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COMMUNICATION FROM ARGENTINA, BOLIVIA, CHILE, THE PEOPLE'S REPUBLIC OF CHINA, COLOMBIA, DOMINICAN REPUBLIC, EGYPT, GUATEMALA, INDIA, MEXICO, PAKISTAN, PERU, PHILIPPINES AND THAILAND

Proposed Liberalization of Mode 4 Under GATS Negotiations

The following communication has been received from the delegations of Argentina, Bolivia, Chile, The People's Republic of China, Colombia, Dominican Republic, Egypt, Guatemala, India, Mexico, Pakistan, Peru, Philippines and Thailand with the request that it be circulated to the Members of the Council for Trade in Services.

I. INTRODUCTION

1. Proposals for liberalization of Mode 4 have been presented by some Members which have been discussed in the Special Sessions of the Council for Trade in Services. Members have also deliberated upon issues relating to Mode 4 in the bilateral request – offer meetings. This proposal is submitted for consideration by Members in the light of the above experience.¹ Its purpose is to highlight some elements related with Mode 4 issues that have been presented in different phases of the current negotiations and that require a deeper discussion in the Special Session of the Council for Trade in Services. The document aims to address some of the crucial issues that have been discussed in the bilateral request – offer meetings and during the discussions that have taken place in the on-going negotiations.

2. Current negotiations provide an opportunity to address a number of substantive and procedural issues concerning the liberalization of temporary movement of natural persons with the objective of attaining effective liberalization. Developing countries in general have comparative advantages only across a narrow range of service activities. The primary mode for most of these relates to Mode 4. Consequently, liberalization of this Mode would provide effective market access to service providers from developing countries and contribute significantly to the implementation of Article IV: 1(c) of GATS.

3. There is a much greater convergence of interests in Mode 4 between the developed and the developing countries in the current negotiations as compared to Uruguay Round. A strong impetus to

¹ This proposal is not a legal text. It is submitted solely for the purpose of negotiation and does not prejudice the position of any Member regarding the issues raised in it. The proponents reserve their right to modify or complement the contents of this proposal at a later stage.

such movement is the large gap between the projected needs and the local availability of certain categories of personnel in developed countries, further accentuated by their increasingly aging populations. Welfare gains from freer movement of natural persons would, therefore, accrue to both groups of countries as has been documented in recent studies. For example, studies by Prof. Alan Winters has shown that increasing developed countries' quotas for incoming Mode 4 by 3% of their labour forces would generate annual gains of more than US\$ 150 billion.²

4. Till date, 26 Members have submitted initial offers of specific commitments. Most of these offers do not include any substantial improvements to existing specific commitments in Mode 4. Some Members have not introduced any improvement to the existing commitments, others have introduced some minor changes aimed at clarifying and in some cases expanding the scope of commitments. Commitments continue to be basically limited to categories of personnel related to commercial presence while developing countries are interested in commitments for categories delinked with commercial presence also. While it is recognised that this is the first set of offers, many developing countries have expressed disappointment at the level of ambition shown in this area, which is crucial for many of them.

5. In view of the facts mentioned above, we consider that these issues need to be discussed multilaterally in order to provide effective market access in Mode 4 including in the context of the "Implementation of paragraph 15 of the Guidelines and Procedures for the Negotiations on Trade in Services (S/L/93)" established in the Agenda of the Council for Trade in Services in Special Session.

II. ELEMENTS THAT NEED TO BE DEALT WITH IN THE SPECIAL SESSION OF THE COUNCIL FOR TRADE IN SERVICES

A. NATURE OF COMMITMENTS

6. Commitments in Mode 4 are primarily horizontal and bound for only a small subset of personnel related to commercial presence and at higher levels of skills. There is an asymmetrical absence of commitments for categories of personnel delinked from commercial presence and at lower skill levels, areas in which developing countries have comparative advantage. Recognition of common categories of movement, both linked to as well as delinked from commercial presence in the horizontal commitments of Members could prove useful and valuable. The objective is not to achieve perfect harmonization of categories in the domestic regimes of all Members, but use of certain common categories of interest to all Members. Such categories could include: (a) Intra-corporate Transferees (b) Business Visitors (c) Contractual Services Suppliers (d) Independent Professionals.

7. Sector specific commitments for most Members are unbound and refer to the commitments in the horizontal section. This does not seem to address specific sectoral commitments where deeper liberalization is being sought compared to the general horizontal commitment and cases of additional skill levels not covered in broad horizontal commitments.

8. To provide adequate certainty and predictability in the commitments that would lead to effective liberalization, it is necessary to analyse the extent to which sector specific commitments could complement the horizontal commitments.

² Winters LA (2002) – "The economic implications of liberalizing Mode 4 trade" – Paper prepared for the Joint WTO –World Bank Symposium on "The Movement of Natural Persons (Mode 4) under the GATS", Geneva, 11-12 April 2002.

