United States would not be ratifying the ITO Charter.

### **The Demise of the ITO**

In retrospect, the ITO Charter has been considered to be weighted more in favour of reducing trade barriers than maintaining employment levels (Hart, 1995:45; also, Tumlrir, 1981:171). Despite the evidence already presented, this was not the dominant perception held by many at the time it was being considered. When the Charter was signed in Havana on

March 24, 1948, by 53 countries, opposition to its ratification was already well underway in the United States. Opponents were disturbed by what they considered to be serious contradictions within the Charter. Although the Charter was supposed to make private markets function more efficiently by reducing trade barriers, they believed it contained many escape clauses allowing Members to undermine this goal (Tumlir:1981:171-172). For example, provisions allowing for the application of quantitative restrictions on imports which adversely affected employment policies were decried as potentially protectionist and as an unacceptable sanctioning of state intervention in the market (Diebold, 1952:16-17).

In addition to being uncomfortable with the escape clauses, certain business groups in the United States thought that only very weak foreign investment protection was offered in the Charter against confiscation or discrimination by governments (Diebold, 1952:18). In response to the Charter's shortcomings on investment, the International Chamber of Commerce published an International Code of Fair Treatment for Foreign Investments containing a critical discussion of the investment provisions in the Havana Charter. It also proposed an investment code which it wanted to see governments adopt (International Chamber

of Commerce, 1949). This document contained a provision that

The High Contracting Parties shall not introduce any legislative or administrative provisions of a discriminatory character placing restrictions on...selection or introduction into their territories of such administrative, executive and technical officers and staff, not nationals of those territories, as shall be deemed by the enterprises concerned to be requisite for their efficient operation (International Chamber of Commerce, 1949:14).

The International Chamber of Commerce argued that this provision was necessary since investors willing to spend capital establishing an enterprise needed to be reassured that the operation would be managed by people with suitable qualifications regardless of nationality. Furthermore, in a footnote to the provision, the Chamber urged that any existing legislative restrictions on the ability of investors to bring in their own employees be withdrawn or modified (International Chamber of Commerce, 1949:14, footnote 2).

The Chamber was supported in these views by one of the last publications of the League of Nations which argued that a "constructive immigration policy" was necessary to attract foreign capital (League of Nations, 1946:44). In particular, control over the admission of foreigners should "be as considerate, as expeditious, and as inexpensive as possible". Furthermore, "restrictions on the employment of

foreigners and provisions requiring their progressive replacement in firms where they are employed by nationals may overreach their purpose and reduce the supply of foreign capital" (League of Nations, 1946:44). It was necessary, therefore, to "encourage, though not demand" the participation of domestic skills and labour. Here, the League was heading off conditions that might be imposed on FDI which sought to use labour mobility and skills transfer as a development tool.

Another argument put forward in the United States to oppose passage of the ITO Charter used the Wilcox and Penrose arguments that an international trade organization should not become bogged down by non-trade issues, namely employment. Here it was pointed out that the Economic and Social Council of the United Nations as well as the ILO could more than adequately address, without the help of the ITO, the issue of maintaining domestic employment as well as coordinate the maintenance of effective demand at the international level via labour mobility.

In the late 1940s and through the 1950s, ECOSOC was active in fulfilling the tasks that had been referred to it by the ITO Charter. For example, in 1949, it reported the results of its survey of state national and international actions to achieve or maintain full employment (United

Nations, 1949). In this report, it found that the commitment to maintain full employment was not supported by a commitment to keeping tariffs low in the event of a depression, nor was it supported by a high degree of confidence in the ability of the IMF to maintain currency stability. With this information in hand, ECOSOC urged Member states of the UN to adopt and announce full employment targets and to create national compensatory measures, such as public works projects, to raise effective demand when necessary.

At the international level, however, ECOSOC adopted a much more development-oriented approach. Here, it concentrated on stabilizing international investment, correcting trade disequilibriums, controlling inflation, promoting industrialization, and enhancing the power of the IMF and the World Bank (United Nations, 1950:3-13; also, *International Labour Review*, 1950; Dawson, 1953). The recommendations ECOSOC adopted in 1950 on national and international measures for full employment did refer specifically to the need to promote international migration, but this recommendation was not acted upon by ECOSOC thereafter (*International Labour Review*, 1951:63).

After the revision of the *Migration for Employment Convention* was passed in 1949, the ILO also backed away from

an international focus on labour mobility. When political considerations in 1950 prevented it from managing a large-scale migration of surplus labour from Europe to the Americas, it gradually shifted its focus to issues concerning technical assistance (Cox and Jacobson, 1973:104).

By 1950, therefore, there was no international body acting to increase employment and thereby international trade through international labour mobility, despite the fact that those who opposed the employment provisions in the ITO Charter maintained that any such action should and was being dealt with by other international organizations.

In the immediate post-war period, the dominant American economic position made it a particularly influential voice in post-war reconstruction efforts. Situations such as European inflationary and balance of payments pressures, the need by Britain to access the American market, as well as the emerging political split between the Soviet Union and the United States, made the Americans very influential players in the formation of post-war organizations like the IMF and the ITO. Consequently, it was very important economically and politically for the United State to be engaged in multilateral efforts to reduce trade barriers. However, with the State Department and Congress at

loggerheads over the ITO in 1948 and the RTA coming up for renewal in the same year, President Truman decided to postpone submission of the ITO Charter to Congress until 1949 (Aaronson, 1996:96). Then in 1949, the Truman Administration became preoccupied with the implementation of the Marshall Plan and Cold War tensions in Korea. By 1950, any pre-existing confidence that the ITO could bridge the gap between largely market oriented and more managed economic systems evaporated. As a result, when the President decided not to submit the Charter to Congress for ratification, other countries, aware that the GATT negotiations were still in play, followed suit, causing the establishment of the ITO to be abandoned.

The GATT, however, was not abandoned. At the end of the Havana conference, it incorporated some of the changes to commercial policy which had been made to the ITO Charter at Havana, but not the chapters on employment, restrictive business practices, or commodity agreements. In addition, despite vigorous lobbying by the International Chamber of Commerce, the GATT did not include a new chapter concerning investment rules. This meant that related FDI issues like labour mobility were also excluded at this time. Instead, with the establishment of the Interim Commission for the International Trade Organization, which became the GATT's de

facto Secretariat, the GATT continued on over the next three years with multilateral negotiations to reduce tariffs. These negotiations were carried out in Annecy in 1949 and Torquay in 1950-51, and served to assure the international community that American participation and indeed leadership in multilateral negotiations to reduce tariffs would be solidified.

Scholars have attributed the success of the early GATT negotiations not only to American hegemonic influence, but also to its narrow, incremental, pragmatic, and low key approach (Hart, 1995:56; also, Dam, 1970). It is also true that the GATT functioned effectively because it was not concerned with internationally negotiating the management of domestic economies and domestic regulatory issues. Indeed, after the demise of the ITO Charter, the postwar world economy was organized on the basis of separate systems of governance whereby "...the domestic and international economies and their management were treated as separate and independent" (Cowhey and Aaronson, 1993:18-19). If the reduction of tariffs was handled exclusively at the international level by the GATT in the postwar era, employment policy, particularly in developed countries, was handled exclusively at the domestic level. By and large, this also included immigration policy and attendant matters



like professional accreditation. This domestic policy autonomy represented one important aspect of the embedded liberal compromise that the postwar reconstruction efforts produced.<sup>9</sup> Consequently, any connection of international labour mobility to full employment policies designed to increase international trade disappeared with the ITO Charter. Furthermore, because the commitment to full employment gradually became weaker in the postwar era (Martin, 1994), international labour mobility has not had the opportunity to reappear within international trade negotiations in the same way it did between the two World Wars and during the post World War II reconstruction phase. That is, it has not been able to reappear as a strategy for helping to achieve full employment and thereby to increase international trade.

The American argument that increased international trade would lead to prosperity and full employment carried the day at the end of the negotiations to construct a multilateral trading system in the late 1940s. Although the GATT did not include any investment rules within its mandate, the fact that states negotiated a multilateral trade agreement meant that long championed business requirements for establishing comparative advantage and

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<sup>9</sup> For more on the embedded liberal compromise, see Ruggie, 1982.

advancing multilateral trade were given priority. The chances that related business needs such as labour-mobility might be worked into the GATT later during future multilateral trade negotiations, then, rested on a supportive foundation.

## **CHAPTER 3:**

### **Trade in Services and the Movement of Service Suppliers: Competitive Necessity and State Security Concern**

#### **Introduction**

Until the late 1970s, the world trading system dealt almost exclusively with the movement of goods. Services such as telecommunications, financial services, and business services did not catch the attention of trade negotiators since services were mainly traded (and regulated) within domestic economies. Indeed, so-called "infrastructure services" such as telecommunications and transport services were not only domestically focused, but in many cases were organized as state-owned monopoly providers within their domestic jurisdictions. Until technological change, increased capital mobility, and market maturation shifted the attention of trade negotiators to trade in services in the late 1970s, this area of the economy was largely ignored by trade agreements. This meant that trade in services supplied by the movement of service suppliers or labour mobility was also a non-issue.

In the post-war period, many governments showed some general interest in services and investment trade issues by

signing various Friendship, Commerce, and Navigation Treaties, Bilateral Investment Treaties, and the OECD Code of Liberalization of Current Invisible Operations in 1973. Although rife with exceptions and vague generalizations, these treaties have provided some (very) limited provisions for movement of professional service suppliers (Feketekuty, 1986:16-25). These agreements spawned initial interest in services trade and, combined with the issues to be discussed in this chapter, led to multilateral negotiations on trade in services including the supply of services via the movement of service suppliers.

This chapter will make the following three points about the international movement of service suppliers: 1) the ability to move labour internationally for the purpose of trading or supplying a service is required by multinational corporations (MNCs), via foreign direct investment and otherwise, to be competitive in trade in services; 2) the international movement of service suppliers is a development issue particularly as it relates to foreign direct investment, technology transfer, and remittances; 3) the international movement of labour for the purpose of trading services raises sensitive domestic regulatory issues regarding immigration, labour market development, and professional accreditation including border security, wealth

redistribution and consumer protection. It will be shown that, together, these three points reveal fundamental tensions existing in the discussions surrounding the international movement of service suppliers.

The literature looking at the international movement of service suppliers mainly exists for the purpose of understanding how such service suppliers can be molded into international trade agreements on services<sup>1</sup>. In so doing, this literature approaches this problem from two different positions. The first position is held mainly by researchers from the North who argue that, given the need by MNCs to move skilled labour internationally for the purpose of trading services, the movement of highly skilled professionals is clearly a competitive necessity and should be comprehensively dealt with in trade agreements concerning trade in services. However, they do not generally support the inclusion of lower skilled labour in these agreements mainly because they are sensitive to the security concerns raised by states about the movement of such labour.

In the second position are researchers, mainly, but not exclusively from the South as well as from the United

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<sup>1</sup> An important epistemological examination of the development of the trade in services literature for the period leading up to and including most of the Uruguay Round is found in Drake and Nicolaidis, 1992.

Nations Conference on Trade and Development (UNCTAD), who argue that both MNCs and the self-employed require a system where both highly skilled and low skilled labour may move internationally. It is therefore necessary to include the movement of both groups of labour within trade agreements concerning services. However, these researchers are also concerned about related development issues concerning the movement of service suppliers and would therefore like to see such issues addressed in trade agreements concerning services. The tension which exists in the practical debate about the movement of service suppliers is also reflected in a more theoretical debate concerning the theory of comparative advantage.

### **The Theory of Comparative Advantage and the Movement of Service Suppliers**

Where the movement of service suppliers is concerned, comparative advantage is based on cheap labour costs from one (exporting) country which are used to fill labour market gaps in another (importing) country. However, the application of the notion of comparative advantage to the delivery of services via movement of people is contentious and reflects an evolving and dynamic debate.

Traditional international trade theory positions a state's factor endowments, labour and capital, as both given

and immobile. These endowments are used to produce goods which, in turn, are sold or traded abroad. This means that trade occurs as a substitute for FDI or migration; FDI and migration therefore do not represent a form of trade. Trade flows, then, according to the Heckscher-Ohlin-Samuelson (HOS) model, are determined by capital and labour factor endowments at different locations (Hindley and Smith, 1984:370; also, Lanvin, 1989). By helping states to specialize in production for which, using their factor endowments, they have a comparative advantage, trade becomes welfare enhancing.<sup>2</sup> As noted in Chapter 1, comparative advantage does not require a state to have an absolute advantage in the production of a product to benefit from international trade. Instead, it need only specialize in the products it produces most efficiently in order to maximize revenue earnings, raise wages, and be assured of economic growth.

International trade, however, is no longer primarily about trading goods. Services trade represents an increasing portion of international trade flows. Trade-related factor movements such as labour are required in

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<sup>2</sup> It should be noted that Krugman (1981) observes that trade most often occurs among countries producing like products. This observation has spawned an interesting debate among economists about the relationship of comparative advantage to intra-industry trade.

order for many services to be produced and delivered. In certain sectors, such as business services, capital also needs to be mobile in order for labour to produce and deliver services abroad. Academics and policy-makers have debated whether the traditional theory of trade and comparative advantage is applicable to the services context. By extending the HOS model to account for additional factors of production and by admitting that factor endowments may be mobile, academics and policy-makers have been able to better account for services trade flows (Stern and Hoekman, 1987; McCulloch, 1990; Hindley and Smith, 1984; Lanvin, 1989). However, even academics and policy-makers from the North who agree that factor endowments may be mobile, focus more on movement of capital than on movement of labour. Capital movement is seen as more important in the first instance. In addition, although capital mobility may raise important domestic regulatory concerns, the domestic policy concerns regarding labour mobility, such as immigration and labour market development, seem to generate more apprehension among this group (Hindley and Smith, 1984:383). Where they do focus on labour-mobility, it is usually with regard to the highly skilled who are seen as a necessary complement to capital flows.

A few academics and many policy-makers from the North,



however, have continued to resist extending the HOS model, particularly where labour is concerned (Lee and Walters, 1989:72). Their main line of argument is that unskilled labour is less integral to production than skilled labour because it is easily replaceable. They also argue that the export of unskilled labour is less legitimate as a form of trade in services because it is achieved with cheap labour. This makes it politically, if not economically, unacceptable in the North. Here, economic theory and political reality become difficult to disentwine. Where unskilled labour mobility raises the problem of illegal permanent migration for developed countries, it becomes difficult for these academics to identify mobility as a legitimate method of exercising comparative advantage. Instead, the issue becomes confused with complex migration issues which are not clearly connected to the economic theory in question.

Academics and policy-makers from developing countries and from UNCTAD, however, have less difficulty with extending the HOS model to admit factor endowments may be mobile because they equate barriers to labour mobility with non-tariff barriers (Ghosh, 1997; Gibbs, 1988; Bhagwati, 1989; Gibbs and Mashayekhi, 1988). They reject the argument that using labour mobility to deliver services is a backdoor route to permanent immigration and point out that a positive

approach to comparative advantage theory does not accept political considerations as disproving the projected outcomes of this theory. Furthermore, they argue that since labour mobility is intended to be temporary, that is, no permanent residency is established, permanent movement is not an issue.

Given that businesses are, in reality, using both skilled and unskilled labour mobility to trade services, we may assume that they are pursuing such activity on a competitive basis. It is easy from a positive viewpoint of comparative advantage to understand how a country with an abundant source of cheap labour, for example, might pursue a specialization of trading services using labour mobility. The normative argument, however, is more complicated. The normative view of comparative advantage,

asks whether the pattern of production and specialization which results from international cost differences is economically efficient and socially desirable and investigates what are the optimal government policies towards international trade (Hindley and Smith, 1984:370).

Importing and exporting services using service providers has important implications for developing countries' development objectives and hence for government policies towards international trade. For developed countries, exporting services, particularly business services, is increasingly

important both in conjunction with other exported services and as value-added to goods exports.

### **Trade in Services in the World Economy and the Need for the Movement of Service Suppliers**

The movement of professionals over borders to deliver services gained heightened attention in the late 1970s and 1980s primarily because of the increased demand by MNCs from the North for business services. As corporations moved their production processes abroad to take advantage of cheaper production costs and as the importance of FDI rose in connection to product delivery systems, other firms which had supplied these businesses with services like accountancy, legal advice, management consulting, and advertising found it necessary to "follow" their clients abroad and establish themselves in new market locations. That is, if they wanted to keep their clients and forestall competition, they had to be prepared not only to offer the same level and type of service abroad, but also to adapt to the peculiarities of the different foreign markets where their clients were locating. This posed difficult challenges both with regard to managing new international relationships and maintaining quality services in different regulatory environments.

With regard to managing new international

relationships, business service firms focused on making it costly for their clients to switch business service providers by customizing services for clients and adding new services depending on client needs (Bressand and Nicolaïdis, 1989:9). Both of these strategies require high levels of knowledge about the client in order to be successfully implemented. For the most part, this information must be acquired on a face-to-face basis because the business service provider must understand the relationship between their clients' distribution network and the consumer.

Although some scholars initially argued that this information could be acquired electronically, it now appears that electronically delivered information may, depending on the sector, reinforce the need for decentralized face-to-face contact because it provides opportunities for even greater customization and local decision-making (Noyelle and Dutka, 1989:90-93). It is not surprising, then, that movement of business service suppliers has often been accompanied by "pure" cross-border trade of a given service such as electronic data or a conference call (Noyelle, 1989:318).

Large MNCs exporting business services in the 1970s and 1980s established offices abroad in many different countries

either through FDI or network affiliates.<sup>3</sup> From here, they sent service providers abroad to work in these offices for both short (under one year) and long periods of time. Smaller companies without the resources to establish offices abroad simply sent service providers abroad to work with clients for brief periods of time (usually under three months). However, whether from large or small companies, these business service providers faced similar barriers including right to practice requirements, establishment requirements, visa requirements, qualification, standards and accreditation requirements, taxation requirements, quantitative requirements for the provision of services, and so on. In the mid 1980s, as these issues became increasingly difficult to resolve on an ad hoc basis, they became the subject of trade negotiations.

### **Nature of Services Trade**

The need for customization and creativity as

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<sup>3</sup> The strategic importance of new international relationships within and between MNCs has been steadily increasing since the late 1970s. Increasingly, MNCs are externalizing service functions and depending on this externalization for readily available expertise, specialized knowledge, and the identification of new growth prospects. In this way, the presence of extensive business service networks and efficiently operating business services are important for a country's participation in technologically advanced service sector industries (Noyelle and Dutka, 1986:88).

determinants of successful business service delivery points to the fundamentally different nature of trade in services from trade in goods.<sup>4</sup> As Hill pointed out in an important paper on services published in 1977,

Services are consumed as they are produced in the sense that the change in the condition of the consumer unit must occur simultaneously with the production of that change by the producer; they are one, and the same change...the fact that services must be acquired by consumers as they are produced means that they cannot be put into stock by producers (Hill, 1977: 337).<sup>5</sup>

Other scholars have noted that the benefits of services are often difficult to describe, the consumer is often a central element in the production, transfer and exchange process, and information flows are central to service provision.

Others have noted that there is often a lack of homogeneity in service provision, there are often problems in controlling the quality of services, and stocks of services do not exist since they are produced and consumed simultaneously (Akehurst, 1987; Feketekuty, 1988, Nicolaidis, 1989). All of these characteristics of services manifest themselves in barriers to services trade,

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<sup>4</sup> For a detailed look at the differences between goods and services, see, Giarini, 1987.

<sup>5</sup> Twenty years later, Hill continued to stress the simultaneity of the production and consumption of services as well as the change in the condition of a person or a good that occurs through service production and delivery (Hill, 1997).

particularly the movement of service suppliers.

If services are generally not storable and must be used as they are produced, some form of interaction must take place between the producer and the consumer in order for a service to exist. For the interaction to take place, the movement of producer to consumer is a possible, and often the only way, in which service production and delivery can occur making the entire interaction very labour intensive (Riddle, 1986).<sup>6</sup>

### **Problems of Statistical Collection**

Besides the claim that trade in services has increased dramatically in the last two decades largely because of technological innovation, statistical information concerning international trade in services generally points to increased services trade activity. Statistical information about international transactions in services are gathered by countries for balance-of-payments purposes and are published

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<sup>6</sup> This interaction creates a high level of dynamism and creativity because it possesses a strong bias towards rapid adaptation and customization. Indeed, certain scholars have argued that service production and delivery have a different relationship to time than goods production and delivery because there is very little time lag between newly perceived needs and the production and delivery of new services. Scholars looking at the relationship of the service sector to time have produced interesting discussions about the development of complex infrastructures and their relationship to economic uncertainty. For more information about the notion of uncertainty and the service economy, see, Giarini and Stahel, 1989.

annually by the IMF in its *Balance of Payments Yearbook*. This yearbook also includes statistics about trade in services delivered by people. However, these statistics are hard to identify in the *Balance of Payments Yearbook* at first glance because they appear in different places in the yearbook and are defined in different ways depending on the category in question. Furthermore, little analysis of the yearbook has been completed in terms of pulling together a comprehensive picture of what information on movement of service suppliers actually exists.<sup>7</sup> A brief attempt to do so is made below.

The current account is divided into merchandise trade and services transactions. The latter includes trade in services, income, and transfers. Information concerning the movement of people to provide services may be included in all three of these areas. For example, the services category (or non-factor services) is broken down into transport, travel, government services, and 'other private services'. The latter includes financial and professional services like accounting, advertising, construction and engineering, data processing, and so on, although these

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<sup>7</sup> One exception is Arkell (1998) who tries to find links between international statistics on the movement of service suppliers and the way various international organizations and agreements (such as the ILO and the GATS) define movement of service suppliers.



break-outs are not readily available for many countries (International Monetary Fund, 1993; Sapir, 1985:29-30). It is these 'other private services' where statistics which include movement of service suppliers have increased substantially in the past two decades and which point to the growing importance of this form of services trade for the world economy.

The income category (or factor services) records transactions involving factors of production that can only be inputs in the production process (International Monetary Fund, 1996:28). The income category (or factor services) does not usually distinguish between goods-related investment and services related investment. However, the latter often includes services delivered by people.

Transfers, which includes workers' remittances and migrant transfers, comprise the third category in the balance-of-payments accounts where statistics on the movement of service providers can also be found. Migrants who are self-employed in a new country and transfer money home are recorded in current transfers (other sectors) since their income arises from entrepreneurial income not labour (International Monetary Fund, 1996:91).

When service providers (and any other workers) move across a border for less than one year but more than three

months to provide a service, their wages and other compensation received are recorded as income under 'compensation of employees'. Remuneration of less than three months is not recorded. Remuneration for stays of longer than one year are not subject to balance of payments statistics since such workers are then considered to be part of the host economy. This means that the balance of payments does not currently track the earnings of those workers delivering services abroad who have been delivering that service in the host country for more than one year but have not become a permanent resident of the host country. This represents a large gap in the statistics on trade involving the movement of service providers. However, remuneration statistics may be collected as worker remittances or migrant transfers if the remuneration is in fact remitted or transferred. When service deliverers return home and their savings are repatriated, adjustments are made in the capital and financial accounts where appropriate. In theory, these all have to be 'unwound' for each individual worker's repatriated savings (OECD, 1999:3). In practice, it is difficult to collect meaningful statistical information about repatriated savings.

The foregoing discussion described where statistics concerning the movement of service providers appears in the

IMF's *Balance of Payments Yearbook*. Keeping in mind that the yearbook represents a compilation of nationally collected statistics, the following discussion will identify some of the underlying national weaknesses of the statistics used by the yearbook to track trade in services delivered by people.

First, there is no uniform record used by national statistical collection agencies to provide complete and comprehensible data on compensation of migrant employees, earnings of self-employed migrants, or transfers and remittances. For example, industry surveys conducted by government agencies to collect data on movement of service providers do not break production data down into goods and services categories. Both are often present in the production of a product and there is no agreement concerning what the criteria are for distinguishing between them (Hill, 1997; Feketekuty, 1988; Riddle, 1986). Services produced and delivered by people may be related or unrelated to goods depending on whether they constitute intra-firm performance of services (for example, advertising or accounting) (Stern and Hoekman, 1987:41) or involve difficult to define value-added services.

These relationships are further complicated by the fact that movement of service providers often occurs in

conjunction with FDI and cross-border trade in services making the statistical collection of services produced and delivered by persons even more difficult. In addition, business services tend to be provided at the intermediate state of an entire service transaction while it is only the expenditure on final demand and/or industry of origin which is recorded.

With all of these deficiencies, it is almost impossible to identify how often international services trade via movement of labour over borders takes place and by whom. However, given the large amount of anecdotal evidence pointing to the increasing importance of trade in services, it is generally thought that balance of payments statistics tracking trade in services, particularly trade in services conducted via movement of service providers, is under-reported (Stern and Hoekman, 1987:48, 52; WTO, 1998m:9-11).

### **The Business Service Industry and the Movement of Service Suppliers**

It is clear from the balance of payments statistics that certain developed countries have greatly increased their trade activity in "other private services" (comprised primarily of business services) in the past two decades. For example, MNCs of American and British origin which have traditionally been the largest players in the trade of

business services such as accounting, advertising, software and data processing, management consulting and legal services have seen the export of these services increase dramatically since the 1970s (Noyelle, 1989:315). French, German, and Japanese firms have also developed a strong presence in these areas in recent years.<sup>8</sup> Indeed, business services is considered to be the unsung leader in the expansion of trade in services in developed countries in the last two decades (Coalition of Service Industries, 1999).

As has been noted above, trade in business services typically requires movement of service providers. A brief survey of the industries that comprise business services is useful to understand exactly how the movement of service providers is important to these industries. It is also useful to understand which countries would benefit from the liberalization of the movement of service providers in these industries.

Business service industries which are typically active in exporting services through the movement of service

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<sup>8</sup> In their quest for greater economies of scale and scope, business services MNCs, particularly in accounting, have invested a great deal of money in on-going training programmes which not only train personnel to use new methods but also help prepare them for new regulatory environments should they need to be moved abroad. These training programmes are essential for MNCs to remain competitive players in the delivery of services.

suppliers are: i) accounting services (including management consulting services), ii) legal services, iii) advertising services and, iv) computer services.<sup>9</sup> Trade in accounting services is led by five large international accounting organizations (Arthur Andersen, operating in 78 countries with a staff of 58,000; Deloitte Touche Tomatsu, operating in 132 countries with over 82,000 employees; Ernst and Young, also in 132 countries with over 82,000 employees; KPMG International, operating in 155 countries with over 85,000 employees; and PricewaterhouseCoopers, in 152 countries with over 140,000 employees (WTO, 1998k:4). These firms establish local affiliates abroad in order to enter foreign markets. These affiliates are locally owned and operate under the regulations of the host state.<sup>10</sup> They also attempt to provide the same quality of service across the board by providing employees with international training and experience. It is this effort to maintain quality of services which necessitates movement of service suppliers on

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<sup>9</sup> Architecture and engineering services are also exported as business services via the movement of service providers. However, the literature treats them as part of construction services which is a sector in which developing countries are seen as having a comparative advantage. They will therefore be dealt with in the section below concerning the movement of service suppliers and development (Noyelle, 1989:311; Lee and Walters, 1989).

<sup>10</sup> Accountancy MNCs establish locally owned affiliates in foreign markets not only because this is an effective way to service the market, but also because domestic regulatory regimes usually prevent them from doing otherwise.

both a short term and long term basis. In addition, medium sized firms operating regionally and small firms with a few foreign clients also need to be able to move accountants across borders usually for a short time and without a significant FDI presence.

The activities of accounting firms are not confined to accounting services but have become increasingly diversified in the last two decades. Typically, large accounting firms also provide management consulting services to their clients. Since accounting is a highly regulated activity while management consulting and computer services are not, these firms face a wide variety of trade barriers in foreign markets (Rossi, 1986). The United States is, by far, the largest exporter of both accounting and management consulting services.

Unlike the accounting services industry, there has been traditionally less concentration of the legal services industry in a few large international firms. This may perhaps be attributed to different regulatory barriers which limit the scope of activity of foreign lawyers in terms of multi disciplinary practices, and in terms of courtroom practice, consultation, advice, and preparation of legal documents (WTO, 1998e:14; Cone, 1986:170-171). Interestingly, the legal services industry is beginning to

experience competition from accounting services firms which are absorbing lower level legal work. This has caused the legal services industry to begin opting for global practices or to form international alliances thereby increasing the concentration of this industry (Bentley, 1998:10; Rice, 1998:1-2). Legal firms from the United States, the European Union, Australia, and Canada all export legal services mainly to service their clients who operate in global markets. Since long term relationships with clients are common in this industry, following clients abroad via FDI (particularly in partnerships with local firms) and the movement of service providers to provide legal advice is seen as a necessary activity.

The advertising services industry is fairly concentrated with the top ten companies controlling over 30% of revenues worldwide (Noyelle, 1989:315). The top advertising firms are from the United Kingdom, the United States, Japan, Germany, and France. This industry is not highly regulated in terms of the conditions under which people are allowed to work in it. Advertising firms will usually undertake FDI via wholly or majority owned subsidiaries in order to better serve host markets and because they are generally not prevented from doing so by domestic regulation (WTO, 1998f:3). Since advertising firms



are fairly centralized, the management of offices abroad requires movement of service providers.

The computer services industry is less concentrated than accounting, management consulting and advertising services, but not as atomistic as the legal services industry. The top thirty firms control about 20% of revenues worldwide (Noyelle, 1989:315) and are from the United States, the United Kingdom, Germany, France and Japan. Since computer services are often delivered through large accounting firms and since it is difficult to discretely identify what computer services are being provided (as opposed to computer goods like software),<sup>11</sup> the degree to which FDI is required to provide computer services varies. Computer service providers may therefore deliver their services in conjunction with FDI or on a stand alone basis. Advancements in technology have meant that certain services in this sector are now being delivered electronically therefore negating the need for movement of service providers. However, other aspects of computer services, particularly software development, continue to be

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<sup>11</sup> The debate about distinguishing between goods and services is reflected in the difficulty of defining computer services and particularly the relationship of this sector to the telecommunications sector. It is presently unclear where trade agreements are concerned whether the myriad of electronic deliverables such as software or websites should be defined as goods or services.

delivered and maintained via the movement of service suppliers (Noyelle, 1989:320; WTO, 1998g).

### **The Movement of Service Suppliers and Developing Countries**

Business services are mainly delivered in foreign markets in conjunction with FDI. Because of both establishment requirements and the nature of business services, offices with equipment and support staff are needed to conduct business services. Without these, it is very difficult to be competitive in business services since it is not easy to otherwise locate service providers in foreign markets or gain necessary knowledge about those markets.

