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The GATS and the Mobility of Service Suppliers

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Abstract: This paper argues that the issue of labour mobility as it is included in the GATS is played out in terms of labour mobility that is undertaken in conjunction with foreign direct investment versus that which occurs independently. This debate has been played out in countries' schedules of commitments and continues to create tension between trade officials and domestic regulatory officials in the spheres of immigration, labour market development, and professional accreditation. Resolving this tension should be explored at the conceptual level via the migration literature and, at the practical level via increased dialogue between all officials concerned both domestically and internationally.

Key Words: foreign direct investment, GATS, guest workers, labour mobility, labour services, WTO

Introduction

The General Agreement on Trade in Services (GATS), signed in 1994, is one of many agreements that exists under the aegis of the World Trade Organization (WTO). It is the only one that provides for the mobility of persons, particularly the movement of service suppliers. Under the current negotiating mandate, negotiations to expand liberalization of the movement of service suppliers under the GATS are to be launched in Seattle in December of this year.

This paper will begin by exploring why the mobility of persons became a subject of interest during the Uruguay Round and how it came to be conceptualized as a “mode” within the GATS. It will then go on to describe how country commitments to liberalize the movement of service suppliers is organized and briefly identify grey areas typically present in the schedules. Next, this paper will discuss how the liberalization of service produces tension between trade officials and domestic regulators particularly with regard to security (immigration), redistribution (labour market development), and standards and consumer safety (professional associations). Finally, this paper will identify some conceptual and practical suggestions for resolving this tension.

The Growing Importance of Trade in Labour Services

The movement of people over borders to deliver services gained heightened attention in the late 1970s and 1980s primarily because of two interrelated reasons. As foreign direct investment (FDI) by developed countries increased dramatically during this period, businesses found it necessary to send managers and executives abroad to ensure the success of new foreign ventures. This foreign investment increased the demand by multinational corporations (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, expand with them geographically, 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. It is the demand for business services which has fueled the push for liberalization of movement of service providers by developed countries.

Large MNCs exporting business services in the 1970s and 1980s established offices abroad in many different countries either through FDI or network affiliates.¹ From here, they sent service providers abroad to work in these offices for both short (under one year) and longer periods of time. The business services most in need of mobility for service suppliers and which we are focusing on here — accounting, legal, management consulting, advertising — require varying degrees of education and licensing. Lawyers, for example, require professional graduate degrees in most countries and are subject to an extensive regulatory structure. Management consultants, in addition to executives and managers, are not necessarily required to have formal training or be licensed. All, however, are considered to be “professionals.”

At the same time as the business service industry was looking in the 1970s and 1980s to export services beyond its developed country base, developing countries were also placing increased importance on exporting labour services. Their industry focus included health services, child and home care services, construction services, tourism services, and more recently, computer services. These services also required varying degrees of education and licensing requirements and included “non-professional” workers.

Unlike business services, these services supplied by developing countries do not require foreign direct investment to be delivered. Rather, the service workers use the facilities at their disposal in the host country. Service suppliers from developing countries have not broken into developed country markets in service sectors requiring foreign direct investment because they do

¹ 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). Since most of the growth in business services has been driven by large companies investing abroad to deliver their services, they gain the bulk of attention in this paper.

not have the resources (either financial or in terms of trained personnel) to do so. For many developing countries, exporting labour services has served as a valuable source of foreign exchange. In some cases, “guest worker” programmes supplying low-skilled services have been in place since the 1960s. The obvious example here is Turkish workers in Germany.

All of these service suppliers, whether from developed or developing countries, have faced various barriers to entry 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.

The Creation of Mode 4 within the GATS

As services have come to represent an increasing share of employment in the past 30 years, often over 70% in developed countries, they have increasingly drawn the attention of not only economists but also sociologists, political scientists, and now trade negotiators. Services are considered to be the glue of any national economy since they are embodied not only in the latest technological products created by high-skilled professionals, but are also present in so-called basic social and economic activities like education, child care, and health care, as well as in basic infrastructure such as transportation and energy networks. Often, goods and services are closely related and not easy to separate (such as products delivered through electronic commerce). The heightened importance of value-added has increased the prominence of services in goods production and delivery in recent years.

Because services seem to be everywhere and in everything, they are hard to define. No one hard and fast definition of services exist, although Hill’s definition from 1977 is often quoted:

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).²

Other scholars have noted that the benefits of services are often difficult to describe, that the consumer is often a central element in the production, transfer and exchange process, that there is often a lack of homogeneity in service provision, that there are often problems in controlling the quality of services (Akehurst 1987), and that information flows are central to service provision (Feketekuty 1988). All of these characteristics of services manifest themselves in barriers to services trade, particularly the movement of service providers.

