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LABOUR MOBILITY  
AND  
TRADE IN SERVICES

by

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## LABOUR MOBILITY AND TRADE IN SERVICES

The objective of this study is to examine the approaches, rules, principles, and procedures that could be developed for the movement of persons under a trade agreement on services. The study will examine the problems and issues for professionals and semi-professionals in both crossing borders on a temporary basis and undertaking work in the foreign country, including issues such as temporary visas and professional accreditation. The types of service professions to be examined include business services, financial services, legal services, computing services and technical services; but it is not the intention of this paper to consider each of them separately.

The study will consist of four sections. A first one, preliminary in nature, will develop a conceptual framework for looking at the subject of labour mobility and trade in services, building upon documents such as the U.S. National Study on Trade in Services<sup>1</sup>, the OECD's Elements of a Conceptual Framework for Trade in Services<sup>2</sup>, the Final Report of Canada's Task Force on Trade in Services and making reference, where it appears useful, to analytical concepts developed in the European Community and elsewhere. The second section of the study will examine how labour movement for the provision of services across borders has been dealt with in international trade agreements, with a particular emphasis on the experience of

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1. Prepared under the direction of the Office of the United States Trade Representative, Washington, D.C., December 1983.
  2. OECD, Doc. TC/WP (85) 79, December 1985.

the European Community. It will also make reference, where appropriate, to various other proposals and suggestions for the treatment of labour mobility in trade in services. The third section will identify, examine and discuss the kinds of impediments that affect labour movement in the transborder delivery of services, focussing primarily on those affecting Canada-U.S. trade in services, and keeping in mind the problems raised by the constitutional division of responsibilities in those two States. The fourth and last part of the study will examine how labour movement can be dealt with in a trade agreement on services, identifying in particular the principles, rules and procedures that could be appropriate for such an agreement, whether a bilateral one between Canada and the United States, or a multilateral one under GATT auspices. The overall goal of the study is not to provide answers to all the potential problems that can arise in practice. Instead, what should come out of it, hopefully, is a graduated normative scheme for dealing with such problems in a dynamic perspective, that is a perspective that puts as much emphasis on the process of economic integration as on the immediate legal results achieved in a given agreement.

## SECTION 1: DEFINING A CONCEPTUAL AND ANALYTICAL FRAMEWORK

Various expressions have been used in defining the object of this study, such as "trade in services", "labour mobility", "undertaking work in a foreign country", "movement of persons", "professionals and semi-professio-

nals", that can easily be misleading if their meaning is not clarified at the outset. Moreover, the very mention of "approaches, rules, principles and procedures that could be developed for the movement of persons under a trade agreement on services" presupposes the existence of a broader framework within which such rules, principles and procedures would operate: otherwise, they would have to stand on their own, which is difficult to imagine. If that is the case, then it is obviously important to develop a good understanding of the legal instrument that would incorporate them. It is precisely the purpose of this first section to clarify the working concepts that will be used in the rest of the study and to describe the basic structure of a trade agreement on services that could include principles, rules and procedures regarding the movement of persons.

### The Basic Concepts

Beginning with the concept itself of trade in services, this is generally understood to involve a movement from an exporter country to an importer country although occasionally the movement could be in the opposite direction, as in the case of tourism. Thus, services rendered by people originating in one country but established in another would not normally be considered as "trade in services" in the country where they are established. Transposing this to the movement of persons involved in trade in services, as does the OECD's note on The Elements of a Conceptual Framework on Trade in Services, it means that "temporary displacements of persons in the context of services transactions would have to be included in the trade in services exercise - but not the whole issue of migration"<sup>3</sup>. More spe-

3. Ibid, p. 4, par. 5.

cifically, this interpretation of what trade in services involves justifies the distinction made in the law of the European Community between "right of establishment" and "freedom to provide services". The distinction is far from purely theoretical, as we shall see later when discussing the EC approach to free movement of services: indeed, it is possible for a person to benefit from the right of establishment, and yet see the freedom to provide services denied because of a residency requirement<sup>4</sup>. The distinction is also of significance for the negotiation of a future agreement on trade in services: whereas a set of broad principles dealing with the freedom to provide services could eventually find its way in a multilateral agreement, the same cannot easily be said of provisions guaranteeing a general right of establishment which, at the multilateral level, would inevitably raise intractable problems in terms of control of migration and investments. In the Final Report of the Task Force on Trade in Services, set up by Canada in 1981, it is pointed out that "there is a distinction to be drawn between services trade (where access to market is the key) and services transactions effected through setting up in the recipient country (where issues of establishment are the crux). The first is more easily assimilable to traditional trade negotiations than the second where there are, as we have seen, serious conceptual and practical difficulties - not to mention policy issues for a country like Canada".

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4. See Commission of the European Communities -vs- Federal Republic of Germany, Court of Justice, case 205/84, December 4, 1986. The concept of commercial presence is also discussed in this case where it is assimilated to establishment.

The notion of "labour mobility" is somewhat larger than the notion of persons involved in trade in services. It applies to all workers, in the primary and secondary sectors as well as the tertiary sector. Used in conjunction with the expression "trade in services", the expression "labour mobility" takes on a more limited meaning. But as we shall see again from the experience of the European Community, it still remains vague until we distinguish between the movement of salaried workers, which raises the complex problems of entitlement to social benefits, and the movement of self-employed or professional workers, more directly associated with the freedom to provide service, which does not raise the same problem regarding social security benefits<sup>5</sup>.

Although we are essentially concerned here with a fairly small group of people, that is those persons who are involved in the delivery of services from one country to another, a further problem arises when we attempt to circumscribe this loose category of persons. The difficulty is due to the imprecision of the concept of services itself, which is usually defined by reference to certain categories of persons, such as professionals, or to certain types of activities, such as commercial services, financial services, computing services, tourism, transportation and so on. Even a limited concept such as that of professionals may raise difficulties, in so far as there is no agreed list of professions beyond those traditionally described as liberal. The Quebec Code of Professions, for instance, defines a professional as any person who holds a permit delivered by one of the corporations mentioned in annex to the Act (close to 40 such corpora-

<sup>5</sup>. See in particular article 51 of the Treaty of Rome.

tions are listed presently, and pressures are constantly exerted to include more)<sup>6</sup>. And this is only one province in Canada. What this means is that any set of principles, rules and procedures dealing with the movement of persons involved in the delivery of services will have to be at the same time general enough to include all these persons (unless it is decided to exclude certain categories), and comprehensive enough to deal with the variety of problems encountered. This, as we shall see, can only be done through a judicious use of the above three categories of legal mechanisms - principles, rules and procedures - each being appropriate for a particular level and type of problems.

Yet another concept that has to be clarified before going further is that of persons. It is obvious that physical persons are included. But what about legal persons (firms and institutions)? Although it is possible in theory to distinguish the two in devising rules that provide for the free movement of persons involved in the delivery of services, the separate treatment of physical persons can easily become meaningless if the firm which they belong to or are associated with is not itself entitled to provide service in the customer country. Consequently, we shall deal in our research with both physical and legal persons to the extent that the movement of the former cannot be dissociated from the movement of the latter.

A last point that has to be clarified at the outset in dealing with the movement of persons involved in the delivery of services is the relationship between their temporary presence in another country and the re-

6. Lois refondues du Québec, ch. C-26, art. 1c) and annex I.

quirements of an effective commercial presence. In the OECD's note on The Elements of a Conceptual Framework for Trade in Services, one reads:

So as to facilitate trade, it is accepted that "trade in services" may include sales via a local commercial presence in the customer country; the form that this presence is to take has to be defined according to the circumstances, the sector, the country, and according to what is required in order to gain effective access to the foreign market. Such form may if necessary encompass the constitution of a company under local laws where cross-border trade is not possible. Thus, some limited aspects of direct international investment and its corresponding financial aspects may be considered part of trade in services in some sectors.<sup>7</sup>

Although temporary access to a foreign country may not be enough in itself to offer a real chance of success to an exporter of services in the absence of some form of local commercial presence, there is a risk, in pushing too far the argument, to generate confusion between investments problems, right of establishment problems and trade in services problems.<sup>8</sup> This is particularly true if one has in mind the conclusion of a multilateral agreement on trade in services. In a bilateral agreement such as the one envisaged between Canada and the United States, on the other

7. Supra note 2, p. 5, par. 8.

8. Under traditional trade concepts the question of access to a national distribution system is a trade issue, while ownership of components of that system is an investment issue. Access usually means to do trans-border trade, but may be extended to include a right of establishment for the purpose of creating closer ties with the distribution system. Establishment does not necessarily involve investment, but often does. (See the U.S. National Study on Trade in Services, A Submission by the United States Government to the General Agreement on Tariffs and Trade, December 1983, prepared under the direction of the Office of the United States Trade Representative, pp. 74 to 78.) This has been recognized by Canadian and American negotiators. The scope of chapter 14 of the Free Trade Agreement, which addresses trade in services, covers the right of establishment of a commercial presence and investment for the provision of a service, but investment is subject to the overriding provisions of chapter 16 (see art. 1401.)

hand, a reference to this "right of effective commercial presence" has indeed been made.<sup>9</sup> But considering the diversity of situations where such a problem could arise, it may well be that its solution ultimately will have to be found in an effective dispute settlement mechanism.