B. ADMINISTRATIVE PROCEDURES

9. Restrictions on the Entry and Stay of Service Providers: Measures related to the entry and stay into other Members' territory like visas or work permits are serious administrative obstacles to temporary movement of persons, largely eliminating the value of any commitments made by Members. The problem relates both to lack of transparency and to procedural delays and hurdles. The problem seems to be the inability to clearly separate the temporary movement of service suppliers from permanent immigration and the application of the normal immigration rules and procedures to even temporary movement under GATS. Consequently, the real challenge and solution is to devise effective ways of differentiating between these two.

10. Some Members have proposed in the past establishment of a separate visa or separate sub-set of procedures for temporary movement leading to a more transparent, timely and less burdensome grant of visas for temporary movement under GATS.³ There is a need to further examine this concept. As is also evident from the submissions to the Special Session of the Council for Trade in Services, there seems to be a growing convergence on the need for additional commitments regarding transparency and procedural aspects affecting temporary entry and stay to ensure full implementation of market access commitments on Mode 4.⁴ Transparency and due process regarding the granting of entry visas or permits could be a positive way to ensure that market access concessions are not nullified or impaired by onerous and non-transparent criteria and procedures.

11. Economic Needs Test: major entry barriers exist in the form of Economic Needs Tests (ENT), Local Market Tests and Management Needs Tests to ascertain the need for entry as well as the number to be allowed to enter. The ENTs are artificial barriers preventing free movement of labour. Further, the conditions on which they are based have not been clearly specified and defined, leaving complete discretion in their application thereby reducing the predictability and certainty of the commitment. Elimination of such ENTs for the identified categories of movement of service suppliers referred to in Paragraph 6 of the proposal could remove one of the fundamental barriers to free movement. Some Members have made similar proposals in the past.⁵

C. RECOGNITION OF QUALIFICATIONS

12. The ability of natural persons to supply services in developed country markets is also adversely affected by the lack of recognition of professional/ equivalent qualifications and licensing requirements. These requirements may either prevent market access for the foreign service provider and denial of work permit or visa, or may limit his scope for work to specific activities once he enters the overseas market, preventing him from providing service.

13. It may be necessary to look at possible approaches for addressing this issue:

- (a) Development of disciplines under Article VI:4 of GATS covering the areas of qualification requirements and procedures, licensing requirements and procedures and technical standards.
- (b) Possibility of undertaking Additional Commitments under Article XVIII of GATS for verifying a foreign service provider's competence to provide the service with a view to laying down a transparent procedure for recognition and to reduce the burdensomeness of domestic regulations on this score. The concept could be to introduce a hierarchy of measures with the burden of proof being placed on the domestic regulator to move from a less burdensome

³ Communication from India: S/CSS/W/12, 24 November 2000.

⁴ Communication from the European Communities and their Member States, S/CSS/W/45, 14 March 2001, Communication from Japan S/CSS/W/42/Suppl.2, 6 July 2001. Communication from Canada S/CSS/W/48, 14 March 2001, Communication from the United States S/CSS/W/29, 18 December 2000.

⁵ Communication from MERCOSUR – S/CSS/W/139, 20 March 2002.

measure to a more burdensome one. For example, it may be considered that administering a test of service provider's competence and/or educational attainment to verify the foreign service provider's competence is the least burdensome measure. Only where it was *necessary* would a foreign service provider be required to make up objectively verifiable deficiencies in their education, training and experience.

- (c) Strengthening the framework for Recognition Agreements under Article VII of GATS through:
- (i) Compliance with notification and consultation requirements under Article VII:4(a), (b) and (c) for improving transparency and for providing adequate opportunities to third country Members to negotiate accession to such an agreement or to negotiate comparable ones with it.
 - (ii) Development of possible multilateral guidelines and principles guiding the establishment of such Recognition Agreements taking a cue from the Accountancy Sector guidelines and building on them with a view to exploring their inclusion as an Additional Commitment under Article XVIII of the GATS.

D. FRAMEWORK FOR A POSSIBLE SOLUTION

14. In order to build a possible framework for liberalization of Mode 4, Members may consider devising a Model Schedule for Mode 4 commitments so as to bring about greater uniformity and predictability in the commitments. The Model Schedule would also address other limitations mentioned in this proposal relating to administrative procedures, recognition of qualifications etc. so as to enhance the real value of the market access commitments.

III. MECHANISM FOR MOVING FORWARD THE DISCUSSION ON MODE 4

15. We consider that the following mechanism may be in order to move the process forward:
- (a) Given the crucial commercial significance of liberalization in Mode 4 to the developing countries and its major contribution to operationalization of Article IV:1(c) of GATS, it may be discussed in the Special Sessions of the Council for Trade in Services under the Standing Sub-agenda item of "Implementation of Paragraph 15 of the Guidelines" (S/L/93)
 - (b) Continuous evaluation and assessment of the extent to which Members' offers would provide effective market access in Mode 4 to developing countries to ascertain the results attained in terms of the objectives of Article IV of GATS as provided for in Paragraph 15 of the Guidelines for Negotiations (S/L/93).
16. We look forward to active engagement of Members on this proposal.
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