

Meeting 459
Date 1.12.04
Time _____

Tape No. _____
IOM COUNCIL, GENEVA, 1 DECEMBER 2004

SPEAKING POINTS FOR AMBASSADOR ALEJANDRO JARA

INTERNATIONAL DIALOGUE ON MIGRATION: MODE 4

- One of the aspects of economic globalization has been a dramatic increase in international migration. This phenomenon has created new challenges for nation states in fields such as human and political rights, social and economic rights, management of migratory flows, cultural and economic adjustment as well as the trade aspects of migration.
- The challenges presented by international migration have increased collaboration among nation states at the bilateral and regional as well as in relevant international organizations such as the IOM, the ILO, the World Bank and recently the Global Commission on International Migration (GCIM), established under the auspices of the United Nations Secretary General to place International Migration on the Global Agenda.
- As the migration debate developed, countries have also focused their attention on the only multilateral instrument that allows its Members to undertake binding trade commitments on the temporary movement of some categories of natural persons: the GATS.
- Two preliminary observations need to be made when introducing Mode 4 of the GATS in the broader context of international migration: first, the GATS – unlike the work of other international organizations such as the OIM, the ILO and the GCIM – is not directly concerned with the issue of migrants rights. Mode 4 is part of a trade agreement and as such it allows WTO Members to undertake binding commitments on the movement of natural persons in connection with the supply of a service; second, even in the context of managing trade flows, Mode 4 is not concerned with all the trade aspects of migration: it concerns only the temporary movement (as opposed to permanent migration) of certain categories of natural persons who move in connection with the supply of a service.
- The GATS Agreement clearly specifies that it "shall not apply to measures affecting natural persons seeking access to the employment market, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis". Similarly, the GATS explicitly protects countries' regulatory sovereignty with regard to immigration.

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."

- Against this backdrop, it is evident that important differences exist between the concepts and definitions used for negotiating specific commitments under GATS Mode 4 and national visa and work permit systems. These differences present significant challenges for Mode 4, some related to the implementation of existing Mode 4 commitments and others related to the advancement of the current negotiations on specific commitments in services, that include Mode 4 trade.
- Events such as the IOM – World Bank – WTO Seminar on Trade and Migration which was held in Geneva on October 4 and 5, 2004 and which brought together the migration and the trade communities, are of great importance in so far as they help both groups to understand their respective approaches to temporary movement of natural persons and facilitate the identification of possible inconsistencies. In this respect, it is important that the trade and migration communities continue to work together in addressing the difficulties presented by the interrelation between trade commitments and migration policies.
- In the current negotiations and in the on-going process of implementation of existing and future GATS commitments on Mode 4, WTO Members should keep in mind the national regulatory frameworks in the area of migration and ensure that Mode 4 commitments, to the extent possible, are consistent with definitions and categories actually used at the national level.
- Similarly migration authorities should – taken into consideration the temporary and services related nature of Mode 4 movement within the wider phenomenon of migration – find effective ways to implement Mode 4 commitments within existing regulatory frameworks and where necessary consider changes to their regulatory framework that would be needed to render existing and future Mode 4 commitments effective.
- In the October Seminar we have learned much from bilateral and regional experiences in managing international temporary migration. These efforts are not necessarily incompatible with multilateral efforts (Mode 4) and can effectively constitute a vehicle to promote deeper and more effective Mode 4 commitments. Bilateral and regional experiences can teach us important lessons on how to tackle the temporary movement of natural persons under Mode 4. Moreover, as for other sectors and modes of supply, bilateral and regional agreements can constitute a first step towards the multilateral liberalization of Mode 4 trade.

- In particular, we have seen that bilateral and regional agreements have a significantly broader reach than Mode 4 in that they may cover issues such as obligations on source and host countries concerning the management of migratory flows (controlling migratory flows; obligations to train workers prior to their movement abroad, measures to ensure the return of temporary workers), measures to offset labour shortages, the creation of cross-border labour markets and the protection of migrant rights. Moreover, unlike the GATS they generally cover temporary movement of workers, regardless of any distinction between services and manufacturing sectors.
- Although the scope of application of the GATS (and thus Mode 4) does not extend to many of these issues, several interventions at the seminar suggested the possibility of using some instruments contained in bilateral and regional agreements (which do not clearly fall outside the scope of application of the GATS) to create a more conducive environment towards improved Mode 4 commitments in the current negotiations.
- For instance it was suggested that cooperation between sending and receiving countries on issues such as pre-screening of workers, training in the sending country and ensuring return at the end of the period of stay as well as in-built flexibility in Mode 4 commitments (for instance linking Mode 4 quotas with the unemployment rate) could favour a more and better commitments in Mode 4, although some of these instruments do obviously seem to have a place in the GATS framework.
- If on the one hand bilateral and regional agreements may help the GATS Mode four negotiations, on the other hand it is also important that they be consistent with the GATS MFN rule or with the GATS provision on economic integration (Article V). It should be emphasized that the consistency of bilateral and regional agreements with Article II and V of the GATS will be at stake only insofar as such agreements do cover Mode 4 trade. Clearly all those provisions in bilateral and regional agreements that are not concerned with the trade aspects of the movement of natural persons raise no concerns as to their compatibility with the GATS.
- To the contrary, as in other areas (such as for instance environmental protection and labour standards), WTO Members should encourage all efforts at the bilateral, regional and multilateral level that are directed at addressing the non-trade aspects of international migration and primarily the protection of migrants rights. It is clear that while the GATS can be used to enforce bindings on the entry of certain categories of natural persons, it can do little to protect migrants rights beyond the basic obligation of national treatment (and only in cases a national treatment obligation has been specifically undertaken).
- Returning to the services trade aspect of movement of natural persons, in the current negotiations there is a clear and urgent need for Members to submit new offers and to