### The Legal Framework

Having clarified our understanding of the basic concepts that will be used in this study, it remains to consider the types of legal instruments that could incorporate principles, rules and procedures regarding the movement of persons involved in the delivery of services. Various possibilities have been mentioned which can be summarized as follows (to borrow from the U.S. National Study on Trade in Services): such rules could be incorporated in multilateral understandings for individual sectors, or in bilateral agreements for individual sectors, or in a multilateral agreement covering all sectors, or in bilateral agreements covering all sectors<sup>10</sup>. Beyond these possibilities, which all presuppose the existence of a code or agreement dealing specifically with services, there is a further possibility which is that such codes or agreements would themselves be part of a wider understanding. Thus, the Canada-U.S. bilateral free trade agreement signed on February 2, 1988, includes two chapters dealing with trade in services and temporary entry for business people. Whatever the option ultimately chosen, however, chances are that a multilateral code or agreement dealing with trade in services would have to include the following measures.

9. Article 1401 of the Free Trade Agreement.

10. Supra, note 1, p. 1.

First, there should be some basic principles enunciating the fundamental obligations of the contracting parties with regard to trade in services. This could begin with a standstill clause, stating the obligation of the parties not to add to existing restraints, and then follow on with a right of access and non-discrimination, expressed in terms of national treatment, and, in a multilateral agreement, also in terms of most-favoured-nation treatment. Mention is sometimes made, as a complement to these basic principles, of an obligation to ensure transparency, that is, to give adequate publicity to laws and regulations dealing with services, to notify other parties of changes in these laws and regulations, and to answer queries regarding the same. These basic undertakings, being general in nature, would apply to all aspects of trade in services, save for exceptions specifically mentioned.

The exceptions themselves could be general, such as the national security exception, or concern particular aspects of trade in services. With respect to the movement of persons, such exceptions, referring more often than not to a particular sector of activity - the cultural sector for instance - would normally apply to all persons involved in providing these services. But other exceptions could equally apply to a particular category of persons, such as those in the public service, or even to a particular type of restraint on the free movement of persons, such as language requirements.

Other provisions that would normally find their way in a code or agreement on trade in services would include a dispute settlement mecha-

nism, as well as measures of consultation for dealing with unforeseen or unsettled problems. These are particularly important as problems will inevitably arise, particularly in an agreement on services that is not meant to deal with the specific problems of a particular sector. Even in an agreement that would contain both general principles applicable to all aspects of trade in services, and particular rules concerning particular sectors, some conflict resolution mechanism would still be required together with a system of sanctions to make the agreement binding upon its signatories.

Such is, broadly speaking, the legal framework that would incorporate the principles, rules and procedures on the movement of persons involved in trade in services, which are the object of the present study. Most, if not all, of the basic principles and procedures concerning trade in services in general would also be pertinent to the movement of persons involved in trade in services. Thus, there is no need to develop here a distinct code or arrangement dealing with the movement of persons involved in trade in services. We shall rather attempt to circumscribe first of all the particular significance and the limits, if any, of those basic principles concerning trade in services in general in their application to the movement of persons involved in trade in services. Subsequently, we shall turn our attention to those problems that are specific to the movement of persons and require a solution of their own. Finally, for those problems that are too specific to be the object of a general rule, or for the solution of which no consensus has yet developed, we shall propose a procedural approach, consistent with the rules of procedure of a general code on trade

in services, that will make possible a gradual elimination of those obstacles to the free movement of persons involved in trade in services that result from mere divergences in national systems of norms. Before doing so, however, it appears useful to consider, in the first place, the solution developed in other legal instruments, to the extent that they are pertinent to our problem, and to describe as exactly as possible the nature of the limits imposed on the movement of persons involved in trade in services, using in particular the example of Canada and the United States.

**SECTION 2: ENSURING THE FREEDOM TO PROVIDE SERVICES: THE EUROPEAN COMMUNITY AND OTHER EXPERIENCES**

Consideration of possible rules and disciplines on the movement of persons engaged in trade in services requires a review of past and present instruments dealing, directly or indirectly, with such trade. The most comprehensive system providing for the freedom to supply services has been set up by the European Community. We will examine it in some detail. But first we will survey briefly other bilateral and multilateral experiences, such as the old classics, the Treaties of Friendship, Commerce and Navigation and others like the European Free Trade Agreement, the U.K.-Ireland agreement, the more recent U.S.-Israel agreement and the OECD Codes. Subsequently, after a more extensive analysis of the sophisticated system developed by the European Community, we will examine briefly the present agreement for a free trade area between Canada and the United States of America.

### Treaties of friendship, commerce and navigation

For centuries, the practice of liberal professions was strictly reserved by states to their own nationals, as a prerogative of sovereignty. However, this did not prevent salesmen and technicians to move relatively freely from one country to another in order to promote the sale of their goods or to service them when required. This freedom of movement was frequently provided in trade and consular agreements, or simply practiced under comity.<sup>11</sup> The "national treatment" clause already appeared here and there in numerous franchises granted by medieval rules<sup>12</sup>.

At the turn of this century, Treaties of Friendship, Commerce and Navigation (FCN), concluded bilaterally by most trading nations, provided for a limited right of establishment, mainly tied in with the export of goods (not services) and on the basis of the most-favoured-nation treatment, although not always on the basis of "national treatment". After World War II, the need for modern states to obtain for their nationals the unrestricted right to engage in economic activities on the territory of another state increased further. An example of a very comprehensive FCN Treaty is that concluded in 1961 between Belgium and the United States<sup>13</sup>. It provided, as a general rule, for national treatment in each country for the nationals and the companies of the other country with respect to the exer-

11. See Hawkins, H.C., Commercial treaties and agreements, New York, Rinehart, 1951.

12. A Nussbaum, A concise history of the law of nations, Macmillan, 1964, pp. 27-33 and 203-207.

13. U.S. Treaties and Other International Agreements, vol. 14, part.2, 1963, pp. 1286-1308.

cise of gainful activities (with the usual exceptions for reasons of public safety, public health, public official functions, etc.). Article 2 of this treaty stipulates that nationals of either Party shall be permitted "to enter the territories of the other Party and reside therein: a) for the purpose of carrying on trade between the two countries and engaging in related commercial activities; or b) for the purpose of developing and directing the operations of an enterprise in which they have invested, or are actively in the process of investing, a substantial amount of capital". Article 6.5 provides for some restrictions in fields such as communications, transport, banking and the exploitation of natural resources. Article 8 is also of particular interest; it reads, in part, as follows:

"Nationals and companies of either Contracting Party shall be permitted to engage, within the territories of the other Party, the services of accountants and technical experts of all kinds, executive personnel, attorneys, agents and other specialists of their choice."

Nationals of the other state were allowed to form companies and establish branches, subsidiaries or offices in the other state under conditions no less favourable than those accorded nationals<sup>14</sup>.

This treaty between Belgium and the USA is an early example of a far reaching instrument of liberalization, which two friendly states can achieve particularly when their economic systems are somewhat similar. This is presumably one reason why, for instance, the free movement of persons engaged in services could be extended to the field of investments

14. See article 6 of the Treaty, loc.cit. note 13 above.

(with limitations in the area of natural resources). The difference of financial rules, for instance, on the notions of interest and profit, between a free market economy and a state planned and controlled economy, would not make for an easy flow of capital and consequently a free movement of persons engaged in that type of services.

### Multilateral Treaties

The first significant multilateral trade agreement to deal with the movement of persons was concluded in 1958 when the "Benelux Economic Union" was formed<sup>15</sup>. The basic objective of the Union was precisely the free movement of persons, goods, capital and services between the three member states (Belgium, Luxembourg and the Netherlands). The general rule, as specified in Articles 55-63, is that nationals may freely enter and leave the other States and that, insofar as concerns free movement and establishment, the exercise of economic activities, labour conditions, social security, etc., they will all be "treated equally". This union represented a degree of integration going far beyond a simple free trade area.

A second multilateral treaty, the "European Establishment Convention"<sup>16</sup>, negotiated and signed in 1955 within the framework of the Council of Europe, was limited to the establishment of physical persons. It dealt with the entry, stay and departure of nationals, the exercise of their

15. U.N. Treaty Series, vol. 381, 1960, no 5471, pp. 165-214.

16. U.N. Treaty Series, vol. 529, 1965, no 7660, p. 141.

civil rights, their legal protection and the exercise of some economic activities on the basis of national treatment. In the absence of specific provisions imposing the abolition of discriminatory national legislation, this Convention had little practical effect.

### The European Free Trade Association

In 1960, negotiations for a large free trade area in Europe failed. The countries left out of the European Community, the "outer seven", established a less ambitious European Free Trade Association (EFTA). As an industrial free trade area (excluding agricultural products) the EFTA represented only a modest form of economic integration (compared to the EC). Therefore, it is not surprising to see that the scope of the EFTA arrangement, with regard to the movement of persons, is limited to rules on the right of establishment. The basic provision is to be found in article 16 of the Stockholm Convention<sup>17</sup> of 1966 which reads, in part, as follows:

"Member States recognise that restrictions on the establishment and operation of economic enterprises in their territory by nationals of other Member States should not be applied, through accord to such nationals of treatment which is less favourable than that accorded to their own nationals in such matters, in such a way as to frustrate the benefits expected from the removal or the absences of duties and quantitative restrictions on trade between Member States."

This amounts to a limited national treatment, in that it falls short of granting this treatment in all spheres of economic activities: it applies

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<sup>17</sup>. U.N. Treaty Series, vol. 370, no 5266, p. 3.

only to activities connected with economic enterprises engaged in the production of, or commerce in, goods which have their origin in the Area. Services such as banks, insurance, advertising industries, etc. are not entitled to the privilege of article 16. We are still far from what is provided under the Canada-US free trade agreement.