In taking these definitional issues into account, service negotiators during the Uruguay Round (1986-1994) initially conceived of three ways in which services could be supplied: on a cross-border basis (from the territory of one Member into the territory of any other Member); by the movement of a consumer to another country to consumer a service; by skilled individuals or corporate suppliers on a temporary basis. The latter category combined temporary movement and commercial presence (or FDI).

Developing countries were initially opposed to negotiating an agreement on trade in services for three reasons. First, they felt that such negotiations would divert developed countries away from agriculture and industrial goods negotiations in which developing countries had significant interests. Second, lack of research meant that developing countries doubted whether they possessed a comparative advantage in any service sector or any mode of service delivery (Drake and Nicolaidis, 1992:77). By 1990, however, the United Nations Conference on Trade and Development (UNCTAD) had completed research on various service sectors in several developing countries which indicated that developing countries did indeed possess a comparative advantage in certain sectors especially if they were able to deliver these services via the mobility of individual service suppliers (UNCTAD 1989, 1990). In particular, they identified comparative

² 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).

advantages for developing countries in the health sector, the construction sector, the transport sector, the computer services sector, and the tourism sector. Only health and perhaps computer services required professionals. Third, developing countries were concerned that an agreement on trade in services which included provisions on investment would leave them vulnerable to MNCs who would overwhelm their undeveloped service sectors and not prioritize their development concerns.

This led developing countries, such as India, to argue for a separate category for all forms of temporary movement which would be included in any agreement on trade in services. A separate category would not only include non professionals but would open up trade in services through the movement of service suppliers independent of investment or commercial presence. For developing countries, then, this separate category became their price for including investment in an agreement on trade in services.

This strategy was initially resisted by developed countries which had hitherto only imagined that certain forms of professional services would be included in any agreement, particularly those professional services required in conjunction with commercial establishment. The temporary movement of non professionals appeared to raise all kinds of additional domestic regulatory problems for developed countries in terms of immigration regulations, labour market development regulations, and consumer safety. However, by 1992, developed countries, under pressure from domestic service industry lobbies as well as the need to finalize the Uruguay Round, finally agreed to this tradeoff. As a result, the GATS includes four modes of supply: i) from the territory of one Member into the territory of any other Member; ii) in the territory of one Member to the service consumer of any other Member; iii) by a service supplier of one Member, through commercial presence in the territory of any other Member; iv) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

Given that the inclusion of mode 4 regarding presence of natural persons occurred toward the very end of the negotiations, not many commitments were made to liberalize with regard to this mode, particularly by developed countries. Consequently, the GATS included a “Decision on Negotiations on Movement of Natural Persons,” which established a Negotiating Group on

Movement of Natural Persons to provide six months more negotiating time for mode 4 liberalization. This decision recognized that mode 4 liberalization was necessary for the increasing participation of developing countries in services trade and that higher commitments for this mode were necessary to achieve a balance of benefits for all Members. In effect, this decision made a direct and explicit link between mode 4 and the interests of developing countries.

In addition, a “Decision on Professional Services” was included in the GATS which recognized that movement of professionals could not occur unless regulatory measures such as qualification, standards and accreditation requirements, right to practice requirements, and so on, were disciplined according to Article VI(4) and Article VII of the GATS. This decision created a Working Party on Professional Services to elaborate these disciplines, particularly where accountancy was concerned. Since the export of professional services like accountancy was primarily a developed country concern, this decision was mainly of interest to developed countries.

The GATS also included an “Annex on Movement of Natural Persons Supplying Services under the Agreement.” This Annex attempted to define the relationship between supplying services via labour mobility and control over national security issues and entry into domestic labour markets. In particular, it emphasized that,

The Agreement shall not apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis. . .

The Agreement shall not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and 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. . . 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.

In short, this annex ensured that domestic regulatory policy areas such as immigration and labour market development continued to be meaningful and enforceable under the GATS. However, since the purpose of the GATS was to liberalize, among other things, mobility of service suppliers, this annex appeared to contribute to a contradictory tension between trade

liberalization and domestic regulation. This tension has been played out in the scheduling practices where it is difficult to understand what countries have committed to under mode 4.