It is usually only MNCs from developed countries which have the resources to deploy FDI. A quick survey of the IMF balance of payments reveals that developing country services exports occur in sectors which do not necessarily require FDI. Developing countries receive remittances from abroad for commercial services indicating that they do export services through movement of service suppliers in sectors which do not necessarily require FDI.<sup>12</sup> These sectors

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<sup>12</sup> "Business services" are sold by businesses to other businesses and used as intermediate inputs in the production process. Most business services require advanced education or professional status to be performed. "Professional services" are services sold by professionals directly to consumers.

include: health care services and computer services (Mallampally, 1990; UNCTAD, 1990; WTO, Council for Trade in Services, 1999a, 1999b). Exports of these services by developing countries have seen particularly strong growth since the mid 1980s. Developing countries are also large exporters of services in low skilled sectors such as construction and transport (especially maritime transport) (Lee, 1990; Yeats, 1990).

### Imports

From a development perspective, trade in services through the movement of service suppliers is of concern both in terms of developing country imports and exports. Services which are *imported* by developing countries from MNCs in developed countries raise difficult development issues because MNCs are accessing markets not yet well developed in terms of service-led competition. In particular, the development literature concerning trade in services is typically concerned with employment creation effects, the scope and extent of technology transfers, the balance of payments effects of liberalization, and market and development interlinkages (Noyelle, 1989:327; Aghatise, 1990). The movement of service providers to trade services has a significant effect on all of these development issues.

Because many services must be delivered in conjunction

with FDI, there are significant employment creation effects for developing countries when importing services. When the Coalition of Service Industries (an American lobby group comprised of businesses selling services) surveyed its members in 1989, it found that for 15 countries in which at least five of its members had a presence, 13 of the 16 companies employed 48, 171 staff in those 15 countries (98.8% nationals), including 910 managers (81.2% nationals) (Coalition of Service Industries, 1989; Noyelle, 1989:327).

However, on a global basis, the level of foreign service provider usage varies between MNCs of different countries of origin and destination and depending on the sector in question (Findlay, 1990:18). Generally, service firms from developed countries send employees abroad in both technical and administrative capacities (Tzeng, 1995:141). In sectors where there is a constant need for rapid technology transfer, such as in computer and managerial services, MNCs are more likely to relocate highly trained service providers on a frequent basis in order to sustain the flow of information exchange. Employees in administrative positions are likely to occupy top managerial positions.

For developing countries, one of the important development issues beyond the number of locals being

employed in firms established through FDI is the extent to which locals are employed in high level technical and managerial positions. To ensure adequate numbers, developing countries may implement performance requirements stipulating the number of local employees to be employed at certain levels. For developing countries trying to develop service industries often from scratch, the knowledge and experience locals gain by being employed in high level positions is extremely important and represents a form of technology transfer. Moreover, employees in higher level positions tend to have more access to training opportunities. Though training opportunities in business services are often centralized by MNCs in a developed country location, such as Arthur Andersen's training centre in Switzerland, regional training centres in developing countries are more likely to develop when the number of local employees increases (Noyelle, 1989:329).

Where MNCs, because of domestic regulations, have to establish network affiliates in order to serve a foreign market such as in the accounting sector, more locals are employed in high level positions. However, in service industries which are more centralized, such as advertising, this is less often the case. Generally speaking, American and European MNCs tend to emphasize localization and

relocate fewer of their employees than do their Japanese counterparts. This difference is attributed to both corporate organizational structure and culture (Tzeng, 1995:144). Interestingly, in the wake of the recent Asian financial crisis, there has been "an increased emphasis on localization as head offices seek to cut costs of expensive ventures in underperforming markets" (Harding, 1998:10). Sending employees abroad for long periods of time is very expensive compared to the cost of hiring someone locally; local employees, depending on the location, typically cost at least 70% less than employees sent abroad (Harding, 1998:10).

For developing countries, these wage differentials are extremely important for two reasons. Large wage gaps between expatriate employees and locals is perceived as having negative social implications since it appears to devalue local expertise. Secondly, for locally owned affiliates, expatriate staff from developed countries are often paid in the currency of their home country which may be considered an unnecessary drain on currency reserves, particularly in developing countries with high international debt loads (Noyelle, 1989:330). The impact of foreign development on developing country service sectors on balance of payments is also affected by the sharing of fees that

results when foreign professionals work temporarily in a developing country as part of a shared assignment.

MNCs providing business services on a global basis through the movement of service providers afford developing countries linkages to markets they might not otherwise have the resources to initially develop. For example, accounting network affiliates have spawned regional market synergies in Latin America which did not exist prior to MNC activity in that developing service sector. However, service sectors with more centralized MNC structures are less likely to develop such regional developing country market interlinkages. Development interlinkages gained from the presence of foreign service suppliers also extend to the process of developing domestic regulatory policies for service industries. Here, the presence of MNC service suppliers interacting with local regulations helps to identify weaknesses in regulatory practices and to provide input for change.

### Exports

Exporting services through the movement of service providers is also an important development strategy for developing countries. As previously noted, developing countries export services in the following sectors: construction services, health services, transport services

and computer services. The movement of service providers is essential for delivering these services. Unlike the business services discussed above, however, FDI is not an essential component of this delivery.

The construction services industry is a large component of all national economies comprising, on average, about 7% of GDP (WTO, 1998b:3). This industry has extensive linkages to other goods and services sectors and provides a significant amount of employment at both the highly skilled and low skilled levels. Developed countries typically employ about 7-8% of their labour forces in this industry while the figure is slightly higher in developing countries (Lee and Walters, 1989:5). The construction services industry includes architecture and engineering services as well as services requiring lower level skills directed at actual construction. This industry is comprised of both large and small firms, the former often being engaged in exporting while the latter concentrates on domestic contracts. The United States is the largest exporter of construction services worldwide with Italy, Japan, France, and the United Kingdom being the next largest suppliers.

The export of construction services through movement of service providers is broken down into two main categories: highly skilled and low skilled service providers. Developed



countries have tended to export highly skilled service providers such as architects and engineers. Developing countries have focused on exporting low skilled service providers since they possess a comparative advantage in terms of the wages paid to these service workers. Moreover, exporting services in this way makes the need for FDI unnecessary. The largest developing country exporters of construction services in the 1970s and 1980s included South Korea, the Philippines, Brazil, Argentina, and Mexico, particularly in the specialized areas of infrastructure related services, mining and petroleum services, and steel and metalwork services (Soubra, 1989:194, 199). Their markets included Singapore, Hong Kong, the Middle East, and Latin America. However, when South Korea's main market, the Middle East, declined in the late 1980s, their services exports in this sector also declined (Lee, 1990:72). More recently, China and India have been increasing their exports in this sector.

Developing countries export health services primarily via physicians and nurses. Physicians from developing countries are estimated at 56% of the total number of migrating physicians worldwide (UNCTAD, 1998a:7). Main LDC exporters come from Asia including the Philippines and India. Jamaica is one of the main suppliers of nurses to

the American market. Since these service providers typically work for entities already established in the host market, FDI is largely unnecessary in this sector. Few health services providers go abroad to establish their own individual practices mainly because of immigration and regulatory restrictions (Feketekuty, 1986:36; Mallampally, 1990:100).

The export of health services by developing countries raises development concerns in terms of resource loss or "brain drain". For example, partly as a result of migration to the United States and Canada, 50% of nursing posts in Jamaica go unfilled (WTO, 1998h:6; UNCTAD, 1998a). However, confirming the fact of brain drain is complicated by,

the potential gains in terms of migrant workers acquiring skills and expertise which, on return, may benefit the home country or of savings and remittances that may be invested back home. In addition, it is difficult to verify whether the alternative to emigration would have been employment in the health sector or, in the event of more lucrative job offers, in another domestic industry (WTO, 1998m:6).

Similar development issues may be raised in the case of developing countries exporting computer service providers. Labour market gaps in developed countries for computer programmers and data processors have created a market for developing countries who can provide such workers (WTO, 1998g:4). India, in particular, has filled this demand as

have countries in the Caribbean simply by sending workers abroad to work for host country employers. The loss of such workers on a permanent basis is a significant brain drain issue for developing countries. However, developments in information technology have meant that computer services, particularly for lower end services such as data processing, can be delivered on a cross-border basis through electronic means rather than by movement of the service supplier (OECD, 1997).<sup>13</sup> This may mean that the need for certain service providers to move to other countries to deliver their services will decline serving to reduce the problem of brain drain.

Developing countries participate in the export of transport services, particularly maritime services, by staffing vessels at the non officer level. Most cargo and liner vessels are owned by developed countries. However, the registration of ships in developing countries allows not only for weaker regulatory structures but also for the use of cheaper crew (WTO, 1998j). Recent efforts to establish multimodal door to door delivery is another area where developing countries may find new export markets using cheaper labour particularly with regard to port services.

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<sup>13</sup> For more information on the changing nature of information technology and its impact on trade see, Krommenacker, 1986.

Land transport services (particularly through trucking) is also of export interest to developing countries. This is especially the case where they border on developed countries such as Mexico and the United States and the various eastern European countries which have common borders with the European Union.

**Domestic Regulation as a Barrier to the Movement of Service Suppliers: Linking International Trade in Services to the Domestic Context**

Considering the extent to which international trade negotiations are dedicated simply to the choice of wording, it can be no surprise that the language used to describe the way a service is supplied in a market has important implications for the way that service is perceived and treated in the host market. In the case of people who move across borders to supply services, instability exists regarding how this movement should be termed. This instability reflects broadly a tension between those who wish to position these people solely as economic agents requiring no social support and those who wish to embed them within a social framework.

Various terms have been used in trade agreements and in the secondary literature to describe the movement of people who cross borders to supply services including *business*

*persons or visitors, service suppliers, temporary entry, labour mobility, free movement, and movement of natural persons.* There are various ways to approach discussing what people understand these terms to mean. These approaches could include looking at the meaning of these terms as they are defined within actual trade agreements; examining these terms from a self-reflective (in this case Canadian English-language socio-economic) standpoint; conducting a lexical analysis, or; attempting an analysis which situates these terms within a particular academic framework, for example, political science. The discussion below draws on all four of these approaches where appropriate.

In English and from a Canadian socio-economic perspective, *business persons* or *business visitors* are terms which emphasize economic activity as the basis for legitimate entry. They also seem to connote high skill levels and wages as well as potential professional affiliation. The NAFTA defines *business person* to mean "a citizen of a party who is engaged in trade in goods, the provision of services or the conduct of investment activities" (North American Free Trade Agreement [hereinafter NAFTA]:Article 1608). Here again it is the economic activity that the business person is conducting which is emphasized.

In English, *service suppliers* is also a term which seems to emphasize economic activity. However, this term does not seem to connote any particular skill level. In the GATS, the meaning of this term also emphasizes economic activity as in "any person that supplies a service" (WTO, 1998:GATS, Article XXVIII.g).

*Temporary entry* in the NAFTA is defined to mean "entry into the territory of a Party by a business person of another Party without the intent to establish permanent residence" (NAFTA:Article 1608). Here again the basis for legitimate entry is economic in nature. Rights that may be derived from permanent entry, such as any social rights, are limited by the exclusion of permanent residence in the definition.

In English, the word *labour* in the term *labour mobility* is associated with a variety of socio-economic issues. Economically, *labour* is sold in the labour market and is used as an input to the production process. At the same time, the word *labour* has historically been associated with the development of important social issues including wage levels, unemployment insurance, social benefits, and so on. As *labour* is mobile across borders, it carries with it both of these economic and social linkages. In the Canadian Oxford Dictionary, *labour* is defined as "workers, especially

manual, considered as a class or political force (dispute between capital and labour)" (Canadian Oxford Dictionary, 1998). This meaning seems to raise economic, social and political issues. Understanding the implications of *labour* as a class and as a political force is a subject often taken up by those studying an academic discipline such as political science or a political theory such as Marxism. Although *labour* has traditionally carried connotations of lower class, lower skilled, and lower paid, this class positioning, at least from a Canadian socio-economic perspective, has become more fluid over time.

In English, *free movement*, a term employed in the EU context, is used in the broad sense of a rights-based analysis. Here, free movement is considered to be a general obligation from which related rights flow. *Free movement over borders* implies that a whole range of rights are available in the host market to those people newly entering it on an equal basis with those who are already there. *Free movement* does not limit mobility on the basis of skill since movement is a right available to all. The term *free movement* does not appear in trade agreements such as the NAFTA or the GATS since movement in these contexts is not about accessing rights (particularly social rights) on an equal basis with those in the host market.

In English, *natural persons* is a common law term used to mean nationals who reside in a territory and have the right of permanent residence in that territory along with all the other rights conferred by that permanent residency status. In the GATS, *natural persons* are expected to move to the territory of other members to supply services (WTO, 1998:GATS Article I.2d). Once this movement by the *natural person* to the other member's territory to supply a services has occurred, that person is not regarded as a *natural person* of that host market but rather as a service supplier. We note again that the term *service supplier* positions a person as an economic agent.

It is not the intention of this thesis to resolve the aforementioned terminological instability that exists in the secondary literature or in trade agreements with regard to conceptualizing people who move across borders to supply services. Instead, it is identified here in order to demonstrate the conceptual difficulty of understanding the linkages between domestic regulatory contexts and trade agreements that provide for people movement. It is also hoped that the proceeding chapters will demonstrate that this instability reflects a dynamic tension within trade agreements over how to position people movement within varied economic and social frameworks.



From a trade agreement standpoint, it is important to keep the rhetoric focused solely on economic activities where the agreement contemplates no objective other than increased economic activity through trade. This serves to position people strategically moving across borders to supply services solely as economic agents without need of any social supports. Consequently, social policies such as immigration, labour market development, and professional accreditation which prevent this movement are perceived either as irrelevant or as barriers to trade even though they are regarded as legitimate social supports in the host market.<sup>14</sup>

From a domestic perspective, the issue of how to position movement of people conceptually is more complex insofar as it must account for both economic and social considerations in the domestic context. Some of this complexity and the ensuing confusion in the terminology used is described below.

Those providing services in a foreign market through self-employment are considered to be *service suppliers* or

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<sup>14</sup> At the domestic level, negotiations within states regarding international trade agreements has not received a great deal of attention. One of the first academics to consider these negotiations was Winham (1986) who examined the internal decision-making process of the QUAD countries (the US, Canada, Japan, and the EU) during the Tokyo Round.

*business persons* because they own the service they supply. This is not necessarily the case where a service supplier is an employee of a supplier located in the sending country, an employee in the host country, or an employee of a foreign affiliate (who may or may not come from the country of ownership of the "parent" company) such as in a branch, representative office, or a joint venture. Here, the terminology used seems to depend not only on professional affiliation, wage and skill level, but also on country of origin.

There does not appear, however, to be any clear demarcation allowing for an easy application of labels. Professional affiliation and skill level require document corroboration which is not easily comparable between countries. With regard to country of origin, labeling appears to depend on the sending country's level of development and the perceived risk this development level may have for the host market.<sup>15</sup>

The host market is not only a market where services are supplied to consumers by non-residents, but, in the case of movement of persons supplying services across borders, it is

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<sup>15</sup> Developed country immigration officials are aware that highly skilled professionals exist in developing countries, but they are also faced with the knowledge that many unskilled people also exist in these same developing countries who would try illegally to enter the developed country market.

also a labour market. That is, when foreigners enter from abroad to supply a service, they are perceived by immigration and labour market officials as also potentially entering the labour market and competing with the local labour market supply. The relevance of this perception varies depending on the length of time in the host market, the level of skill required, the sector in which the service is supplied, as well as the way a person supplies the work they are providing.

In the case of 1) self-employment; 2) those who are employees of a supplier located in the sending country; 3) employees of a national company in the host country, or; 4) employees of a foreign affiliate (who may or may not come from the country of ownership of the "parent" company) such as in a branch, representative office, or a joint venture, difficult questions arise for the host market regarding immigration regulations, labour market regulations and professional accreditation.<sup>16</sup> This is why the lexicon of services trade becomes important in the eyes of policy-makers. From a trade standpoint, these questions represent potential barriers to trade while for domestic regulatory

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<sup>16</sup> The following discussion concerning immigration regulations, labour market regulations, and professional associations is drawn from extensive confidential interviews with trade officials, immigration officials, labour market development officials, and industry experts conducted in 1998 and 1999.

officials they represent legitimate immigration, labour market development, and professional accreditation policy issues.

From an *immigration perspective*, the movement of people over borders to provide services produces various regulatory problems which are security-related in nature. First, this movement puts increased pressure on officials regulating entry, especially where visas are concerned. Visas are typically used to track entry and exit, prevent fraud, and weed out criminals. They do not generally exist to facilitate the entry of service providers. Second, immigration regulations often prevent foreigners from working in certain sectors deemed security related. Tracking entry and job changes, however, poses difficulties for immigration authorities. Third, immigration officials must verify documentation concerning skill level at the border. This is an onerous and labour intensive task in which it is difficult to ensure consistency of verification. In sectors with accreditation standards, immigration officials may work with professional associations to determine appropriate entry criteria. In sectors without these standards, immigration officials must perform a much more arbitrary function in order to protect consumer interests. Fourth, and closely related to labour market concerns is the problem

of length of time in the host market. While trade officials may contend that where service suppliers do not become residents or citizens they remain temporary entrants and therefore do not enter the local labour market, immigration officials regard stays of longer than one year as defacto entry into the local labour market. Consequently, they must work closely with labour market officials to determine under what conditions longer stays are considered legitimate as well as to ensure exit is enforced after the service is supplied for the agreed amount of time.

From a *labour market perspective*, the length of time in the host market is important because it affects, for example, distributional issues such as tax collection, benefits provision and, potentially, union membership. In sectors characterized by seasonal labour, high unemployment, low skills, and/or unstable union membership such as the construction industry, labour mobility is perceived as a sensitive economic and political issue with the potential to depress wages and undermine labour market development. In higher skill sectors such as computer services, foreign labour may be perceived as filling labour market gaps and/or hindering training opportunities and therefore labour market development in the host economy. Sectors attracting both high and low skilled services suppliers must be tracked for

all the myriad of relationships a service supplier may have with their service or work because, especially in states which lack comprehensive social benefits, the nature of this relationship will affect benefits provision and therefore social planning and redistribution efforts. Because labour market regulation and development often occur at the sub-national level, coordination with immigration officials is essential for achieving labour market regulation objectives.

*Professional associations* exist for the following inter-related purposes: to protect consumers, maintain standards and to control who may practice the profession. Often, they themselves are regulated by governments in terms of,

...protection against the exercise of monopoly power or in terms of protection against the abuses that could arise because of the complicated nature of the services and the superior knowledge of the service provider vis-a-vis the consumer (White, 1999:8).

Professional associations view entry by foreign suppliers with some concern since this entry makes the maintenance of standards more difficult. Because immigration officials control entry, professional associations must work with these officials to ensure that entry criteria meet professional standards. This coordination is not well organized, especially since professional standards often differ at the sub-national level where they are (often)

regulated. This problem has caused professional associations to promote standard harmonization and mutual recognition nationally and even internationally in some sectors. As we will see in subsequent chapters, negotiations to provide for harmonization or mutual recognition are ongoing.

Professional associations also view entry of foreign service providers with concern because they represent a form of competition within the profession both in terms of numbers and in terms of any additional skills the foreign service provider may bring. The concern over numbers depends particularly on labour market tightness. The concern over additional skills may be debated positively in terms of the new knowledge foreigners may bring to the profession and more negatively in terms of how this new knowledge may threaten the profession's coherency.

Interestingly, members of professional associations are employed in a range of contexts from large MNCs to self-employment. This range of employment affects the ability of professional associations to respond in a coherent manner to the increased competition resulting from the international movement of service suppliers into their markets. Nevertheless, professional associations from developed and developing countries are taking note of the barriers facing

them in foreign markets (both developed and developing). As the US National Study on Trade in Services found in 1984,

...industries have expressed concern about personnel-type and professional-practice problems that exist in banking, insurance, law, engineering and construction, hotels/motels, telecommunications, data processing, accounting, advertising, franchising and health care. Among the complaints listed are work permit requirements for professional and technical personnel, minimum percentages of local nationals to be employed; hiring restrictions or quotas; citizenship or licensing requirements for foreign engineers, lawyers and other professionals (United States, 1984:39).

These regulations are coming under increasing scrutiny in trade negotiation fora both with regard to their ability to protect consumers and in terms of the degree to which this regulation is captured and instead protects the incumbent service providers and professional associations.

### **Conclusion**

As this chapter has demonstrated, MNCs require the ability to move labour in order to supply services. This is particularly the case for business services in areas such as accountancy, legal services, architecture and engineering, and computer services, are concerned.

This chapter has also demonstrated that the movement of service suppliers across borders is of concern to developing countries both in terms of importing services and exporting services. Importing services through the movement of



service suppliers raises questions concerning technology transfer, balance of payments, and market and development interlinkages. Exporting services to developed countries through the movement of service providers particularly in construction, health, transport and computer services earns developing countries valuable foreign exchange but it also raises issues concerning brain drain.

This chapter has further demonstrated that the exporting of services through the movement of service suppliers has created a dynamic debate in developed countries, and to some extent in developing countries, with regard to what extent exporters are legitimately exploiting comparative advantage. From the importing side, this has revealed terminological instability which reflects tension between the narrow economic focus of trade agreements and domestic regulatory regimes which seek to embed economic activity within a broader social framework. In particular, these domestic regulations raise important questions regarding immigration, labour market development, and professional accreditation.

The concerns raised by immigration officials, labour market development officials, and professional associations reflect domestic regulatory structures established to maintain national security, develop the labour market and

protect consumers and service suppliers. From a trade standpoint, these regulations represent barriers to services trade and need to be either removed or modified to facilitate that trade. Bringing about a useful discussion about trade and domestic regulatory objectives where the movement of service suppliers is concerned necessarily requires new approaches for mediating the relationship between trade officials and domestic regulatory officials. As we shall see in Chapters 4, 5, and 6, the GATS, NAFTA, and EU have taken up this challenge in similar ways despite the different objectives to which these agreements aspire.

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## **CHAPTER 4:**

### **General Agreement on Trade in Services and the Movement of Service Suppliers**

#### **Introduction**

As we saw in Chapter 3, both developed and developing countries had reason in the 1980s to be interested in liberalizing the movement of service suppliers. Developed countries wanted to export business services worldwide in conjunction with FDI. Developing countries wanted to export services (mainly to developed countries) in sectors such as computer, health, construction, and transport services using only the movement of service providers. From an import perspective, however, developed countries were concerned about the movement of service suppliers because such movement raised important domestic regulatory issues concerning immigration, labour market development, and professional accreditation. For developing countries, FDI from developed countries raised additional development issues including employment creation effects, the scope and extent of technology transfer, the balance of payments effects of liberalization, and market and development interlinkages. These concerns generally came down to *developed versus developing* country tension where the

liberalization of the movement of service suppliers was concerned. As we shall see in this chapter, this tension significantly affected the way in which negotiations to include the movement of service suppliers in the General Agreement on Trade in Services (GATS) were played out.

The primary purpose of this chapter is to examine those negotiations of the GATS which led to movement provisions for service suppliers. This examination will begin with the launch of the Uruguay Round negotiations in 1986, and proceed to the end of the extended Uruguay Round negotiations on mode 4 completed in July 1995. The main issues which will be looked at are: coverage, architecture, immigration, labour market development, and professional accreditation. Because efforts to liberalize the movement of service suppliers created negotiating tension between developed and developing countries, this examination will also pay special attention to how this tension arose and how it was eventually resolved.

A secondary question to be explored here is what the liberalization of service suppliers within the GATS means in terms of inter-state relations. To begin to answer this question, this chapter will compare the provisions for the movement of service suppliers within the GATS to what has been accomplished in the EU context concerning labour

mobility. The EU context has been chosen because it has a long history of dealing with labour mobility issues, and because many of the challenges it has faced appear to be similar to what negotiators faced (and continue to face) in the GATS context. This question will be raised where relevant in exploring the issues mentioned above, and will cover the period from the signing of the Treaty of Rome in 1957 to the signing of the Treaty of Amsterdam in 1997.<sup>1</sup>

### **Context**

Before looking at the GATS negotiations on service supplier movement, it is important to describe briefly the context in which this issue-specific negotiation took place.

Shortly after the Tokyo Round had ended in 1979, pressure began to build, particularly from the United States, for a new round of trade negotiations; after having agreed not to push for the inclusion of services in the Tokyo Round<sup>2</sup>, the US was eager to start a new multilateral

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<sup>1</sup> A great deal of material exists about labour mobility within the EU. It is not the purpose of this chapter to re-examine all of this material. Rather, main landmarks in the development of free movement within the EU will be identified and compared to the GATS context. References will be cited to point interested readers in the direction of further reading material.

<sup>2</sup> References to services did appear in the codes dealing with Non Tariff Barriers (NTBs) that came out of the Tokyo Round, particularly in the GATT Government Procurement Code, the Standards Code, and the Subsidies Code. However, these references to services were very limited in scope. For more on codes, see Winham, 1986;

negotiation which would include services and investment, and which would address protection in agricultural products.<sup>3</sup> However, this pressure was resisted by the EU (on agricultural products) and by developing countries (on services and investment) at the 1982 ministerial meeting. Developing countries, in particular, believed that their lower level of economic development meant they had little to gain and much to lose from including services and investment in another round of negotiations (Aghatise, 1990).

Moreover, developing countries did not want liberalization of services to be positioned as a trade-off for further goods liberalization, particularly where textiles were concerned (Bhagwati, 1987). Instead, developing countries wanted the focus to be on what they considered to be the "unfinished business" of the Tokyo Round: concessions by developed countries on agriculture and manufacturing, particularly textiles. This led them to maintain that the GATT had no competence in services. Because of these divergent views, the end result of the 1982 ministerial meeting was not to launch a new round of negotiations, but instead to establish a work programme in

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Maffucci, 1981.

<sup>3</sup> For more on the American desire for a multilateral services agreement, see Lazar, 1990.

the GATT Secretariat to look at services and agriculture.

In the 'prenegotiation phase' between 1982 and 1986, wide-ranging discussion took place about the nature of services trade.<sup>4</sup> These discussions took place not only within the GATT<sup>5</sup> but also within the wider trade policy community which included academics, business lobby groups, governments, and other international organizations such as OECD and UNCTAD.<sup>6</sup> Generally, the approach taken in these discussions was to define services trade, to identify what had already been accomplished to facilitate trade in services in other fora, to generate data about trade in services for both developed and developing countries, and to give initial consideration as to how trade in services could be included within the multilateral trading system. As we saw in Chapter 3, these discussions produced interesting debates about the nature of services trade, including delivery via the movement of service suppliers, which were not resolved during this prenegotiation period. These

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<sup>4</sup> For a detailed discussion of the entire prenegotiation phase of the Uruguay Round, see Winham, 1989.

<sup>5</sup> As of 1983, a group of delegates to the GATT undertook informal meetings on trade in services. These meetings were chaired by Felipe Jaramillo, Colombia's ambassador to the GATT, who would later chair the negotiations to create the GATS during the Uruguay Round.

<sup>6</sup> For a detailed look at the role of these groups, see Drake and Nicolaidis, 1992.

discussions also revealed that bringing services trade into the multilateral trading system would create new tension between developed and developing countries.

Diverging views on services (among other issues) meant that until the 1986 Ministerial meeting at Punta del Este, Uruguay, it was unclear whether a new round would be launched. Developing countries continued to be uncertain as to how services liberalization would serve their long-term interests, and they continued to fear issue linkage by developed countries between goods and services liberalization.<sup>7</sup> It was clear that bringing developing countries on board would require some mechanism to delink goods and services liberalization. It would also require recognition by developed countries that phase-in of services commitments was possible, that special consideration to achieve market access for developing country services exports was necessary, and that the creation and maintenance of domestic regulatory structures for services transactions was legitimate. In short, a strong development angle had to be reflected in the negotiating mandate, and that mandate had to proceed separately from the goods negotiations.

This was achieved at the Punta del Este Ministerial

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<sup>7</sup> Most of the organized resistance to including services on the agenda was spearheaded by the G10 comprised of Argentina, Brazil, Cuba, Egypt, India, Nigeria, Peru, Tanzania, Vietnam and Yugoslavia.



Meeting by creating parallel negotiating tracks which delinked the goods and services negotiations. It was agreed that the other considerations (special consideration for developing country services exports, phase-in of commitments, and the creation and maintenance of domestic regulatory structures) were to be embedded in any services agreement. This compromise eventually contributed to a successful launching of the Uruguay Round at Punta del Este in 1986.<sup>8</sup>

### **Coverage**

The General Negotiation on Services (GNS) body hammered out the architecture of the services agreement as well as negotiated commitments between 1987 and 1993. Labour mobility<sup>9</sup> formed a continuous point of discussion and debate throughout this period, and served to highlight developed-developing country tensions where the services negotiations were concerned.<sup>10</sup> A significant part of the debate over

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<sup>8</sup> For the text of the Ministerial Declaration, see GATT, 1986b.

<sup>9</sup> The term "labour mobility" is used in the GNS documents when negotiators discussed people moving over borders to supply services. This term does not, however, appear in the GATS. As noted in Chapter 3, this confusion of terminology reflects the tension that exists between trade and domestic regulatory officials regarding how to understand and position the issue of people movement.

<sup>10</sup> By late 1990 until the end of the Round, the negotiations were conducted largely on an informal basis with few supporting documents from the GATT Secretariat or Members being used, other than

labour mobility, and one which reflected the developed-developing country tension over mobility, revolved around the issue of coverage.

As we saw in Chapter 3, companies from developed countries export a great deal of services using FDI or commercial presence.<sup>12</sup> They support this commercial presence by sending labour abroad, such as intra-corporate transferees, managers, and business visitors. Developing countries do not generally export services via FDI, particularly to developed country markets, because they cannot afford to do so. Rather, they export services largely by sending labour abroad to work for companies located in developed country markets. In the GATS negotiations, the question over coverage was whether or not the agreement would cover both types of labour movement.

The answer to this question required an understanding of what kind of FDI would be covered by the agreement since balancing FDI and labour mobility liberalization was key to off-setting the negotiating tension between developed and developing countries. Negotiators grappled with the

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request-offer submissions. The proceeding discussion is therefore based largely on information derived from confidential interviews the author conducted in 1998.

<sup>12</sup> FDI can be used to mean both commercial presence and portfolio investment. In this Chapter, unless otherwise indicated, it will be used to mean commercial presence.

following questions concerning FDI: Did the FDI need to be wholly owned by the investor? Did it include both commercial and portfolio investment? Did the establishment of commercial presence need to be temporary or permanent? Did restricting the scope of activity of the commercial presence somehow limit supply of the service?

The common and most important question to be resolved for both labour mobility and FDI was how long would foreign labour be allowed to remain in the foreign market (GATT, 1987)?