### The U.K. - Ireland Free Trade Agreement

A clause quite similar is to be found in article XVI of the Agreement establishing a free trade area between the United Kingdom and Ireland (1965)<sup>18</sup>. In this case the Parties only "affirm their general policy" not to impose restrictions in such a way as to frustrate the benefits of the agreement. More interesting is paragraph 2 of the same article which reads as follows:

"If either party considers that measures in force in the territory of the other are not in keeping with this general policy, the parties shall enter into consultation in accordance with paragraph (3) of Article XXIII."

Article XXIII (3) for its part reads as follows:

"Should either party consider that an obligation under this Agreement has not been fulfilled, or that any benefit conferred upon it by this Agreement is being or may be frustrated, or that any cases of special difficulty have arisen or may arise, or that a change in circumstances necessitates or may necessitate a varia-

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18. U.N. Treaty Series, vol. 565, 1966, no 8235, p. 89.

tion in the terms of this Agreement, the other party shall on request enter into consultation immediately with a view to seeking an equitable and mutually satisfactory solution which preserves the balance of the Agreement."

Here we have a strict legal obligation to consult. Although this provision does not constitute a mechanism for the binding settlement of disputes between Parties, this "open ended" type of clause presents a significant interest for an agreement of a general nature in that no single Party is free to act unilaterally to the detriment of the equitable balance intended by the agreement without running the risk of having to justify itself. The consultation technique provides also a flexible method for working out adjustments which the agreement may require from time to time in light of the changing circumstances of its implementation.

### The liberalization Codes of the OECD

The main vehicles through which the OECD countries (including Canada) attempt to liberalize services trade are the "Code of Liberalization of Current Invisible Operations"<sup>19</sup> (1961) and the "Code of Liberalization of Capital Movements". The Invisibles Code applies mainly to current invisible transactions; it contains no provision for the right of establishment except for some form of local commercial presence. In this Code, OECD mem-

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19. Code of Liberalization of Current Invisible Operations, OECD, 1961 (March 1986 edition). For a detailed study see Discussion paper: "Trade and Investment in Services: OECD Agreements and the GATT", by J.A. Everard, the Institute for Research on Public Policy, February 1988.

bers agreed to eliminate restrictions on current invisible transactions and transfers between residents and non-residents. In principle, all trade in services is covered by this Code, but reservations and derogations limit its scope significantly. There is no provision for dispute settlement mechanism, or for compensation. It is more related to such things as royalties, profit remittances, advertising, etc. It contains no blanket authority for the right of establishment (except for some form of local commercial presence) or the right to national treatment as such. However, these can be incorporated with respect to particular industries in specific annexes. The principle concrete example of such incorporation is the insurance industry. Given the requisite political will the scope of the Code could be extended specifically to several service industries. The Capital Movements Code is similar to the Invisibles Codes in that it commits OECD members to progressively abolish restrictions on long-term capital flows; its focus is not on services. More recently, in 1985, the OECD adopted a Declaration on Transborder Data Flows<sup>20</sup>, but it is not relevant to the mobility of persons.

### The Israel-U.S. Declaration on Services

A more recent instrument: the Israel-United States Trade Agreement of 1985<sup>21</sup>, is worth summarizing. The principle of freedom of supply of services is not included in the main agreement as such, but it takes the form of an annexed declaration. This is not a legally binding instrument, but

20. See a note by T. Flory in Annuaire français de droit international, 1985, p. 690.

21. International Legal Materials, (1985), vol. 24, p. 653.

it is intended to pave the way toward contractual rights and obligations in the future. Its purpose is to promote open market access for trade in services on the basis of national treatment. It also includes the right of commercial presence. In addition, it provides that national authorities will consult with their respective regulatory agencies in an effort to achieve consistency with the principles of the Declaration. This, coupled with compulsory periodic consultations between the Parties to discuss problem areas, constitutes a significant step forward in a relatively new and difficult field. Also of special interest is a provision equivalent to a "federal clause" included in the services declaration. Finally, full transparency of each country's domestic laws and regulations on services should be achieved and reasonable access to the judicial process should be available to nationals and companies of the other country.

#### Limited Scope of The Above Experiences

What is clear from the various experiences briefly described above is that the free movement of persons involved in trade in services is not a well developed and consistent feature of contemporary international trade agreements. It is true that the notion of establishment in a foreign country for the purpose of trading goods has made significant progress in many areas, but with some notable exceptions, such as transport and communications. With respect to services, however, even industrialized and like-minded countries, like the OECD member states, were only able to agree on minimum Codes and Declarations, at the cost of myriad reservations and

other derogations. In the Israel-U.S. free trade agreement, very little is said about the movement of persons as such; the principles of open market access and national treatment presumably take care of the problem. This very general, but potentially vague, approach to what is in reality a complex problem, may perhaps be seen as a step in the right direction, as the beginning of a process. But even admitting that progress in implementing the free movement of persons involved in trade in services can only be realized on an incremental basis, the fact remains that a clearer identification of the specific problems associated with this freedom will have to be made. Meanwhile, one is tempted to conclude that any far-reaching liberalization of movement of persons in trade services can only be achieved between a limited number of countries (preferably neighbours) when they enjoy compatible economic and regulatory systems, as well as political affinities; the Benelux agreement is a good example.

More significant lessons may be learned from what has become the most sophisticated and complete system of liberalization in services trade, that is the system developed over the last thirty years by the European Community.

#### **A Sophisticated and Binding System: The European Community**

The drafters of the 1958 Treaty of Rome establishing the European Economic Community (EEC)<sup>22</sup> readily acknowledged that achieving their ultimate goal of a genuine economic union required more than the free exchange of

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<sup>22</sup>. U.N. Treaty Series, vol. 298, 14 (1958).

goods under a simple customs union: it had to include binding provisions for the gradual liberalization of all factors of production. Consequently, workers, professionals and companies had to be free to move to the areas of greatest employment and business opportunities. Also services, as intermediate inputs, had to be treated on a similar basis of national treatment, just like the goods produced, if a unified market were to be achieved as envisaged in the EC.

#### The Concepts of "Establishment", "Services" and "Workers"

Under the EC Treaty the rules governing "workers", "establishment" and "services" are purposely dealt with one after the other (articles 48 to 66). A "worker" in the EC terminology is, in general, a wage earner and his freedom of movement is guaranteed by articles 48 to 51. This category is not included in our present survey of Community law, although it is not entirely unrelated to some aspect of the supply of services. We are dealing here only with self-employed persons such as doctors, architects, managerial personnel, etc., who are not "workers". Their right to engage temporarily in economic activities in other member states of the Community - that is to trade in services - is therefore governed by different provisions. As for the word "establishment" it connotes a more permanent move to another country and without the same cross-border movement typical of "services trade".

Provisions dealing with services are to be found in articles 59 to 66. However, many of the provisions for the lifting of restrictions on the

right of establishment, to be found in articles 52 to 58, also apply to services by virtue of article 66. Indeed, the treatment of the right (or freedom) of establishment and the freedom to supply services are so similar that they are frequently considered together, in practice. This is so because an establishment is created to perform a service, and performance of a service frequently requires a minimum of establishment. However, these two notions cover different realities, and before considering how the Community deals specifically with services, it is necessary to contrast establishment and services, bearing in mind that both concepts represent one face of the same coin: non-discriminatory national treatment.

Whereas the right of establishment implies a right to set up a business within any one of the member states and to be treated without discrimination vis-à-vis the nationals of the host country, the freedom to provide services refers to the right recognized to a person, physical or legal, to provide services in the territory of another member state, or to a person or company residing or established in a member state, from an establishment situated in another member state. In other words, services trade, as opposed to establishment, implies a movement (by a person or sometimes only by the service itself) across national frontiers without resulting necessarily in an "establishment". Services also involve the payment of a remuneration, not a salary, as such. Services are, in principle, of a temporary nature (but without any specific limits in time). The cross-border link can take three forms:

- a) the supplier of services moving temporarily, from his own country to the customer's country, for the purpose of consulting, maintenance, etc.
- b) the customer moving to the supplier's country, for medical treatment, tourism, etc.
- c) the service itself moving across the border, as in the case of broadcast, films, expert's advice, insurance, etc.

In situations such as these, intended or unintended obstacles may exist that hamper the delivery of services. Abolition of such obstacles was the purpose of the EC Treaty and this purpose has been largely achieved.

#### National Treatment Principle

The aim of the EC Treaty is for nationals of all member states to be allowed to offer their services, professional or other, throughout the territory of the Community, at least on conditions not less favourable than those applying to nationals: this is frequently referred to as the principle of equality although it amounts, in fact, to the classic right to "national treatment". (In some areas, such as for the movement of workers, detailed Community rules have been approved which provide full equality of treatment for all.) In other words, there is a legally binding interdiction against member states discriminating, in the field of services, on the

basis of nationality and even residence. The Reyners case<sup>23</sup> and the Van Binsbergen case<sup>24</sup> made this clear, shortly after an illustrative list of illegal discriminations was proclaimed in a specific EC Programme on Services. It is illegal to impose conditions which, although not discriminatory on the face of it, are intended in practice to prevent foreigners from supplying services. (Language requirements can present problems in this regard: some are legitimate, others not). Of course, persons or companies offering their services must be fully qualified in their field, as we will see below.

