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May 22, 2001

Ms. Gloria Blue
Office of the U.S. Trade Representative
600 17th Street, N.W.
Washington, DC 20508

Dear Ms. Blue:

In response to your April 5, 2001, "Federal Register" notice soliciting comments on objectives for the upcoming WTO Doha Ministerial, PricewaterhouseCoopers is respectfully submitting our views on the four submissions related to Mode 4. In addition, we are attaching a draft model schedule that we have formulated to stimulate discussion and action on this issue, in an effort to eliminate the costly, cumbersome and time-consuming procedures for granting work permits and visas to professional people; and to make the process for obtaining such authorization more clear and predictable.

The four proposals on the temporary entry of persons have been submitted as part of the exercise of negotiating proposals in the current round of services negotiations being conducted under the auspices of the Council on Trade in Services. Delegations that have addressed this aspect of trade in services are: the United States, India, Canada and the European Communities. Additionally, of the 42 negotiating proposals to date 23 of them have made reference to mode 4.

1. **India.** This is the most comprehensive and ambitious of the four proposals, and is the product of considerable early research by an Indian think tank that produced a very lengthy paper on the subject a number of months prior to a November 24 submission by the government. The Indian proposal consists of the following key elements for negotiating purposes:
 - (a) GATS visa. The Indians believe that the creation of this special visa category is necessary for two reasons: (1) to de-link ordinary immigration rules from those of temporary entry, on the theory that most immigration rules pertain to permanent residence and stay, and (2) the ability to expedite the process of granting visas, with greater flexibility for visas on shorter notice; strict time frames in which authorities must grant a visa (2-4 weeks); and greater transparency in the streamlined application process. The GATS visa would be available for select companies and for select categories of service providers who wish to send their employees abroad temporarily.

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- (b) Sector coverage. India proposes to strengthen horizontal commitments (those that apply to all scheduled services sectors) that define more precisely certain categories, such as "other persons" and "specialists", with the objective of reaching lower skill levels. The use of the ISCO classification listing becomes quickly outdated, is frequently vague, and reaches well beyond professionals. In addition, they propose the adoption of sector specific obligations in mode four, particularly for professional and business services. They feel that greater disaggregation of categories can enable members to establish greater flexibilities in spelling out market needs in the various sectors.
- (c) Economic Needs Test Criteria. India believes that economic needs tests frequently restrict the number of foreign workers who can enter a country. It proposes that criteria be established to applying the tests, as well as the establishment of norms that would help assess how needs tests restrict the entry of foreign workers.
- (d) Norms to address social security issues. India has noted for some time that the absence of totalization agreements between developed and developing countries means artificially higher costs for Indians entering these markets in the form of social security taxes that are never repatriated. India's proposal calls for the negotiation of such bilateral agreements to remove what they regard as a trade distortion.
- (e) Qualifications requirements. The Indian proposal devotes some length to a discussion of Mutual Recognition Agreements (MRA) among the professions as an important impediment to the ability of its professionals to provide services through mode four. It calls for prompt notification of these MRA's to the WTO, as required under GATS, thus providing countries, such as India, the opportunity to benefit from the MRA's as well. It also calls for the development of "minimalistic" accreditation standards in education, experience, and work-related credit to overcome ordinary national requirements to meet these professional requirements.

Conclusion: This is a very ambitious proposal. Its call for greater transparency and speed in granting visas goes to the heart of every country's frustration in this area. We endorse the concept of a GATS visa for expedited intra-company transfers and for companies sending employees on a contractual basis not linked to commercial establishment. Additionally, we agree that Economic Needs Tests must be made fully transparent and have some accountability in order to avoid the danger of subjectivity.

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However, to address social security totalization agreements and professional qualification requirements would take on other bureaucratic firewalls that could easily sink the proposal. Finally, India's proposal to include lower skill levels, while predictable at this early stage of the negotiating process, is a potential red light to labor interests who might declare it dead on arrival.

2. **United States.** The U.S. proposal calls for the same "tailored" approach for negotiations for temporary entry, as was the case for basic telecommunications and financial services, thus suggesting that these negotiations somehow should be de-linked from other services negotiations. This one page submission focuses solely on transparency improvements as the vehicle to accomplish improvements in the area of temporary entry.