In the negotiating context, developed countries, given their export interests, wanted to define commercial presence as permanent, without limits to scope of activity, and including labour mobility necessary for the commercial presence venture. This reality kept the American negotiating position focused on defining labour mobility as something necessary for supporting commercial presence. The same was generally true of the other QUAD countries, namely, the EU, Japan, and Canada.

Developing countries, led by India, argued for a definition of labour mobility separate from commercial presence which would allow workers to be exported on their own to supply services. Developing countries would only agree to labour mobility being folded into commercial

presence if that commercial presence was made temporary and restricted in ownership and activity (Drake and Nicolaidis, 1992:94).

By the 1988 ministerial meeting in Montreal, there was general consensus that services would be defined in the agreement by the way they were supplied. It was also agreed that the factors necessary for service supply, capital and labour mobility, should be rolled into one of three *modes* services could be supplied: cross-border, movement of consumer, movement of factors of production (including capital and labour mobility). This latter mode excluded portfolio trade, permanent commercial establishment, and permanent residency. There was also agreement that this mode of supply would cover foreign providers present in a market for a limited time and for a specific purpose. This definition, however, did not address the question of skill level of the foreign service provider nor did it specify if labour mobility could be used both with commercial presence and separate from it (GATT, 1988b; GATT, 1988a).

By 1990, the GNS realized that severely limiting the duration of commercial establishment and labour mobility in the host market was not a viable way to meet the needs of service suppliers. However, it was unclear how to accommodate this reality in a services agreement. In order

to determine what labour mobility for service supply should look like in the agreement, the GNS established a Working Group on Labour Mobility to identify the special features of this issue and possibly to design an annex to accommodate it.<sup>12</sup>

Early on, the Working Group on Labour Mobility agreed to examine how the concepts of national treatment (NT), market access (MA), most-favoured nation (MFN), transparency, domestic regulation, progressive liberalization, and the increasing participation of developing countries in services trade could be applied. (GATT, 1990a).<sup>13</sup> It also decided that its work programme would be to define the distinction between temporary movement and immigration, and to identify what would constitute equal treatment between the factors of

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<sup>12</sup> The GNS also established eight other working groups related to services at the same time: Construction and Engineering, Maritime Transport, Land Transport, Air Transport, Telecommunications, Audio-visual, Professional Services, and Tourism. The general purpose of these working groups was to identify the special features that characterized these service sectors in order to facilitate an understanding of how liberalization might proceed (GATT, 1990a). It is unclear why a working group on commercial establishment was not also put in place. Presumably it was assumed that commercial establishment issues would continue to be discussed on a sectoral basis where appropriate as well as within the broader GNS.

<sup>13</sup> Developing countries were not uniformly convinced that the application of traditional trade principles from the goods side could or should be applied to services. Indeed, many felt that such principles were weighted in favour of developed countries. See, Aghatise, 1990.

production, capital and labour, in the agreement.

By following this work programme, the working group felt it might eventually be possible to establish a common "horizontal" or "cross-sectoral" approach to liberalization of labour mobility which could be applied across many sectors.

### **Architecture**

One of the challenges for the services negotiators was to identify how the agreement would be framed. To do so, it examined how trade principles for goods could be applied to services. At first glance, it appeared that the concepts of MFN (treating all foreign suppliers alike), NT (treating foreign suppliers in the same way as domestic suppliers) and transparency would work for services as they had for goods. However, by 1990, it was apparent that these concepts would not be sufficient to cover those barriers existing within a market which were not discriminatory in nature either from the point of view of MFN or NT. For example, regulatory frameworks, quotas, value limits, transaction limits, ownership limits, and economic needs tests, to name a few, affected domestic service suppliers in the same way as they affected foreign service providers. These barriers were not covered by the traditional trade principles used on the

goods side, primarily because barriers to goods were experienced at the border in the form of, for example, tariffs. Barriers to services were experienced directly in the domestic market. This reality led negotiators to conceive of "market access" barriers requiring discipline within the services agreement.

From the point of view of the Working Group on Labour Mobility, it became evident by late 1990 that market access barriers for labour mobility differed from those for capital. This meant that defining equality of treatment<sup>14</sup> for these factors of production was complex.

In order to more easily identify the different market access barriers that existed for capital and labour mobility, India argued that movement of labour should be separated from movement of capital and examined separately as a fourth mode of supply. India felt that this would not only produce conceptual equality between capital and labour mobility in the agreement, but it would also facilitate the increasing participation of developing countries in services trade by clearly identifying a mode of supply of negotiating interest to them.

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<sup>14</sup> Defining "equality of treatment" for these factors of production had to address two issues: their equality as distinct forms of service supply in the agreement as well as comparability of scheduled commitments. The term "equality of treatment" will be used to refer to both of these issues simultaneously.

Developed countries, led by the EU, initially resisted this argument because they felt that states would then be drawn directly into having to defend their immigration and labour market development policies within the scope of the agreement. They were particularly concerned about having to do this for policies which sanctioned labour market tests and quotas as well as domestic regulatory frameworks in general. They believed that keeping capital and labour mobility together would keep the focus on commercial presence and obscure the existence of these policies which were perceived by many states as politically sensitive and exclusively sovereign matters not subject to trade negotiations. In any case, this discussion on a separate mode of supply for labour mobility did not help to define what market access barriers for labour mobility actually were. This definition would take another year to develop.

The application of MFN, NT, and transparency to labour mobility were conceptually possible, but they, like the concept of market access, raised sensitive sovereignty issues. One notable difficulty was that immigration agreements between countries were predominantly conducted on a bilateral basis making the application of MFN difficult. The application of NT to foreign personnel potentially brought domestic procedures to recognize qualifications into



question as well as regulations for working conditions regarding wages, social security, hiring practices, and so on. This appeared to negotiators to be a potential minefield. As for transparency, this seemed to be the least threatening trade principle to apply to labour mobility since it would probably mean requirements for making regulations readily available, informing states as to changes in legislation, responding to requests for information, and so on. However, even the application of this trade principle to labour mobility was complicated since gaining entry into a country was accompanied by immigration and labour market development regulations which were often applied in a discretionary manner at the border.

An important characteristic of immigration and labour market development regulations is that they often apply to permanent entry. In order to avoid such immigration and labour market development regulations when applying MFN, transparency, market access and national treatment principles, the working group agreed, in 1991, that the movement of labour to supply services should be only *temporary* in nature. That is, delivery of a service in a foreign market for a certain amount of time would not be grounds for attaining permanent entry status in that country. The Working Group reasoned that immigration and

labour market development regulations, primarily geared toward issues concerning permanent entry, could in this way be largely avoided. The length of a "temporary" stay in the host market would be left up to the host to define.

There was less agreement, however, on how to define equality of treatment between the factors of production, that is, labour and capital mobility. Canada and the United States felt that equality of treatment could be achieved by liberalizing movement for only executives, managers and specialists who, by their nature, would be supplied in conjunction with commercial presence. India, however, wanted an illustrative list covering all skill levels<sup>15</sup> for all sectors which would provide for the possibility of services being supplied through labour mobility, but not necessarily in association with commercial presence.<sup>16</sup> This suggestion was strongly resisted by Japan and Australia who were against labour mobility for unskilled workers.

Canada then suggested an approach for how labour

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<sup>15</sup> India knew it might eventually have to back off the demand for all skill levels because it was not interested in promoting labour mobility between it and its developing country neighbours. However, it used this demand as leverage to achieve its more important goal of having labour mobility included as a separate mode of supply in the agreement. This was an important goal given India's exports of skilled computer software engineers.

<sup>16</sup> Since 1989, the GNS had found that labour mobility being used separately from commercial presence to deliver services occurred in the construction, transport, tourism, and professional services sectors. See, GATT, 1989a; GATT, 1989b; GATT, 1989c; GATT, 1989d.

mobility might be included in the agreement. It proposed that a horizontal or cross-sectoral approach to defining service supplier movement for all sectors be used. This approach would define service suppliers as intra-corporate transferees (executives, managers, and specialists) and sellers (GATT, 1991). This suggestion was not generally well received by developing countries because it favoured labour mobility in conjunction with commercial presence. However, developing countries did like the broad term "specialist" because it seemed to provide an opening for the inclusion of different skill levels.

To sum up, by 1991, although general agreement had been reached on the definition of temporary service suppliers, little progress had been made on establishing equality of treatment between labour and capital mobility. In particular, there was disagreement on whether labour mobility should form a separate and fourth mode of delivery and whether it should include skilled and unskilled workers. Moreover, it was unclear what constituted market access barriers for labour mobility and the degree to which the principles of MFN, NT, and transparency were applicable to labour mobility being used on a temporary basis. There was also confusion about how to deal with related domestic regulations, how to achieve progressive liberalization, and

how to increase the participation of developing countries. All of these problems hampered the development of a common horizontal or cross-sectoral approach to liberalization which the Working Group on Labour Mobility had initially set out to create.

It remained clear, however, that without the resolution of the labour mobility issue, developing countries would not agree to permanent establishment for movement of capital, jeopardizing the successful negotiation of a services agreement. This impasse was eventually finessed through the agreement's design for scheduling liberalization commitments.

### **The Scheduling Design**

In order to arrive at an agreement or legal code concerning services trade, negotiators drew up general principles on which the agreement would be based. These general principles became the core of the GATS. However, the actual negotiation over and scheduling of commitments represented a different, albeit closely related, part of the negotiations. Before negotiated commitments could be scheduled, negotiators had to iron out how such scheduling would occur. Determining the scheduling design turned out to be a complex process because of the multiple objectives

negotiators tried to achieve through this design.

At the same time that negotiators recognized the need to discipline new types of barriers relevant for services trade in order to realize the benefits of liberalization, they also wanted to preserve the ability to regulate their own domestic markets. In addition, if developing countries were going to go along with services liberalization, they wanted to be able to control both its pace and the sectors that were being liberalized.

In order to accommodate all of these needs, in 1992 negotiators decided on a hybrid positive and negative scheduling approach.<sup>17</sup> What this meant was that each country would decide in which sectors they wished to make liberalization commitments (positive approach). Market access and national treatment principles would then apply across four modes of delivery (cross-border (*mode 1*), movement of consumer (*mode 2*), commercial presence (*mode 3*), movement of service suppliers (*mode 4*) except where Members indicated market access and national treatment exceptions (i.e. allowable restrictions).

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<sup>17</sup> The scheduling approach is evident in the General Agreement on Trade in Services (WTO, 1995:Article I Scope and Definition, Article XVI Market Access, Article XVII National Treatment, Article XVIII Additional Commitments, Article XX Schedules of Specific Commitments) and laid out in more detail in a guide to reading the schedules (WTO, 1997:1-4).

The acceptance of the movement of service suppliers as a separate mode of delivery finally occurred because negotiators, including those from developed countries, realized that in the scheduling process, separating movement of capital from movement of labour would allow for more detailed exceptions to be taken where labour mobility was concerned. Even the EU became convinced that a separate mode for labour mobility would help EU states better regulate temporary entry under the GATS. Developed countries therefore agreed to separate movement of capital and movement of labour into two separate modes of supply. The question then became how to define the exceptions for movement of service suppliers or "mode 4" (the fourth mode of services supply) as it came to be known.

Negotiators dealt with this problem by creating a market access exception allowing states to limit the number of foreigners who could be employed in a particular sector. This exception was identified as either a numerical quota or the requirement for an economic needs test (ENT) (WTO, 1995:GATS Article XVI.2(d)). Economic needs tests, which referred to a country's policy of deciding if foreign labour would adversely affect a local labour market, were notoriously difficult to pin down. This offered countries an almost free hand to erect a non transparent trade

barrier.<sup>18</sup>

For national treatment, states could take virtually any discriminatory exceptions in their schedules. For labour mobility, this almost exclusively amounted to exceptions scheduled for residency requirements. Anything else which might conceivably be considered national treatment exceptions were shifted under the broader rubric of domestic regulation and declared off-limits from GATS disciplines concerning market access and national treatment. The same strategy was applied to any market access barriers which fell outside the pre-agreed measures for which states could schedule exceptions. For labour mobility this meant anything besides numerical quotas or ENTs. An example of a scheduled sector for mode 4 is shown below in Figure 1.

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<sup>18</sup> Para 8 of the scheduling guidelines attempts to discipline economic needs tests by indicating that the main criteria on which the test is based should be concisely described (GATT, 1993a). However, even national legislation and administrative practices for economic needs tests contain built in discretionary measures making it difficult for states to be precise in their schedules about these tests.

| Sector-specific Commitments              | Limitation on Market Access  | Limitations on National Treatment | Additional Commitments |
|--|--|-----------------------------------|------------------------|
| Transport Services<br><br>All subsectors | 4) Only aliens qualified to hold technical positions may be employed within the first five years of operation of the enterprise, their stay not to exceed five (5) years upon entry. Each employed aliens should have at least two (2) Filipino understudies.<br><br>3),4) Limitations listed in the horizontal section shall also apply |                                   |                        |

Figure 1: Scheduled sector for mode 4 (GATS, 1994b: Philippines, Schedule of Specific Commitments).



Negotiators then informally agreed to use a horizontal or cross-sectoral approach to scheduling commitments for mode 4. In this case, a horizontal or cross-sectoral approach meant that certain occupational categories could be inserted into the beginning of the schedules (before the sector specific commitments) where mode 4 was concerned. Each category of entrant as well as the extent of the commitment would still be defined by each individual state. It was agreed that this approach would broadly include labour mobility needed in association with commercial presence such as business visitors and intra-corporate transferees (including executives, managers, specialists, and professionals) but it would not include the self-employed. "Specialist", in the absence of a common definition, would accommodate different skill and formal education levels depending on how each state's laws defined it. This approach served to mollify developing countries who were interested in labour mobility for lower-skilled service suppliers.

An example of the use of this horizontal approach to market access limitations for managers and specialists in the Canadian schedule reads,

Managers

Natural persons employed by a juridical person who

direct the juridical person, or department or subdivision of the juridical person, supervise and control the work of other supervisory, professional or managerial employees, have the authority to hire and fire or recommend hiring, firing, or other personnel actions and exercise discretionary authority over day to day operations at a senior level.

### Specialists

Persons in the employ of a juridical person who possess knowledge at an advanced level of expertise and who possess proprietary knowledge of the juridical person's product, service, research equipment, techniques or management (GATS, 1994a:Canada, Schedule of Specific Commitments).

The horizontal approach also did not preclude countries from making any additional commitments they desired in specific sectors such as those of interest to developing countries.

In addition to this hybrid positive/negative scheduling approach, the general principles of MFN and transparency would apply to all sectors, whether or not they had been scheduled. MFN exemptions, however, could be taken for mode 4 (as well as any other mode or sector). Typical mode 4 exemptions taken included bilateral labour mobility programmes. Canada, for example, exempted its farm workers program which contained bilateral agreements with certain countries to provide Canada with farm workers at certain times of the year. Many other countries took similar exemptions.<sup>19</sup>

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<sup>19</sup> A compilation of the MFN exemptions taken in the GATS can be found in, WTO (2000a). For an analysis of MFN exemptions with

This flexibility in scheduling commitments and MFN exemptions for mode 4 helped to alleviate developing country concerns that developed countries should make special efforts to schedule mode 4 commitments in sectors of interest to developing countries such as tourism, transportation, computer services, certain professional services, construction services, and so on. Developed countries were also encouraged to use this scheduling flexibility to fulfill GATS Article IV *Increasing Participation for Developing Countries* which stated that the increasing participation of developing countries in world trade shall be facilitated through "...the liberalization of market access in sectors and modes of supply of export interest to them". At the same time, Article XIX *Negotiation of Specific Commitments* recognized that the pace and breadth of liberalization to be taken by developing countries could proceed at a slower pace given their development needs.

Despite Articles IV (*Increasing Participation of Developing Countries*) and XIX (*Negotiation of Specific Commitments*) supporting developing country needs, the actual pace of scheduling of commitments in specific sectors remained flexible for all Members, including developed

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regard to mode 4 see WTO, 1998m.

countries, because of the way scheduling of commitments was designed. At the same time, the scheduling design finessed the problem of defining commitments for labour mobility as only being in association with commercial presence or as being used on its own to supply services since states retained the possibility of scheduling commitments in both ways.

Consequently, by the end of the negotiations, the working group on labour mobility had come to a general understanding of the meaning of temporary service suppliers. They had also achieved conceptual and architectural symmetry between capital and labour mobility by assigning each a separate mode. At the same time, negotiators had created a scheduling design which allowed for a great deal of flexibility in scheduling, among other things, commitments under mode 4. This flexibility allowed developed countries to make few commitments for mode 4 while convincing developing countries that real potential existed for developed countries to make greater mode 4 commitments in the future. Articles IV and XIX seemed to support developing countries in this regard. In addition, this scheduling design preserved domestic regulatory powers while also providing avenues for international cooperation and the development of least restrictive trade measures where

domestic regulations were concerned.

### **Coverage and Architecture in the EU Context:**

In the EU context, the separation of coverage and architecture with regard to labour mobility was not as obvious an issue as it was for the GATS because the objectives around which the EU revolved were and are markedly different from the GATS. Where architecture was used to finesse the coverage issue in the GATS (via the scheduling design), in the EU context the principles of free movement and national treatment were simply enshrined in the Treaty Establishing the European Economic Community (EEC Treaty) in 1957<sup>20</sup> with the assumption that implementation would follow, preferably in a voluntary manner or, where necessary, via European legislation and the courts.<sup>21</sup>

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<sup>20</sup> The EEC Treaty forms part of the Treaty of Rome to create a European common market. The Treaty of Rome was signed on March 25, 1957 and comprises the EEC Treaty and the Treaty Establishing the European Atomic Energy Commission. The third treaty to make up the common market was signed in 1951 and is titled the Treaty Establishing the European Coal and Steel Community.

<sup>21</sup> Labour mobility within the Community in the 1960s and 1970s was very dynamic given movement from southern Italy, Greece, and Portugal to France and the Federal Republic of Germany. It is now generally seen as a reflection of imbalanced development. Labour mobility leading to permanent residency within the EU has since tapered off. Currently, about 3% of the current population of the EU works on a permanent basis in another EU state. Temporary mobility, including frontier worker mobility, is much more difficult to track, but is believed to be on the rise due to better occupational mobility, economic disparity between the EU and its eastern European neighbours, and the growing regional focus of business. See European Commission,

The origin of free movement within the community had its roots in economic reasoning related to trade in services: mobile human resources were seen as factors of production in the provision of services and as support to mobile capital.<sup>22</sup> However, the articles dealing with free movement enshrined in the EEC Treaty achieved both economic and social objectives. These objectives were broadly reflected in the *Preamble* as ensuring economic and social progress, improving living and working conditions, and preserving and strengthening peace and liberty. On the economic side, EEC Treaty Article 48 on the free movement of workers, Articles 52 on freedom of establishment and 59 on freedom to provide services<sup>23</sup> lent support to the notion of the free movement of persons. On the social side, Article 6 provided for non-discrimination on the grounds of nationality which, when seen in its positive form as the principle of national treatment, meant that "the nationals of each member State must, within the material and personal scope and application defined by the Treaty, be assimilated to the nationals of any other Member State where they are

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1989; European Commission, 1993; Council of Europe, 1996; Smith, 2000.

<sup>22</sup> For more on this argument, see League, 1991; Flanagan, 1993; Ulman, Eichengreen, and Dickens, 1993.

<sup>23</sup> All of these articles appear in EEC Treaty Title III *Free Movement of Persons, Services, and Capital*.

present or are in permanent residence" (European Commission, 1997:17). This positive interpretation, as we will see, has guided Community legislation and case law where issues concerning immigration, labour market development, and professional accreditation are concerned.

Both the economic and social objectives of the EEC Treaty regarding labour mobility implied the gradual lessening of national sovereignty in favour of an integrated supra-state or union.<sup>24</sup> This meant that the same issues which appeared stark in the GATS context were, given the positive interpretation of national treatment, blurred in the EU context. For example, in principle there was no preoccupation with skill level, self-employment status, the definition of temporary or with whether or not labour mobility would accompany commercial presence. Instead, all people were entitled to free movement. This meant that there was no perceived trade-off between capital and labour mobility and therefore no concern with the way services were traded. National treatment and market access would be implemented and where this did not occur, European

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<sup>24</sup> The term "union" or "integration" will be used in this work to mean a transformation and general lessening of state sovereignty in favour of closer cooperation with other states in the areas of economic and social policy through various formal and informal mechanisms including trading agreements. Integration can proceed at various paces and vary in intensity. For more on the categorization of integration schemes, see UNCTAD (1992:35).

legislation or the European Court would be in place to rectify the situation. Domestic regulations would gradually be subsumed into the larger regulatory whole. Moreover, since poorer and prospective members of the EU (such as Italy, Greece and Portugal) would later become entitled to capital transfers from other EU members, there was less concern about which sectors of interest to these poorer members should be liberalized. There was also less concern about the impact of capital mobility on poorer economies and the need for balancing this impact with something like mandatory technology transfer. In the end, these potentially divisive issues were avoided by the mutually reinforcing economic and social objectives of the EEC Treaty (that is, economic and social union) and the subsequent conditions of the EU's expansion.<sup>25</sup> Practical implementation was left to member states and EU legislation and case law.

This was not the case where the GATS was concerned

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<sup>25</sup> Enlargement of the EU to include countries such as Poland, the Czech Republic, and Hungary raises political concerns regarding labour mobility since it appears that enlargement may adversely impact blue-collar workers of the EU. Many of these concerns arise from the significant frontier mobility currently occurring between the EU and Austria and Germany. It is unclear, however, if these concerns will have a basis in reality when enlargement occurs or if they can be mitigated by equalization payments (ie., capital transfers) or by temporary arrangements to slow down labour mobility as enlargement is implemented. See OECD, 2000; Lieven, 1998; Sohinger and Rubinfeld, 1993; Smith, 2000.



because its objective was solely economic in nature, that is, the expansion of services trade (WTO, 1995:GATS *Preamble*). Although the GATS recognized that labour mobility was necessary to provide services, it did not explicitly envision any kind of social and economic union at the multilateral level and therefore did not provide any mechanism to support such a process by, for example, a self-correcting legislative process.<sup>26</sup>

### **Immigration**

GATS negotiators recognized that as they went about defining what constituted market access and national treatment barriers for labour mobility, they were in danger of including domestic immigration regulations which they did not want to see disciplined under the GATS. In terms of labour mobility, negotiators in the working party on labour mobility realized that these domestic regulations covered immigration and labour market development. These policy areas were traditionally within the purview of sovereign states and not subject to international agreements<sup>27</sup>, let

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<sup>26</sup> Of course, the World Trade Organization's dispute settlement mechanism applies to the GATS. However, as yet, no cases have been adjudicated directly for the GATS to judge how such issues might be interpreted.

<sup>27</sup> Refer to Chapter 2 for information on the general failure of states to cooperate effectively in these policy areas.

alone international trade agreements.

To solve this dilemma, the negotiators decided to include in the Preamble to the GATS recognition of "...the right of members to regulate, and to introduce new regulations, on the supply of services within their territory in order to meet national policy objectives..." (WTO, 1998:GATS, Preamble). This set up the agreement's general orientation with regard to domestic regulation. Meanwhile, the working group on labour mobility sought additional protection via an *Annex on Movement of Natural Persons Supplying Services Under the Agreement*.

The Annex made much more explicit what the GATS did not cover with respect to immigration regulations, especially concerning state security and length of stay. Its formulation by negotiators in this respect was not controversial since all states wanted to retain domestic regulatory control over immigration policy.<sup>25</sup> The Annex stated that:

The Agreement shall not prevent a member from applying measures to regulate the entry of natural persons into,

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<sup>25</sup> This is not to say that businesses from both developed and developing countries did not lobby for less restrictive visa systems where temporary movement of service suppliers was concerned. However, it was clear early on that all states had little political room to manoeuvre on this issue because of employment and security concerns. Moreover, the notion that developed countries should make special efforts in this area in order to promote the service exports of developing countries via temporary movement went nowhere because of political sensitivities.

or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment (WTO, 1995:GATS, Annex on Movement of Natural Persons Supplying Services Under the Agreement).

This section of the Annex was followed by a footnote which stated that "the sole fact of requiring a 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." Here the Annex explicitly reinforced the state's primary role as arbiter of border entry via the visa system which was and remains the main way states act to regulate entry and to protect the integrity of their borders where movement of people is concerned.<sup>29</sup> Visas, therefore, remained within the sole purview of state control; they were effectively exempt from GATS coverage. From this perspective, the negotiators attempted to ensure that states maintained absolute control over entry. Although one might argue that states' rights regarding border entry were also protected under Article XIV regarding General Exceptions,

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<sup>29</sup> The importance of the state's ability to maintain border integrity where people are concerned is fundamental to the nation state system. From a realist perspective, this function is commonly understood to be important for maintaining national security which broadly includes military, economic, social, and cultural objectives. For more on the importance of this function for the nation state system, see Waltz, 1979; Waltzer, 1983; Keohane and Nye, 1989.

the Annex allowed for regulation up front without requiring states to wait for a serious threat to public order before acting to regulate.

The Annex also laid the groundwork for ensuring that the movement of labour covered under the GATS was temporary rather than permanent by stating that the GATS would not apply to measures regarding citizenship or residence. The meaning of temporary was up to the state to define. Many defined it as a period of up to three to five years or longer in their schedules of commitments.

It is significant to note that, by having the GATS make this distinction between temporary and permanent movement, negotiators inadvertently cast a new role for immigration policy makers where people movement is concerned. Immigration policy has traditionally focused on regulating permanent movement, not temporary movement. It is true that the temporary movement of farm workers via bilateral agreements has been common in the past fifty years.<sup>30</sup> States have also created ad hoc arrangements for highly skilled researchers, for example. However, the temporary movement of service suppliers on a multilateral scale and

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<sup>30</sup> For example, Mexican farm workers have gone to work temporarily in the United States for many years. See Valdes (1995). For more information on attempts to organize temporary worker mobility in the first half of the twentieth century, see Chapter 2.

across many different sectors for the purpose of trading services is a new phenomena characteristic of the knowledge economy. Most states, whether developed or developing, do not have well-developed immigration policies to deal with this issue. Separating out and implanting movement of service providers in the GATS therefore created a new multilateral trade issue with important ramifications for immigration policy.

The temporary movement of service providers now reaches into two different policy domains: trade policy and immigration policy. The former is focused on how to enhance this movement in order to benefit from international trade in services. The latter must determine, in close cooperation with local labour market development policy, how to continue regulating this movement in what has now become a multilateral negotiating environment. In addition to forcing dialogue between trade and immigration officials domestically, this new environment may create incentives for international dialogue among immigration officials and even cooperation and adaptation of best practices to national contexts where immigration policy is concerned. Immigration officials, for example, will likely want to understand how other states attempt to promote the liberalization of temporary movement while also providing for its regulation.

While the Annex attempted to protect states' rights in terms of immigration policy, the context in which it operates (liberalizing movement of service providers under the GATS) has created a new situation where immigration and trade officials must communicate about their objectives and where ground work has been laid for possible multilateral cooperation by immigration officials regarding a new "immigration" issue: temporary movement of service suppliers.

Interestingly, the Annex also contains language which does not allow complete regulatory discretion at the domestic level. It says that the application of measures to regulate entry must not be applied in such a manner "...as to nullify or impair the benefits accruing to Members under the terms of a specific commitment (WTO, 1995:GATS, Annex on Movement of Natural Persons Supplying Services Under the Agreement). Although the nullification and impairment standard is a difficult one for a complainant to prove (Nicolaidis and Trachtman, 2000:258-259), it does provide a minimum level of regulatory discipline on the application of entry measures.

Such discipline is generally reinforced by Article VI *Domestic Regulation*. By its existence, GATS Article VI ensured that the sovereign right to regulate was regarded as

a legitimate principle alongside MFN, NT, market access, and transparency. Where immigration was concerned, this implied that states had the right to regulate entry at the border with respect to people. At the same time, Article VI.1 contains a general obligation to ensure that domestic regulations would be administered in a "reasonable, objective and impartial manner" (WTO, 1995:GATS, VI.1).<sup>31</sup> In addition, Article VI.5 provides a default nullification and impairment test for the application of certain regulatory measures. This means that for regulations which fall outside market access and national treatment disciplines, they are still subject to some disciplines in sectors where market access and national treatment commitments have been taken.

### **Immigration in the EU Context**

In order more fully to understand the specificity of GATS provisions, it is worthwhile looking at the contrasting situation under EU arrangements. Unlike the GATS, the EU provides for right of entry and right of residence for workers (including the self-employed) and their families. These rights had been provided for in the EEC Treaty via

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<sup>31</sup> Article VI(4) will be discussed under the section "Professional Accreditation" below.

Articles 48 on freedom of movement which outlined the measures to give effect to the right of citizens to move and reside freely as well as the limitations and conditions to which this right was subject.<sup>32</sup>

In 1992, the Treaty on European Union (signed at Maastricht) introduced the concept of 'citizenship of the Union' (Article 8) (Council of European Communities, 1992). This concept supplemented the concept of allowing service suppliers and consumers to move freely within the new internal market as economic agents with the concept of citizenship as an individual right. This EU right of citizenship included the right of entry and the right of residency to be granted indiscriminately and only restricted by requirements specifically provided for in the Treaty.<sup>33</sup> This meant that where member states had not previously implemented the right of entry and residence, they could no longer claim that the absence of implementing measures were valid grounds for denying this right (European Commission, 1997:23).

Where the right of entry requires only identity checks

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<sup>32</sup> These rights were further elaborated in 1968 when the Council of Europe adopted Regulation No. 1612/68 and Directive No. 68/360 which granted institutions of the EU explicit power to draft secondary legislation for implementation of free movement of workers.

<sup>33</sup> For more on the concept of European citizenship, see Preub, 1996.



at the border, the right of residence (if exceeding three months) is subject to more extensive requirements. Under Regulation (EEC) No 1612/68, the right of residence treats workers not only as factors of production organized to help satisfy the economic requirements of member states, but also as citizens who may reside in other member states for various reasons including to seek and take employment and to become self-employed. They may also seek residence when unemployed and when unfit for work. In addition, dependents of these workers are also entitled to residence. However, unemployed workers may remain only if in possession of sufficient resources and health insurance for themselves and their dependents. Those not gainfully employed must obtain a residence card valid for five years which may or may not be renewed after two years (Directive 68/360/EEC).<sup>34</sup> In this way, the right of citizenship in an EU member state is still subject to certain limitations in other member states.