#### Process for removal of restrictions

A double process characterizes the EC's legal approach to fully, but gradually, implementing the free movement of services derived from the national treatment principle. The first involves the gradual elimination of restrictions on the freedom to provide services. The second involves the harmonization, or coordination, of national legislation. This process is achieved by the supranational normative power vested in the Council of the European Community, working in conjunction with the Commission and in consultation with the European Parliament. In addition, the Court has played a prominent role in asserting the gradual liberalization of services in Europe.

23. Reyners, Case 2/74 (1971) E.C.R. 631. A Dutch lawyer had been refused the right to practice law in Belgium only because he was not a Belgian citizen and notwithstanding the fact that he wrote successfully the Belgian Bar exam. The EC Court of Justice ruled that citizenship was no ground to refuse him the right to practice law in Belgium, under article 52.

24. Van Binsbergen, Case 33/74 (1974) E.C.R. 1299. The Court ruled that residence in another country was not a reason to prevent a Community "citizen" from performing a professional service in any one member state.

1. Elimination of Restrictions:

The liberalization of trade in services finds its legal basis at the very beginning of the EC Treaty, in articles 3(c) and 7. These articles condemn all forms of discrimination on the basis of nationality. The first practical step then was to refrain from introducing any new legislation involving restrictions against foreign suppliers of services. This is the purpose of the so-called "standstill" clause of article 62. For several years after the entry into force of the Treaty, many cases were brought up to the European Court against states found in violation of that important initial obligation. Although negative in character, this clause was essential as a preliminary step. In addition, any person (physical or legal) was allowed to plead it in the Court of Justice, since it was considered as being directly applicable for the benefit of individuals.<sup>25</sup> (In other international treaties this direct effect is not available to individuals, their case must be espoused by their government.)

The next step was to compel each member state to abolish progressively, "proprio motu", all existing restrictions to the freedom of services

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25. The theory of "direct applicability" or "direct effect" is characteristic of Community law. It was developed by the European Court to allow individual persons (physical or legal) to plead any provision of the Treaty, or other legal instruments such as Community regulations and directives, in cases where no implementing legislation was yet adopted or required to give effect, in practice, to the purpose of a legal obligation.

not applicable to nationals, as called for by articles 59<sup>26</sup> and 60(3)<sup>27</sup>. This was to be done during the transitional period of 12 years which ended in 1970. One must admit that 30 years after the entry into force of the EC Treaty, this second part of the process is still ongoing, since several service activities are not yet fully opened to non-nationals (for example). The obligation to abolish restrictions on the free movement of non-wage-earning persons does not apply when a state is compelled to impose special entry, residence or other rules. This situation is justified, under article 56<sup>28</sup>, when public order, public safety or public health dictate extraordinary measures of protection. The Court readily admitted that those notions may vary from one country to another, but warned that this

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26. Article 59 reads: "Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended. The Council may, acting unanimously on a proposal from the Commission, extend the provisions of this Chapter to nationals of a third country who provide services and who are established within the Community."
27. Article 60 reads: "Services shall be considered to be "services" within the meaning of this Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating the freedom of movement for goods, capital and persons. "Services" shall in particular include:
- a) activities of an industrial character;
  - b) activities of a commercial character;
  - c) activities of craftsmen;
  - d) activities of the professions.
- Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals."
28. Applicable to services under article 66.

should not lead to abuses or disguised protectionism<sup>29</sup>. As for the exception of public health, serious contagious diseases or drug control were considered as grounds for refusal of entry. Restrictions on services in the field of transportation are governed by a special section of the Treaty (articles 74 to 84) according to art. 61.

### The General Program

To assist states in removing existing restrictions, the Council of Ministers of the EC, acting unanimously at first and now by qualified majority in most cases, drew up a General Program setting out the lists of beneficiaries and giving the conditions under which, and the stages by which, each type of service was to be liberalized<sup>30</sup>. A parallel Program was adopted for the right of establishment<sup>31</sup>. Although not legally binding, this Program on Abolition of Restrictions on the Freedom to provide Services amounts to firm guidelines and a timetable which states must follow. Of special interest for our present study is the illustrative - but not exhaustive - list of restrictions which are inadmissible (this listing technique resembles the illustrative list of subsidies not admissible under the GATT). It is worth quoting in extenso this list of inadmissible restrictions:

29. Council Directive 64/221 of Feb. 25, 1964 listed circumstances which cannot be used to justify entry refusal. For instance, the financial situation of an individual or a previous criminal record are not valid grounds for refusal. In other words, refusal cannot be justified on presumptions of future acts of an individual. See also the following cases 41/74 (Van Duyn), 67/74 (Bonsignore), 36/75 (Rutili) 30/70 (Bonchereau).

30. Article 63(1) and (2) refers. See also J.O.C.E. 15-1-62 p. 32/62.

31. J.O.C.E. 15-1-62 p. 36/62.

"A. Any prohibition on or any impairment of the non-wage earning activities of the offeror, consisting in a treatment differentiating on a basis of nationality as provided by a legislative, regulatory or administrative provision of a Member State or resulting from the application of such a provision or of administrative practices.

Among such restrictive provisions and practices are particularly those which, with regard to foreigners only:

- a) Prohibit the provision of services,
- b) Condition the provision of services on an authorization or on the issuance of a document, such as a foreign merchant's card or a foreign professional's card,
- c) Condition the granting of the authorization required for the provision of services upon additional requirements,
- d) Condition the provision of services on the fulfilment of a prior sojourn or period of probation in the receiving country,
- e) Make the provision of services more costly through the imposition of a tax or other charges such as a deposit or surety bond paid to the receiving country,
- f) Limit or obstruct access to sources of supply or to outlets by making such access more costly or more difficult,
- g) Prohibit or restrict the right to participate in social security programs and particularly in health, accident, disability and old-age insurance and in family allowances,
- h) Grant less favorable treatment in the event of nationalization, expropriation or requisition.

The same applies to provisions and practices which, solely with respect to foreigners, exclude, limit or make subject to conditions the ability to exercise the rights normally attached to the provision of services and, in particular the opportunity:

- a) To enter into contracts, and particularly manufacture and rental contracts, such as the hiring of services, as well as to benefit by all the rights flowing from such contracts,
- b) To tender bids or to participate as co-contractor or sub-contractor on public contracts or contracts with other bodies under public law,
- c) To profit by concessions or authorizations granted by the State or by other bodies under public law,
- d) To acquire, exploit or transfer rights and property, both real and personal,
- e) To acquire, exploit or transfer intellectual property and rights attached thereto,
- f) To borrow, and particularly to have access to various forms of credit,
- g) To benefit from direct and indirect aid extended by the State,
- h) To sue or be sued and to exercise all rights of appeal before administrative authorities, to the extent that the professional activities of the party concerned require the exercise of such opportunity.

Furthermore, the conditions to which a legislative, regulatory or administrative provision or an administrative practice subject the provision of services and which, although applicable regardless of nationality, impair the provision of these services by foreigners either exclusively or principally, also constitute restrictions.

B. Any prohibition on or any impairment of moving the object or the support of the services, or the instrument, machines, apparatus and other auxiliary tools used for such services.

C. Any prohibition on or impairment of the transfer of financial means necessary to the carrying out of the services.

D. Any prohibition on or impairment of the payment for the services where exchanges of services are limited only by related restrictions on payments.

However, as concerns the provisions of paragraphs C and D, the Member States retain the right to verify the na-

ture and authenticity of the transfers of financial means and of the payments and to take such measures as are indispensable for checking infringements of their laws and regulations, particularly in matters concerning the issuance of currency to tourists.

It is worth noting that the Court has made reference, from time to time, to the above illustrative list, thus giving it significant authority.

### Council Directives

Article 63 provides that in order to actually implement the guidelines of the General Program, or in the absence of such Program, the Council should issue the necessary Community directives.

The "directive" is the supranational legislative technique used by the European Community. Directives, according to article 189, are obligations, approved by the Council and binding on the member states insofar as the results to be attained are concerned, but leaving it to each state to decide on the ways and means (legislation, regulations, etc.) to obtain those results, in due course.

The choice of this type of normative instrument of intervention, the directive, instead of the regulation (which amounts to a law without state transformation), reflects the cautious approach of the EC system in services trade: it amounts to a compromise between Community and member state responsibilities in the area of services, a field in which national govern-

ments remain inclined to shelter their own citizens against foreign competition (with its cultural overtones) and to protect their consumers from transient suppliers.

Even if the adoption of directives in the field of services was prescribed by the Treaty, this did not prevent the European Court from deciding, in 1974, in the landmark Van Binsbergen case<sup>32</sup>, that even in the absence of a specific directive abolishing restrictions on a given service activity, the freedom to provide services had become absolute in the Community (after the transitional period) and therefore was directly applicable in favour of individuals, or service companies, and consequently enforceable in domestic courts against offending states. In other words, directives were no longer necessary in strict law to establish the existence of the right to freedom of services: that had been firmly established by the Treaty itself, and the purpose of any future directive is simply, according to the Court, to facilitate and regulate the exercise of rights already existing under the Treaty itself. This sort of broad interpretation is typical in the Community's "new legal order"; obviously, it could not be applied under normal treaty law, where legislative implementation is necessary to make treaties applicable to individuals.