It proposes that two aspects of regulation be examined: (1) Greater access to information to the laws and regulations covering temporary entry, as well as access to the procedures and application materials to this area. (2) Greater transparency through obligations that governments must respond promptly to visa applications; to explain why such applications were denied; and the ability of interested parties to comment on proposed regulations.

Conclusion: The U.S. proposal reflects the absence of any real consensus within the Executive Branch (or the Congress) as to whether much more can be done to improve market access opportunities in the sensitive area of temporary entry. By any standard, however, the U.S. proposal is sparse. We support its attention to transparency, but even in this area, a set of best practices is needed, including needs tests standards. It should be noted that some elements of the U.S. transparency proposals are already incorporated in GATS. While the need for transparency is real (especially outside the U.S.), this alone will not solve the problems faced by business in deploying their personnel.

3. **European Community.** The Community's submission builds around the theme of greater transparency of procedures and harmonization of work classification codes. It also hints at the objective of removing arbitrary economic needs tests. It contains the following elements:

- (a) In its introduction, the Community paper observes that, "taking account of wider sensitivities", improved commitments in the area of temporary entry of persons is desirable.

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- (b) While expressing a willingness to consider sectoral approaches, the Community's paper calls for building on the horizontal approach previously used ("Nevertheless, this will require careful study.") The paper observes—but stops short of proposing—a more harmonized and transparent system could be developed.
- (c) Special focus is laid to improving definitions of some of the oft-used categories in mode four commitments, such as managers, specialists, executives and senior personnel. It observes that the vagueness of these terms leaves room for administrative discretion, and thus discrimination.
- (d) It calls for particular attention to labor market needs tests, which the Community describes as fulfilling the role of a permanent safeguard measure.
- (e) Using its words carefully, the Community paper states that "Members should reflect" on the prospect of harmonizing the definitions referred to above, strictly in the context of intra-corporate transferees. It also calls for reflection on substituting the arbitrary economic needs test criteria with common code of practice in this area that would make ENTs more specific and transparent.
- (f) Improved transparency in the rules and regulations governing the issuance of visas, as well as well-defined information points, perhaps through websites, as a better means of obtaining this information.

Conclusion: The EU faces similar political obstacles as the U.S. in promising, at this early stage of negotiations, to increase the level of liberalization of commitments already undertaken in the Uruguay Round. Despite its qualifiers, the EU proposal makes clear that it has an interest in improvements in transparency, elimination of the arbitrary features on economic needs tests, and the harmonization of terms used in defining work categories. While this paper goes further than the U.S. proposal, it falls short of recognizing the vital need to find ways to bring about expedited procedures.

Canada. This proposal addresses both market access improvements and transparency issues, with comparatively greater emphasis on individuals from SME's who are not likely to have a commercial presence in a foreign country. It proposes:

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- (a) to improve commitments in mode four, including persons entering under contract, as well as the inclusion of business visitors and professionals;
- (b) improvements in the transparency and predictability of procedures, as well as the specification of criteria for economic needs tests; and greater clarity of information in the maximum length of stay under specified commitments;
- (c) the creation of an *ad hoc* group in the GTS to address these issues and a special seminar devoted to the subject that would bring in immigration officials to the debate.

Conclusion: While Canada's proposal is rather short on specifics, it is clear in its objective. Unlike the U.S. and the EU proposals, Canada makes clear its intention to seek improvements in the current schedules of commitments by all countries in the area of mode four. Its stress on small businesses without overseas offices is not surprising, as the SME theme is spread throughout Canada's negotiating proposals in other areas. But this is a serious proposal calling for some form of modality in Geneva to address mode four issues. We fully endorse the seminar approach and the formation of an ad-hoc group to explore mode 4 liberalization.