In 1997, the Treaty of Amsterdam amended and added to the Treaty on European Union, particularly where the 'third

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<sup>34</sup> For a detailed breakdown of the Council Decisions, Directives, and Regulations which have been passed between 1957 and 1977 to give effect to the right of entry and residence, see Commission of the European Communities, 1977. For a complete guide to the case-law on free movement of services including those relating to free movement, see, Robert Schuman Project, 1997.

pillar'<sup>35</sup> on Cooperation in Justice and Home Affairs was concerned (Council of European Communities, 1997). Where this third pillar had merely encouraged intergovernmental cooperation regarding external border control, immigration, free movement of persons, asylum, visas, and closer cooperation in fighting crime, the Treaty of Amsterdam attempted to set out a five year programme to transfer these issues to the first pillar where they are supposed to be dealt with as a Community responsibility. Given current political sensitivities, however, it is unclear if this will actually occur as scheduled.

The Treaty of Amsterdam also incorporates the *Schengen Acquis* within its framework. Schengen refers to an intergovernmental agreement which has led to the creation of an area of free movement of persons by abolishing controls at internal borders between Schengen member states and by introducing the principle of a single set of controls (including immigration and policing) on entry to the Schengen territory. This agreement was developed outside the EU in 1985 by certain EU states. The agreement is

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<sup>35</sup> The EU, as structured by the Treaty on European Union, rests on three 'pillars'. The first pillar comprises the three European Communities (European Community, the European Coal and Steel Community, and the European atomic Energy Community). The second pillar is the Common Foreign and Security Policy and the third pillar is Cooperation in the Fields of Justice and Home Affairs.

eventually supposed to be absorbed either in the first or third pillar of the Amsterdam Treaty and therefore be extended to other member states. Although some EU members, such as the UK and Ireland, have opted out of the agreement, new member states joining the EU will be required to submit to Schengen.<sup>36</sup>

Notwithstanding member exemptions, for example by the UK, the Treaty of Amsterdam and the treaties on which it is built work to limit the national sovereignty of EU members in the areas of immigration policy (whether the free movement leads to permanent or temporary residence) and position this policy as a matter to be dealt with at the regional level. This limitation on national sovereignty means that economic and social objectives which were traditionally the responsibility of the state where immigration was concerned are gradually being shifted (albeit with national resistance) to the regional level.

The GATS, on the other hand, is silent about the social implications of temporary movement preferring instead to focus on the economic objectives of temporary movement while leaving the rest to national immigration policies. These implications, such as the relationship between temporary and permanent movement, security issues, and social support

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<sup>36</sup> For more on Schengen, see, Schitte, 1991.

requirements, will not however disappear. They may even require resolution via greater multilateral dialogue and cooperation in immigration policy where temporary movement is concerned. Whereas the EU deals with these issues at a legislative level after enshrining general principles in its treaties, the GATS, in the absence of such a legislative process, is left to resolve such issues on an ad hoc basis or via continuing rounds of negotiations.

### **Labour Market Development**

In the GATS context, labour market development<sup>37</sup> is implicitly dealt with under Article VI *Domestic Regulation* and more explicitly in the *Annex on Movement of Natural Persons Supplying Services Under the Agreement*. Though states could have conceivably scheduled wage and working condition regulations as barriers under national treatment or could have negotiated their inclusion under exceptions to market access, states have chosen to keep labour market regulations under Article VI. The Annex appears to prove this point as the following argument demonstrates.

The Annex states that "the Agreement shall not apply to

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<sup>37</sup> In this thesis, "labour market development" is used to mean those policies which help to: shape the labour market in terms of sectoral and regional development; to determine who may be employed in it; and to identify how that employment may be defined in terms of wages, conditions of work, social rights, and so on.

measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding...employment on a permanent basis" (WTO, 1995:GATS, Annex on Movement of Natural Persons Supplying Services Under the Agreement). Here, temporary entry of a service supplier was positioned as unconnected to employment in the local labour market while permanent entry meant that employment in the local labour market was to be expected. From the point of view of trade negotiators, this made sense since they focused on service supply rather than on the fact of employment per se and they assumed that the service supplier would remain in the host market only on a (receiving state defined) temporary basis.

To some extent, these assumptions were biased in favour of movement of service suppliers occurring in conjunction with commercial presence and therefore in favour of developed countries. The ability to focus on service supply and temporary entry is much easier when the business investor or employer is located in the sending country or if the sending company is a branch of a multinational in the host country. Temporary rotation for intra-corporate transferees, for example, is a norm and the company is likely to take responsibility for all social costs associated with the movement such as employment security.

Where the employer is located in the host market and recruits workers from abroad (that is, services are supplied without associated commercial presence), there is the problem of temporary entry turning into permanent stay with the associated social benefits and costs this may entail. From the point of view of those regulating labour market development, this is a very real problem, especially when the temporary entry is for a period of longer than three months. Commitments under GATS for temporary entry were often for a period of up to five years. Hence the concern by developed countries about allowing in service suppliers (particularly from developing countries) who were not coming as part of a commercial establishment venture. The same may be said about south-south movement of service suppliers.

This bias is perhaps normal, however, for an agreement with the narrow economic objective of expanding services trade. Any other orientation would lead toward social issues concerning labour market development which are not addressed by the GATS, but are instead regulated domestically by the state. The economic focus with respect to labour market development is sharpened by the GATS which positions "natural persons" only as "service suppliers". This positioning is introduced in Article I when defining trade in services for mode 4,

"...trade in services is defined as the supply of a service:...(d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member (WTO, 1995:GATS, Article I.2d)",

The Annex is even more direct in this positioning by using the term "natural persons who are service suppliers". This terminology moves away from the term "labour mobility" which is used throughout the GNS negotiating documents and which carries with it possible social connotations concerning wages, working conditions, collective agreements, and so on.<sup>38</sup> Conversely, using "natural persons who are service supplier" positions people solely as economic agents who may also be factors of production. Some economic agents may be business visitors investigating new investment opportunities while others may be actually supplying a service. The Annex does not leave room for the examination of any social implications that this service supply may raise. Under the GATS, the responsibility for any such implications rests solely with the state.

However, the length of stay allowed for temporary entry as well as the requirement imposed by Article XVI Market Access on states to eliminate any limitations on the total number of natural persons that may be employed in a

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<sup>38</sup> A more fulsome discussion of the terminological instability surrounding the issue of movement of service suppliers can be found in Chapter 3.

particular service sector as well as any applicable economic needs tests has inadvertently brought a domestic social policy area, labour market development, into the multilateral environment, much as was the case for immigration policy. Since many states have now made commitments in their schedules to certain lengths of stay, and entered quotas and economic needs tests into these schedules, they will inevitably be targeted for rollback by trade negotiators.<sup>39</sup> This situation creates tension between trade and domestic regulatory officials because it inadvertently forces those regulating labour market development to defend why they have these policies. At the same time, it also has the potential to encourage labour market development officials to become more aware of how other states are dealing with market access via mode 4.

#### **Labour Market Development in the EU Context:**

In the EU context, embedding social rights into labour market development policy for mobile labour has been an ongoing and explicit programme for several decades. A mechanism to coordinate national social security systems at

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<sup>39</sup> Although the GATS scheduling guidelines do not require that a specific duration of stay be indicated in the schedules where a mode 4 commitment is taken (GATTa, 1993:#4), the absence of such details creates a target for future negotiations.



the Community level was developed in 1958 based on EEC Treaty Article 51. This coordination sought to ensure that those exercising freedom of movement were not disadvantaged in terms of social security. It did not, however, affect the ability of members to develop their own social security rules.

Article 51 operates, where social security is concerned, primarily through two Council Regulations: (EEC) No 1408/71 of 14 June 1971 (updated by Council Regulation (EC) No 118/97 of 2 December 1996<sup>40</sup>) and (EEC) 574/72 of 21 March 1972. These regulations essentially provide social security for mobile workers.<sup>41</sup> These Council Regulations are based on four principles, namely: settlement of conflicts of law, equal treatment, aggregation of insurance periods, and the payment of benefits to Community residents. Their coverage, in terms of population, is very broad and includes employed, non-employed, and self-employed workers and their families and survivors moving within the Community. In terms of issue coverage, these regulations apply to unemployment benefits and sickness benefits which

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<sup>40</sup> To view this regulation, see Official Journal of the European Communities, 1997.

<sup>41</sup> For a detailed look at the coordination of social security in the EU, see Swedish National Social Insurance Board, 1997; Moussis (1996); Social Security Institute of Greece (1995).

may be accessed after three months in the host market. Pre-retirement schemes and pensions are not covered by these regulations.

Because these regulations seek to coordinate rather than harmonize social security systems, national systems continue to vary widely resulting in gaps in coverage, inadequate provision of certain benefits, and transparency problems for mobile labour (European Commission, 1997:45).<sup>42</sup> Furthermore, social assistance (also known as "welfare programmes") continues to be within the exclusive competence of national authorities and is non-exportable for workers migrating within the Community. However, the fact that it is not always easy to distinguish between social security and social assistance schemes combined with the fact that many hybrid schemes exist, renders the application of the regulations in question very complex. Harmonization does not appear imminent, however, since the conceptual differences between these systems are so great.<sup>43</sup> In the end, this translates into more limited coverage for mobile

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<sup>42</sup> For a critical review of the implementation of social security provisions by employers where mobile labour is concerned, see Robin, 1996. Social security under the regulations in question does not cover third country nationals (unless they are married spouses). For more on the question of third country nationals, see Vershueren, 1997; Commission of the European Communities, 1995.

<sup>43</sup> On the link between European integration and social assistance, see Majore, 1993; Kleinman and Prichard, 1993; Cochrane and Doogan, 1993.

labour than was perhaps intended, and weakens the concept of an EU wide labour market.

Indeed, talk of any policy which could lead to an EU-wide policy on social issues related to labour markets is highly controversial. Such a strategy was attempted in the late 1980s with a view to attaching a social dimension to the internal market. Those arguing for a social dimension pointed out that freedom of movement could not exist unless the EU acted to put in place the social framework necessary for its operation (Springer, 1992:41).

In response to this and other arguments, the Commission released "Social Dimension of the Internal Market" in 1988 (Commission of the European Communities, 1988). Where free movement was concerned, this paper recognized that social policy was very important for the creation of a single labour market. However, other than proposing some modest reforms to existing regulations and directives such as the international clearing system for vacancies and applications, no other action was taken.

In 1990, the European Council adopted the Community Charter of Fundamental Social Rights. The Charter was comprised of twelve categories, the first being freedom of movement (Commission of the European Communities, 1990). During the negotiation of the Charter, there was some

support for subsuming certain national policy issues, such as minimum wage laws, within the Charter and establishing a European minimum wage to facilitate, among other things, free movement. However, in the end, the Charter broadly reverted to subsidiarity where employment and social policy were concerned (Doogan, 1992:171).<sup>44</sup> This meant that policy issues such as social assistance and a minimum wage law would remain the responsibility of national governments since it was believed that this was where such policies could be most effectively administered. Nonetheless, EU members informally recognized that, where free movement was concerned, policy-making in these areas was necessary if a European labour market was to operate effectively.

To some extent, the Amsterdam Treaty of 1997 gives attention to this matter. The Amsterdam Treaty broadly recognizes that coordination over labour market development and employment policies is desirable, especially where freedom of movement is concerned. To this end, the Treaty's section on employment directs members to add a separate Title to the EEC Treaty which will aim at producing a coordinated strategy on employment and labour market development via guidelines issued annually from the Council

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<sup>44</sup> For more discussion on the complexity of trying to integrate labour market practices within the EU, see Du, Marsden, and Jensen, 1991.

and the Commission. Though obviously oriented towards subsidiarity, that is, retention of these issues at a level where they can be most effectively and efficiently administered, it is hoped that these guidelines will help guide the evolution of social security and social assistance programmes, as well as ensure that greater coherence exists between economic and labour market development policies at the Community level.<sup>45</sup> In terms of creating an EU wide labour market and facilitating labour mobility, this can only be helpful since full labour mobility will require equal access not only to employment, but also to the broad social framework supporting it, namely social security and social assistance.

It is clear that the GATS and the EU have pursued different objectives where labour mobility and labour market development are concerned. While the GATS focuses exclusively on the economic objective of increasing services trade via liberalization of service suppliers, the EU has a broader mandate which includes both economic and social objectives. Although member states of the EU are resisting full coordination of employment and labour market development policy presumably because of their importance

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<sup>45</sup> For more discussion on this line of thinking, see Grahl and Teague, 1994.

for national sovereignty, the treaties which make up the EU point them in that direction. In the GATS case, though only an economic objective is made explicit in the agreement, similar issues for member states are raised (albeit at an earlier institutional stage of development) where employment and labour market development policy are concerned. For example, will temporary services suppliers affect local employment and wage rates? Will temporary service suppliers be taxed and entitled to social security and social assistance benefits?

Interestingly, although both the EU and GATS states have demonstrated that they are resistant to further (EU) and any (GATS) coordination of labour market development policy which would infringe on sovereign state responsibilities, both groups have created the conditions which raise expectations in this regard. In the EU case, the Amsterdam Treaty has laid the basis for a process of drawing comparisons of labour market development policies among the EU member states. Via domestic bargaining which will assess and adapt best practices from other member states, this labour market development policy is likely to remain national in character in terms of its development, yet become Europeanized in terms of the best practices members states are made aware of and take on board via the

comparison process (Doogan, 1992:188).

Similarly, in the GATS context, as labour market policies become more evident via the scheduling process, several things begin to happen. First, trade negotiators begin to ask why these policies exist and if they could be liberalized. Labour market development regulators must then not only defend their policies based on domestic considerations, but they also must defend them in relation to other countries' policies in this area. The result is regulatory competition. This forces national comparisons of different policies and potentially lays the groundwork for adaptation of best practices to national contexts.<sup>46</sup> In effect, while labour market development policies remain national in terms of their actual development and implementation, they become inadvertently and gradually multilateralized in terms of the practices states are made aware of and actually adapt for their domestic contexts. This process has just begun to happen within the context of the new round of GATS negotiations.

### **Professional Accreditation**

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<sup>46</sup> It remains true that regulatory competition may also lead to a "race to the bottom" in the absence of institutional pressures to force adaptation of best regulatory practices as a response to new globalized conditions.

In the professional services sector, negotiators realized that liberalization would depend not only on commitments concerning immigration, labour market development, and even commercial establishment (mode 3), but also on some mechanism which would deal with the plethora of national and sub-national qualification procedures, technical standards and licensing requirements (i.e., domestic regulatory structures) characteristic of this sector. Although negotiators did not design the GATS to resolve this domestic regulatory diversity via scheduling, they did provide avenues for members to attempt to deal with domestic regulations in order to make liberalization commitments under mode 4 more meaningful.<sup>47</sup>

In the GATS, two articles and one related instrument have a bearing upon professional accreditation: Article VI *Domestic Regulation*, Article VII *Recognition*, and the *Decision on Professional Services*. This section will examine how the negotiation of these parts of the GATS impacted on the liberalization of the movement of service suppliers.

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<sup>47</sup> This section on professional accreditation will only focus on those aspects of domestic regulation which directly impede labour mobility. It is clear that there are numerous forms of domestic regulation which affect a firm's ability to establish in a foreign market and consequently are of interest when examining mode 3, such as regulations concerning firm names, but these will not be addressed here.



By 1989, the GNS had noted that regulations in the professional services were motivated by both economic and social objectives: consumer protection, protection of domestic business and local employment, the need to manage foreign exchange, and the preservation of cultural identity. It had also realized that regulations were applied on both a firm and individual basis (GATT, 1989c). Wanting to know more about these regulations and how they affected services suppliers, the GNS established a *Working Group on Professional Services*.

In terms of professional services being provided via movement of the service supplier, the Working Group identified several regulations directly affecting this movement: linking right to practice with citizenship or residency requirements; qualification requirements; and, the requirement of visas or work permits (GATT, 1990b). Interestingly, the requirement for visas or work permits, even though not an accreditation issue per se, gained heightened attention in the *Working Group on Professional Services*. This was perhaps because liberalizing trade in professional services was of great interest to MNCs from developed countries. These MNCs traded professional services using movement of services suppliers in association with commercial presence. The pressure this lobby placed on

immigration and labour market development officials to address visas and work permits was perceived by negotiators as politically palatable since officials in these areas did not consider labour mobility in conjunction with commercial presence to be as much of a security threat as labour mobility occurring apart from commercial presence.

Meanwhile, as developing country participation in exporting services via mode 4 was examined by the working group, it was noted that "...generally, participation of developing countries in international trade is likely to be greater at the level of individual practitioner than at the level of the firm" (GATT, 1989). In other words, service supply by developing countries in the professional services sector would likely occur via labour mobility alone and not in conjunction with commercial presence. This was implicit recognition by the working group that providing equal treatment for all service suppliers would pose serious problems from an immigration and labour market development perspective particularly in the areas of visas and work permits. It also meant that given less even domestic regulatory capacity in developing countries, their participation in exporting services for professional services would need to be accommodated with some scheme to ensure standards were maintained. Article VI(4) and Article

VII *Recognition* provided avenues to potentially bridge this gap.

In terms of the applicability of trade principles, the working group realized that additional problems might arise for movement of service suppliers in the professional services sector. Where MFN was concerned, any pre-existing recognition agreements regarding equivalence or entry requirements that had been negotiated bilaterally, would potentially have to be extended on a multilateral basis. Transparency requirements would also need to be ensured both with regard to existing regulations and potentially the development of new ones. With regard to national treatment, it was clear that labour mobility could be hampered by local accreditation standards and qualification recognition as well as barriers to establishing local linkages via partnerships. In addition, residency and citizenship requirements as well as the non-discriminatory application of local qualification and licensing procedures could be construed as market access barriers.

Realizing that domestic regulations in this sector were necessary to achieve both social and economic objectives, and that states were not interested in achieving liberalization at the expense of these regulations, negotiators left states either to schedule any regulations

as national treatment or market access limitations or to move them under the rubric of domestic regulation as they saw fit . Nonetheless, since in many states these domestic regulations were administered sub-nationally or by professional associations, either way that they were dealt with would have an impact on labour mobility. This was clearly a problem which negotiators attempted to solve via Article VI(4) on developing disciplines to ensure qualification requirements did not constitute unnecessary barriers to trade and via Article VII *Recognition*.

Article VI(4) of the GATS mandates the Council for Trade in Services to develop any necessary disciplines to ensure that "...measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services..."<sup>43</sup> These disciplines, if developed, are supposed to ensure that such requirements are based on objective and transparent criteria, are not more burdensome than necessary to ensure the quality of the services, and, in the case of licensing procedures, are not in themselves a restriction on the supply of a service (WTO, 1995: GATS, Article VI(4)). This means that members would

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<sup>43</sup> As Article VI.5 points out, these disciplines, once developed, will replace the default mechanism of Article VI.5.

still have full sovereign responsibility for the development of domestic regulations, but they would have to ensure that these regulations met the above criteria in order not to constitute trade barriers. In effect, Article VI(4) constituted a form of subsidiarity.<sup>49</sup> Since all sectors differ to some degree in the way they are regulated, Article VI(4) would presumably require disciplines in all sectors having qualification requirements and procedures, technical standards, and licensing procedures. Note again that such regulations covered both economic and social issues as envisioned by the Working Group on Professional Services including consumer protection, the need to manage foreign exchange, the preservation of cultural identity, and the protection of domestic business and local employment.

According to the *Decision on Professional Services*, the first set of disciplines to be developed in the professional service sector was to be for accountancy. The development of these disciplines would be carried out in the post-Uruguay Round period by a Working Party on Professional Services.<sup>50</sup> It would account not only for domestic

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<sup>49</sup> In other words, the level of government most suited to implementing the disciplines within the agreed parameters but in a way suited to particular domestic contexts would do so.

<sup>50</sup> Any impact of these disciplines on mode 4 will be discussed in Chapter 6.

regulatory practices but also for those standards set by international bodies. In addition, guidelines for the verification of qualifications by states would also be established by facilitating the effective application of paragraph 6 of Article VI of the GATS. Paragraph 6 states that, "In sectors where specific commitments regarding professional services are undertaken, each member shall provide adequate procedures to verify the competence of professionals of any other Member". For labour mobility, this would mean that service suppliers would have some framework for understanding states' domestic regulatory practices concerning qualification requirements, technical standards and licensing procedures in the accountancy sector. This information would allow them to use mode 4 more effectively for supplying services.

The ability to undertake further international coordination of these regulations was provided for in Article VII *Recognition*. Here, states are required to notify any agreements they reach bilaterally or plurilaterally to recognize or harmonize education, experience, licenses or certifications from abroad. Such recognition should be based on multilaterally agreed criteria and members should work toward the adoption of common international standards and criteria for recognition

(WTO, 1995:GATS, VI((5))). All recognition agreements must be open to accession negotiations with other interested members. Although Article VII does not require the development of recognition agreements, it does, through notification, provide an opportunity for states to negotiate access to bilateral or plurilateral recognition agreements. Given the disciplines required in Article VI(4), it is possible to see that the next "natural" step to dealing with qualification requirements at the multilateral level might be recognition agreements.<sup>51</sup>

Again, for service suppliers crossing borders, a recognition agreement would mean much smoother entry at the border in terms of assessing qualifications and licensing, and perhaps in terms of labour market assessment in obtaining a work permit. It would not necessarily make obtaining a visa any easier, however, since security issues would presumably not be covered by recognition agreements since they constitute a completely separate domestic regulatory policy area.

Article VII represents the next logical step after Article VI(4) toward facilitating temporary entry for professionals and indeed any occupations where qualification

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<sup>51</sup> The paths toward and implications of recognition agreements are varied and complex. For an indepth discussion, see Nicolaïdis and Trachtman (2000).

standards exist. For developing countries, Article VII provides a route for helping developing countries not to be completely excluded from recognition agreements once they have been negotiated. However, given the fact that many developing countries have to develop or upgrade their domestic regulatory structures in the professional services sector before recognition can be pursued, this highlights the need for capacity building assistance in this area. Without such assistance, whether via FDI from developed countries or via direct government assistance, the increasing participation of developing countries in exporting professional services will not occur. This will negatively impact the equality of treatment established between mode 3 and mode 4 in the GATS thereby fueling tension between developed and developing countries where service liberalization via labour mobility is concerned. Although the GATS, through Article IV *Increasing Participation of Developing Countries*, recognizes that the development of domestic services capacity is essential for their increasing participation in services trade, it does not make this development mandatory either through scheduling commitments or via Articles VI *Domestic Regulation* or VII *Recognition*. This is left up to the negotiating initiative of GATS member states.



### **Professional Accreditation in the EU Context**

Unlike under GATS, the recognition of professional qualifications in the EU context has actually been undertaken by all member states. Indeed, domestic regulatory structures for professional accreditation have been the subject of recognition at the regional level since the early 1960s. Article 57(1) of the EEC Treaty reads, in part, "In order to make it easier for persons to take up and pursue activities as self-employed persons, the Council shall...issue directives for the mutual recognition of diplomas, certificates and evidence of other formal qualifications." Clearly, member states recognized that free movement for the purpose of employment would depend on such recognition in any sector where some form of professional accreditation was required. Nonetheless, given the variability among member states of regulation across the professions, it has been very difficult to achieve this recognition. Below is a brief summary of the efforts the EU has made in this regard.

While the GATS initially focused its recognition efforts in the professional sector (particularly for areas such as accountancy, engineering, accounting, and legal services) the EU began its recognition work in the craft and industrial sectors (plumbers, builders, travel agents, tour

guides, wholesalers and retailers, hairdressers, etc) (European Commission, 1997:30). This is not surprising since demand for labour mobility in the EU of the 1960s was high in these sectors. In 1964, a series of transitional directives were adopted for the craft and industrial sectors. These directives did not provide for the recognition of diplomas but for the recognition of professional experience acquired as a self-employed person in another member state.<sup>52</sup>

In 1975, the Community adopted a series of sectoral directives to begin the process of recognizing diplomas for doctors, nurses, veterinary surgeons, dentists, midwives, pharmacists, architects, dispensing chemists, and others. These directives moved members in the direction of harmonizing accreditation by attempting to establish minimum criteria for training and the automatic recognition of qualifications meeting these criteria. Although hailed as a breakthrough for harmonization and recognition, this labour intensive process took over ten years (to 1985) to complete,

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<sup>52</sup> Note that the major problem with these directives was that "...they offered no mechanism of recognition for recently qualified professionals who did not have the requisite experience or who had only acquired experience as an employee" (European Commission, 1997:30). In *Vlassopoulou* (European Court of Justice, 1989a) it was determined that, in such circumstances, the host state, under Article 52 (freedom of establishment), was obliged to compare the qualifications of the applicant with its own standards and where these were found equivalent to grant recognition.

making it widely acknowledged that some other, less time-consuming and expensive, process had to be used to achieve recognition (Moussis, 1996:68).

Consequently, in 1989 EU members adopted a general system for the recognition of higher-education diplomas awarded after completion of professional education and training of at least three years duration (Council Directive, 1989). Underpinning this directive were the principles on which recognition was to operate in the future: the principle of mutual trust among members; the principle of the comparability of university studies among members; the principle of the mutual recognition of diplomas without prior harmonization of the conditions for taking up and pursuing occupations; and the principle that any divergence between members states, especially regarding training, will be offset by vocational experience. In 1992, a similar system was implemented for completion of education and training of less than three years, secondary education diplomas, and non-graduates who have acquired experience. That is, it was extended to non-professionals. Where there were substantial differences in training and education, the host member could require proof of vocational experience, adaptation training, or a competency test (Moussis, 1996:68). Although the general system was a significant

breakthrough for recognition and therefore mobility, the fact that it lacked a harmonized element meant that residual requirements in the host state still had to be met by foreign entrants. The result has been only partial automatic right of entry for professions covered by the general system.

Clearly, the EU has a long history where recognition of professional accreditation is concerned, while the GATS has only laid the groundwork for work in this area. In the EU context, recognition is inevitable given Article 57(1) of the EEC Treaty. With the sectoral directives, this means that harmonization has occurred at the regional level and national control of domestic regulatory policy has been reduced. Under the general system, states still retain domestic regulatory control of accreditation but the principle of recognition creates a regional underpinning for this control.

In the GATS context, recognition is not inevitable but the mechanism provided for in Article VI.4 and VI.5 ensures a similar approach for determining that domestic regulatory policies are not trade distorting. This mechanism limits state choices to some extent potentially creating a multilateral understanding of what policies might be possible. Article VII of the GATS concerning recognition

provides a more direct route to a multilateral underpinning of professional accreditation which, while not as strongly crafted as in the EU context, does provide states with the option of creating a multilateral recognition system on a sectoral basis. Article VII of the GATS has yet to be used for any professional sector.<sup>53</sup>

While Article 48 on freedom of movement in the EU allows states to subsume discriminatory citizenship and residency requirements where recognition is concerned, this is less certain in the GATS environment where freedom of movement is not an enshrined obligation. The granting of citizenship and formal residency remain within the purview of immigration officials. This is consistent with the narrow economic objective of the GATS versus the broader social and economic objectives of the EU. However, the pressures of GATS Article VI *Domestic Regulation* and Article VII *Recognition* will raise questions about this control where professional accreditation is concerned and potentially could lead to the abolishment of discriminatory citizenship and residency requirements.<sup>54</sup> This would

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<sup>53</sup> Non-binding guidelines for recognition of qualifications in the accountancy sector have been developed by the Working Party on Professional Services (WTO, 1997b).

<sup>54</sup> In Canada, for example, such requirements have been abolished for engineering services and duly notified in the WTO.

indirectly promote freedom of movement within the GATS context, albeit still only for professionals as compared to both the professionals and non-professionals covered in the EU context.

Of even more interest is the fact that, like the EU, the GATS recognizes that professional accreditation regulations hamper labour mobility (and service supply generally) and therefore must somehow be addressed. For the EU, which possesses explicit economic and social integration objectives, this would appear natural. For the GATS, the existence of Article VI(4) and Article VII are perhaps surprising given the limited economic objective of the GATS to expand services. These articles lead states into a difficult discussion about the economic and social objectives of particular domestic regulations, particularly qualification requirements and procedures, technical standards, and licensing requirements. However, without such a discussion and some potential for agreed action, service supply via mode 4 will remain limited.

### **Conclusion**

At the end of the Uruguay Round, commitments made for the movement of service suppliers were fairly limited. Most states took horizontal commitments for business visitors,

intracorporate transferees (including executives, managers and [highly skilled] specialists) and professionals. These commitments generally allowed visitors to stay for up to 90 days, and intracorporate transferees up to three years. Many states also took sectoral exceptions under market access regarding quantitative restrictions in the form of quotas or economic needs tests. Certain developing countries worked in market access restrictions based on the need for technology transfer.<sup>55</sup> National treatment exceptions were often scheduled for citizenship and residency requirements.

The structure of the horizontal or cross-sectoral commitments for mode 4 encouraged commitments which linked movement of service suppliers to commercial presence. Few countries had made commitments for mode 4 being used on its own to deliver services, particularly for low-skilled labour. Developing countries argued therefore that not enough effort had been made by developed countries to increase developing country participation in services by making more commitments under mode 4. Consequently, as outlined in the GATS Decision on Negotiations on Movement of Natural Persons, the negotiations for mode 4 were extended

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<sup>55</sup> See, for example, the schedule of the Philippines (GATS, 1994b).

beyond the end of the Uruguay Round. By the summer of 1995, six countries (Canada, the EU, Australia, India, Norway and Sweden) had made more commitments under mode 4. Canada, for example, included more professional sectors in its schedule of commitments and the EU included limited entry for contract workers (GATS, 1995a; GATS, 1995b).

What does this all mean?

To recap, a fundamental tension existed between developed and developing countries regarding liberalization of commercial presence (mode 3) and the movement of service suppliers (mode 4). Developing countries were reluctant to liberalize commercial presence without something significant in return to provide them with an effective way to compete in developed country markets. They argued that the inclusion of labour mobility in the GATS (especially when allowed without associated commercial presence) would meet this objective. Developed countries initially resisted this argument because they were concerned that labour mobility would raise difficult domestic regulatory issues in the areas of immigration, labour market development and professional accreditation.

However, after much negotiation and analysis of the application of trade principles to the movement of service



suppliers, this tension between developed and developing countries was eventually resolved by defining labour mobility as temporary and by creating a scheduling design which not only allowed for market access and national treatment exceptions, but also created a domestic regulatory carve out broadly outlined in the Preamble. If any one had any doubts about what the carve out covered, it was reinforced by an Annex which clearly stated what would not be covered in the agreement where mode 4 was concerned, albeit with a built in nullification and impairment standard providing some oversight for the application of regulatory measures.

These provisions seemed to strike the right balance between the coverage issues developing countries wanted to see included in the agreement (i.e., mode 4 used without associated commercial presence) and the domestic regulatory concerns of developed countries. However, these provisions masked a fundamental problem which was that separating temporary and permanent labour mobility was very difficult if not impossible for immigration and labour market development officials to achieve in practical terms. The fact that anything regarding temporary labour mobility was included in the agreement meant that domestic regulatory issues concerning both temporary and permanent movement

inadvertently became targets for trade liberalization.