## 2. Harmonization of Legislation

Abolishing restrictions on the supply of services by foreigners is one thing; harmonizing, or coordinating, national rules with some degree of common standards applicable to a services activity, is another. But here

<sup>32.</sup> See note 24 above.

again the EC's supranational approach means going as far as harmonizing national laws, in order to create a genuine common market in services, where each member state must play by the same rules of the game. Of course, the second process of coordination constitutes a much more difficult challenge than just providing for "national treatment" within each country. Coordination, or harmonization (as opposed to a single Community legislation), in the EC is governed by article 57 of the Treaty. Two situations are envisaged: one dealing with the mutual recognition of qualifications (diplomas, certificates, etc.); the other dealing with the coordination of the member states's statutes and regulations concerning the nonwage-earning activities. These situations can best be described once we have identified the individual beneficiaries, or the specific activities, which are entitled to full freedom of transnational movement.

#### Beneficiaries and service activities

Beneficiaries of the EC's freedom of services include not only professionals (such as doctors, lawyers, etc.) but also other non-salaried persons engaged in service activities of an industrial character, a commercial character or craftsmanship. Article 60<sup>33</sup> of the Treaty provides that all the above persons, including companies, are free to deliver their services in another member state by means of establishment or temporary visits, on the same conditions as those which apply to nationals of that country, i.e. "national treatment". The list of beneficiaries is by no means an exhaustive one. It includes, in principle, all persons (physical

33. See note 27 above.

and legal) engaged in the performance of all sorts of profit-making activities (tradesmen, hairdressers, real estate agents, etc.). One must note, however, that non-profit organizations (or unpaid individuals) do not enjoy the advantages of Treaty rules on establishment and services. We will discuss below the actual regimes governing certain activities such as banking, insurance, etc.

### Free Trade in Services in Practice

Before 1958, all persons in service fields faced practically insurmountable hurdles if and when they intended to offer their services in another country in Europe. The usual obstacles had to do with the refusal of entry or residence in the foreign country, extraordinary professional qualifications requirements, special work permits, restrictions on payment for their services, etc. Practically all these obstacles have now been removed within the Community.

We will now examine briefly some of the major problems faced in providing free movement of services in an economic union as integrated as the European Community and we will outline the basic principles adopted for their gradual solution.

### Entry and Residence

The initial step for a citizen (or corporation) of any EC member state who wishes to perform a professional (or similar) service in another member

state is to be allowed to enter freely in that other State and to reside therein for the entire period required in order to perform the service desired.

An EC directive, dated May 21 1973<sup>34</sup>, abolished all restrictions with regard to entry and residence in favor of Community suppliers of services, regardless of their nationality (provided it is one of the member states). This right extends to members of their immediate family if they are also citizens of an EC country. In addition, the entire family is allowed to reside permanently in the host country, even after the period of service is terminated.<sup>35</sup> The Court went as far as to hold that a residence permit was not essential, since the right to enter and reside in the other country, for performing a service, was part of the Treaty itself and directly applicable to individuals, without the need for a specific directive and national implementing legislation to that effect. No discrimination can apply on the basis of nationality or because the person(s) has an establishment in another country. Conversely, there is no legal requirement for that person to open an establishment in the host country, although this, of course, is definitely allowed under Community law as interpreted by the Court.<sup>36</sup>

In actual practice, if the period of residence required for the performance of the service is longer than three months, a residence permit will be issued automatically by the host government. In addition, member

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34. Directive 73/148 J.O.C.E. no L.172 of 25-6-73 p. 14.

35. Directive 75/34 J.O.C.E. L. 14, 20-1-75, p. 10.

36. Van Binsbergen and Reyners cases, see notes 23 and 24 above.

states must, as a matter of right, provide their nationals going to another EC country for the performance of a service, with a passport or another type of identification card allowing them to freely return to their home country when they wish. There are exceptions to the above fundamental rules and they will be discussed below under State exceptions.

### Professional Qualifications

Understandably, it is not sufficient to allow citizens of another EC country to move freely within the Community territory to perform services; the government of the host country must also ensure that the foreign supplier is qualified to perform the service adequately. Professional qualifications are therefore a fundamental but complex problem in most countries of the world where foreign professionals are allowed to practice. They are normally required first to qualify fully by completing successfully their training program(s) at university or technical levels in the host country itself, and sometimes they are also required to take up citizenship.

The rule in the EC is much less stringent: persons duly qualified in their home country are normally allowed to provide their services in another member state. This stems originally from the "mutual recognition (by all states), of diplomas, certificates and other titles" (i.e. any document which a person requires in order to be qualified to exercise a service activity), as prescribed by article 57 of the Treaty. This basic rule was developed in a General Program and a number of general and sectoral directives, governing specific activities and/or professions. The method used

consisted of drawing official Community lists of degrees or similar qualifications, which are considered admissible throughout the member states. For this purpose, minimal requirements were agreed amongst governments with regard to the duration and context of the training itself. In some cases, evidence of actual professional experience or, alternatively, a period of supervised practice in the host country, is required. For obvious reasons, EC directives refer to the obligation for foreign practitioners to observe the ethics and other rules of conduct of the profession applicable in the host country (i.e., national treatment).

In actual practice, a major result was achieved when the Council of Ministers adopted, in 1975, two directives opening the practice of medicine throughout the Community<sup>37</sup>. This freedom now applies also to dentists, veterinarians, midwives, etc. Physicians must comply with administrative formalities such as obtaining a prior authorization. Lawyers are also permitted to give legal advice in other EC countries, but actual practice as resident barristers or solicitors remains subject to qualifying for the Bar in the host country (since training in law is by nature quite different in substance from one country to another). The question of foreign resident lawyers is a difficult one, presently being considered. Professionals such as medical doctors and lawyers, providing temporary services in the host country, are exempted from the requirement of registration with a professional corporation in that country.

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37. Directives 75/360 and 75/363 of June 16, 1975.

With regard to other service activities related to trade, industry, handicraft, personal services including insurance agents, brokers, travel agents, etc. the EC does not provide for the mutual recognition of professional qualifications (nor for the coordination of training requirements). In such cases, the production of a certificate establishing that the relevant activity was actually and lawfully carried out in the country of origin is considered adequate guarantee of professional knowledge, skill and ability by the host member state.

#### Payment for Services Rendered

It goes without saying that unless the person or company performing a transnational service can be effectively paid there is no point in supplying a service abroad. Consequently, restrictions on such payments for services are now lifted within the EC.<sup>38</sup> However, there may be exceptions in some cases (transportation, tourism, etc.). But normally, governments must allow all transfers of funds (including in foreign currency) that may be required for paying a service rendered by a supplier from or in another Community country. In a decision of 1984, the Court made various distinctions between such payments for services and the transfer of capital for other purposes.<sup>39</sup> Special derogations from the above right of payment can be arranged, under articles 108 and 109 of the Treaty, during periods of economic crisis.

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38. Directive 63/340 of May 31, 1963 J.O.C.E. no 8650 10-6-63 p. 1609.

39. Joint cases 286-82 and 26-83 (Graziani Luisi and Giuseppe Carbone).

### State Exceptions

One important professional activity which is not included in the broad labour mobility system practiced within the Community is the category of public service. Understandably enough, article 55 of the Treaty ensures that such official activities are reserved exclusively for nationals of each country. However, the Court has given a restrictive interpretation of this exception to the general freedom of movement rule.<sup>40</sup>

Under article 56 of the Treaty, national governments enjoy a broad discretionary power to refuse to non-nationals the right to provide services in their country on the grounds of public order, public safety and public health. This is a classic exceptions clause to be found in other similar instruments such as the GATT. The concepts of "public order" and "public safety" are not specifically defined, thus leaving room for interpretation. On the other hand, the concept of "public health" is clarified by a directive which includes an exhaustive list of diseases which would justify refusing the right to labour mobility. Incidentally, the poor financial situation of a person is not considered a ground to refuse entry to an individual wishing to perform a service in another country (except, of course, when there are specific financial guarantees required by law for the exercise of certain service activities, such as insurance).

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40. Reyners case 2/74 and Sotgen case 153-73.

The Case of Financial Services and Insurance

The Treaty and its subsequent implementing rules do not prevent a country from requiring financial commitments and/or guarantees from foreign firms or persons providing certain services, in order to protect its nationals. Such requirements apply in particular to banking and insurance activities, and for obvious reasons. For instance, foreign insurance companies must submit detailed descriptions of their proposed activities, including the type of contracts and tariffs to be offered to their customers, before being granted authority to sell insurance policies in the host country. Access to foreign banking is also partly controlled. By virtue of article 61 of the Treaty, the freedom to provide banking and insurance services is closely related to the provisions of articles 67 to 73 dealing with the movement of capital. Similar restrictions exist in the field of transportation, as provided by article 61 (combined with articles 74 to 84). It is not within the scope of the present paper to study the myriad of restrictions on the free movement of services in the financial or transportation fields.

Finally, article 65 of the Treaty stipulates that as long as restrictions on the free supply of services are not fully abolished, each member state must apply them in such a way as not to discriminate between persons or companies of different countries; this is the equivalent of MFN treatment.

### Lessons to be Derived from the EC Experience

The above is only a rough outline of some problems and solutions as encountered within the EC.

The experience of the European Community is perhaps typical of what takes place at a particular level of economic integration, namely that of a common market. However, it should not necessarily be considered as a model or as a necessary outcome of other types of economic arrangements, especially those that are less integrated. At the same time, however, it stands as a practical example - the only one as a matter of fact - of a system of legal rules designed to implement the free movement of persons involved in trade in services. From that point of view, there are indeed lessons to be derived from the European Community's experience.