Scheduling Commitments to Liberalize Mode 4 under the GATS

Commitments to liberalize mode four under the GATS are listed in Member countries schedules of commitments. Most Members have explained in the horizontal section of the schedules under market access what commitments they are making (“unbound, except for. . .”), and then listed any exceptions or additional restrictions in the sectors section of the schedules.³ Many developed and developing country Members have made horizontal commitments with respect to business visitors, intra-corporate transferees (especially executives, managers, specialists), and professionals. Within these horizontal commitments, they have tried to define who these commitments apply to by specifying duration of stay, pre-employment criteria, scope of activity, employment responsibility, type of employment (such as contractual), type of profession, requirement of commercial presence, economic needs test (or labour market test), and technology transfer requirements (e.g. requires x number of understudies). In the sectors section of the schedules, commitments will often refer back to the horizontal section or will list additional requirements especially concerning citizenship or residency requirements and/or certification requirements.

Although the schedules of commitments for mode 4 may appear very detailed, they actually leave out a great deal of information a service supplier may need to enter a country using mode 4. For example, labour market development officials are left with wide discretionary power in implementing economic needs tests or determining scope of activity. Immigration officials also retain broad discretionary powers in issuing visas and in defining “specialist” on a case-by-case basis. In the American schedule (United States of America 1994), all intra-corporate transferees are subject to an INS petition process to obtain a visa, though this is not indicated in its schedule.

³ Under Article XVI of the GATS, members are allowed to take exceptions in the schedules in six areas including the total number of persons that may be employed in a particular service sector in the form of a quota or the requirement of an economic needs test.

Furthermore, quotas are attached to the entry of foreign skilled workers arriving under the H1-b visa. The European schedule provides only a limited temporary period of three months for contracted work and does not otherwise specify duration of stay, which is regulated nationally (European Communities and their Member States, 1994 and 1995). The Mexican schedule does not make clear for how long intracorporate transferees are allowed to work in Mexico and professionals are completely excluded (Mexico 1994). The exclusion of professionals is common in many developing country schedules.⁴

Generally speaking, commitments under mode 4 are significantly less extensive than those found in the other three modes (Council for Trade in Services 1998). Although the additional six months of negotiations provided for in the “Decision on Negotiations on Movement of Persons” produced additional commitments from six countries including the EU in terms of contractual work and Canada in terms of additional professions listed, commitments continue to be very limited. Moreover, the commitments are biased with regard to professional labour and with regard to their close link, in practical terms, to mode 3 (commercial presence). That is, many commitments also require a commercial presence to be useful though this is not necessarily apparent at first glance. Mode 4 commitments, which are linked to mode 3, are mainly of use only to developed countries.

Domestic Regulation and the Mobility of Service Suppliers

Liberalizing the mobility of service suppliers under the GATS is complicated not only by scheduling opaqueness, but also by domestic regulatory practices. Article VI(4) of the GATS makes some effort to remedy this problem. This article is designed to allow members to simultaneously maintain domestic regulatory policies regarding qualification requirements and procedures, technical standards, and licensing requirements and ensure that any trade distorting effects of those policies are minimized as much as possible. It proposes to do this by ensuring that relevant domestic regulatory policies are based on objective and transparent criteria, no more

⁴ For more discussion on scheduled commitments, see Young 1999b.

burdensome than necessary to ensure the quality of a service, and, in the case of licensing procedures, not in themselves a restriction on the supply of a service.

Domestic regulatory policies are not scheduled in the GATS unless members make additional commitment with respect to qualifications, standards or licensing matters. These commitments would be scheduled under Article XVIII Additional Commitments. Most country schedules contain no commitments under Article XVIII. This is presumably the case because countries would rather first negotiate such commitments under the disciplines set out by Article VI(4) than give anything away unilaterally either with regard to making their domestic regulatory policies more transparent or with regard to actually changing them. As mentioned in the “Decision on Professional Services,” a Working Party on Professional Services at the WTO handled this negotiation (initially on accountancy) after the GATS was agreed to by member countries. This working party has since evolved into the WTO’s Working Party on Domestic Regulation. Domestic regulatory issues will presumably be looked at during the next round of multilateral trade negotiations.

Liberalizing the mobility of service suppliers means having the GATS come to terms with three important domestic regulatory areas: immigration (often regulated by government authorities at the national level), labour market development (regulated by government authorities nationally and/or sub-nationally), and professional standards (regulated by private professional associations either nationally or sub-nationally who have been often been given this authority by governments).⁵ These three domestic regulatory areas generally exist for the purpose of protecting national security (immigration), redistributing wealth (labour market development), and maintaining standards to ensure consumer safety (professional associations).

From an immigration perspective, the movement of service suppliers creates new border control concerns. 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, not facilitate the entry of service suppliers. Second, immigration

⁵ The latter two - labour market development and professional standards - are particularly relevant to the disciplines present in GATS Article VI(4) on domestic regulation.

regulations must prevent foreigners from working in certain sectors deemed security related. Third, immigration officials are required to verify documentation concerning skill level and accreditation in order to maintain standards and ensure consumer safety. This requires coordination with professional associations or other standards setting bodies. Fourth, immigration officials must determine (according to pre-set criteria) length of time allowed in the domestic market as well as the length of any requested extensions. This function requires coordination with or on behalf of labour market development officials.