Were these regulatory issues only economic in nature? No. GATS treatment of these issues demonstrates that they contain both economic and social dimensions. This reality creates new incentives for finding ways to make liberalization and regulation of the movement of service suppliers accommodate each other such as: international dialogue, comparison of national policies, adoption of best practices to national contexts and even cooperation among immigration and labour market development regulators. In effect, while immigration and labour market development policies remained national in terms of their development and implementation, the inclusion of mode 4 in the GATS created an informal pathway to multilateralism of this issue in terms of the practices states could be made aware of and might adapt for their own domestic contexts in order to simultaneously liberalize and regulate the movement of service suppliers in a complementary manner. This all happens in an informal and inadvertent manner since the main focus of the GATS as outlined in the preamble is only economic, not social, in nature.

Meanwhile, as negotiators largely carved out domestic regulatory issues concerning immigration and labour market development, they created two formal mechanisms to deal with

domestic regulations: Article VI(4) and Article VII.

Article VI(4) provides an opportunity for states to develop disciplines to ensure that their regulations concerning professional accreditation and other qualification requirements, technical standards, and licensing requirements developed in the domestic context are not more trade restrictive than necessary. Article VII provides an opportunity to notify and expand the membership of recognition agreements which may or may not contain elements of harmonization. Two things have been achieved with these formal provisions.

First, they provide an opportunity to draw developing countries into a detailed discussion about domestic regulatory issues regarding professional accreditation and other sectors where qualification requirements, technical standards and licensing requirements are present. This has the potential to lead into a discussion about related capacity building and trade-related technical assistance, and to help mediate the tension between developed and developing countries where mode 4 commitments are concerned.<sup>56</sup>

Second, these formal mechanisms provide a format for

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<sup>56</sup> Without such assistance, it is not difficult to see how the careful balance achieved by including modes 3 and 4 in the GATS will be undermined by "barriers" such as professional standards.

the multilateral discussion of both the economic and social objectives of regulations. This will likely promote an inter-state dialogue and comparison about the most effective way to regulate service sectors while simultaneously limiting the market restrictiveness of these regulations. Furthermore, it is likely that these more formal pathways to developing international cooperation for domestic regulations in professional sectors will also draw immigration and labour market development regulations into the discussion. For example, regulations in professional services concerning the protection of local employment are directly related to labour market development regulations. It is unclear how this reality will be dealt with in the GATS context since the narrow economic objective of the GATS to increase services trade positions it as remaining silent on immigration and labour market development policies.

One general conclusion that can be drawn from this examination of negotiations on mode 4 is that despite the narrow economic focus of the GATS to expand trade as expressed in the Preamble, social issues have also been drawn into the discussion in both a formal and informal manner. The EU experience with free movement serves as a useful benchmark for understanding what the implications of the broadening of the GATS parameters of discussion means

for inter-state relations in the multilateral context.

In the EU context, where economic and social objectives are fundamental to the EU vision of social and economic integration, labour mobility is embedded within the right to enter and reside freely within the union. This has made it difficult to identify the difference between temporary entry and permanent residency since the differences in treatment are diminishing as integration proceeds. Indeed, the use of various formal mechanisms to achieve integration such as Council regulations, directives, and case law have resulted in harmonization and recognition agreements as well as subsidiarity policies which have helped to blur this line.

This situation has raised expectations where free movement is concerned, helping to keep the challenges associated with these expectations, such as developing common social assistance and employment policies, on the political front burner. Awareness of this situation has spurred EU dialogue and comparison of policies as well as opportunities for adaptation of best practices to national contexts. In this way, regionalism supports perceived solutions to eliminating barriers to free movement thereby facilitating integration.

Similarly, the inclusion of mode 4 in the GATS has created potential paths for dialogue and comparison between

domestic regulators at the multilateral level, albeit in a much more informal manner. This can promote adaptation of best practices to national contexts helping to facilitate multilateral solutions to eliminating unnecessary barriers to mode 4 while maintaining other regulatory practices. The GATS also provides support for the development of similar formal mechanisms to address differences in domestic regulations for qualification requirements, technical standards and licensing requirements including recognition, harmonization, and subsidiarity.

Since the overall objective of the EU is social and economic integration broadly defined, can we conclude that the inclusion of mode 4 in the GATS is evidence that economic and social integration is also occurring at the multilateral level? It remains true, particularly for labour mobility, that enormous political barriers exist which will prevent the achievement of economic and social integration whether multilaterally or even in the EU context. These barriers will not easily or soon disappear. Indeed, it has taken the EU over fifty years to achieve its current level of integration where free movement is concerned, and it still has significant issues to address before complete free movement is realized. However, it is fair to say in a preliminary manner, the liberalization of

movement of service suppliers in the GATS has laid the foundation for moving inter-state relations in the long term toward a yet to be defined form of economic and social integration.

## **CHAPTER 5:**

### **The North American Free Trade Agreement and Temporary Entry for Business Persons**

#### **Introduction**

The negotiation and implementation of temporary entry for business persons in the North American Free Trade Agreement (NAFTA) is the subject of this chapter. The provisions for temporary entry are contained in Chapter 16 of the NAFTA entitled *Temporary Entry for Business Persons*. Chapter 16 is an interesting chapter because it attempts to balance the rather contradictory goals of facilitating temporary entry for business persons and maintaining sovereign state control over borders. As we shall see, this is a difficult objective to achieve and mainly serves to lay bare the fact that achieving freer trade for services and investment creates difficulties for traditional border policing functions performed by the state as well as difficulties for maintaining state control over labour market development. This is especially the case when the context involves a dominant market and developed-developing country border control tensions.

The organization of this chapter will proceed with a brief contextual discussion of the Free Trade Agreement's



(FTA) negotiations on temporary entry and then proceed to a contextual discussion of NAFTA Chapter 16.<sup>1</sup> It will then examine NAFTA Chapter 16 coverage and architecture and use this examination to provide an analysis of the immigration, labour market development, and professional accreditation issues arising therein.<sup>2</sup> It will then examine the implementation issues which have arisen since the NAFTA came into force in 1994 with a view to commenting on the related institutional provisions contained within Chapter 16.

In concluding, this chapter will give consideration to what the liberalization of temporary entry for business persons means in terms of inter-state relations among the signatories. To do so, it will use the EU as a point of comparison for helping to understand whether and how Chapter 16 leads NAFTA members to simultaneously accommodate both liberalization and regulatory objectives which, in turn, have integrative effects.<sup>3</sup>

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<sup>1</sup> This chapter will not give a detailed examination of the FTA's provisions for temporary entry since these provisions were incorporated in and expanded upon in the NAFTA. Instead, a detailed examination of the temporary entry provisions will proceed in the NAFTA context. Where FTA provisions significantly differed from the NAFTA provisions, this will be indicated.

<sup>2</sup> Since licensing and certification issues are dealt with in Chapter 12 of the NAFTA concerning Services, these issues will also be examined in light of their impact on the temporary entry of business persons.

<sup>3</sup> Since a detailed discussion of the EU and free movement was provided in Chapter 4, this chapter will not repeat this discussion

**Context: The FTA**

The Free Trade Agreement (FTA) between Canada and the United States came into effect in 1989. The reasons which led to its negotiation have been discussed in detail elsewhere.<sup>4</sup> Briefly, rising protectionism in the United States coupled with a bogged down multilateral trade negotiation in Geneva in the mid 1980s prompted Canada, in 1985, to consider a bilateral agreement with the United States in order to achieve secure access to the American market. The United States, concerned about a protectionist minded Congress and foot-dragging in Geneva, hoped that a tough-minded trade bargain with Canada would mollify Congress and create renewed support for the Uruguay Round (Hart, 1994:243). For these reasons, Canada and the United States agreed to undertake bilateral free trade negotiations. These negotiations began in 1986 and were concluded in late 1987.

The interest of the United States in including services and investment chapters in an FTA was always more enthusiastic than its interest in including a chapter on

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but only refer to it as necessary for comparative purposes.

<sup>4</sup> For further information about the FTA, see, Richard and Dearden, 1988; Dearden, Hart and Steger, 1989; Smith and Stone, 1987; Hart, 1994.

temporary entry for business persons.<sup>5</sup> In addition to the fact that the US did not want to create a demonstration effect for the GATS context, the Immigration and Naturalization Services (INS) and the Department of Labour (DOL) in the United States were reluctant to negotiate such a sensitive issue. First, DOL was concerned that provisions for temporary entry would inhibit its ability to protect the American labour market, particularly in times of economic downturn. It was also not obvious to either DOL or INS, given the complexity of the American visa system for non-immigrant categories, how such an issue would be negotiated or what immigration laws might have to be changed to accommodate any negotiated provisions.<sup>6</sup>

However, strong lobbying by the American business services sector helped to make the case that increased investment and services exports by American business needed to be accompanied by some provisions for the temporary entry

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<sup>5</sup> There is virtually no publically available written documentation about the negotiations concerning temporary entry for either the FTA or the NAFTA. The proceeding discussion about these negotiations is derived largely from confidential interviews the author conducted in Ottawa and Washington D.C. in 1998 and 1999. For a brief description of the results of the Canada-United States negotiations on temporary entry, see Richard and Dearden, 1988. For a brief discussion of immigration issues and the NAFTA, see Orme, 1996.

<sup>6</sup> The non-immigrant categories including temporary workers are codified in the Immigration and Nationality Act (United States, 1994:8 U.S.C. § 1101(a)(15)(B)).

of business persons.<sup>7</sup> This helped to reassure INS and DOL that the US labour market would not be compromised by a ready source of cheap labour from Canada.

From a Canadian negotiating perspective, it seemed obvious from the beginning of the negotiation that the movement of service suppliers was necessary to accompany services exports and investment.<sup>8</sup> Representatives of the banking sector, through Canadian Sectoral Advisory Groups on International Trade, highlighted the importance of being able to easily enter the United States to conduct business. The Canadians were also particularly interested in provisions for "after-sales services" since many of the goods they sold in the American market required, as part of the sale, follow-up services support by specialized personnel. Canadian after-sales service providers had always experienced difficulty entering the American market and they were hopeful that these difficulties could be

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<sup>7</sup> This pressure helped to ensure that "immigration" was at least included on the American negotiating agenda right from the beginning of the negotiations (Murphy, 1986:87).

<sup>8</sup> The fact that the Canadian negotiator for both services and temporary entry was the same person seemed to indicate that Canada viewed these issues as complementary. The Americans, however, had different negotiators for these two issues perhaps reflecting a more traditional view of the separateness of trade and temporary entry. USTR was the lead on negotiations for services while DOL was the lead on negotiations for temporary entry. The same pattern prevailed during the NAFTA negotiations.

addressed in the trade agreement.<sup>9</sup> Further into the negotiations, Canada proposed temporary entry for professionals who sought work in either the American or Canadian labour market. It is not exactly clear why this proposal was made and why the US eventually agreed to accept it. Canadians were far more likely to use this provision to enter the larger American market where more opportunities for employment existed. It is conceivable that the Americans wanted to codify an illegal practice that had been taking place for some time, i.e., highly-skilled Canadians lying at the border in order to gain entry into the US labour market.<sup>10</sup>

From the Canadian perspective, the motivation for proposing temporary entry for professionals to work and be paid in the host market was less clear. Presumably, Canada did not want to lose its professionals permanently to the US. It is probable that negotiators were aware that

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<sup>9</sup> Although the FTA included provisions for after-sales service, these provisions were not well implemented on the ground. Implementation issues concerning after-sales service were more successfully dealt with under the NAFTA.

<sup>10</sup> Whatever the case, this proposal helped to provide a backdoor entryway for high skilled Canadians to apply for permanent residency status in the US; once employed in the United States, the American employer can more efficiently sponsor the employee for permanent residency status. The net economic loss to Canada of Canadian professionals moving even temporarily to the US and the corresponding benefit to the American economy is well documented. See DeVoretz, 1998.

Canadian professionals have long sought entry into the American labour market and are one of the largest sources of temporary professional labour for the United States. They are, however, some of the least likely entrants to seek permanent residency status (United States, Department of Labour, 1997:15, 20, 42). Instead, they are likely to return to Canada within five years of leaving.<sup>11</sup> It is conceivable that Canadian negotiators wanted to enhance this reality. It is also conceivable that Canadian negotiators wanted to create some leverage for the investment concessions they were being asked to make. In other words, by being aggressive on temporary entry for Canadian professional workers who sought employment in the American market, they hoped to create some negotiating room with regard to American investment negotiating demands.

In any case, the Canadian negotiators knew that the Canadian Immigration Act provided for the entry of visitors into Canada for the purpose of fostering trade and commerce (Government of Canada, 1985:I(e)). This made it unlikely that any provisions negotiated in the FTA would require legislative changes. Furthermore, since Canadian

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<sup>11</sup> There is, however, some debate within Canada regarding the issue of whether or not permanent brain drain to the United States from Canada is actually occurring. This debate is muddied by the fact that it is very difficult to track when temporary entrants become permanent. For more on this debate, see DeVoretz, 1998.

negotiators did not anticipate a huge northward migration of American workers, they felt that it made sense to push the United States for provisions on temporary entry. Although the Americans were not especially enthusiastic about including any provisions for temporary entry, in the end they did not object to their inclusion in the FTA.

**Context: The NAFTA**

Negotiations for the NAFTA began in 1991. The impetus for such a negotiation began with Mexico's debt-induced economic collapse and the significant economic reforms President de la Madrid and President Salinas of Mexico had begun to undertake in the 1980s (Prestowitz and Cohen, 1991:Introduction). In 1990, President Salinas surprised the United States by proposing the negotiation of a comprehensive bilateral free trade agreement between the two countries. The United States Trade Representative, Carla Hills, was initially reluctant to consider it because most of the resources of her office were tied up with the Uruguay Round negotiations. However, appeals by the Salinas Administration to President Bush and Secretary of State Baker led the Bush Administration to respond favourably (Mayer, 1998:39-43). However, it was only after a hard fought battle with Congress to win fast-track authority

(during which time the Bush Administration agreed to include some consideration for labour and environmental concerns) did the US actually take a seat at the negotiating table.

For Mexico, the need for economic diversification as well as capital made liberalization seem an obvious policy choice for the outward-looking Salinas Administration. The fact that it had already conducted issue specific and sectoral talks with the US in the late 1980s also helped to lay the groundwork for an FTA with the US.<sup>12</sup>

When the US and Mexico announced their intention to negotiate a bilateral agreement in 1990, Canada was initially uninterested in negotiating a regional agreement. Prime Minister Mulroney felt that it would be politically risky and that, anyway, Canada had no clear economic interest in establishing a free trade agreement with Mexico (Mayer, 1998:48). However, Canada soon became concerned that the US would embark on a series of bilateral negotiations with countries in the western hemisphere reducing Canada to a "spoke" in the US FTA system. Preferring instead to be part of the "hub"<sup>13</sup> of the system,

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<sup>12</sup> For a more detailed discussion of US-Mexico trade relations during this period, see Hart (1990:55-66).

<sup>13</sup> For an excellent discussion of the "hub and spoke" argument for why it was necessary for Canada to participate in a regional trade agreement with the US and Mexico, see Wonnacott (1990).



Canada opted to join the negotiations and create a regional trade agreement (Schott and Hufbauer, 1992:63).

Negotiations began in 1991 and were completed in 1992. Side agreements on labour and the environment were then negotiated in 1993 and the NAFTA was implemented with considerable political dissent in 1994.

Although the negotiations purported to proceed from a clean slate, it was assumed that the FTA provisions would have a significant impact on what was negotiated in the NAFTA context (Schott and Hufbauer, 1992:63). For temporary entry, the demonstration effect of the FTA coupled with Canada's insistence that nothing in the FTA's Chapter 15 *Temporary Entry for Business Persons* be rolled back (at least in the US treatment of Canada) seemed to guarantee that some provisions for temporary entry would make it into the NAFTA. However, this was not initially the viewpoint of Carla Hills, the US Trade Representative, who stated at the first NAFTA negotiating session that, "the only thing that's off the table is the ownership of the mineral rights in Mexico and US immigration laws" (Journal of Commerce, 1991:1A).<sup>14</sup> This comment reflected the intense political sensitivities the US faced with regard to its porous

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<sup>14</sup> Other representatives of the United States Trade Representative expressed a similar view as the negotiating agenda was developed. See, Cameron and Tomlin (2000:71).

southern border. It also reflected the reality that although the participating countries to the negotiation had agreed to conduct a trilateral negotiation, some issues might not be fully trilateralized. Temporary entry was one of these issues.

Mexico's position on negotiating temporary entry was initially ambivalent. There were some within the Mexican bureaucracy, supported by certain non governmental organizations, who felt that these negotiations would provide an excellent opportunity to resolve some of the longstanding labour migration issues that existed between the US and Mexico.<sup>15</sup> However, this viewpoint was soon overcome by a more conservative trade liberalization perspective which prioritized goods, services and investment on the negotiating agenda and relegated labour mobility to a minor trade negotiating issue. Mexican negotiators feared that any prominence given to migration issues would endanger the success of achieving a free trade agreement with the United States or perhaps force Mexico to police its own northern border to prevent illegal emigration. Mexico also did not want to draw attention to the fact that trade

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<sup>15</sup> Orme (1996:316) appears to be the only one to suggest that President Salinas himself initially wanted the negotiations to deal with longstanding migration irritants perhaps as part of whatever approach would be taken for labour and environmental issues. However, Mexico backed off in the face of strong US opposition.

liberalization with the United States would likely exacerbate Mexican peasant farmer displacement and create more incentives for illegal migration to the US at least in the short term. Furthermore, the strategy of exporting its unemployment problem netted Mexico significant remittance dollars (in the order of \$3 billion annually) which it in turn used to prop up its debt-ridden economy.<sup>16</sup> Mexico therefore stayed away from any migration issues during the negotiations, including temporary entry for business persons. This virtually guaranteed that it would accept different treatment for temporary entry than what had been achieved between Canada and the US in the FTA.

### **Coverage**

The objectives of the NAFTA as outlined in Article 102 are purely economic in nature. The NAFTA is intended to eliminate barriers to trade in goods and services, promote fair competition, and increase investment opportunities. That is, it purports to create a free trade area, not a customs union nor an economic and social union leading to

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<sup>16</sup> In 1997, Mexican remittances were over \$4 billion American dollars, double what they were in 1991. (International Monetary Fund, 1998:Table B-19.) For more discussion on the reasons for and implications of Mexican illegal migration to the US, see Bean, Garza, Roberts, and Weintraub, eds., 1997.

some supra-state arrangement.<sup>17</sup> The general principles article on which Chapter 16 *Temporary Entry for Business Persons* is based appears, at least on the surface, to support the general objectives of the NAFTA when it states,

Further to Article 102 (Objectives), this Chapter reflects the preferential trading relationship between the Parties, the desirability of facilitating temporary entry on a reciprocal basis and of establishing transparent criteria and procedures for temporary entry, and the need to ensure border security and to protect the domestic labor force and permanent employment in their respective territories (North American Free Trade Agreement, 1993:Article 1601)[hereinafter NAFTA].

The intent of this article is clearly to indicate that while temporary entry will be facilitated, it will not be allowed to affect the border security, domestic labour force or permanent employment opportunities of the signatories. Each signatory will continue to regulate its own border, domestic labour force, and employment policy.

Annex 1603 of Chapter 16 identifies the four categories of people who will gain temporary entry under NAFTA. They include: business visitors, traders and investors, intra-corporate transferees, and professionals. For all but the traders and investors category, the requirements that

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<sup>17</sup> A free trade area leaves members free to pursue their own trade policies vis-a-vis nonmembers. A customs union requires members to adopt a common set of commercial policies towards nonmembers. An economic and social union requires some form of harmonization of domestic economic and social policies.

Canadians have to meet to enter the US are less stringent than the requirements imposed on Mexicans to enter the US. These differences speak to American sensitivities concerning its border relations with its developing country neighbour. Canada imposes the same requirements for both Mexicans and Americans entering Canada. Mexico imposes the same requirements for both Canadians and Americans entering Mexico. The following is a description of these categories and the terms on which each signatory allows their temporary entry.

#### Business Visitors

According to Annex 1603.A.1 of the NAFTA, the business visitors category allows short term entry for those who plan to carry on the following seven business activities: research and design, growth, manufacture and production, marketing, sales, distribution, after-sales service, and general service. The general qualifying criteria for entry are: citizenship in a NAFTA country; entry for business purposes only; scope of business activity is international; no intent to enter the local labour market; primary source of remuneration is outside the country in which temporary entry is sought; principle place of business and the predominant place where profits are accrued is outside the country in which temporary entry is being sought; and

existing immigration requirements for temporary entry are met (NAFTA, 1993:Annex 1603, Section A,1-2). These criteria can be met by presenting proof of citizenship and a letter at the port of entry outlining the purpose of the business trip. If entry for after-sales service is being sought, copies of the original sale, warranty or service agreement and any extension must be presented. The applicant must also present proof of specialized knowledge essential to the sellers's contractual obligation (Government of Canada, 1998:9-10).

Generally, each NAFTA member is committed to granting temporary entry for this category without requiring an employment authorization, prior petitions, or labour market tests and without imposing any numerical restrictions. Visas may, however, be imposed (NAFTA, 1993:Annex 1603, Section A, 3-5). This qualifier was not present in the FTA and reflects the concern that the state be able to preserve its border policing function and use it when necessary to override the agreement. It is likely that the presence of a developing country in the agreement prompted the inclusion of this provision.

Existing immigration requirements for each member country require the following procedures. For both American and Mexican business visitors entering Canada, the general

qualifying criteria must be met and a visitor record may be issued at the border to facilitate frequent cross-border entries or to serve as documentation for extended stays beyond two days.

For Canadian and American business visitors entering Mexico, the general qualifying criteria must be met and an FMN form must be completed at the port of entry. This form asks for information on the type of activity to be carried out and the principal enterprise or natural person in Mexico with which the activity is being carried out. This form is valid for 30 days, but can be extended for an additional 30 days. The FMN form must be returned to Mexican immigration officials when leaving Mexico.

For Canadians entering the United States, the general qualifying criteria must be met at the port of entry. Frequent cross border movement over a six month period can be facilitated by asking for an I-94 document to be inserted into the passport. Entry is allowed for up to six months with possible extensions in increments of up to six months.

For Mexican business visitors entering the United States, the general qualifying criteria must be met and Mexicans must produce a border crossing card.<sup>18</sup> The

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<sup>18</sup> US immigration rules requiring a border crossing card are codified in, 8 C.F.R. § 214.2(b)(4).

application for this card is made at an American embassy or consulate in Mexico. The United States is able to impose the requirement for a border crossing card because of an exception it was able to negotiate with Mexico regarding paras 4 and 5 of Annex 1603 which prohibits prior approval procedures and petitions (NAFTA, 1993:Appendix 1603.D.4, 3). By taking this exception, the US is able to impose a more onerous border policing function on Mexicans which serves to hinder the facilitation of Mexican temporary entry for business visitors.

#### Traders and Investors

As outlined in Section B of Annex 1603, traders are defined as business persons who are engaged in conducting significant trade in goods and services between their country of citizenship and the country in which entry is being sought. Investors are defined as business persons who establish, develop, administer, or provide key technical services to the operation of an investment to which the person or person's enterprise has committed substantial capital. For both categories, the capacity of the business person must be supervisory or executive or involve essential skills.

The general qualifying criteria for traders are:  
citizenship in a NAFTA member country; the enterprise has



the nationality of a member country; the trader is an executive, supervisor or someone with essential skills; and existing immigration requirements for temporary entry are met. For investors, the general qualifying criteria are: citizenship in a NAFTA member country; the enterprise must have the nationality of a NAFTA member country; a substantial financial investment is made; the enterprise is a real and operating enterprise; the investor is an executive, supervisor or someone with essential skills; and existing requirements for temporary entry are met (Government of Canada, 1995:5-6).

NAFTA member states have agreed not to impose labour market tests or numerical restrictions on traders and investors. However, they may require a visa to be obtained prior to entry (NAFTA, 1993:Annex 1603, Section B, 2-3). This qualifier was not included in the FTA and reflects the reassertion of border policing functions in a context where significant border tensions exist between two members to the agreement, namely the US and Mexico.

Existing immigration requirements for temporary entry differ per NAFTA member. For Mexican and American traders and investors entering Canada, the general qualifying criteria must be met and an application for an employment authorization must be completed at Canadian embassy or

consulate prior to seeking entry. Upon entering the country, traders and investors may use the employment authorization to obtain a social insurance number (Canada, 1995:7).

For Canadian and American traders and investors entering Mexico, the general qualifying criteria must be met and an FM3 Employment Authorization form must be issued before entering Mexico or before the trader/investor has spent 30 days in Mexico. The employment authorization is valid for one year and can be renewed for an additional four years before a new FM3 must be obtained.

For Canadian and Mexican traders and investors entering the United States, the general qualifying criteria must be met and an application for entry as a trader or investor, available at a US embassy or consulate, must be completed and approved. Upon approval, an employment authorization document is issued and inserted into the passport (E-1 for traders and E-2 for investors).<sup>19</sup> Upon entering the US, the trader/investor should obtain a social security number. There is no specified length of time a trader/investor may remain in the US. This is the only category where Canadians and Mexicans seeking to enter into the American market have identical requirements for entry.

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<sup>19</sup> Codified in 8 C.F.R. § 212.1(1) (1995).

### Intra-Company Transferees

Under the NAFTA, temporary entry is also granted to "a business person employed by an enterprise who seek to render services to that enterprise or a subsidiary or affiliate thereof, in a capacity that is managerial, executive or involves specialized knowledge..." (NAFTA, 1993:Annex 1603, Section C, 1). The general qualifying criteria for this category are: citizenship in a NAFTA member country; proof that employment is in an executive or managerial capacity or requires specialized knowledge; employment within a similar position in the enterprise for at least one year in the previous three years; transfer to an enterprise that has a clear relationship with the sending enterprise; and compliance with existing immigration requirements for temporary entry (Canada, 1995:4). The total period of stay cannot exceed seven years.

NAFTA member states have agreed not to impose labour market tests or numerical restrictions on intra-company transferees. However, they may require a visa to be obtained prior to entry (NAFTA, 1993:Annex 1603, Section C, 2-3). This qualifier was not present in the FTA and again reflects the reassertion of border policing functions which has arisen in a developed-developing country context.

In the case of Mexican and American intra-company

transferees entering Canada, the general qualifying criteria must be met and an application for an employment authorization must be completed and approved at a Canadian consulate or embassy before departing for Canada. Application may also be made directly at the port of entry. Employment authorizations are initially issued for up to one year and extensions may be granted in increments of up to two years. The total period of stay for executives and managers not to exceed seven years for those employed in a specialized knowledge capacity, the total may not exceed five years. Upon arriving in Canada, intra-company transferees can obtain a social insurance number (Canada, 1995:5).

In the case of American and Canadian intra-company transferees entering Mexico, the general qualifying criteria must be met and an FM3 Employment Authorization form must be issued before entering Mexico or before the intra-company transferee has spent 30 days in Mexico. The employment authorization is valid for one year and can be renewed for an additional four years before another FM3 must be obtained.

In the case of Canadian intra-company transferees entering the US, the general qualifying criteria must be met and the US employer must submit a petition to INS for an

employment authorization. The petition must be shown at the port of entry by the intra-company transferee upon which an employment authorization (L-1) will be issued.<sup>20</sup> Upon arriving in the US, this employment authorization can be used to obtain a social security number.

In addition, Canadian small business owners who are considering expanding into the US (and not simply entering to seek self employment) may apply to enter as an intra-company transferee at any consulate, embassy, or port of entry. A detailed business plan must be provided identifying how the expansion will result in direct local employment. An extension of up to seven years may be granted if it is proven that the objectives of the business plan are being met (Canada, 1995:5).

In the case of Mexican intra-company transferees entering the US, the general qualifying criteria must be met and the US employer must submit a petition to INS for an employment authorization. The approval of this petition must occur before the intra-company transferee arrives at the border. In addition, the transferee must apply for admission to the US which also must be approved prior to arrival at the port of entry. Here, Mexicans, unlike Canadians, are kept away from the port of entry until their

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<sup>20</sup> Codified in 8 C.F.R. § 214(1)(17).

documents are in order. This is another example of an American border policing function which serves to inhibit temporary entry for Mexicans but helps the US control its border relations with its developing country neighbour. Upon arriving at the port of entry with the appropriate documents, an employment authorization (L-1) will be issued. This employment authorization can be used to obtain an American social security number.

### Professionals

Professionals are defined as business persons "...seeking to engage in a business activity at a professional level in a profession set out in Appendix 1603.D.1..." (NAFTA, 1993:Annex1603, Section D, 1). The general qualifying criteria for this category are: citizenship in a NAFTA member country; minimum baccalaureate level degree; appropriate qualifications; pre-arranged employment documentation (such as a contract or letter of offer) which indicates employment in an area where the qualifications apply; intent not to reside indefinitely in the host country; and the fulfillment of existing immigration requirements for temporary entry. The documentation to be presented includes: job title, summary of job duties, starting date and expected length of temporary stay, qualifications, and the arrangement for

remuneration (Government of Canada, 1995:3).

Self-employed professionals may only gain temporary entry under this category to provide training activities such as conducting seminars. They may not enter under this category to establish professional practice solely for the purpose of self-employment.

NAFTA member states have agreed not to impose labour market tests or numerical restrictions on professionals. They may require a visa to be obtained prior to entry. This qualifier was not present in the FTA but serves to reassert a border policing function into an agreement which now includes both developed and developing countries. Although the NAFTA generally prohibits numerical restrictions, the NAFTA allows such numerical restrictions to be imposed "...if the Parties concerned have not agreed otherwise prior to the date of entry into force of this Agreement for those Parties" (NAFTA, 1993:Annex 1603, Section D, 4). This is in reference to the fact that although there were no numerical restrictions placed on Canadian professionals entering the United States under the FTA and hence none under the NAFTA for Canadians, Mexican professionals entering the US face an annual 5500 numerical limit (NAFTA, 1993:Appendix 1603.D.4, 1). This limit is supposed to be removed 10 years after the NAFTA has been in force. Again, the US has managed to

successfully insert provisions into this Chapter which allow it to better manage its border relations with Mexico where labour mobility is concerned.

For Mexican and American professionals entering Canada, the general qualifying criteria must be met and an employment authorization can be applied for at any Canadian embassy, consulate or port of entry. There is no limit specifying the amount of time professionals may remain in Canada. Upon entry into Canada, the employment authorization can be used to obtain a social insurance number. (Government of Canada, 1995:4).