The first lesson is certainly that general principles such as those of open access and national treatment are not enough in themselves to ensure the free movement of persons involved in trade in services. More detailed rules are necessary, whether to deal with specific instances of discrimination - as is done in the General Program for the Abolition of Restrictions on the Freedom to Provide Services - or to bring about greater harmonization in the interventions of signatories where the lack of such harmonization becomes in itself a problem. Furthermore, in moving from general principles to specific rules, particular attention has to be paid to the nature of the obstacles encountered as this conditions the choice of legal instruments to be used. A very basic distinction here is that made in the Community between problems relating to entry and residence, problems relating to the exercise of a specific profession or activity and problems concerning the general conditions of stay.

The second lesson is that full freedom of movement for persons involved in trade in services cannot be attained without the support of some fairly elaborate institutional apparatus. The EC's experience shows that the elimination of all forms of discrimination often raises complex problems of interpretation of treaty norms as well as of national rules, a task that only a binding tribunal such as the EC Court of Justice can adequately carry out. Similarly, the elaboration of generally accepted standards for the protection of the public in matters involving the practice of a particular profession or activity requires the presence of fairly strong central institutions if it is to proceed on an ongoing basis. Such an institutional support, it goes without saying, is not essential at lower levels of economic integration; but then significantly less than full freedom of movement for persons involved in trade in services can be realized.

The third important lesson to be learned from the EC's experience is that ensuring the free movement of persons involved in trade in services is a fairly lengthy process. After nearly thirty years, the EC is still struggling to realize this goal. In less integrated regimes, and a fortiori at the world level, it is far from certain that the goal can be attained. But the EC's experience also shows that once a process is started, it is difficult to stop it altogether. In attempting to implement free movement of persons involved in services, the Community has met serious difficulties, but it has also made some very real progress. What is more important, it is still forging ahead. The most important step, one would be tempted to say, is the first.

SERVICE MOBILITY AND THE FREE TRADE AGREEMENT BETWEEN CANADA AND THE UNITED STATES OF AMERICA

The free trade agreement concluded on January 2, 1988 between Canada and the United States breaks new ground in agreements of this nature; it includes general comprehensive chapters aimed at binding the two countries (including their provinces and states) to liberalize, gradually, their trade in services - some 70 sectors<sup>41</sup> - as if the two territories would constitute, for all intents and purposes, the equivalent of a single services market, parallel to the free trade zone established for goods established by the agreement. As for goods, this new free trade service zone is based on the principle of national treatment (extended in this case to the notion of "provincial or state treatment".)

As we have seen in the case of the EC, such a broad liberalization in services calls not only for the mutual right of "establishment of a commercial presence" in each country (article 1401), but also it calls necessarily for the maximum mobility possible for individuals from one country to another. At the same time, and for obvious reasons, nationals of both countries must have adequate qualifications when they are called upon to perform a service in the other country. Therefore, the Agreement provides for a minimal set of binding obligations and rights for this purpose, as well as for individual mobility.

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41. Annex 1403 and its schedules.

### Qualifications and Non-Discrimination

As to qualifications, each party remains free to set its own level of standards which will be applicable to nationals of both countries. Licensing and certification should relate principally to competence or to ability to provide specific services (article 1403). This, presumably, would include a working knowledge of French in some areas of Canada. However, such national qualification requirements should not have the purpose of discriminating against nationals of the other country (article 1403:2). In addition, while qualifications will remain a matter for each country (or province or state) to decide, Canada and the United States are committed to "encourage the mutual recognition of licensing and certification requirements" (article 1403:3). As an initial example, "harmonization" will be developed for professional standards and criteria for the licensing and conduct of architects and the provision of architectural services (Annex 1404, article 1). Shortly after, provincial and state governments will be encouraged to adopt or amend those measures necessary to implement the new scheme (Annex 1404.A, article 3). The idea is to extend this pattern to other professional services, in order to "integrate" them (article 1403).

The above mutual advantages will be safeguarded in favour of Canadian and American citizens alone. If indeed, it appears that a service is indirectly performed by a person (physical or legal) of a third country, steps will be taken to deny that person the benefits of the Agreement (article 1406). This is a sort of rule of origin for services.

In addition, new taxation measures should not be used as "a means of arbitrary or unjustifiable discriminations between nationals of the parties" (article 1407). Tourism services, including the movement of individuals engaged in them, are covered not only by the general rules of the Agreement but also by a separate and sectoral annex (Annex 1404, B).

### Freedom of Entry

As we have seen, a large degree of labour/professional mobility for nationals of the other country must be allowed if free trade in services is to be achieved. The EC is the most far reaching example. The Canada-U.S. Agreement devotes a separate chapter to this "sine qua non" requirement (Chapter Fifteen). Here, the notion of national treatment is not relevant. What is provided is a substantial degree of freedom for individuals performing services to enter the other country for the purpose of performing covered services and to be allowed to remain in that country as long as necessary for the performance of services required or offered (articles 1501 to 1506, Annex and Schedule 1 and 2).

This chapter is entitled "Temporary Entry for Business Persons" and is meant to lay down ground rules which are to be developed by mutual agreement. Essentially, this provides not only for entry facilities (no visa requirement) but also for permission for Canadian and American citizens to stay in the other country when they are engaged in the trade of goods or services or in investment activities in that country, provided they do not intend to establish permanent residence there (article 1506). No time

limit is specified. One presumes that the individual may stay for the period of time required to perform the service, which may mean several years in some cases. No reference seems to be made to social security benefits, or other forms of government assistance, which individuals may or may not enjoy in the other country. (We have seen that the EC allows those benefits and permanent residence may also be granted in some cases.) Finally, freedom of entry for purposes of services is distinct from entry for immigration purposes, according to the Agreement (article 1505). But clarification may be required in this area.

In summary, any individual, Canadian or American, going in good faith to the other country to perform one of the services or activities (including investments) listed in Schedule 1 to Annex 1502.1, shall be granted free entry at the border, without a visa, upon proof of citizenship, and provided he or she meets certain requirements of the respective immigration acts (such as the rule pertaining to the source of remuneration.) This general rule is dealt in detail in two distinct but similar sections of Annex 1502.1: one for Canadian "business visitors" (as defined by article 1506) and the other for American "business visitors". Labour certification tests will not be required (Annex 1502.1.A.3). Admission to the other country will be free and must be granted expeditiously (article 1502.5) to avoid impairing the normal conduct of trade in goods or services (or investments.) In addition, specific rules are provided for certain executive categories of traders and investors (Annex 1502.1.B) and for intra-company transfers (Annex 1502.1.D.8).

A list of "professionals" covered by the Agreement is set out in an annex (Annex 1502.1, Schedule 2). Admission of professionals does not mean that they are allowed automatically to practice in the other country; this remains governed by the principle of national treatment, as seen above.

Finally, all above entry facilities are subject to the usual exceptions of public health and safety and national security, etc. (article 1502). There are also provisions in the Agreement for full transparency of each country's rules and for exchange of entry statistics (article 1502.2 and 4).

Undoubtedly, this Agreement goes well beyond a declaration such as the one included in the Israel-U.S. Free Trade Agreement, but there remain grey areas in terms of legal commitments. Therefore, the jurisprudence which will be developed as the agreement is implemented (if and when it enters into force) should help to chart the most secure course possible, in still largely unknown territory.

**SECTION 3: IDENTIFYING THE PROBLEMS: THE FREE MOVEMENT OF PERSONS INVOLVED IN THE DELIVERY OF SERVICES IN PERSPECTIVE**

Any international agreement with the objective of reducing or eliminating all state-imposed barriers to the free movement of persons involved in trade in services has to address three different types of obstacles, as was demonstrated previously by the experience of the European community: barriers to entry into a country, conditions pertaining to the right to pursue a particular profession or activity, and the general conditions of stay. We shall examine in the following pages each of these three types of obstacles, using in particular Canadian examples to illustrate them, and making reference where appropriate to the usual arguments put forward to justify such obstacles. Once clearly identified, these three basic types of obstacles shall be put in perspective, first by reference to the desired level of international economic integration, and secondly by reference to the constraints deriving from the federal character of Canada.

**A) Categories of Barriers to the Free Movement of Persons Involved in Trade in Services**

**Barriers to entry**

The elimination of barriers to entry on the national territory (or to departure, in some cases) is the first step towards liberalization of the international movement of the self-employed. The freedom to enter and to leave a country is a necessary element of the free movement of persons.

Control of access to national territory has traditionally been considered one of the most evident and justified manifestations of State sovereignty.<sup>42</sup> Indeed, sovereignty would be in doubt where it could not be expressed through physical (i.e. coercive) control of territory. In classic international law, the state is also the legitimate creator of the rules that will bring it to acknowledge a right of physical presence in the geographic area where it deploys its sovereignty.

The conditions for the obtaining of citizenship and the law of extradition are two aspects of this jurisdiction competence over individuals in relation to territory. Temporary admission of aliens who do not seek citizenship is another.