improve the quality of existing ones, including with respect to Mode 4. Possible approaches to improving the quality and the effectiveness of Mode 4 commitments have been suggested by some Members' in negotiating proposals such as a Model Schedule, a GATS Visa for service providers and additional commitments on transparency and domestic regulation.

- These instruments, among others, could have the merit of focusing WTO Members' attention on fundamental obstacles to the liberalization of Mode 4 trade, such as the definition of common categories of natural persons covered by the commitments and the creation of an effective regulatory environment for the implementation of Mode 4 commitments. They could only be effective, however, if they reflect Members' ambitions and concerns in liberalising Mode 4 and are matched by a critical mass of new and significantly improved offers.
- However, while there certainly is merit in looking at these issues in the context of Mode 4 liberalization, we should also keep in mind (in order to avoid duplication of work and to ensure consistency among modes of supply) that issues relating to transparency and domestic regulation are at the same time being negotiated horizontally in the Working Party on Domestic Regulation.
- A word should also be said on the importance of Mode 4 for developing countries. It is undisputed that the special attention paid in these negotiations to Mode 4 is grounded in Article IV of the GATS (that calls for the liberalization of market access in sectors and modes of supply of export interest for developing countries) and is further justified by the limited scope and depth of the Uruguay Round commitments in this mode of supply. Therefore, everyone would agree that reasonable progress on the liberalization of Mode 4 is of crucial importance to a successful outcome of this round of services negotiations.
- It should also be noted that, while the Mode 4 export interest of developing countries is in many cases matched by the import interest of developed countries, developed countries also have an export interests in Mode 4, in particular with respect to the movement of intra-corporate transferees.
- Finally, without questioning the comparative advantage that many developing countries have in the movement of some categories of natural persons (and the consequent benefits they could derive from liberalization of Mode 4), it is important to keep in mind development objectives can and should also be advanced by pursuing liberalization of other modes of supply and sectors of export as well import interest to developing countries.

- Concluding on a more general note, we all agree that Mode 4 deserves special attention, because of its unique characteristics and of its importance to developing countries. However, progress on Mode 4 liberalization cannot and should not be disjointed from progress in the liberalization of all the other modes of supply. At the end success in the services negotiation will be measured by a critical mass of commitments in all sectors and modes of supply, including Mode 4.

Background

- The presence of natural persons, otherwise referred to as Mode 4, is one of the four possible ways of trading a service under the GATS. Mode 4 is defined in Article I:2(d) as entailing "the supply of a service ... by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member".
- The Annex on Movement of Natural Persons Supplying Services under the Agreement (hereinafter the Annex) specifies that two categories of measures are covered: those affecting natural persons who are "service suppliers of a Member", i.e. self-employed suppliers who obtain their remuneration directly from customers; and those affecting natural persons of a Member who are "employed by a service supplier of a Member in respect of the supply of a service". These natural persons can be employed either in their home country and be present in the host market to supply a services or employed by a service supplier in the host country.
- The Annex also clarifies that, regardless of their obligations under the Agreement, Members are free to regulate the entry and stay of individuals in their territory, including through measures necessary to protect the integrity of, and ensure the orderly movement of natural persons across, their borders, provided that the measures concerned "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 operation of visa requirements only for natural persons of certain Members, but not for others, is not per se regarded as nullifying or impairing such benefits.
- The Annex clarifies that the GATS does not apply to measures affecting individuals seeking access to the employment market of a Member, nor to measures regarding citizenship, residence or employment on a permanent basis. There is no specified timeframe in the GATS of what constitutes "temporary" movement; this is defined negatively, through the explicit exclusion of permanent presence.