For Canadian and American professionals entering Mexico, the general qualifying criteria must be met and an employment authorization FM3 must be obtained either before entering Mexico or within 30 days of entry. Professionals must also obtain a professional identity card before commencing practice. The employment authorization is valid for one year and then may be renewed up to four years before a new one is needed.

For Canadian professionals entering the United States, the general qualifying criteria must be met and presented at any US port of entry. There is no labour market test, no prior appraisal, and no petition required. At the port of entry, an employment authorization will be issued (TN) which



can be used to obtain a social security number in the US. There is no limit on the duration of the employment authorization for this category.<sup>21</sup> These provisions are identical to the ones negotiated in the FTA.

For Mexican professionals entering the United States, the general qualifying criteria must be met. In addition, Mexican professionals must file and have approved a non-immigrant worker petition at a US embassy or consulate. Then, a labour market test must be performed by DOL to establish that by employing this Mexican professional, the employer will not be displacing an American worker or adversely effecting US wages.<sup>22</sup> If this test is met, a certification is issued. Professionals may then proceed to an American port of entry to obtain a TN employment authorization. This document can be used to obtain a social security number in the US. There is no limit on the amount of time Mexican professionals may remain in the US with a TN employment authorization.

The categories covered under Chapter 16 seem to encompass most professionals seeking entry into NAFTA member states. Except in the case of journalists, who were included in the FTA professionals list but removed from the

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<sup>21</sup> Codified in 8 C.F.R. § 214.6 (e)2-3, f-h.

<sup>22</sup> Codified in 8 C.F.R. § 214.6 (d)(1) and (2)

NAFTA<sup>23</sup>, coverage is similar in both agreements. Exceptions to the coverage occur through the agreement's architecture.

### **Architecture**

The general architecture of the NAFTA is oriented toward a negative list approach. That is, if an exception to the agreed general provisions is not included somewhere in the agreement, then the general provisions apply and liberalization is presumably achieved. In the case of Chapter 16 of the NAFTA, member states have included exceptions through appendices. For example, in Appendix 1603.D.4 para 1 of Annex 1603 the United States has indicated that it may impose a numerical restriction on Mexican professionals despite the prohibition of such numerical restrictions in the general text (Annex 1603, Section D, 2(b)).

Chapter 16 also departs from the negative list approach by employing a positive list approach for identifying exactly what services and which professionals are eligible for temporary entry under the business visitor (Appendix 1603.A.1) and professional (Appendix 1603.D.1) categories.

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<sup>23</sup> American journalists petitioned to be taken off of the professionals list because they were concerned that their professional standards were being undermined by foreign journalists who did not have proper credentials.

Any service or professional not on those lists is excluded.

Interestingly, unlike other chapters such as Chapter 11 *Investment* and Chapter 12 *Cross-Border Trade in Services*, Chapter 16 does not explicitly identify any trade principles such as MFN or NT on which temporary movement is to be based. However, article 1601 *General Principles* (of Chapter 16) does note that Chapter 16 follows from Article 102 *Objectives* (of Chapter 1). Article 102 *Objectives* indicates that the objectives of the Agreement are elaborated through its principles and rules, including national treatment, most-favored-nation and transparency.

Article 1604 *Provision of Information* does provide transparency measures which require members to publish explanatory material of the requirements for temporary entry related to Chapter 16 as well as measures which require members to collect and publish data on the granting of temporary entry. Otherwise, the chapter is rather unique in its design.

In particular, it provides a framework for liberalizing temporary entry while simultaneously allowing member states significant leeway in rolling back or slowing down that liberalization as necessary. The detailed description of the chapter's coverage given above provides a basis for analyzing this rollback and slow movement potential

particularly where immigration, labour market development, and professional accreditation are concerned.

### **Immigration**

There are several places in Chapter 16 where the immigration prerogatives of member states are emphasized. The first is in Article 1601 *General Principles*. Here, border security is given equal weight to facilitating temporary entry:

Further to Article 102 (Objectives), this Chapter reflects the preferential trading relationship between the Parties, the desirability of facilitating temporary entry on a reciprocal basis and of establishing transparent criteria and procedures for temporary entry, and the need to ensure border security and to protect the domestic labor force and permanent employment in their respective territories (NAFTA, 1993:Article 1601).

This article sets up a tension between opening borders to facilitate temporary entry for business persons and keeping them closed to ensure border security because it is not obvious how these objectives are complimentary. This tension is also reflected in Article 1607 *Relation to Other Chapters* which states that

Except for this Chapter, Chapter One (Objectives), Two (General Definition), Twenty (Institutional Arrangements and Dispute Settlement Procedures) and Twenty-two (Final Provisions) and Articles 1801 (Contact Points), 1892 (Publication), 1803 (Notification and Provision of Information) and 1804 (Administrative Proceedings), no provision in this

Agreement shall impose any obligation on a Party regarding its immigration measures (NAFTA, 1993:Article 1607).

It is unclear, however, how these cited chapters and articles may adversely affect a members' immigration measures especially given the flexibility built into Chapter 16 for maintaining such measures. For example, immigration concerns are cited in Article 1603 *Grant of Temporary Entry* where any temporary entry for business persons must meet "...applicable measures relating to public health and safety and national security..." (NAFTA, 1993:Article 1603, 1). In addition, all four temporary entry categories may be subject to a visa if a member state decides to impose such a requirement. No criteria is provided for limiting when a visa may be imposed. Members are encouraged to consult with other members in order to avoid the imposition of a visa, but they are not bound by this consultation in any way (NAFTA, 1993:Annex 1603, Section A, 5; Section B, 3; Section C, 3; Section D, 3). This provision was not included in the FTA and reflects concerns about maintaining border policing functions in light of security issues faced by the US with regard to its border with Mexico.

Finally, the definition of temporary entry in Chapter 16 is an attempt to broadly identify what form of movement is covered by the Chapter and, by implication, what form is

not. "Temporary entry" is defined as "entry into the territory of a Party by a business person of another Party without the intent to establish permanent residence" (NAFTA, 1993:Article 1603). Permanent immigration is therefore not covered by Chapter 16. It is unclear, however, what practical significance the difference between temporary entry and permanent immigration actually has for questions of border security. As we can see below, it also has little significance where labour market development is concerned.

### **Labour Market Development**

Chapter 16 provides substantial flexibility for members to protect their labour market development policies. First, the protection of the domestic labour force and permanent employment is, like immigration, given equal weight to facilitating temporary entry in Article 1601 General Principles. Importantly, Article 1603 Grant of Temporary Entry includes the provision that a member may refuse temporary entry where the entry might affect adversely:

- (a) the settlement of any labor dispute that is in progress at the place or intended place of employment; or
- (b) the employment of any person who is involved in such dispute (NAFTA, 1993:Article 1602, 2(a) and (b)).

Second, in each of the four categories of persons who

may seek temporary entry under Chapter 16, there are provisions for ensuring that members not impose labor certification tests, prior approval procedures, petitions, or numerical restrictions as conditions for entry (NAFTA, 1993:Annex, 1603, Section A, 4(a) and (b); Section B, 2(a) and (b); Section C, 2(a) and (b), Section D, 2(a) and (b)). However, these provisions are watered down in various ways. As previously mentioned, for example, all are subject to the sudden imposition of visas.

Third, for intra-company transferees, a member may require previous continuous employment "...by the enterprise for one year within the three-year period immediately preceding the date of the application for admission" (NAFTA, 1993:Annex 1603, Section C (1)). This provision attempts to ensure that the intra-company transferee really is entering the market only for a short period and has other interests to return to upon completion of the transferee rotation. This also means that the position may eventually be opened up to a local employee.

Fourth, in the business visitor category, after-sales services personnel may not perform "hands-on building and construction work" including installation, maintenance and repair of utility services, the fabric of any part of a building or structure, as well as machinery, equipment or

structures within a building (Government of Canada, 1998:10). The argument here is that such work is not considered to require specialized knowledge and can therefore be performed by those already residing in the local labour market, including (but not limited to) millwrights, bricklayers, carpenters, sheet metal workers, teamsters, plumbers, roofers, and plasters.<sup>24</sup>

Fifth, for professionals, numerical limits may be established where previous agreements do not exist to disallow them (NAFTA, 1993:Annex 1603, Section D (4)). This provision allowed the United States to impose a 5500 numerical limit on Mexican professionals entering the US while the FTA provisions prohibited it from imposing a limit on Canadian professionals (NAFTA, 1993:Annex 1603, Appendix 1603.D.4 (1)). This ceiling on Mexican professionals is to lapse in 2004 unless the US agrees that it may be removed earlier (NAFTA, 1993:Annex 1603, Appendix 1603.D.4, 3(b)). The differential treatment afforded to Canada by the United States speaks to the developed-developing country tension regarding migration that the US experiences with Mexico. A

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<sup>24</sup> An important reason why after-sales service is so narrowly defined is that the construction industry, particularly in Canada and the United States, has successfully lobbied to keep the definition narrow in order to protect the domestic labour market. Since unemployment for lower-skilled workers in this industry is typically higher than the national average, such protection is seen as politically necessary.



quota stops the possibility of a flood of Mexican professionals taking jobs from Americans and makes visible the level of demand sought by Mexican professionals for entering the American market.<sup>25</sup>

All of these provisions are designed to allow members to preserve their control over domestic labour market development. They do this by prohibiting entry outright or limiting the number of entrants allowed in. Where entry is permitted, it is characterized as temporary and therefore considered to be having no impact on the domestic labor force or on permanent employment. Although prohibiting entry or limiting the number allowed to enter is effective for protecting the domestic labor force, the concept of temporary is weak in this regard especially where traders and investors, intra-company transferees and professionals are concerned.

These three categories allow those crossing the border to be remunerated in the host country. When entering into Canada and the United States, this means that their employment authorization makes them eligible for a social insurance number in Canada and a social security number in

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<sup>25</sup> One should note that Mexican professionals have not exceeded the 5500 numerical limit since the NAFTA was implemented (United States, 1997:42).

the US.<sup>26</sup> These numbers are necessary for taxes, unemployment insurance premiums, health insurance premiums, union dues, and so on, to be deducted. Although temporary is defined as without intent to establish permanent residence, if a professional enters the host market, fills a job in that market and works there indefinitely while contributing to various collectively run programmes, how is permanent residence not being approximated? It is true that the foreign domicile from which the entrant came has not been formally abandoned, but for all intents and purposes, once allowed into the host market to take a job which is remunerated in that market, this is the effect. This means that although there are provisions in Chapter 16 intended to protect the domestic labour market and employment opportunities, they do not fully do so. In fact, Chapter 16 broadly helps to encourage labour market integration by attempting to facilitate temporary entry.

### **Professional Accreditation**

Chapter 16 of the NAFTA provides for a grant of temporary entry for professionals who practice in a profession in Annex 1603.D.1 (i.e., the professionals list)

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<sup>26</sup> It is unclear if the Mexican FM3 employment authorization performs a similar function in this regard.

"...where accreditation, licensing, and certification requirements are mutually recognized by those Parties" (NAFTA, 1993:Annex 1603, Section D, 5(c)). The professionals list contained in Annex 1603.D.1 provides information (unlike the FTA) on the minimum education requirements and alternative credentials needed to be able to practice a given profession in the host market. In most cases, the minimum level of education required is a baccalaureate degree. Many professions also require a license to practice. As indicated above, the appropriate credentials and license must be presented at the border in order to acquire an employment authorization.

The requirements for obtaining a license are specific to a particular country and often differ at the sub-national level. This means that temporary entry can be denied if the entrant does not possess the required license to practice a particular profession. Chapter 16 does not attempt to solve this problem, but Chapter 12 *Cross-Border Trade in Services* does.

Chapter 12 contains provisions to encourage the development of mutual recognition agreements (MRAs) for licensing and certification of professional service providers. The development of MRAs are not, however, required. As outlined in Annex 1210.5, the standards and

criteria to be developed for MRAs are with regard to education, examinations, experience, conduct and ethics, professional development and re-certification, scope of practice, local knowledge, and consumer protection (NAFTA, 1993:Annex 1201.5, 3(a-h)). The development of an MRA is mandated for foreign legal consultants (NAFTA, 1993:Annex 1210.5, section B). Temporary licensing may also be developed to expedite temporary entry in the short term (NAFTA, 1993:Annex 1201.5(5)). The development of temporary licensing is required in the case of engineers (NAFTA, 1993:Annex 1210.5, Section C).

The only MRA which has been successfully developed and implemented so far is for the profession of architecture. However, this MRA was developed in the FTA context between Canada and the US (Canada, 1987:Annex 1404). The NAFTA emphasizes that this agreement does not have to be automatically extended to Mexico on an MFN basis. However, under the NAFTA, Mexico must be given the opportunity to demonstrate that its standards and criteria for the licensing of architects is comparable to the Canada-US MRA (NAFTA, 1993:Article 1210, 2(a-b)). So far, Mexican architects have not joined this MRA. Negotiations have taken place, but American concerns about Mexican qualification and licensing procedures have inhibited the

conclusion of an agreement.

For engineering, after several years of undertaking mandated negotiations to develop an MRA, little success was achieved. Although the parameters of an agreement were reached among regulators at the national level in all three member states, the sub-national regulators in the US, except for Texas, had no interest in signing on as they were concerned about jurisdictional rights in negotiating such an agreement. This has left Canada and Mexico with an MRA which does not include the United States in any significant way. Given that Canada and Mexico are most interested in exporting engineering services to the US, the outcome of this MRA negotiation was disappointing.

The situation for developing an MRA for foreign legal consultants is even more discouraging. Negotiations revealed significant differences in licensing and certification procedures which regulators found difficult to address. Furthermore, lack of American interest reduced the urgency of the negotiations until it was no longer practical to proceed. Consequently there is no MRA for foreign legal consultants despite the fact that the development of one is mandated in Chapter 12.

Since citizenship and residency requirements are often required to obtain a professional license, the NAFTA

*encourages* members to eliminate these requirements or to periodically consult about the feasibility of removing them (NAFTA, 1993:Article 1210, 3-4). So far, these requirements have yet to be removed and there seems to be no significant pressure which will lead to this outcome. Without their removal, temporary entry as defined in Chapter 16 is undermined. Professionals are left to pursue the traditional form of entry which is to attempt to establish permanent residency in the host market and then pursue requalification.

The NAFTA also contains another procedure for ensuring that licensing and certification requirements for professionals do not constitute unnecessary barriers to trade. This procedure is weak because it does not involve member negotiation. Rather, it merely directs members to "endeavour" to ensure that any such requirements are based on objective and transparent criteria, are not more burdensome than necessary to ensure the quality of a service, and do not constitute a disguised restriction on the cross-border provision of a service (North American Free Trade Agreement, 1993:Article 1210, 1(a-c)).<sup>27</sup> In effect, this provision constitutes a form of subsidiarity where

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<sup>27</sup> As we saw in Chapter 4, GATS members are required to develop disciplines to ensure that these requirements do not constitute unnecessary barriers to trade in services.

members take agreed objectives and implement them as appropriate in their own jurisdictions. However, this is a very weak form of subsidiarity which does not require the development of disciplines for implementation (unlike the GATS) nor does it require members to ensure that any such barriers are eliminated for professionals. This means that there is not even institutional opportunities provided for members to share best practices about how they are eliminating such barriers.

One can conclude from this examination of professional accreditation provisions in the NAFTA, that these provisions do not go a long way toward facilitating temporary entry for professionals. At most, they make members aware of the issues involved and provide a framework from which to begin negotiations for MRAs. This is at least a start in helping to implement the temporary entry goals of Chapter 16. However, without concerted pressure from particular professions on member states to conduct such MRAs, it is unlikely, given the time and expense required to develop them, that they will be developed.

### **Implementation**

Chapter 16 mandates the creation of a Temporary Entry Working Group (TEWG) made up of representatives of each

member state, including immigration officials. The TEWG is to meet at least once a year to consider:

- (a) the implementation and administration of this Chapter;
- (b) the development of measures to further facilitate temporary entry of business persons on a reciprocal basis,
- (c) the waiving of labor certification tests or procedures of similar effect for spouses of business persons who have been granted temporary entry for more than one year under Section B, C, or D of Annex 1603; and
- (d) proposed modifications or additions to this Chapter (NAFTA, 1993:Article 1605, 2(a-d)).

In order to fulfill this mandate, the TEWG has concentrated on the following three activities: making members aware of and solving problems faced by business persons at ports of entry; considering additions and deletions to the professionals list; and sharing information about policy approaches to temporary entry.

With regard to problems faced at ports of entry, the TEWG has examined numerous issues that have arisen. For example, it is unclear in the NAFTA if the minimum level baccalaureate needed for many professions can be a baccalaureate obtained in a non-NAFTA member country. Border officials have indicated that the baccalaureate must be obtained in a NAFTA member country. Although no resolution has been achieved in the TEWG with regard to this issue, it



seems that the TEWG is leaning toward a three to four year first-level post-secondary degree earned anywhere in the world.

It is also unclear if the NAFTA covers teachers working at junior colleges. Border officials have indicated no. Here the TEWG has considered that the focus should not be on the category of employer but on the qualifications that the individual possesses. This issue is still being discussed.

A significant border entry problem existed for the after-sales service business visitor category. Many after-sales services personnel complained about the treatment they were receiving by border officials. Border officials were indicating that many after-sales service personnel did not possess specialized knowledge essential to a seller's contractual obligations and consequently should not be allowed entry under Chapter 16. This problem forced the TEWG to negotiate exactly what special requirements applied to after-sales services personnel, define after-sales services and who may perform such services, and deal with the issue of third-party service provision.<sup>28</sup>

The interesting problem here was that many of the

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<sup>28</sup> A third party service occurs when a seller located in a NAFTA member country or in another country contracts the after-sales servicing to another firm (a third party). The third party must be established in a NAFTA member country (Government of Canada, 1998:11).

after-sales services personnel did not possess a minimum baccalaureate degree and were not executives or managers. In addition, they were entering to provide a service which, though perhaps specialized, did not require high-level skills and could arguably have been provided by the host labour market. The TEWG therefore had to define "specialized knowledge" for after-sales services personnel and to define who could not enter to perform after-sales service. In doing so, the TEWG had to account for various labour market development issues in the NAFTA member countries' host markets concerning lower-skilled workers such as sheet metal workers and bricklayers. In the end, all three NAFTA partners successfully implemented uniform rules for entry of after-sales service personnel.<sup>29</sup> On the whole, these rules have been successfully implemented, although, from time to time, cases arise which do not fit the definition of after-sales service. In these cases, resolution occurs through bilateral channels.

Canada and Mexico as well as American employers have been particularly critical of the way INS has implemented the provisions of Chapter 16 concerning professionals,

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<sup>29</sup> Note that though these rules were harmonized among the NAFTA partners, the requirements for licensing and certification with respect to after-sales service were not affected. That is, those entering as after-sales services personnel were not relieved from any obligations to comply with these requirements (Government of Canada, 1998:11-12).

especially where software engineers, computer systems analysts, scientific technician/technologists, and management consultants are concerned. They accuse INS of being overly rigid and literal in its interpretation of who should be allowed in under these professions (Vazquez-Azpiri, 2000:819-820). The TEWG has noted these concerns and awaits further information from the US before an attempt to resolve them can be made.

Where implementation problems arise, the TEWG has had mixed results in achieving resolution. However, it has served to bring implementation problems to the attention of trade and immigration officials. Where it is not the intention of the member state to uphold the spirit or even the intent of Chapter 16, the TEWG has no real recourse. What the TEWG does inadvertently do is systematically expose the tension that exists between facilitating temporary entry and maintaining sovereign border control especially where protecting border security and labour market development are concerned.

The TEWG is also having to deal with additions and deletions to the professionals list. The American Registered Nursing Association has been petitioning since 1996 to be taken off the NAFTA professionals list. It claims to have anecdotal evidence suggesting that wages have

been lowered because of foreign nurses from Canada and Mexico. This issue is still being discussed by the TEWG.

Actuaries requested in 1995 to be put on the NAFTA professionals list. This required a very detailed examination of the profession to determine if it required a minimum baccalaureate education and if there was any reason why foreign competition in this profession might harm labour market development. After about five years of negotiations conducted by officials reporting to the TEWG, actuaries are close to being put on the professionals list.

The TEWG provides a forum for both trade and immigration officials to exchange information about policy approaches to temporary entry. For example, in an effort to facilitate the movement of highly skilled workers, Canada has been trying to convince the US and Mexico that spouses of business persons entering the US on a temporary basis should be allowed to work in the US temporarily without labour certification even if they do not fall into one of the categories in Chapter 16.<sup>30</sup> Canada has even conducted a pilot project for spouses to gauge their impact on the Canadian labour market. This is part of a Canadian strategy

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<sup>30</sup> The NAFTA formally mandates the TEWG to examine the issue of waiving labour certification for spouses of business persons who have been granted temporary entry for more than one year as traders and investors, intra-company transferees, and or professionals (NAFTA, 1993:Article 1605,2(c)).

to develop the approach that both competition for and movement of skilled workers should be encouraged. In its view, this competition can be enhanced with policies which encourage temporary movement such as spousal accompaniment. Although Mexico is generally convinced, the US remains unsure why less highly skilled spouses should be given special treatment. Without pressure from its own domestic constituency to pursue this issue, it is unlikely that this issue will be resolved in the TEWG.

Although Chapter 16 provides recourse to a dispute settlement process (Article 1606 of the NAFTA), it is unlikely that this tension within Chapter 16 will be resolved in this manner. Proceedings regarding a refusal to grant temporary entry cannot be initiated unless a pattern of practice is established and the business person has exhausted all other administrative remedies available (NAFTA, 1993:Article 1606, 1(a-b)). Furthermore, it is difficult to imagine a member pursuing a costly dispute settlement case over temporary entry. Rather, disputes will likely be resolved (or at least discussed) in the TEWG or not at all unless political pressure forces a compromise.

Institutionally, then, the NAFTA's success at resolving implementation problems has been mixed. However, the TEWG is an important mechanism for bringing trade and immigration

officials from member countries together on a regular basis to discuss policies which are still very much within the purview of national governments. This is important for helping officials understand the domestic realities of other members as well as giving the NAFTA a dynamic edge in having to deal with ongoing problems of implementation. It is also significant to note that the TEWG serves to highlight the rough accommodation that exists in Chapter 16 between facilitating temporary entry and maintaining control over border security and labour market development. The exposure of this situation in this way helps to sharpen the discussion about its existence and create pressure for its resolution.<sup>31</sup>

### **Comparison of NAFTA Chapter 16 with the EU Context**

As one of the main principles on which the EEC Treaty was based, the EU uses free movement to achieve integration. Since integration was never a NAFTA objective, Chapter 16 does not formally lead members in this direction. Indeed, several Chapter 16 provisions as well as external conditions leads Chapter 16 in the opposite direction. However, there are certain Chapter 16 provisions which, when combined with

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<sup>31</sup> For very recent examples of this phenomena, see Papademetriou and Meyers, 2000; Canadian Chamber of Commerce, 2000.

domestic administration of immigration and labour market development policies, do provide accommodation between liberalization and regulation in a way similar to the EU context.

There are five important issues concerning temporary entry which help to inhibit both accommodation between liberalization and regulation in the NAFTA context. These issues are not present in the EU context. First, the dominance of the American market means that the Chapter 16 provisions are more likely to be used by Canada and Mexico to enter the US than the other way around. This means that little incentive exists for the largest NAFTA partner to want to expand Chapter 16, iron out border implementation problems, or push for recognition agreements for professionals. The absence of such a dominant partner in the EU context precludes such an effect.

Second, the problem of illegal Mexican migration to the US raised border security issues which had the effect of limiting the scope of Chapter 16, particularly between the US and Mexico. In the EU context, any similar problems which might have arisen between poorer and wealthier EU members has been mitigated by capital transfers to help address regional disparities and any negative adjustment effects creating during the development of the internal

market. Furthermore, the *Schengen Acquis* works to create a common border policing function for certain EU members states which is largely absent in the NAFTA context.

Third, unlike the mandated development of recognition agreements in the EU, the NAFTA has only weak provisions for the development of professional recognition agreements with the result that none have been successfully negotiated.

Fourth, somewhat weak institutional arrangements in the NAFTA context, particularly the TEWG and the provisions for recourse to dispute settlement, create mixed results where the resolution of implementation problems is concerned. This is in contrast to the EU which possesses both legislative and judicial recourse for implementation problems regarding free movement.

Fifth, although Article 1605.2(d) of Chapter 16 mandates the TEWG to propose modifications of or additions to the Chapter, the one-off negotiation of the NAFTA does not set the stage for a further deepening of temporary entry provisions via another negotiating round. Unless all NAFTA members countries, particularly the US, identify a new issue which urgently needs to be addressed under Chapter 16, it is unlikely that any modifications will be made. In this way, the NAFTA does not benefit from the structured political process present in the EU context which works to improve



free movement on a continual basis.

Nevertheless, there are certain provisions in the NAFTA, similar to those in the EU, which do provide for a rough accommodation between liberalization and regulation. For example, in the EU context, entry can occur for an indefinite length of time. In the NAFTA, this is also the case for both the professionals category and the traders and investors category. Once entry occurs within the EU and three months have passed, social security applies on a non-discriminatory basis. For NAFTA intra-company transferees, traders and investors, and professionals, access to social security (where it exists) and other collectively run programmes such as healthcare, is immediate. Curiously, although the NAFTA is silent about such access, nationally controlled immigration and labour market development policy allows temporary entrants to access social security (where it exists) once entry has been achieved through Chapter 16. This means that liberalization and regulation are simultaneously being accommodated for these categories of entrants. In this way, labour market integration is inadvertently facilitated by national immigration and labour market development policies although this is not their intended effect.

One important aspect of EU free movement coverage is

that it applies to all equally regardless of skill level. This helps to create a comprehensive European-wide labour market. In the NAFTA context, temporary entry is for the highly skilled only with the exception of after-sales service personnel. In this way, only a certain segment of the population can reap the rewards of the temporary entry provisions and only the highly skilled face the competition of a continental labour market. This narrows the integrative effects of Chapter 16, yet it also serves to highlight the importance, in business terms, of temporary entry where the highly skilled are concerned. This creates a convincing business argument that temporary entry needs to be facilitated which in turn creates the political pressure to improve temporary entry provisions. This sequence of events has the potential to produce policies which accommodate both liberalization and regulation and which have integrative effects.

### **Conclusion**

The comparison with the EU provisions for free movement indicates that, in terms of inter-state relations, Chapter 16 does not achieve the same level of integration as in the EU context. This is not a surprise given the NAFTA's narrow economic objectives. However, there are certain things

occurring within Chapter 16 which point in the direction of such integration. These include indefinite lengths of stay for professionals, traders and investors, relatively easy entry by professionals into the host market, and access to social security provisions. All of these help to accommodate both liberalization and regulation within the trade agreement and in turn have integrative effects.

Within the confines of the NAFTA's narrow economic objectives, these provisions are an arguably significant breakthrough where simultaneously accommodating liberalization and regulation through trade agreements and therefore integration is concerned. There are several reasons for saying this. First, Chapter 16, despite the narrow economic objectives of the NAFTA, sets up a framework for allowing temporary entrants, particularly professionals, to operate within a North American labour market in a way which approximates permanent residency and which therefore accounts for both economic and social concerns. Second, this framework was negotiated despite the significant developed-developing country sensitivities regarding migration that exist between Mexico and the US. Third, the framework admittedly provides only a rough accommodation between facilitating temporary entry and maintaining sovereign state border control both in terms of a security

policing function and in terms of protecting labour market development. This situation is exacerbated by the dominant US position within NAFTA. It is not well resolved through NAFTA institutional measures. However, the blatant exposure of this situation through Chapter 16 serves to set up a target for understanding how the need for temporary entry to support services trade is evolving and how the state is responding (or not responding) to that reality in the context of a free trade agreement. Where this response smooths out the rough edges of accommodation that is taking place between liberalization and regulation of temporary entry within the NAFTA, integrative effects are occurring. All of these reasons help one to conclude that while NAFTA Chapter 16 certainly does not achieve the level of integration found in the EU context, it does help lay the foundations for such integration to take place.

## CHAPTER 6:

### **GATS 2000 Negotiations and the Evolving Discussion of Mode 4 Liberalization**

#### **Introduction**

At the Ministerial Meeting in Marrakesh in April 1994, the Final Act of the Uruguay Round and the Marrakesh Agreement Establishing the WTO (the WTO Agreement) were signed. Included in the Final Act was the General Agreement on Trade in Services (GATS).

Although one might expect that a trade agreement on services would include a definition of services, the GATS does not include such a definition. Given the complexity of services, members could not agree on what such a definition would be. Instead, they agreed to define how services could be supplied.<sup>1</sup> Liberalization commitments would therefore be based on service supply rather than on the definition of what was a service. Negotiators agreed on four methods or "modes" by which services could be supplied. The fourth

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<sup>1</sup> Article I.2 of the GATS states that "...trade in services is defined as the supply of a service: a) from the territory of one Member into the territory of any other Member; b) in the territory of one Member to the service consumer of any other Member; c) by a service supplier of one Member, through commercial presence in the territory of any other Member; d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

mode, "by a service supplied of one Member, through presence of natural persons of a Member in the territory of any other Member", (now commonly referred to as *mode 4*) stood equally with the other three modes of supply for which WTO members could schedule commitments.

Liberalization commitments made during the Uruguay Round for movement of service suppliers (or *mode 4*) were not extensive. A cursory examination of WTO members' schedules of commitments for services reveals that more trade restrictions exist for *mode 4* than for any other mode of supply (WTO, 1999a:8-10). Generally speaking, liberalization under *mode 4* has been limited to horizontal commitments for the movement of business visitors, intra corporate transferees, executives, managers, high-skilled specialists, and (occasionally) professionals who supply services in conjunction with commercial presence (or *mode 3*). Few WTO members had made commitments for *mode 4* service supply occurring on its own. Some members have made additional sectoral commitments for *mode 4* but these are often limited in duration and require economic needs tests (ENTs), numerical quotas, and/or qualification and licensing requirements.

Although *mode 4* commitments made during the Uruguay Round were limited, the work programme agreed to in the

*Decision on Professional Services* (WTO, 1998a) concerning Article VI(4) of the GATS as well as the built-in agenda of the GATS enshrined in Article XIX *Negotiation of Specific Commitments* ensured that the topic of mode 4 liberalization would not disappear. This built-in agenda included an agreed date for a new round of services negotiations "...beginning not later than five years from the date of entry into force of the WTO Agreement and periodically thereafter, with a view to achieving a progressively higher level of liberalization" (WTO, 1998a:GATS, Article XIX). This new round of negotiations was launched early in 2000 in Geneva and the first negotiating session took place in February of that year.<sup>2</sup> The issue of mode 4 liberalization has become an important aspect of these new negotiations.