In the absence of international agreements that would restrain its discretion, a country can prohibit access to this last category of persons, or make access subject to the conditions it sees fit. Such conditions may relate, for example, to the length of the visit to the country. A number of considerations may be part of the evaluation by government officials of the state's agent at this point; for example, the concepts of national security, public health and public safety. Generally speaking, political and social factors are more prominent here than purely economic ones. Unfortu-

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42. The Attorney General of the United States reiterated this point during his testimony before the Immigration Subcommittee of the House of Representatives on Sept. 9, 1985: "We cannot fairly speak of ourselves as a sovereign nation if we cannot responsibly decide who may cross our borders." U.S. Code, Congr. and Adm. News, 99th Congr., 2nd Session, 1986, vol. 6, 5650. These hearings led to the adoption of the Immigration Reform and Control Act of 1986.

nately, the restrictions that apply to entry are sometimes so political and discretionary in nature that they appear to escape at first sight almost any type of control.<sup>43</sup>

The right of access to national territory must be distinguished from the right to work. Many of the persons who wish to enter a country do not have an economic motive for doing so; only a fraction of them intend to pursue gainful activities there. The right to work and the right of access (materially recognized by a work permit and a visa, respectively) may be given simultaneously, but the criteria surrounding the administrative decision relative to the former will take the applicant's economic objectives into account. At this level, a government may seek to insulate its domestic market, either completely or relatively, from foreign competition for the benefit of national service providers.

In Canada, the work permit is required to pursue gainful employment.<sup>44</sup> Canadian citizens, landed immigrants and the holders of certain categories of employment are exempt.<sup>45</sup> This permit must be obtained before appearing at a port of entry; but article 19(3) of the Immigration Regulations, as amended, exceptionally gives to a national of the United

43. For a list of the categories of persons excluded from entry, see s. 19 of the Immigration Act, S.C. 1976-77, c. 52 and U.S.C.A., Title 8, 1182, as amended. See also other national legislations dealing with right of entry in the series prepared by the General Secretariat, Organization of American States which surveys the laws of the various members in matters affecting business.

44. Immigration Act, S.C. 1976-77, c. 52, s. 10 (c).

45. Immigration Regulations, SOR/78-172, 1978 Canada Gazette Part II, p. 757, s. 18 and 19, as amended by SOR/84-849, 1984 Canada Gazette Part II, p. 4075.

States the right to ask for an authorization at a port of entry. The immigration officer who delivers the permit must consult an officer of the National Employment Service responsible for the employment sector chosen by the applicant.<sup>46</sup> This economic evaluation may be justified if its purpose is to avoid a serious disruption of the internal market, which would threaten the livelihood of both national and non-national self-employed. The same process may, however, be managed with a protectionist intent that would seek to discourage the foreign competitor.<sup>47</sup>

When barriers to entry have been overcome, the self-employed alien is confronted with the conditions relative to the right to pursue specific professional activities.

#### The Conditions Attached to the Right to Pursue Specific Professional Activities

The definition and implementation of these conditions often involve an active role for professional associations. Three types of conditions are usually encountered: recognition of qualifications, financial guarantees, and conditions of practice. The host country will justify these restrictions in the name of consumer protection, health and public safety consid-

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46. Id., s. 20(4). The preliminary transcript of the projected Canada-U.S. Free Trade Agreement provides that s. 20(5) of the Regulations will be applied to facilitate access to Canada for American businessmen. S. 20(5) gives an immigration officer the power to issue an employment authorization if the applicant is seeking employment pursuant to an international agreement entered into by Canada.

47. The right to mobility may be counterbalanced by a prohibition to use corporate names, for instance, which would often make mobility a pointless exercise.

erations. The argument is not unfounded. The European Court of Justice has repeatedly acknowledged the right of member states to impose restrictions on the freedom of establishment and the freedom to provide services where such restrictions have as their purpose the application of professional rules justified by the public good, in particular rules relating to organization, qualifications, professional ethic, supervisions and liability; they are permitted, however, only to the extent that a member state has no other means of protecting its legitimate interest.<sup>48</sup> In federal states such as Canada and the United States, such restrictions are to be found on a state or provincial basis.<sup>49</sup>

The barriers relating to professional qualifications create difficulties with respect to recognition of foreign diplomas and of professional training; through such barriers, governments may also impose supplementary conditions even where an equivalence of previous academic background and training has been recognized. These supplementary terms may involve addi-

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48. For a recent case dealing with the legal profession, see Ordre des avocats du Barreau de Paris vs Onno Klopp, case 107/83, July 1984. The case and its significance with regard to the right of establishment and the freedom to provide services is discussed in Common Market Law Review vol. 22 (1985) pp. 736-751.
49. M.J. Trebilcock, et al., "Provincially induced barriers to trade in Canada: a survey", in M.J. Trebilcock et al. (ed.), Federalism and the Canadian Economic Union, Ontario Economic Council, 1983, p. 243; J.B. Laskin, "personal mobility in the United States and the EEC", ibid., p. 456.

tional vocational training, a probation period or a number of years of experience in the country of origin.<sup>50</sup>

The national treatment rule is not sufficient in this case to ensure the movement of providers of services. Application of the rule can effectively remove barriers to entry where discrimination is involved, but it also requires the non-national applicant to begin his training all over again, because it applies precisely the same conditions to him as to nationals. The principle of equivalence through mutual recognition of diplomas and training, based on minimal common or supra-national standards, is introduced to mitigate the discriminatory effect of a stringent application of national treatment.

Financial guarantees are expected in order to protect the local consumer and to ensure confidence and credibility. Deposits, compulsory insurance, a requirement to create a business base in the host country may be sought in order to give to the national legal process the means to enforce its rules upon the property of the non-national applicant.<sup>51</sup>

An assortment of other rules may be added as well that relate to the actual practice of a profession or activity. We mention language require-

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50. Japan is reported recently to have opened its doors to foreign lawyers on the condition that they have 5 years' experience in the law of their country, but they may only advise foreign clients on non-Japanese legal matters.

51. Articles 1702 and 1703 of the Canada-U.S. Free Trade Agreement liberalize the provision of financial services in each country by institutions of the other, but subjects such liberalization to "normal regulatory and prudential" considerations. See also supra, note 49.

ments, the regulation of advertising and quotas. A government will sometimes require a self-employed non-national to deal with his national clients in the official language of the country (or one of the official languages), at least in formal settings such as the language of contracts, so that all parties to a transaction are clearly aware of their obligations and to prevent a non-national with powerful economic leverage from establishing unfair terms of trade.<sup>52</sup> Advertising in certain sectors, such as the legal profession, is tightly regulated; often the state seeks to justify such regulation by referring to the danger of dilution of the quality of professional services in the wake of unlimited commercialization.<sup>53</sup> The national treatment rule, in this context, would not allow a self-employed non-national to claim better conditions than his local competitor, even if those conditions obtain in his own country.

Quotas are used to restrict the number of individuals admitted to a professional association, or, once admitted, to practice in a country or a part of that country, even if the candidates satisfy all other requirements. This barrier may be selectively opposed to non-nationals, or may uniformly apply to national applicants as well. A government may use quotas to distribute professional services over the entire territory of its jurisdiction and therefore avoid a high concentration of services in the

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52. For a development of this question in the Canadian context, see below, pp. 63-65.

53. In Canada, such regulations vary considerably from one province to the other. For Quebec, see R.R.Q. 1981, c. B-1, r. 11.

major cities with a corresponding scarcity in remote areas. As with all other barriers to trade, this one may be employed with a protectionist intent.<sup>54</sup>

This also holds for our third category, concerning the more general conditions of stay.

#### General conditions of stay

The terms of residence offered to non-nationals are determined by the extension a country is willing to give to the national treatment rule. Even if the barriers to entry and to professional practice are removed, the conditions of residence may well present such difficulties to non-nationals that they may be dissuaded from providing their services in the host country.

Among such conditions, mention can be made of the right to contract and to litigate, the right to acquire property, the non-national's fiscal status and his or her access to social security. As a group, they make up the general legal and economic conditions which permeate the relationship between the non-national and the host country.

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54. Such quotas are encountered particularly in the field of medicine: see below, note 56, for a discussion of the situation on Canada.

The rules defining those conditions are traditionally reserved for the government's discretion. Legitimate national values may justify a prohibition of the sale of land to aliens or non-residents, for example.<sup>55</sup> Special rules will continue to be required because of the non-national's temporary presence in the country, but it is to be expected that an international regime of liberalization of the flow of services would make it more difficult, if not impossible for general access to national economic and legal systems to be dependent on such criteria as citizenship or residence.

#### B) Levels of Liberalization

The three categories of restrictions we have identified may be the object of different levels of liberalization. These levels are important because they determine the objectives in terms of actions to be taken; they may be encountered more or less clearly in any attempts at economic integration. Within the context of Canadian federalism, for instance, S. Rogers-Magnet and J. Magnet write that, to ensure complete mobility, it is not enough to erase visible barriers; social services must also be comparable, and at a third level pensions must become portable.<sup>56</sup> There is a gradation here that goes from elimination of barriers specifically designed

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55. For a good comparative survey on this point, see J. Weisman, "Restrictions on the Acquisition of Land by Aliens", (1980) 28 Am. J. of Comp. Law 39. See also E. James Arnett, "Which investors are "Foreign" LV Canadian Bar Review (1977) p. 231.

56. S. Rogers-Magnet and J. Magnet, "Mobility Rights: Personal Mobility and the Canadian Economic Union", in Perspectives on the Canadian Economic Union, vol. 60 of the studies for the Royal Commission on the Economic Union and Development Prospects for Canada, Univ. of Toronto Press, 1986, 195-270, at 205-206.

to block or limit international movement (inter-provincial movement in this case) to a second phase of coordination of different national regulations and finally to the emergence of a body of common rules, either through the convergence of national (or provincial) laws or through the creation of an effective supra-national regime, specially designed to facilitate international movement.