Sincerely,



Allen J. Weltmann

Enclosure

Cc/w/encl:

Joseph Papovich

Peter Collins

5/14/2001

**DRAFT
MODEL SCHEDULE
COVERING THE
TEMPORARY ENTRY OF NATURAL PERSONS
UNDER THE GENERAL AGREEMENT ON TRADE IN SERVICES**

I. Introduction

1. This draft "model schedule" is put forward as a basis to focus negotiations on the temporary entry of natural persons on a single document. It is divided into two parts. The first deals with market access and national treatment commitments under Part III of GATS. It is designed to supplement and improve the existing commitments WTO Members have already undertaken in the Uruguay Round and the extended negotiation thereafter. As a "model schedule", it is not designed as a "formula" of commitments that all parties are to assume. Rather, it is a specific proposal that is designed to generate improved commitments in this mode of supply, recognizing that Members may adopt different levels of obligations.
2. Existing obligations by nearly all WTO Member countries in the category of temporary entry of natural persons are structured to apply to all services sectors, and are therefore entered as "Horizontal Commitments" that either leave out no service sector, or otherwise apply to those sectors listed in their schedules of specific commitments. This follows the pattern of regulation in nearly all Member countries, where, with a number of exceptions, government measures governing the temporary entry of natural persons apply to all sectors. This model schedule follows the same structure, thus envisioning further entries in horizontal commitments pertaining to all sectors. However, it is recognized that it may be necessary for Members to schedule these commitments for a more limited set of services sectors, since they would entail a higher level of obligation. Nonetheless, the underlying presumption in the elements of the model schedule is that the obligation is assumed for professional skill levels, and that such a standard exists in virtually every service sector.
3. The second part of the model schedule, which is entitled "best practices", represents a set of proposed additional commitments under Article XVIII. This part essentially

encompasses domestic regulatory obligations that relate to the improvement of transparency of procedures. The objective of the second part would be for an acceptable number of Members to enter identical undertakings pursuant to Article XVIII, similar to the "reference paper" obligations in basic telecommunications. Some may question whether such regulatory obligations are "non-discriminatory", since they pertain solely to foreign persons entering the country, not nationals.

However, this issue of placement is a comparatively technical one, particularly at this early stage of the process. Of much greater importance is that they are inscribed in GATS Schedules of Commitments, and they are deliberately set apart from the obligations to Part 1 because there would be no discretion to take reservations from this particular set of obligations among those willing to make such commitments.

4. Finally, this proposed model schedule addresses exclusively the temporary entry of natural persons. As is clearly set forth in its "Annex on Movement of Natural Persons Supplying Services Under the Agreement", the GATS does not cover permanent residency or nationality.

I. Market Access and National Treatment

Note: To be applied in the "Horizontal Commitments" section of a Member's schedule.

A. The following provisions apply to two categories of persons entering countries on a temporary basis:

1. **Short-term, intra-company visits.** This category covers: (1) Employees of a subsidiary or branch of a company or a partnership or its affiliate in another country, and who enter that country for short periods of stay, up to 365 days, to provide assistance and advice to its foreign office, or otherwise directly provide a service to a foreign client; and (2) Employees of a company or partnership who are sent to its office in another country for training in business techniques or methods.
2. **Short-term visits to fulfill contracts.** Persons who are employees of a foreign-based company or partnership, who travel to another country for short periods of stay, up to 365 days, in order to perform a service pursuant to a contract between their employer and a foreign client located in a country where the employer does not have an affiliate office, and where remuneration must be paid solely to the employer.

B. Conditions and Qualifications.

1. Visas and work permits will be subject to the laws and regulations that apply to the temporary entry of natural persons in the host country, subject to the provisions specified below.