This chapter will examine how the discussion concerning mode 4 liberalization has evolved since the Uruguay Round. In particular, it will look at this discussion in the context of the post-Uruguay Round services work programme, the assessment phase, relevant trade policy and domestic regulatory discussion in other fora, and the prospects for

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<sup>2</sup> The failure at the WTO Seattle Ministerial to launch a new general round of multilateral trade negotiations did not affect the built-in agenda of the GATS negotiations. The "Council for Trade in Services - Special Session" was created to oversee the services negotiations. In the absence of a general trade round, the Council for Trade in services - Special Session reports to the WTO General Council on the status of the negotiations.

further mode 4 liberalization in the current round of multilateral services negotiations.<sup>3</sup> The main point to be made in this chapter is that the evolution of this discussion points to a policy nexus that is developing between trade policy-makers and regulatory officials who manage the temporary movement of service suppliers.

### **Post-Uruguay Round Services Work Programme**

Article VI(4) of the GATS mandates the development of disciplines to ensure that qualification and licensing requirements as well as technical standards do not constitute unnecessary barriers to trade in services. In order to develop such disciplines, GATS members agreed to include a related instrument in the GATS called the *Decision on Professional Services* (WTO, 1998a). This *Decision* directed WTO members to create a Working Party on Professional Services (WPPS) which would develop such disciplines in the field of accountancy.<sup>4</sup> In December 1998,

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<sup>3</sup> This discussion of the current round of multilateral services negotiations will cover the period from February 2000 when the negotiations began to December 2000.

<sup>4</sup> The *Decision on Professional Services* stated that "...a Working Party on Professional Services shall be established to examine and report, with recommendations, on the disciplines necessary to ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements in the field of professional services do not constitute unnecessary barriers to trade...As a matter of priority, the Working Party shall make



these disciplines were finalized and adopted by the WTO Council for Trade in Services, though they were not to be implemented until the end of the next round of services negotiations scheduled to begin in 2000 (WTO, 1998).

Where mode 4 is concerned, these disciplines for accountancy positively affect the ability of a service supplier to use mode 4 to supply accountancy services.<sup>5</sup> For example, with regard to licensing requirements, the accountancy disciplines require that WTO members<sup>6</sup> must consider less trade restrictive means than residency requirements in order for a foreign services supplier to practice in the host market (WTO, 1998n:III.2). Although this provision in the accountancy disciplines does not eliminate residency requirements in order to obtain a license to practice, it does begin the discussion of considering whether residency requirements are necessary to ensure that standards are being met. Since residency requirements exist in various ways, some more onerous than

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recommendations for the elaboration of multilateral disciplines in the accountancy sector..."

<sup>5</sup> One may note that these disciplines will also support the use of other modes of supply, particularly mode 1 (cross-border) and mode 3 (commercial presence).

<sup>6</sup> It is important to note that the reference to "members" also includes professional associations and sub-national governments within the member state who, in many member countries, regulate the accountancy profession.

others, such a provision provides an incentive for considering their usefulness.<sup>7</sup> For users of mode 4, the absence of residency requirements would mean a significant lifting of immigration restrictions for entering the host market. Members agreed in the accountancy disciplines to eliminate one form of residency requirement across the board: residency requirements for sitting qualification examinations (WTO, 1998n:VI.2). An examinee may therefore sit the exam without requiring proof of any form of residency.<sup>8</sup>

In order to develop the accountancy disciplines, trade negotiators undertook extensive domestic consultations with the relevant domestic regulators in their respective markets. Since, for this sector, the domestic regulators were often professional accountancy associations (at both the national and sub-national levels) the consultations occurred with these associations. This consultation exercise provided an opportunity for trade negotiators and

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<sup>7</sup> The meaning of "residency" can range from meaning the formal requirement by a border official of residency status to simply spending a few days in the host market as a visitor before applying for a licence or sitting an exam. The important aspect of residency is that a physical presence in the market is required for some period of time. This means that, at minimum, a service supplier has to cross the border and be allowed entry by border control officials.

<sup>8</sup> The WPPS, reincarnated as the Working Party on Domestic Regulation (WPDR) in 1999, is now trying to apply the accountancy disciplines to the engineering, architecture, and legal professions.

domestic regulators to learn in detail about each other's' policy areas and to arrive at disciplines which helped to liberalize accountancy while at the same time maintaining domestic regulatory standards. Achieving mutual policy complementarity in this way within the context of a multilateral trade agreement indicates that, to some degree, domestic regulatory "borders" can be transcended in order to promote trade without jeopardizing regulatory standards.

The disciplines on accountancy also make mention of the role mutual recognition agreements (MRAs) and international standards can play with regard to qualification requirements in facilitating trade in accountancy services (WTO, 1998:V.3). To facilitate the development of MRAs for accountancy, the Working Party on Professional Services developed *Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector* which were adopted by the Council for Trade in Services in May 1997 (WTO, 1997b). Although only non binding guidelines, this document does identify issues which would need to be addressed to create an MRA. Some of these issues are of direct relevance to mode 4. For example, resolving establishment requirements, residency and nationality requirements in order to become licensed, clearly indicating the scope of the agreement with regard to temporary or permanent access to the profession

concerned, and stating minimum levels of education required including entry requirements for sitting examinations. (WTO, 1997b:Guidelines 3,4(a)(i),4(b),6).

These guidelines reveal, among other things, the kinds of mode 4 issues which would need to be addressed for an MRA to be established. This is significant because it directs trade negotiators and domestic regulators to the nature of cooperation needed to achieve an MRA for accountancy and to help embed such cooperation within a multilateral trade framework. Here, the policy areas of trade, immigration and accountancy would have to develop complementary ways of addressing their concerns in order to make an MRA workable from all policy perspectives. Achieving this complementarity is an important step needed for negotiating an MRA.<sup>9</sup> Such mutual recognition would likely facilitate the supply of accountancy services via mode 4.<sup>10</sup>

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<sup>9</sup> There is no discussion currently taking place in the Working Party on Domestic Regulation to develop similar MRA guidelines for other professions.

<sup>10</sup> It is important to note that states which made mode 4 liberalization commitments for the movement of professionals such as accountants still require that visiting accountants supplying services meet host market domestic regulatory standards or that they only supply such services in partnership with domestically licensed accountants.

### **The Assessment Phase**

As part of each negotiating round, Article XIX(3) of the GATS mandates an "...assessment of trade in services in overall terms and on a sectoral basis with reference to the objectives of this Agreement, including those set out in paragraph 1 of Article IV." Since paragraph 1 of Article IV *Increasing Participation of Developing Countries* encourages liberalization of market access in sectors and modes of supply of export interest to developing countries, this has meant that a certain portion of the assessment exercise has focused on mode 4. Other organizations beyond the WTO, such as UNCTAD, OECD, and the IMF have also contributed to this exercise in various ways. The assessment has mainly focused on two issues where mode 4 is concerned: examination of economic needs tests (ENTs) listed as Article XVI *Market Access* exceptions in country schedules; and improvement of international statistics for trade in services.

#### Economic Needs Tests

In 1998, the WTO Secretariat, as part of its information exchange series of papers developed for the assessment exercise, released a paper titled "Presence of Natural Persons (Mode 4)" (WTO, 1998m). In addition to providing an overview of the relevant issues associated with

mode 4 liberalization, this paper took stock of the commitments and exceptions made for mode 4 in terms of market access, natural treatment, and MFN. Its examination of market access commitments revealed significant transparency problems concerning ENTs (WTO, 1998m:14-16).<sup>11</sup>

ENTs have the effect of restricting market entry based on a test of the domestic market. ENTs can affect entry via mode 4 as well as via the other modes of service supply. Exceptions for mode 4 ENTs are permitted to be taken in the market access column of the schedules of commitments as set out in GATS Article XVI.2d *Market Access* which states that,

In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:...d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of a numerical quota or the requirement of an economic needs test...

There are a total of 57 instances where market access exceptions for ENTs under mode 4 have been taken, 35 in mode

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<sup>11</sup> Although this Secretariat paper on mode 4 noted the existence of ENTs, it did not go beyond their identification to discuss why ENTs exist and why they may be important for the host market. One might speculate that the Secretariat did not do so because ENTs raise politically sensitive domestic and regulatory issues.

4 horizontal commitments and 22 in mode 4 sector specific commitments. There are 54 countries out of a total of 135 WTO members who have scheduled market access ENTs for mode 4 (UNCTAD, 1999c; WTO, 1999b:5). Most members do not identify what criteria are used for market access ENTs scheduled under mode 4. This means that, in practice, the application of market access ENTs for mode 4 is highly subjective and non transparent.

Some examples of scheduled ENTs listed either horizontally or sectorally in members' schedules of commitments in the market access column include testing whether nationals are available in the local labour market, undefined labour market tests, testing whether local skills are in short supply, and workforce planning (UNCTAD, 1999c:3-8). The existence of market access limitations for mode 4 ENTs in the schedules of commitments has served to catalyze analytical work about the nature of these ENTs as well as the development of strategies about how they might be disciplined or removed from the schedules.

ENTs are designed to respond to a wide range of policy objectives including regional development, protection of the local labour force, and even cultural concerns. In this way, they address labour market and social development policy issues in their application as well as having

"economic" impact. Here, then, is an example of a domestic policy mechanism which speaks to multiple domestic policy areas and which the GATS attempts to capture as a trade issue. However, because the criteria and purpose of ENTs are not required to be included in the schedule of commitments when listed as market access exceptions,<sup>12</sup> this capture is rendered incomplete leaving a non-transparent domestic policy mechanism intact but visible in the schedule and therefore vulnerable to targeting by trade negotiators. A policy dialogue about the purpose of ENTs and how to deal with them in the trade context has inevitably ensued spawning interesting and novel policy exchanges between trade officials and various regulatory officials. This policy dialogue has been initiated not at the domestic level, but at the international level in a bid to identify where either more transparency or more liberalization with respect to mode 4 commitments could potentially be achieved.<sup>13</sup> This dialogue has the potential to encourage a

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<sup>12</sup> The GATS scheduling guidelines do encourage states to list in their schedule the criteria on which their ENTs are based. However, since the legislation and even administrative regulations on which ENTs in many states are based do not specify such criteria, it is not possible for states to be more specific in their schedules without changing relevant legislation and administrative regulations (GATT, 1993a).

<sup>13</sup> It is not readily apparent that this policy discussion is occurring at the domestic level perhaps because it is a politically sensitive issue with potentially significant ramifications for states'



domestic policy debate among trade and regulatory officials about the purpose and impact of ENTs.

Since many states do not specify the criteria on which their scheduled ENTs are based, many have argued that ENTs represent a non-transparent trade barrier which can be applied in a very subjective manner by regulatory officials in the host market (UNCTAD, 1999c). Developing countries, in particular, have noted that mode 4 liberalization by developed countries is limited because of the numerous market access ENT exceptions present in their schedules under mode 4 (Mukherjee, 1996:31). Consequently, work has been carried out on how to make ENTs more transparent and less subjective in their implementation. UNCTAD in particular, as part of the Trade and Development Board's work programme for 1999, has given a great deal of attention to this issue (UNCTAD, 1999c; UNCTAD, 1999a; UNCTAD, 1999b).

By synthesizing UNCTAD's work on ENTs, this work can broadly be understood to encompass six progressively more ambitious suggestions which address the issues of transparency of purpose as well as transparency of implementation of ENTs. Importantly, none of these suggestions directly raises the issue of the legitimacy of these ENTs in terms of the policy objectives they attempt to

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negotiating positions.

achieve or whether or not such objectives as implemented are creating unnecessary barriers to trade. However, such questions are implicitly raised by several of these suggestions.<sup>14</sup>

The first suggestion put forward by UNCTAD to deal with ENTs is simply to establish enquiry points in member states so that members are able to contact the host market and obtain information concerning how ENTs are implemented by the domestic regulatory authority. (General enquiry points are already mandated by Article III *Transparency*, but not specifically for ENTs). If created and used, such enquiry points would improve transparency in terms of ENT implementation and thereby help the foreign service supplier better understand the operation of the host market. Less directly, such contact points could potentially help members track exactly how ENTs are affecting the penetration of the host market by foreign service suppliers via mode 4. This information would help inform both a domestic and international debate about the objectives ENTs are

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<sup>14</sup> The issue of transparency and whether or not domestic policies are implemented in a way which creates unnecessary barriers to trade are ones which arguably arise in the context of GATS Article III *Transparency* and VI *Domestic Regulation* as well as in the context of the *Annex on Movement of Natural Persons Supplying Services Under the Agreement* (WTO, 1998:Annex, para 4). This raises the point that ENTs seem to straddle Article XVI and Article VI and the Annex making it more difficult to understand how they should be dealt with in the GATS context.

attempting to achieve and whether or not these objectives are being met via their implementation.

The second suggestion is to conduct a formal information exchange on ENTs in order to develop a knowledge base about the purpose they serve and how they are implemented. Such an exercise would likely lead to a deeper domestic and international debate about whether or not ENTs achieve their intended objective and eventually to a discussion about whether or not they create unnecessary barriers to trade.

The third suggestion is to require members to notify ENTs. Notification obligations typically serve transparency obligations (as laid out in GATS Article III *Transparency*). Notification obligations could include the operation of the ENTs, their duration, the criteria on which they are based, and the policy objective which they fulfill. This would force states to internally determine the exact nature of their ENTs and to systematically expose them to the international community as they are implemented. This exposure might lead to a domestic discussion about whether ENTs are an effective policy mechanism as well as what impact they have on trade flows.

The fourth suggestion is for WTO members to develop an agreed framework of scope and application criteria for ENTs

and then to situate this framework in an ENT "reference paper" within the GATS. This framework could, at one end of the spectrum, simply outline transparency obligations for using ENTs or, at the other end of the spectrum, could enumerate the principles on which ENTs could be used by states and how ENTs should be implemented. Such a framework would achieve transparency of purpose as well as transparency of implementation. Given that this is a much more ambitious approach for disciplining ENTs, the framework might also incorporate principles for ensuring that ENTs were defined and implemented in such a way as to be no more burdensome than necessary to achieve the desired objective. This suggestion brings together a policy dialogue involving both domestic and international perspectives on ENTs in a way that would have to include both trade and regulatory officials.

The fifth suggestion would be to agree on certain types of personnel, such as managers, who could be excluded either horizontally or sectorally from an ENT. This would enhance transparency but might not increase liberalization commitments since the option to use ENTs with scheduled commitments for such personnel would be eliminated. This suggestion also includes agreeing on certain occupations that could be excluded from ENT usage. However, the

operational drawback here is that it would be unclear how such a list related to the sectors within the services sectoral classification list<sup>15</sup> and it would be unclear if such a list could be based on any common definition of the occupations included. Rather, it would be up to members to define who, for example, constituted a specialist for computer services. This could mean disparities in commitments depending on the definitions used. The suggestion of using an occupation list to identify those occupations where market ENTs could not be scheduled would not only require the development of common definitions of occupations but would also require the development of a method to understand how sectors and occupations are related. Both of these requirements would entail extensive policy coordination between trade and regulatory officials at both the domestic and international levels.

The sixth suggestion attempts to overcome the occupation definition problem by proposing that a list of occupations to be excluded from ENTs could be based on an internationally agreed occupation list. The ILO has developed an occupation list which it has named the

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<sup>15</sup> Members generally organize their schedules of commitments into two parts: horizontal commitments and sectoral commitments. The sectoral commitments are organized against a sectoral classification list developed in 1993. See, GATT, 1993.

*International Standard Classification of Occupations (ISCO)*. Adopting the ISCO for use in the GATS would imply an acceptance of an international definition of occupations or some form of recognition or harmonization of national occupational definitions. It is unclear how the ISCO would be related to the services sectoral classification list on which the commitments are based (GATT, 1993c).

Many states have developed their own occupation lists which are particular to the reality of their own jurisdictions. Canada, for example, has developed its own occupational classification called the *National Occupational Classification Matrix* (Government of Canada, 1993). The NOCM is used to help determine who is allowed permanent entry to Canada and to develop labour market development strategies which include the application of ENTs. It is unclear, given Canadian membership in the ILO, if a correspondence exists between the NOCM and the ISCO. In any case, an agreement to use such a common occupation list in the schedules on which to base ENT exclusions would affect the scope and application of ENTs for all participating countries. It would also enhance the transparency of ENT scope and application. To operationalize such a suggestion, extensive policy coordination would have to be undertaken by trade and regulatory officials both domestically and

internationally since it would involve changing not only how commitments are scheduled but also the use of occupation lists in both the international and domestic contexts.

Currently, a detailed study of ENTs is still being undertaken by WTO, UNCTAD and OECD as part of the assessment exercise. It is likely that the discussion concerning ENTs will continue right through the negotiations since the degree to which the non-transparent nature of ENTs is addressed, especially by developed countries, will affect developing country concerns regarding mode 4 liberalization commitments.

Significantly, the discussion of ENTs at the international level, then, is helping to encourage policy dialogue and linkages between trade and regulatory officials at the domestic level. In particular, this international discussion is focusing the dialogue with regard to how best to understand and regulate the impact of mode 4 liberalization on domestic markets and societies while simultaneously allowing service supply via mode 4 to occur.<sup>16</sup>

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<sup>16</sup> Understanding the emerging linkages between international migration, trade, and domestic labour markets is a new topic of interest from the trade policy perspective. Migration theory has looked at the linkages between international migration and domestic labour markets. See, for example, Salt, 1987; World Bank, 1995.

### International Services Trade Statistics

The second important aspect of the assessment exercise which has relevance for mode 4 concerns improving the collection of international services trade statistics. Here GATS members have realized that in order to understand the importance of this mode for exporting services, they must have better statistics. As noted in Chapter 3, mode 4 statistics are inadequate for various reasons including the difficulty of tracking non-resident employees, the aggregation of employment in goods and services industries, and the fact that non-residents in the IMF Balance of Payments Statistics are defined as people who stay in a host market for less than one year.

A significant amount of work is being undertaken internationally to improve international services trade statistics including those statistics concerning mode 4. Through the organizational effort of the UN Statistical Division, UN members are writing a *Manual on Statistics of International Trade in Services* to complement the latest Balance of Payments Manual (IMF, 1993) for collecting statistics and to provide a bridge between statistical approaches to international services trade and the needs of GATs negotiators with regard to the modes of supply. The WTO and trade policy-makers as well as UNCTAD, OECD, IMF,



and the European Commission are also involved in the development of this Manual. Annex 6 *Movement of Natural Persons Supplying Services Under the GATS* attempts to identify and address the deficiencies in statistics collection for mode 4 (United Nations, 2000). In doing so, it raises interesting policy linkages between trade and regulatory officials.

One of the problems that Annex 6 addresses is that there is no meaningful way to compare trade in services supplied by mode 4 by occupation (thereby making it difficult to develop an occupation list from which ENTs could be exempt, for example). The Annex gives particular attention to occupational classification lists which could be used to better understand movement of service suppliers. For instance, it argues that, from a statistical perspective, the common use of the ILO's ISCO would provide a good basis for comparison of statistics for mode 4. Here the Annex is attempting to use ISCO as a policy tool for understanding how domestic labour markets and education contexts relate to the trade policy context. To the extent that UN members use the ISCO in their domestic contexts or establish a correspondence for its use with their own national occupation lists, this suggestion could advance statistical collection for the movement of service

suppliers.

Annex 6 also notes that the collection of services trade statistics for mode 4 is very bound up in the service suppliers' relationship to the service being supplied. For instance, are they independent service suppliers who are self-employed or employed in the host market by a resident company or foreign affiliate? Are they short-term business visitors not remunerated in the host country? These relationships affect how states liberalize mode 4 as well as how to collect international trade in services statistics for mode 4. Understanding how to collect services statistics for these relationships as they relate to mode 4 will require dialogue and coordination between domestic policy-makers concerned with trade, labour market development and statistical collection.

Annex 6 points out that developing a common understanding of these relationships could be achieved by using the *International Classification of Status of Employment*<sup>17</sup> as well as the *United Nations Recommendations*

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<sup>17</sup> The *International Classification of Status of Employment* divides worker-employer relationships into the following 6 groups: 1. employees, among whom 'employees with stable contracts' may be distinguished; 2. employers; 3. own-account workers; 4. members of producers cooperatives; 5. contributing family workers; and 6. workers not classified by status.

on *Statistics of International Migration*.<sup>18</sup> Again, in order to adopt and use such classifications within the GATS, it would need to be made clear how the use of such tools would correspond with domestic regulatory frameworks which define and regulate the relationship of service suppliers to the services they are supplying. This would undoubtedly be an enormous task requiring much policy coordination. However, inclusion of these ideas in the Manual at least leads trade policy-makers and negotiators to begin to think and talk about how to develop a common international understanding of collecting statistics for the movement of service suppliers.

#### **Linking Trade Policy and Domestic Regulatory Discussions on the Movement of Service Suppliers**

Since many WTO member states have listed market access ENTs for mode 4 in their schedules, ENTs are being discussed as part of the current multilateral services negotiations

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<sup>18</sup> The *United Nations Recommendations on Statistics of International Migration* has established a framework of categories for understanding the different forms of international migration. Some of these categories would be of interest to statisticians and trade policy-makers concerning movement of services suppliers. For example, the non-migrant category in the framework includes: foreign border workers (daily or weekly movement); visitors from abroad to the country (tourists and business activities not remunerated within the host country), and; foreign business travelers (whose length of stay cannot surpass 12 months). The category for foreigners admitted for employment includes: migrant workers (seasonal, contract, project-tied, and temporary); migrants having the right to free establishment or movement (usually because of a bilateral treaty), and; migrants for settlement (both employment-based and entrepreneurs and investors).

which seek to increase market access for services suppliers. This reality is helping domestic regulatory officials to see the economic and social importance of sharing policy information and even coordinating policy development in the area of regulating temporary entry for services suppliers. This is significant because it means that domestic regulatory officials are identifying complementarity between their regulatory objectives and facilitating temporary entry. Three examples of this phenomenon follow.

#### Asia-Pacific Economic Co-operation (APEC)

In 1995, the Pacific Business Forum (a business lobby group) made six recommendations to APEC concerning the facilitation of business travel and service supply: 1) the introduction by 1999 of an APEC business visa by APEC member countries to allow ease of entry for business travelers entering for short stays to conduct business; 2) special stream-lined immigration procedures for business travelers carrying APEC business visas; 3) the development of accreditation criteria for identifying professional business persons in each APEC member economy; 4) shorter processing times for business visitors seeking residency visas; 5) automatic extensions of residency visas for a period of up to three years, and; 6) the creation of special

immigration lanes at ports of entry (Asia-Pacific Economic Cooperation, 1995:41-42).

The Pacific Business Forum did not identify or discuss the domestic regulatory complexities that these recommendations raised. However, these recommendations did serve to highlight business concerns regarding the barriers business people face moving over borders to conduct trade. This led APEC member countries and their regulatory bodies to attempt to respond to these concerns where possible. For example, in 1997 an APEC *Business Travel Handbook* was published to describe how business visitors should use visitor visa systems in each APEC member country. In 1998, five out of eighteen APEC members including Australia (though not Canada or the US), introduced the APEC Business Travel Card which allows streamlined entry for temporary business visitors. This card, however, does not address the issue of business residency, multiple entries, or accreditation criteria.

Many members have not adopted the APEC Business Travel Card because of security and privacy related issues. Canada and the US have not implemented the APEC Business Travel Card because they view it as an additional bureaucratic burden which uses lower level technology than the automated biometric system currently in use in these two countries.

Many APEC countries also created special immigration lanes for business travelers. Canada and the US have not done so mainly because of the additional resources required for implementation.

Although the manner in which APEC member countries responded to APEC business concerns over temporary entry did not address all the recommendations put forward, the response was important for the cooperative domestic regulatory effort that it helped to catalyze among APEC member countries. Moreover, because APEC membership comprises both developed and developing countries, this cooperative effort occurred in a policy area (immigration) where relations between developed and developing countries have not always been the best mainly because of tensions over illegal migration.

#### Four Country Conference

Senior immigration officials from Australia, Britain, the US, and Canada meet annually at a Forum called the Four Country Conference to exchange views and share best practices regarding a variety of immigration-related policy and operational matters. Previous to 1999, the conference had focused mainly on enforcement issues. However, the 1999 conference marked a departure from that focus toward broader

"facilitation-oriented" themes including the benefits of international mobility. This occurred because Australia, which had undertaken significant reforms to accommodate temporary entry, wanted to encourage the other participating countries to think in this direction. In addition, businesses in all four countries were strongly lobbying for policies to facilitate temporary entry for business service suppliers. This made the agenda for a broader focus seem timely.

This conference proved particularly useful for sharing policy ideas and best practices for visa exemptions for low risk business travelers, recruitment and admission of highly skilled workers, dedicated centres for employers petitioning for foreign workers, and the use of technology, such as smart cards, at the border to facilitate business entry. It was also significant because it marked a departure from the traditionally inward and defensive nature of international discussions concerning immigration policy to a discussion with a more outward looking and cooperative focus.

#### International Metropolis Project

In 1995, immigration policy-makers and researchers from various developed and developing countries formed the International Metropolis Project (IMP) as a way to conduct

international comparative research on and improve countries policies on immigration and integration. The IMP now comprises 20 members countries and six international organizations meeting annually to present research and discuss best policy practices concerning immigration integration.<sup>19</sup>

In 1999, the IMP for the first time included a panel on "Trade Agreements and Migration". This panel brought together academics, trade negotiators, and high level domestic regulatory officials from immigration and labour market development departments to discuss the impact of trade agreements on migration. Like the Four Country Conference, this panel developed an outward oriented perspective towards trade and immigration related issues which positioned these two policy areas as potentially complementary. Because the panel included presentations from both developed and developing countries, the discussion also sought to identify positive reasons for developed and developing countries to work together in a domestic regulatory area (immigration) where tensions concerning illegal migration have traditionally existed.

From a labour market development perspective, the panel

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<sup>19</sup> For more information on the International Metropolis Project, see, [www.international.metropolis.globalx.net](http://www.international.metropolis.globalx.net).



was of interest because it attempted to link trade objectives such as facilitating temporary entry for services suppliers with labour market development objectives such as addressing skill gaps and labour shortages in the host market. The panel also discussed controversial issues such as the need for trade agreements to facilitate temporary low skilled movement to plug local labour market gaps. This is a difficult issue to tackle because it raises labour market development concerns regarding wage levels and working conditions.

Domestic regulatory flexibility was also discussed in the context of trade agreements. For example, the practice of entrenching mobility provisions in legally enforceable trade agreements was discussed in terms of its tendency to limit the ability of immigration and labour market development regulators to change policies as necessary to meet domestic objectives. This discussion highlighted the fundamental tensions that exist between the traditional trade principle of "binding" and the need, both in practical terms and with regard to democratically developed policy-making, for maintaining regulatory flexibility.<sup>20</sup>

These examples demonstrate that the increased pressure

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<sup>20</sup> For an advocacy-oriented discussion of the relationship between binding commitments and the democratic development of policy, see Sinclair, 2000.

to facilitate trade via temporary entry for service suppliers has caused the discussion about trade and migration to evolve in a new dynamic direction. Immigration and labour market development officials are now sharing best practices at an international level and even cooperating on programme development in a way which attempts to support the objectives of trade agreements with regard to mode 4 while simultaneously achieving regulatory objectives. This coordination points to a new policy nexus among trade, immigration, and labour market development policy-makers.

#### **Mode 4 Liberalization in the Current Round of GATS Negotiations**

Since the end of the Uruguay Round and now during the current round of multilateral services negotiations, both business groups and developing countries have continued to lobby for increased mode 4 liberalization. The pressure for liberalization in this area raises regulatory issues which will need to be addressed before further liberalization can be achieved.

In 1999, the Coalition of Service Industries in the US submitted recommendations to a Federal Register Notice regarding US preparations for the WTO Seattle Ministerial to launch a new round of trade negotiations (Coalition of Service Industries, 1999). These recommendations included

more transparency of ENT exceptions for mode 4, the creation of a system of easily obtainable and renewable visas and work permits, MRAs for licensing of professionals, removal of performance requirements to employ only local people, as well as quotas to limit intra-firm transfers, and removal of onerous citizenship and/or prior residency requirements in order to practice a profession.

In 2000, the Coalition of Service Industries again submitted recommendations to a Federal Registry Notice which solicited public comment for multilateral trade negotiations on agriculture and services (Coalition of Service Industries, 2000). This submission contained very specific negotiating recommendations including the development of common definitions of key business personnel and intra-company transferees, more transparency to facilitate compliance with negotiating requirements to obtain entry, the development of a common definition for ENTs, and provision of expedited entry procedures such as a GATS permit for short-term personnel. In addition to emphasizing the business need for an internationally mobile workforce, the Coalition of Service Industries recognized that these recommendations impacted on nationally sensitive immigration and labour market policies. However, it argued that the gains made from reducing barriers to mode 4, including

increased technology transfer, more innovation, and enhanced international competitiveness, provided important reasons for removing these barriers. It further argued that because service supply via mode 4 focused on temporary rather than permanent movement, removing barriers to this temporary movement should have the effect of lessening the regulatory sensitivity felt towards their removal.<sup>21</sup> Finally, the Coalition of Service Industries argued that an internationally coordinated response from governments with regard to mode 4 liberalization was necessary and appropriate.

European businesses also lobbied the European Commission for longer foreign stays for personnel, larger numbers of people to be able to enter and stay in foreign markets, and the facilitation of the increasing use of specialist teams of personnel including trainees rather than sole individuals (European Commission, 1999). In 2000, the European Services Forum (a European business services lobby group) made recommendations to the Trade Commissioner of the European Commission, Pascal Lamy, that were similar to what

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<sup>21</sup> The Coalition of Service Industries' submission emphasized several times that the GATS covered temporary rather than permanent movement. It noted, however, that many of the existing barriers affected both temporary and permanent movement. This observation, as noted in Chapters 4 and 5, speaks to the considerable conceptual and practical difficulty that exists with regard to separating regulatory measures that affect both temporary and permanent movement.

the Coalition of Services Industries had recommended to the US Government. In addition, it outlined the specific sectors where it felt that mode 4 liberalization was important (including telecoms, construction, environmental, financial, tourism, and transport services) for both intra-corporate transferees and short term business visitors.

At the same time as large MNCs were lobbying for removal of mode 4 barriers in other markets, more domestically oriented firms in countries like the US and Canada were lobbying for the removal of mode 4 barriers by their own governments. These businesses were interested in bringing in foreign workers to fill vacant positions in the Canadian and American labour markets especially in computer services as well as in the professions. In the American context, this lobbying led to higher H1-B visa quotas for professionals from 65,000 in 1998 to 115,000 in 2000 (Ojito, 1998:A17) and to even higher levels in 2001 and 2002. In the Canadian context, Citizenship and Immigration Canada, in response to the computer services sector business lobby, has created a special pilot project to meet domestic demands for software development without the usual labour market tests required to obtain a work permit. The extent to which such programmes will become bound in the schedules of commitments as a result of the negotiations remains to be seen.