From a labour market development perspective, the main regulatory concerns are: determining length of time in the domestic market; ensuring that minimum working conditions are enforced; identifying and implementing quotas, and; determining the conditions of any economic needs or labour market tests which may need to be conducted before entry can be permitted. Implementation of these regulations must be coordinated with immigration officials.

From the perspective of maintaining standards and consumer safety, the main regulatory issues for professional associations concern regulating entry to ensure qualification requirements and procedures, technical standards, and licensing requirements. Implementation of these regulations must be coordinated with immigration and often labour market development officials.

These domestic regulatory functions raise new issues in the context of liberalizing the movement of service suppliers within the context of the GATS. First, more resources are needed for immigration authorities to deal with extra visa administration, verification of documents, and tracking requirements. Second, new coordination functions must be organized between domestic regulatory agencies. In addition, a better understanding of service supplier impact on labour markets and consumer safety needs to be developed. The lack of understanding in this area is illustrated in the debate over the length of stay in the domestic market.

Currently, trade officials and trade-oriented academics contend that where service suppliers do not become residents or citizens, they remain temporary entrants and therefore do not enter the local labour market regardless of the length of their stay in that market. This argument is predictable because trade officials view this mobility positively in terms of increasing trade flows. Domestic regulatory officials, on the other hand, view stays of longer than one year as de facto entry into the local labour market. Such entry raises complex and often sensitive

distributional and security issues concerning visa renewals, tax collection, benefits provision, right to establish and to practice requirements, domestic educational training, union membership, employment in sectors considered to be of interest to national security, and so on. From a developing country perspective, longer-term stays also raise issues concerning employment creation effects, the scope and extent of technology transfer, balance of payments effects, and market and development interlinkages (UNCTAD 1989:327).

Suggestions for Future Research and Practical Action

Clearly there is a need to bridge the gap between the gains to be had from the increased mobility of service suppliers and the legitimate concerns of domestic regulatory officials. Here it may be useful for researchers to turn to the migration literature for ideas on how to bridge this gap. Although this literature has traditionally been pre-occupied with understanding permanent migration flows (World Bank 1988:4), in the last decade it has begun to give more attention to new issues such as the association of international migration with formal political relationships between states (such as regional and multilateral trade agreements), international migration as a component of the global economic order, and a focus on temporary movement as opposed to permanent migration (Salt 1987).

In conjunction with GATS provisions and trade literature arguments concerning the promotion of economically efficient domestic regulation and the need to liberalize services trade (Hoekman and Messerlin, 1999; Mattoo, 1999), there are at least three themes needing more attention by migration and trade researchers (in both developed and developing countries) where mobility of services suppliers is concerned: the development of an international skills markets;⁶ the impact of the temporary movement of suppliers on domestic labour markets,⁷ and; the regulatory response of these labour markets to temporary movement.

⁶ On the trade side, more attention needs to be given to occupational classification issues concerning service suppliers. A potentially useful place to start would be with the ILO's International Standard of Classification of Occupations.

⁷ Improved statistical collection will be important in this regard. See, Council for Trade in Services 1998, pp. 9-11; Henderson 1997.

At a more practical level, there is clearly need for more dialogue at the domestic level between trade officials and immigration officials, labour market development officials, and standards setting bodies. Trade officials need to better understand the challenges and complexities of regulating borders, developing labour markets, and protecting consumers, while immigration and labour market development officials and standards setting bodies need to have a better grasp of the technical details of services trade agreements, the motivations which have produced them, as well as the actual and potential benefits they are able to produce for both economies and societies. At the same time, more dialogue is needed at the international level among immigration officials and among labour market development officials in order to compare temporary movement impact and regulatory responses to this impact.⁸ With more research and dialogue, it will be possible to generate new ideas for deepening commitments to liberalize the mobility of service suppliers while continuing to achieve domestic regulatory objectives. This will serve not only to strengthen the GATS, but also to produce domestic regulatory policies, which are relevant for both domestic and global socio-economic realities.

⁸ International dialogue on immigration issues occurs sporadically between Australia, the UK, Canada, and the United States in a forum called the Four Country Conference. The last one was held in San Francisco in April 1999. Dialogue also occurs among developed countries in the Working Party on Migration, OECD. Here, there is increased focused on trade and temporary movement issues. See, Young 1999a.

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