2. A special permit, entitled a "GATS Permit", can be obtained by nationals of one WTO Member country from another WTO Member country, when the applicant falls under the categories listed under (A) above.
 - a. For employees falling under Category 1 and Category 2 above, the GATS permit will be extended strictly to personnel with requisite qualifications to fill a professional-level position. These individuals should be responsible either for management of operations, or provision of services at a level of complexity and specialty that require, at a minimum, a university degree, or demonstrated experience.
 - b. Applicants seeking a GATS permit under both categories must fulfill certain specific requirements ordinarily imposed under existing procedures for intra-firm transferees intending to reside temporarily in the company's foreign office, such as information necessary to support the application, proof of employment with current employer, and declaration of intention not to stay for a period of more than twelve months.
 - c. For persons falling under Category 1, Members will authorize the GATS permit for a period of three years, allowing for multiple entry.
 - d. The GATS permit will allow for two extensions. For category 1 and 2, the provisions for renewal of the permit shall be based on the permit holder's continued professional status as an employee of the same company or partnership, and the absence of abuse of any of the conditions governing the use of the permit. GATS permit holders must seek renewal no later than one month prior to the date of expiration of the permit.
 - e. Wage parity or labor certification requirements (testing of the market), as well as economic needs tests, will not apply for Category 1 holders of a GATS permit.
 - f. The GATS permit for both Category 1 and Category 2 persons will be issued no later than three weeks following the satisfactory presentation of documentation required by host country authorities. Where the GATS permit is denied, the applicant will have an opportunity to appeal the decision and obtain a determination within one month from the time he has lodged the appeal. GATS permit renewal procedures will follow the same conditions and maximum time frame for issuance or denial.
 - g. Category 2 permits are subject to the following conditions and are subject to renewal every three years:
 - (i) A copy of a contract or service made between the employer and a foreign client must accompany all applications between the permit holder's employer and the foreign client, demonstrating terms and conditions of the contract, as well as its monetary value.

- (ii) The permit holder would be permitted to stay in the country where the contract is being performed for no longer than the duration of each contract, or 365 days, which ever is less. Remuneration provided under the contract must specify payment to the employer alone as a condition for issuing the GATS permit.
- (iii) Contracts in excess of US\$50,000 will be exempt from labor certification requirements, wage parity rules, and economic needs tests. Return visits, i.e. after sales service, will be permitted under the contract and will not be subject to economic needs tests or labor certification requirements, provided they are covered under the terms and conditions of the contract, and the contract exceeds US\$50,000.

- h. Applicants under Categories 1 and 2 must submit information pertaining to level of education, professional qualifications (including professional accreditation when required in the home country), proof of citizenship, and wage statements showing the applicant has been an employee of his or her company for at least six months.
- i. For services that require the GATS permit holder under Categories 1 and 2 to be accredited in the host country in order to provide the service, any such limitations and conditions will be governed by specific commitments undertaken by the host country in the pertinent services sector.
- j. Holders of GATS Permits would not be authorized to change their status to another non-immigrant visa category while using the GATS permit..
- k. Performance Bond. For Category 2 permit holders, the applicant company or partnership will post a program bond with the local Embassy of the GATS country to which its employee is seeking access in the amount of US \$250,000.
- l. Fines and Penalties. For Category 1 permit holders, abuse of the program will result in requisite fines and a one-year program prohibition.
- m. Special Safeguards. Notwithstanding (g) above, where a Member can establish that a pattern of practice among a number of companies of a Member country has led to fraudulent use or misrepresentation of the GATS permit, its recognition may be suspended by any WTO Member country for a temporary period of time, not to exceed one year.

II. Best Practices

- 1. For all forms of temporary entry, Members will:

- a. Make available, in a consolidated text, all measures, in particular administrative measures, and any descriptive material accompanying such measures that pertain to the temporary admission of natural persons (defined as entry, stay, and work authorization). Where possible, members should provide this information electronically, on websites or otherwise.
- b. as part of the consolidated text, provide information on the materials or evidence required of an applicant seeking temporary admission into their territories, as well as a description of the complete process for its submission, consideration, and approval.
- c. grant approval of applications for temporary admission within a defined period of time, and provide notice as when any such deadlines cannot be achieved.
- d. as part of the consolidated text, provide a full description of the manner in which any limitations to market access and national treatment for the temporary entry of natural persons are administered by their authorities.

2. Prior Comment.

- a. For new measures or alterations to existing measures that are being proposed by a Member country, interested parties will be given a reasonable period of time to comment on any such proposed measures that would govern the temporary entry and stay of natural persons. Procedures will be followed that provide for public notice, on a timely basis, to any interested party who wishes to make comments, with a reasonable period of time allowed for the submission of views. Measures that would be subject to prior comment would include visa conditions and procedures to obtain them, changes or additions to worker categories covered by visa procedures; work permit conditions and economic needs tests; and any other proposed measure directly affecting the temporary entry and stay of natural persons. Provided: that the prior comment procedure can be waived when a measure is needed to address urgent problems of safety, health, environmental protection, and national security.
- b. Except for the urgent circumstances in (a) above, members will allow a reasonable interval between the publication of the measure in proposed form, and its subsequent entry into force, in order to allow time for affected parties to become acquainted with it.