In the EC context, the European Services Forum recognized that the EC needed to improve liberalization commitments (including administrative practices) for foreign labour, especially information technology workers.<sup>22</sup> Because border entry control remains a sensitive national prerogative within the EC (except for those members who participate in the *Schengen Acquis*), it is unclear whether agreement could be reached on a common set of liberalization commitments for mode 4.

Significantly, the European Parliament recently approved the European Services Card Directive<sup>23</sup> which would allow third country nationals who are legally resident in a member state the freedom to provide services in another EU member state for up to 12 months (with no automatic renewal) (Official Journal of the European Communities, 1999). The third country national may be self-employed or in the employ of an established foreign firm. It is made clear in the Directive that this new policy of posting third country nationals is different from the right to free movement

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<sup>22</sup> Indeed, the European Services Forum noted that the German accelerated five year work visa programme for highly skilled non-EU technical workers and their spouses, as well as the UK pilot programme to allow multinational employers to self certify rather than apply for a work permit for intra-company transferees, were programmes that needed to be considered on a EC-wide basis as well for inclusion in the EC services negotiating position at the WTO.

<sup>23</sup> COM [2000]271 final.

within the EC as well as distinct from national immigration policies. However, minimum wage laws and working conditions in the EC member states must be enforced when the posting of third country nationals occurs. The Directive also notes that a labour market assessment of this policy shall be carried out by the Commission against the background of planned EU enlargement. The proposed implementation date for this Directive is 2002. Since efforts by the Commission to liberalize internal trade are often indicators of positions the EU will adopt in bilateral and multilateral negotiations, there is some possibility that the EC would consider binding such a policy in the EC schedule of commitments.

Developing countries such as Pakistan, Egypt, India, Peru, the Dominican Republic, and Honduras, have been lobbying for more mode 4 commitments from developed countries in the current round of services negotiations. In preparation for the Seattle Ministerial, Pakistan emphasized that more mode 4 commitments were needed to "restore the overall balance of rights and obligations in terms of sectors and modes of supply". In its view, more commitments, particularly for telecommunications and financial services, had been undertaken by developing countries for mode 3 than had been taken by developed

countries for mode 4, particularly mode 4 commitments where the service supplier was not associated with commercial presence (WTO, 1998p:3).

In the current round of multilateral services negotiations, two negotiating proposals, one from the United States and the other from India, have been made concerning mode 4. While the US proposal is much less ambitious than the Indian proposal, both proposals attempt to address domestic regulatory issues which act to impede service supply via mode 4.

The American proposal suggests that a tailored approach be taken with regard to horizontal restrictions on the movement of natural persons. This tailored approach would address two trade-related regulatory aspects of mode 4 supply: 1) access to information that would,

"help promote competitive access and may include laws and regulations relevant to entry, stay, and work authorization of natural persons, including relevant terms and conditions. [Access to information] may also include the procedures and application materials relevant to entry and stay"

and 2) procedural transparency which might include,

"timely governmental responses to applications submitted for temporary entry and stay, and, in appropriate cases, a statement of the reason of denial of such applications. Such aspects may also include an opportunity for interested parties to comment on proposed new or amended regulations concerning temporary entry and stay" (United States, 2000).

The American approach to improving market access commitments



in mode 4 essentially focuses on improving regulatory transparency with regard to how the regulations are implemented and developed. Its approach does not directly question the purpose or legitimacy of such regulations or whether or not they constitute unnecessary barriers to trade although this might be the long term effect of such an approach if implemented. In any case, achieving more regulatory transparency in terms of regulatory development and implementation will help create a new policy dialogue between trade and regulatory officials at the domestic level.

The Indian proposal is much more ambitious (and lengthy at 10 pages) than the American proposal (at one page). It first argues that most commitments for professionals that have been made in members' schedules of commitments are largely linked to commercial presence and are therefore of "limited use to developing countries who are interested primarily in movement of independent professionals and other persons" (WTO, 2000). The proposal also argues that the restrictions on mode 4 originate in immigration and labour market policies which are primarily targeted at permanent movement rather than temporary movement and for this reason should be removed. The proposal is also critical of the existence of wage parity requirements, numerical limits,

economic needs tests, limitations on the transferability of work permits, lack of recognition of professional qualifications and licensing requirements, the under use of notification under Article VII *Recognition*, and requirements to pay social security taxes without corresponding benefits.

In order to achieve effective liberalization for mode 4, the proposal calls for 1) a multilaterally agreed reference paper on ENTs which would define their use and applicability; 2) multilaterally agreed norms to address visas, work permits, and social security issues; 3) strengthening of GATS norms and disciplines regarding recognition of qualifications; and 4) the super-imposition of the ILO's *Standard Classification of Occupation* on the *WTO Services Classification List* in order that members can make mode commitments by occupation as well as by sector (WTO, 2000).

Although the Indian proposal does not acknowledge this, it clearly raises sensitive issues where domestic regulation of the movement of service suppliers is concerned. The proposal not only calls for regulatory transparency but also seeks to establish common regulatory norms at the multilateral level within the context of a trade agreement. As previously noted, many of these domestic regulations, such as ENTs, may exist not only to achieve economic

objectives, but also social objectives. It is unclear at this time how the social and economic balance present within these regulations at the domestic level could be translated to the international trade context of the GATS on a consensus basis. It is likely that a full array of mechanisms from harmonization to some form of global subsidiarity would have to be discussed in this regard. Additional conceptual and practical complexities that would also need to be addressed include separating regulations applied to both temporary and permanent movement as well as defining a common understanding of "professional" given that the Indian proposal includes high, middle, and lower level professionals. It is clear that this proposal will create incentives and opportunities for further policy dialogue between trade and regulatory officials which may lead to new ideas about how to move mode 4 liberalization forward while also achieving regulatory objectives.

### **Conclusion**

Since the end of the Uruguay Round, the discussion about mode 4 liberalization has evolved into a technical and wide-ranging discussion of what would be required to bring about further liberalization. It is a discussion which continues to divide along developed and developing country

fault lines while also creating a policy nexus between trade policy-makers and regulators dealing with immigration, labour market development, and professional accreditation concerning how to accommodate both liberalization and regulation within a trade agreement.

This discussion has been catalyzed from within the international trade context because of the GATS work programme concerning the *Decision on Professional Services* as well as the GATS' built-in agenda concerning the assessment exercise and continued multilateral services negotiations. As we have seen, this discussion between trade and regulatory officials has taken place at the international level in various fora including the WTO, UNCTAD, OECD, the UN, APEC, the Four Country Conference, and the International Metropolis Project which, in turn, creates opportunities for a similar discussion to occur domestically and to be lifted to the international trade context via WTO negotiating proposals.

Importantly, this discussion or dialogue between trade and regulatory officials dealing with movement of service suppliers is one which is struggling to simultaneously accommodate both liberalizing and regulatory objectives and consequently both economic and social objectives where such movement is concerned. It is as yet unclear how this

accommodation will be moved beyond what is presently contained within the GATS and members' schedules of commitments. However, it is likely that any further accommodation will have integrative effects on the policy choices that states make since the dialogue which will spawn these choices includes within its scope both trade negotiators and regulators at both the domestic and international levels.

## CHAPTER 7:

### Conclusion

When Candide and his manservant Cacambo arrived in Eldorado, they collected gold stones from the ground and entered an inn to eat. When the meal was over, they tossed two of the large gold pieces on to the table. As Voltaire writes,

The landlord and his wife burst out laughing and held their sides for a long time. Finally they recovered themselves:

'Gentlemen,' said the host, 'we can see you're strangers. We're not used to them here. Forgive us if we started laughing when you offered to pay with stones off our roads. Presumably you don't have any of the local currency, but you don't need any to dine here. All inns set up for the convenience of those engaged in commerce are paid for by the government' (Voltaire, 1990:46).

In an increasingly mobile global environment, the treatment meted out to foreign business people, as in Voltaire's *Candide*, is important to consider. Without a clear understanding of the implications behind the rules governing such mobility, it will be difficult to be confident that they are providing a coherent framework for supporting trade liberalization while simultaneously addressing regulatory concerns.

Before looking forward to the implications of accommodating both trade liberalization and regulatory objectives where movement of service suppliers is concerned,

it is useful for purposes of policy-making to put this whole issue in the context of the development of the international trading system in the post World War II period.

As developed in Chapter I Section II and Chapter 2, the ascendent American position that liberalized trade would lead to full employment was a significant reason for the demise of the ITO and the birth of the GATT. Where the ITO had been ambitious about addressing a wide range of domestic policy practices, such as employment policy, which could hamper trade, the GATT took a more pragmatic approach by focusing largely on gradual tariff reductions. These tariff reductions provided the practical policy context for the two inherently contradictory though politically viable principles on which the GATT rested, namely, MFN and mercantilism.

The GATT, like the ITO, contains an MFN provision. Such a provision provides equal market access for like products from all countries in the markets of all other countries affording MFN treatment. It therefore promotes a liberal international approach to trade.

The implementation of the GATT MFN provision was based on gradualism and pragmatism. Tariffs were reduced only gradually and GATT rules were applied pragmatically rather than in a doctrinaire way. This gave the GATT the room to

develop strength over time both technically and politically and the contracting parties the time to develop confidence in its application.

As Wolff argues, the GATT also possessed a mercantilist philosophy (Wolff, 1987:70). This philosophy, geared toward strengthening the wealth and power of a given nation-state at the expense of other states, sought to protect the domestic market from the disruptive foreign imports brought on by MFN. It did so through the use of domestic protectionist regulatory measures which thwarted any "real" (i.e. comparative advantage oriented) domestic adjustment to liberal international trade. In this way, the mercantilist approach avoided the domestic policy implications of liberal international trade and managed to insulate nationally controlled economic and social policy-making from non-discriminatory trade.

This mercantilist approach was in marked contrast to the ITO which had tried to create an international vision of how to pursue domestic policy adjustments and therefore domestic stability. Indeed, the GATT proved more acceptable in 1948 because it contained scope for liberalizing and for domestically controlled protectionist measures. That is, these measures were liberalizing in terms of MFN tariff reductions, while protectionist in terms of maintaining



imperial preferences, escape clauses for balance of payments problems, quantitative restrictions to guard agricultural supports, and exemptions of coverage for foreign direct investment and the services sector.

Interestingly, this arrangement worked very well in the context of the Cold War. It espoused a philosophy of market capitalism and maintained pressure for trade liberalization via tariff reductions at the same time as it permitted protectionism and united the West into an anti-communist trade bloc (Zeiler, 1999:197). In effect, the GATT helped undercut growing support for communist parties in Western Europe by becoming an important building block for domestic income redistribution.<sup>1</sup> Broadly speaking, by generating wealth through a liberal international trade policy and retaining control of domestic economic policy through mercantilistic protectionism, states obtained the resources and legitimacy necessary to help temper the social pressures produced by market capitalism.<sup>2</sup>

States used various protectionist measures to resist competitive foreign imports brought on by MFN tariff

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<sup>1</sup> As Wolff notes, "After all, protection is not mainly about international relations. It is primarily about the internal distribution of income, a truth that the present framework of trade policy obscures" (Wolff, 1987:83).

<sup>2</sup> This arrangement is the 'embedded liberal compromise' that Ruggie speaks to from a theoretical perspective (Ruggie, 1982).

reductions. In the US, for example, such imports were positioned as the product of "unfair" trading practices, and were dealt with through antidumping and countervailing duty procedures. In 1948, a peril-point clause was introduced into the Trade Agreements Act. This clause sought to avoid injury to domestic products from foreign imports. In 1951, the process for applying the escape clause was strengthened<sup>3</sup> and a significant amendment to the Agricultural Adjustment Act was introduced which restored "...the right of domestic producers to intervene in customs cases with a view to obtaining more tariff protection" (Hawkins and Norwood, 1963:105). The Trade Expansion Act of 1962 curtailed use of the escape clause and gave some emphasis to domestic adjustment assistance and retraining. However, in 1974, the escape clause was reinvigorated, export subsidies were targeted, and voluntary export restraints were introduced (Baldwin, 1985:85).<sup>4</sup>

In dealing with the effects of MFN tariff reductions brought on by a liberal trade policy, domestic protectionism functioned as a mercantilistic replacement for domestic

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<sup>3</sup> As Leddy and Norwood note, the original trade-agreements law of 1934 contained an escape clause. For a detailed examination of the escape clause and the peril-point provision see, Leddy and Norwood (1963).

<sup>4</sup> For a detailed look at US non-tariff barriers see, Metzger (1974).

adjustment induced by liberal international trade. That is, the pursuit of nationally defined economic interests redistributed income to less productive but politically important parts of the economy, such as the steel, apparel, and textiles sectors (Wolff, 1987:83).<sup>5</sup> National economic policy autonomy and arguably domestic social stability were maintained, though at the expense of optimal economic productivity or regard for the effects of such protectionism on other jurisdictions.

Despite the use of mercantilist policies, tariff levels gradually became lower in the postwar period due to recurring GATT negotiations. This meant that non-tariff measures which functioned as protectionist trade barriers became more visible. Calls were therefore made during the Tokyo Round for them to be addressed. Of course, non-tariff barriers were some of the very measures which governments had been using to avoid domestic adjustment and to maintain national policies which were at odds with liberal international trade policy.

The Tokyo Round negotiations resulted in six "Codes"

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<sup>5</sup> Baldwin makes the important point that protectionism was not only the result of politically important lobby group pressure. The US Government also acted to protect smaller less efficient industries characterized by labour intensive low skilled non-unionized employment from the implications of non-discriminatory trade. It did so in order to address social and equity concerns brought about by non-discriminatory trade and to maintain social stability (Baldwin, 1985:123, 165).

which attempted to bring some discipline to non-tariff measures taken by states that produced discrimination against imports. They were not overwhelmingly robust given the continued mercantilist attitudes held by states towards international trade. Instead, in some ways they attempted to strike a balance between removing measures which acted as trade barriers and allowing states to retain measures designed to achieve national policy objectives for reasons not directly protectionist. For example, the Agreement on Subsidies and Countervailing Duties stated that it did not want to restrict the use of subsidies to achieve social and economic objectives but recognized that some domestic subsidies could cause material injury to other countries (Baldwin, 1985:86).

All this is to say that, on the goods side, protectionism was largely sustained in the postwar period despite, and even under the cover of, successive rounds of wealth generating MFN tariff reductions. This allowed protectionist national economic policies, and any direct or indirect support they may have given to domestic social policy objectives exercised by an increasingly interventionist state, to carry on rather independently from liberal international trade policy as expressed through

tariff reductions.<sup>6</sup> However, by the 1970s, this arrangement was beginning to wear thin as tariffs came down and protectionist policies became more visible.

On the services side, the circumstances are quite different and therefore require new policy responses. There are no tariffs at the border to provide "cover" of any kind for protectionist domestic policies. Moreover, such domestic policies are more often than not justified on regulatory grounds that are embedded in diverse political, economic, and social cultures. That is, they are not necessarily discriminatory in nature. Non-discrimination therefore cannot operate at the border while leaving states to devise protectionist domestic economic policies as had been the case on the goods side. Instead, in a services context, the effort to achieve non-discrimination and market access becomes focused on domestic regulatory policies themselves. This focus raises new challenges for the old question of how to achieve the benefits of liberalization (of services trade) while preserving the freedom to pursue nationally determined economic and social policy objectives.

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<sup>6</sup> Of course, this cover has gradually withered away over time as tariff levels have been reduced. This means that domestic policies related to goods production, such as subsidies, standards, and intellectual property, have gradually become more exposed to the glare of international trade rules. Although this problem began to be evident during the Tokyo Round, it was fully exposed by the results of the Uruguay Round.

This thesis has demonstrated how trade in services, particularly movement of service suppliers, has come into direct contact with domestic regulatory concerns. This contact has effectively by-passed the approach of separating MFN tariff reductions from protectionist national economic policy that we saw on the goods side. It has instead generated the need for a new *policy accommodation* approach between non-discriminatory trade and domestic regulation. Chapters 3, 4, 5, and 6 demonstrated how this need was identified and addressed through services trade agreements in the contemporary period.

To briefly summarize, Chapter 3 demonstrated the emerging need by MNCs and developing countries for movement of service suppliers. Both of these needs brought the issue of movement of service suppliers into direct contact with domestic policy considerations. In particular, the contact it engendered between service suppliers and domestic policy raised sensitive questions in terms of the regulatory impact on immigration, labour market development, and professional accreditation policies; and in terms of the impact on development objectives, including employment creation, technology transfer, market and development interlinkages, balance of payments effects, and remittance gain versus brain drain. These questions were reflected in the

terminological instability surrounding this issue which further proved that movement of service suppliers fundamentally challenged the traditional method of separating trade policy from domestic policy.

Chapters 4 and 5 demonstrated how the negotiation of provisions to include movement of service suppliers in trade agreements attempted to simultaneously accommodate both liberalization and domestic regulatory concerns.

Chapter 4 identified the new policy accommodation approach by looking at those negotiations of the GATS which led to movement provisions for service suppliers. It was found that, via coverage, architecture, and scheduling design, negotiators began to simultaneously accommodate liberalization and regulatory concerns in a manner that was politically acceptable to all negotiating parties. Interestingly, this policy accommodation approach revealed fault lines that would need to be dealt with in future multilateral services negotiations. These fault lines included the nature and extent of commitments for mode 4, the difficulty of separating temporary and permanent entry in policy terms, and the need for technical assistance to allow developing countries to participate meaningfully in the positive effects that would arguably accrue from the implementation of Article VI.4 (Domestic Regulation) and

Article VII (Mutual Recognition).

In comparative perspective, Chapter 4 also demonstrated that the approach taken by GATS negotiators to simultaneously accommodate liberalization and regulatory concerns revealed important similarities with the EU context. Despite the different objectives to which the GATS and EU aspire with regard to people movement, that is, more liberal trade in the case of the GATS versus far-reaching integration in the case of the EU, they face similar policy challenges including security concerns over immigration, policy differences with respect to labour market development and social security, and differences with respect to institutionally and culturally complex accreditation methods. Furthermore, they employ similar strategies to resolve these challenges including comparison of policies, adaptation of best practices to national contexts, subsidiarity, recognition, and harmonization. Given these similar policy challenges and strategies for solving these challenges, it is conceivable that the attempt to directly accommodate liberalization and regulatory concerns from within the GATS will have integrative effects.

In Chapter 5, it is similarly demonstrated that, although rough in nature, the NAFTA does provide accommodation between facilitating temporary entry and



simultaneously maintaining control over border security and labour market development. This accommodation occurs through: 1) the workings of the Temporary Entry Working Group; 2) the fact that professionals, intra-company transferees, and traders and investors can obtain entry for long periods of time, and; 3) the fact that these groups have access, where it exists, to social security programmes and other collectively run programmes. This accommodation also highlights fault lines that need to be addressed including weak provisions for developing recognition programmes and weak institutional arrangements for implementation and enforcement.

These fault lines are further exacerbated by the context in which the NAFTA operates, namely, American preponderance, the one-off nature of the NAFTA, and the developed-developing country partnership that exists alongside significant sensitivities over illegal migration. As noted in Chapter 5, the accommodation between liberalization and regulatory issues that occurs in the NAFTA where temporary entry issues are concerned bares some weak resemblance to the EU context. The extent to which this accommodation might be able to begin to address the fault lines revealed in the agreement, namely weak institutional arrangements and recognition mechanisms,

remains unclear.<sup>7</sup>

In the EU context, stronger EU institutions have worked to mediate and even resolve differences that have arisen among states concerning people movement. Significant differences of course remain but the common goal of integration, which encompasses at least a general level agreement about the need (if not exactly the method) to mediate between the market and social interests, seems to require that solutions be found. In the NAFTA context, integration is not a stated objective but there are domestic policies, for example, social insurance coverage, which reproduce the accommodation for non citizens and thereby simultaneously achieve both regulatory and liberalization objectives, at least in Canada and the United States. Ironically, these domestic policies have integrative effects. However, this accommodation is not well reproduced in the Mexican context raising questions about the level and degree of developing country participation in the agreement regarding temporary entry.

Chapter 6 makes the point that, in the context of 1) the post-Uruguay Round work programme; 2) the assessment

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<sup>7</sup> There is some indication that the new American administration under President Bush and the new Mexican administration under President Fox may wish to reinvigorate NAFTA institutional instruments to, among other things, reduce illegal migration (Lindgren, 2001).

phase; 3) relevant discussion in other fora, and; 4) the current round of multilateral services trade negotiations, a policy nexus has begun to develop between trade negotiators and regulatory officials who manage the temporary movement of service suppliers. This policy nexus facilitates a wide-ranging discussion aimed at identifying how to pursue further policy accommodation between liberalization of mode 4 and achieving regulatory objectives with respect to movement of service suppliers. At the same time, the development of the policy nexus reveals interesting challenges that will need to be accounted for including developing country concerns over mode 4 commitment levels and the integrative effects that might arise from further progress on, for example, clarifying scheduled economic needs tests and approaches to occupational classification.

What are the challenges to achieving further policy accommodation between liberal international trade policy and domestic regulatory policy, particularly where movement of service suppliers is concerned? These challenges, briefly identified in Chapters 3, 4, 5, and 6, can generally be grouped under two headings: developing country participation and integration.

Clearly, this policy accommodation approach will have

to account for the fact that such an approach, while challenging for developed countries, will be enormously difficult for most developing countries to accomplish on their own or even with support. Creating and maintaining viable regulations and regulatory institutions, such as in the areas of labour market development and professional accreditation, which strike the right balance between social and economic concerns is a difficult and resource intensive task which developing countries have been struggling to bring about, with varied success, for decades. Overlaying that task with the need to accomplish accommodation between regulatory and liberal international trade policy makes it even more challenging to accomplish. The economic and social gains that can be accrued from making multilateral services trade liberalization and domestic interventionism mutually supportive, however, make policy accommodation an important task for developing countries to accomplish.

To some extent, there has been an ongoing international effort to deal with the challenges of accommodating domestic regulatory and multilateral trade policy. This effort is embodied in the *Integrated Framework* initiative spearheaded by several international organizations including the WTO. This initiative, conceived at the 1996 WTO Singapore

Ministerial meeting,<sup>8</sup> is directed at enhancing trade-related technical assistance, including human and institutional capacity building, to support trade and trade-related activities. It is co-sponsored by the WTO, the IMF, UNCTAD, the International Trade Centre, the UN Development Programme and the World Bank.<sup>9</sup> However, there is so far little practical evidence that a concerted effort by developed states is being undertaken to ensure that the wide-ranging objectives of the framework are implemented, notwithstanding any intentions developed countries may have in this regard. Speculating on the best way to accelerate the pace of implementing this framework is necessarily a topic for future investigation. However, facilitating the participation of developing countries in implementing policy accommodation will clearly be important for achieving the objectives of the integrated framework.

Another challenge which arises in attempting to achieve further policy accommodation between liberal international trade policy and domestic regulatory policy concerns the

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<sup>8</sup> The 1996 WTO Singapore Ministerial meeting based its call for an Integrated Framework initiative, in part, on the 1994 Marrakesh Declaration in which members states confirmed their resultation "...to strive for greater global coherence of policies in the fields of trade, money, and finance, including cooperation between the WTO, the IMF, and the World Bank for that purpose" (WTO, 1995:iv).

<sup>9</sup> For a description of the *Integrated Framework* see, <http://www.Idcs.org/intframe.htm>

integrative effects of such a policy approach.<sup>10</sup> As we have seen in Chapters 4, 5, and 6, the policy challenges and strategies used to achieve policy accommodation where movement of service suppliers is concerned are similar to those employed in the EU context, despite the fact that the stated objectives of the GATS and the NAFTA are markedly different from the EU where integration is concerned. This arguably means that, in the areas of domestic social and economic policy, these trade agreements are likely having an integrative effect of some kind. Since integration (of any kind) is a stated objective of neither the GATS nor the NAFTA, one might anticipate that such a prospect will slow down the development of policy accommodation between multilateral trade policy and domestic regulatory policy as different domestic actors struggle to identify what integration could mean politically, economically, and socially. This slow down of policy accommodation will likely occur at the level of politics, policy, and intellectual thought.

At the political level, concern has already manifested itself in countries like Canada about the scope and pace of

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<sup>10</sup> Cooper foreshadowed the potential for integration (that is, joint determination of economic and social objectives and policies) as a possible method for dealing with greater economic interdependence. He also explored other methods, such as protectionism, for dealing with such interdependence. See, Cooper (1968).

services trade liberalization. Civil society groups are convinced that the nature of the contact between multilateral trade policy and domestic regulatory policy is a zero sum game (Sinclair, 2000:7). In effect, they are not convinced that all states party to the agreements fully accept or are capable of implementing a policy accommodation approach either sectorally or on a cross-sectoral basis. They are therefore leery of what integration might look like socially and economically. More fundamentally, civil society groups question the democratic legitimacy of the nature of integration that might result from a policy accommodation approach. They wonder about the effect of such an approach on fundamental questions like political and social organization as well as on human rights.

At the policy level, the prospect of integration leads policy-makers towards the task of devising policy mechanisms which produce policy accommodation but do not exceed the level of integration identified by domestic political institutions as necessary or desirable.<sup>11</sup> Broadly, then, the most obvious question for policy-makers to ask is what will be the nature of the policy accommodation given domestic political imperatives. For movement of service

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<sup>11</sup> Mechanisms for MRAs, for example, may range from *laissez-régler* to *enhanced policed regulation* to *mutual recognition and harmonization* (Nicolaidis and Trachtman, 2000).

suppliers, policy accommodation will be a difficult task to accomplish, especially given the dynamic and sensitive nature of this issue in terms of immigration and labour market development policy as well as developing country and business needs for multilateral movement of service suppliers. Here, achieving the objectives of both liberal international trade policy and domestic regulatory policy simultaneously will require creative policy-making where, for example, domestic regulators dealing with labour market development and immigration policy begin to think of their issues in terms of liberal international trade policy and trade policy-makers begin to think of their issues in terms of regulatory policy.

At the intellectual level, the prospect of a policy accommodation approach which results in integration is not well thought through. First, intellectuals need to remind themselves of the way liberal international trade policy and protectionism long co-existed to shape the postwar international trading system. This co-existence then needs to be considered in light of the contemporary context, particularly developing country trade needs, the more widespread use of communications technology, and the multiple and complex ways domestic interventionism (including its connection to protectionist domestic



policies) has operated in sophisticated industrialized states. Second, the implications of implementing non-discrimination and market access trade principles need to be more seriously addressed from an economic as well as social domestic policy perspective. Such a task might naturally fall to the discipline of political science. However, this discipline has also organized itself largely along the lines of separating liberal international trade policy from national economic and social policy-making, with the result that it is ill-prepared to consider a policy accommodation approach.

International relations and the sub-discipline of trade policy have traditionally focused on the workings of multilateralism while leaving the study of domestic political, economic and social institutions to the comparativists. Certain aspects of the sub-discipline of political economy have begun to address the contact between the domestic and international spheres (Stubbs and Underhill, 1994) but these are not yet well developed within the discipline, particularly with regard to trade policy. Instead, what is needed is for multilateral trade policy, both the technical and theoretical implications of non-discrimination and market access, to be more thoroughly integrated into both comparative politics, developed and

developing, and international relations, especially international political economy. In effect, intellectual accommodation between comparative politics and international relations needs to occur. It is unclear if this approach can be made to happen given the difficult technical nature of trade policy, a difficulty which increases as it subdivides along complex sectoral lines. In a preliminary way, this thesis is an example of such an accommodation approach where movement of service suppliers is concerned.

Interestingly, the challenge of integration raised by the policy of accommodation seems to call fundamental state sovereignty issues into question. To the extent that deeper integration is the result of such a policy, it is possible to speculate that its implementation will lay the foundation for an entirely new form of global political organization whose form is conditioned by such accommodation. Undoubtedly, this point raises larger theoretical and practical questions which cannot be resolved here but which merit further attention in the future.

For example, in terms of movement of service suppliers and the challenge of integration, whatever accommodation policy is chosen will have an impact on the traditional notion of borders and territoriality. This reality goes to the heart of the state system which, fundamentally, is about

defining and justifying the conditions of membership, "...who may become citizens and who must remain strangers..." (Trebilcock and Howse, 1995:367). As Trebilcock and Howse point out, the discussion within western democracies about *immigration policy* gives rise to a variety of modern theoretical debates about liberty and community (Trebilcock and Howse, 1995). In important ways, these debates speak to wealth generation and distributional issues with regard to who is allowed to enter and to remain. However, in the case of movement of service suppliers and trade agreements, the emphasis on *temporariness* adds another dimension to understanding the implications of the form of accommodation chosen. Here, postmodern notions of territoriality, unbound by traditional understandings of borders, likely provide fruitful paths for investigation (Ruggie, 1993:150-151). From a postmodern perspective of territoriality, for example, borders could be conceived as ending wherever a person is located and not where a state's

physical territory ends.<sup>12</sup>

At this thesis has demonstrated, there are multiple perspectives from which to think about trade agreements and the movement of service suppliers. These range from the political to the technical detail of trade negotiations, from developed to developing country concerns, from historical to linguistic analysis. All of these perspectives speak to the overarching context in which policy-making of this kind takes place, namely how to reconcile liberal international trade policy with nationally determined economic and social policy. They also demonstrate the need to find accommodation between liberal international trade and domestic regulatory policies where movement of service suppliers is concerned.

It is unlikely that those engaged in commerce will ever be accommodated by governments to the same extent that they are in Voltaire's *Candide*. Notably, however, *Candide* and his manservant receive non-discriminatory treatment at the

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<sup>12</sup> Understanding the nature of borders and the implications of their existence/alteration/removal is a complex topic which can be considered from various perspectives. In the Foucauldian sense, for example, borders might be conceived as "disciplines" which integrate individuals into a homogeneous social body (no matter what their physical location) where individuality becomes important only to measure the distance from what is "normal". As Foucault writes, "discipline fixes; it arrests or regulates movements; it clears up confusion; it dissipates compact groupings of individuals wandering about the countryside in unpredictable ways" (Foucault, 1977:219). 'Cosmopolitics' provides another way to consider the changing nature of borders. See Cheah and Robbins, eds. (1998).

inn despite the fact that they are not from Eldorado. Such non-discriminatory treatment is integral to the multilateral trading system both on an MFN and national treatment basis. In the area of services trade and movement of service suppliers, such treatment brings the international trade and domestic regulatory contexts into contact. This contact makes accommodation between these two spheres imperative, both to practice and to theory. From the perspective of 21<sup>st</sup> century trade in services policy, reaching Eldorado means ensuring that this accommodation takes place.

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