3. Economic Needs Tests. For members who place conditions on the temporary entry of natural persons on the basis of domestic economic needs, they will assume the following obligations with the objective of making this condition more transparent and predictable:

- a. The economic needs test will be defined under a government measure.

- b. Members will establish and make available the conditions for granting or denying temporary entry and stay on the basis of economic needs, providing quantitative and/or qualitative criteria for making determinations, and by specifying how the results of such tests are to be used in restricting entry of foreign services suppliers under Mode 4.
- c. Members will establish and make publicly available all procedures associated with the application of an economic needs test.
- d. Members will establish time limits on the duration or review of the application for an economic needs test.

4. Member countries will establish a contact point at authorized departments for both trade and immigration, allowing business persons to report on examples where they have encountered special difficulties in the process of seeking temporary entry and stay in another country. The Council for Trade in Services, or any body it so designates, shall periodically assess the effectiveness of the GATS permit system as well as "best practices" undertakings, and consider possible adjustments on the basis of information drawn from regulators and users.

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May 25, 2001

Office of the United States Trade Representative
Trade Policy Staff Committee
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Dear Sir or Madam:

We are writing in response to your agency's request for public comment on U.S. goals and objectives in preparation for the Fourth Ministerial Conference of the World Trade Organization ("WTO") in Qatar in November.

PricewaterhouseCoopers is submitting these comments on behalf of a Coalition of companies that have utilized the "Foreign Sales Corporation" ("FSC") and the recently enacted "Extraterritorial Income" ("ETI") provisions of the Internal Revenue Code. The Coalition is greatly concerned about WTO's past and pending deliberations with respect to these U.S. tax law provisions. In light of these concerns, we respectfully would urge the United States Trade Representative ("USTR") to consider raising related issues in connection with the Qatar Ministerial Conference.

First, the Coalition urges the Administration to take the necessary steps in the months leading up to the Ministerial to resolve the current dispute with the European Union ("EU") regarding the FSC and ETI regimes, and to do so in a way that avoids trade retaliation and does not penalize U.S. exporters. Trade retaliation by the EU in connection with these matters would serve neither the interests of the EU or United States. This dispute clearly injured the EU-U.S. relationship and has begun to undermine public support of the WTO itself. This is a serious matter that could have repercussions for the future of broader free trade initiatives, which this Coalition vigorously supports. In the event that this issue is not settled quickly, we would note that a new Round could serve as an effective avenue for ultimate resolution of this long-simmering dispute.

Our second recommendation is more fundamental, involving the question of whether it is appropriate in the first place to have matters relating to taxation considered by the WTO. The WTO, in our view, lacks the expertise to serve as an international tax court. The U.S. FSC and ETI statutes are quite complex and nuanced by tax policy objectives that may have little to do with trade considerations. These intricacies are not grasped easily by those lacking extensive experience in tax practice. In our view, all interests would be

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better served if the WTO ruled exclusively on those matters (i.e., trade issues) that it knows better than any other forum in the world.

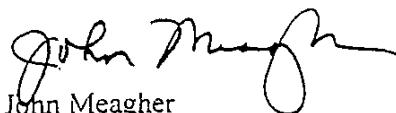
We also would note that the WTO's current authority with respect to tax matters has created the worst of all possible situations for the United States. That is, while indirect taxes, such as the value-added taxes imposed by many of our trading partners, are not subject to limitation by the WTO, direct tax regimes like the FSC are open to challenge. Thus, the United States is left simply to defend aspects of our income tax system that are viewed by our competitors as providing a benefit to U.S. companies. This situation has created an uneven playing field, and has reconfirmed fears of those in the United States who opposed joining the WTO that our country in so doing was surrendering its sovereignty. Tax laws are among the most sovereign of laws.

In light of these concerns, we would urge the USTR to consider advancing the case, in connection with a new Round, that issues relating to direct tax regimes should be removed from the purview of the WTO, as is now the case with indirect tax issues. We believe such action, in the long run, would significantly enhance U.S. willingness and ability to partner with the WTO in the furtherance of free trade.

Sincerely,



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Washington National Tax Services
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John Meagher
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