This process of gradual change may or may not be due to a so-called spillover effect, where the gains derived at one level induce countries to accelerate the pace of change, but it is clear that no determinism should be postulated. Political will controls the process and may halt it or decrease the commitments it entails. International economic integration on a widening scale is not a predetermined characteristic of the next century. It should be freely chosen by governments and public opinions if it appears to them that it would lead to a more optimal allocation of resources and values. What follows therefore is not a road map for the future, but a description of the essential stages of integration should that option be chosen and pursued along the lines contemplated by the present government of Canada.

In the Treaty of Rome, the major objectives with respect to services are the suppression of those restrictions to establishment and the trans-border provision of services which are based on the nationality of the persons offering those services, the mutual recognition of diplomas and certificates of professional training, and finally the coordination of legal,

regulatory and administrative rules of the member states of the European Community concerning access to self-employment.<sup>57</sup>

Once again, each of those objectives relates to a different degree of integration in a process similar to that described above. As already mentioned, the suppression of nationality-based barriers does not ensure national treatment. At most, this will only take care of the overt and intended forms of discrimination, while leaving intact all barriers having no apparent bearing on nationality, but whose principal effects are discriminatory on national lines.

National treatment is attained at a second level of integration, when governments are not content with the disappearance of barriers which have been specifically designed to block trans-national integration. At this point, States must not only cease and desist from this particular form of economic warfare, they must begin to take further measures in order to facilitate integration. National legal choices become oriented by the greater weight of the international legal order, even in areas having traditionally little to do with external relations.

Education, for example, a core state function primarily of domestic concern, becomes increasingly affected by rules governing the international recognition of diplomas. The point is that at this level the whole of domestic law becomes a potentially legitimate concern of international agreements. While at the first level, governments only seek to remove the nor-

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57. Art. 52(1), 57 and 59(1) of the Treaty.

mative barbed wire, the asperities created to insulate national legal systems from each other, an inter-systemic dialogue is established here and national rules are made compatible to each other, in that they begin to "speak" to each other in a common language. Trans-national legal linkage becomes a new value in itself attached to internal legal decision-making.<sup>58</sup>

The third and ultimate level of the legal dimension of integration goes beyond the reciprocal acceptance of national differences within a minimal common set of standards. It is characterized by the emergence of a new relationship between national and international law. The traditional relationship is inverted and the former becomes clearly subservient to the latter. This may be attained by a firmer alignment of national rules to the point where autonomous decision-making is only nominal, or by the complexification of an international legal order which gradually reduces and replaces the material domain of national choices.

Mutual recognition of diplomas would here be replaced by a single uniform set of rules applicable in the internal law of all member States of the proposed economic union. At this point, of course, integration is so advanced that national sovereignty in particular fields is significantly eroded.

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58. Some commentators of the new Single European Act have written that the focus of concern in the EEC, in many fields, has passed from national barriers to national non-barriers, that is to rules whose principal weakness is not their hostility to international integration, but their diversity itself: N. Forwood and M. Clough, "The Single European Act and Free Movement", (1986) European Law Review 383, 385.

While conceptually distinct, these levels of integration often overlap in practice and they inter-relate differentially as well with the categories of restrictions discussed previously. This means that each attempt at trans-national integration presents a unique mix of these factors and holds a different position in the spectrum of possible departure from traditional State sovereignty.

It is not surprising, therefore, that a working party of the OECD should mainly be concerned with the first two levels of integration.<sup>59</sup> The Treaty of Rome contemplates a process for change leading to the objective of political integration. Open-ended provisions such as those mentioned<sup>60</sup> imply a continued erosion of national decision-making. The proposed free trade agreement between Canada and the U.S. lies somewhere in between: the commitment to liberalize service-related personal mobility lays some important groundwork but largely consists of an agreement to further negotiate on this matter, and the ultimate outcome may or may not have far-reaching consequences, once it is made clear in both countries what those consequences might entail.

Federations, of course, form another class of attempts at economic and legal integration of initially dissociated political units. These attempts have achieved variable success.

It has often been noted of the Canadian federation, in particular, that in some ways it is already less integrated than international expe-

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59. OECD, Working Party of the Trade Committee, The Elements of a Conceptual Framework for Trade in Services, Dec. 16 1985, 18 p.

60. Supra, note 57.

riences, such as the European Community, where distinct sovereignties have not been abandoned. To the Canadian experience we now turn.

### The Canadian Constitutional Constraints

The present state of Canadian constitutional law relating to the inter-provincial mobility of Canadian citizens is well known. While there are no barriers to physical entry into a province such as might be opposed to aliens at the international border, the right to provide trans-provincial services and the right of establishment are subject to a great number of impediments which may in practice be fatal to hopes of access to an out-of-province market.

With the exception of those industries which are wholly within the range of federal law, such as banking, navigation and shipping, or international and interprovincial transportation and communication, the provinces have much the greater share of the constitutional authority to regulate most professions, services, and industries. This has resulted in variations in licensing requirements, and sometimes prohibitive costs to mobility resulting from the non-portability of qualifications.

In other relevant areas, provincial powers are also important. The jurisdiction over education is exclusively provincial, while power over immigration, social security, taxation, and linguistic law are shared with the federal Parliament and government.

The question is how long this heterogeneous state of affairs shall last, in the face of a perceived need of greater international integration. Can the present level of autonomous provincial decision-making long survive a free trade agreement with the U.S. or a reinforced GATT? Already, potentially ominous signs for the provinces are appearing. In the softwood lumber dispute with the United States, the provinces had to agree to a uniform cross-Canada solution that would satisfy our foreign partner. The provinces had a significant opportunity to influence federal policy, but in return they had to reduce their options to the one that would be acceptable to other provinces, to Ottawa and to Washington.

A similar degree of flexibility may be taken away in other contexts. The recent GATT ruling on beer and wine marketing in Canada will force the provinces once again to align themselves more closely with each other and with the federal government in a manner that is compatible with the international commitments of the country. The provinces had already undertaken to modify their practices in this matter during the Tokyo Round. The fact that they did not live up to that commitment means that the international community now expects international law to exert greater pressure on them to integrate their rules both within Canada and with the outside world.

The American government has taken the same stance with respect to free trade. Time and again, its representatives have stated that the provinces must be effectively bound by Canada's international commitments for free trade to remain an attractive proposition to the United States. In the specific case of services, the proposed free trade agreement intends to

follow up on the initiative of Canadian and American architectural associations which have tried to open access to both countries for their members. The example of architecture is explicitly mentioned in the proposed agreement. The Royal Architectural Institute has negotiated with its American counterpart and some results have been achieved. Perhaps other professional associations will follow. It is significant, from the standpoint of Canadian federalism, that these national associations have undertaken international negotiations on matters covered by provincial law. Presumably, a common Canadian position is presented by the national association. Provincial governments can be expected to support and implement the commitments that the provincial architectural associations agree to. The agreements reached will eventually become international law because they will be confirmed by the free trade regulatory scheme. Thus, while provincial governments may agree at this point to harmonize and merge their respective positions, they may find that when the new scheme does not serve their interests, they will have lost the autonomous decision-making capacity to opt out or to modify their commitments.

A greater interface between provincial and international law flows from this process of international integration. Constitutional law mediates that relationship, but where international integration is perceived as a public good whose legitimacy is rising, and where it is perceived that it catalyzes the completion of internal economic union, the result may not only be greater alignment of provincial law with the law of other provinces and greater compatibility with international law, it may also signal a trend to re-interpretation of federal economic powers at the expense of the

provinces, so that both external and internal integrations can proceed simultaneously and harmoniously.

Many courses are open, and there is no single pre-determined constitutional avenue to economic integration. Provinces which would consider blocking the process of voluntary harmonization, however, will have to evaluate the consequences of their refusal on the evolution of constitutional jurisprudence. Already, the Supreme Court has shown a willingness to redefine the depth of s.91 (2) of the Constitution Act, 1867.<sup>61</sup> In Australia, in a recent seminal case on a related matter<sup>62</sup>, the High Court consented to become an active instrument of the integration of domestic law with international law in order to overcome the reluctance of federated states to cooperate in this process. The legal technique chosen there was the expansion of the federal power over external relations. The following view was expressed by Murphy, Justice, of the High Court<sup>63</sup>:

"... along with other countries, Australia's domestic affairs are becoming more and more involved with those of humanity generally in its various political entities and groups. Increasingly, use of the external powers will not be exceptional or extraordinary but a regular way in which Australia will harmonize its internal order with the world order. (...) Under the Constitution Parliament has the authority to take Australia into the "one world", sharing its responsibilities as well as its cultural and natural heritage."

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61. See, for example, the uncontradicted and trail-blazing dissent of Dickson, Justice (now Chief Justice) in Attorney General of Canada v. CN, (1983) 2 S.C.R. 206.

62. Commonwealth v. Australia, (1983) 57 A.L.J.R. 450.

63. Ibid, 505.

Murphy Justice further discussed the preservation of Australian forests as a matter which could pass from State to Commonwealth jurisdiction in the event of increased international concern over continued depletion of the global environment.

In Canada, there is no specific allocation of constitutional power over external relations, but this only means that other points of access of international law to the domestic legal system must be found. In a context of increased international economic integration, the likely candidate is s. 91(2). This would NOT involve a reversal of the Labor Conventions Case, merely a new application of it. A greater range for federal power over trade and commerce would bring a corresponding rise in the treaty - applying legislative power of the federal Parliament. The result would be a draining of provincial power, not through convergence of provincial laws, but through an outright reallocation of constitutional power by the Supreme Court as a product of the reinterpretation of existing heads of jurisdiction.<sup>64</sup>

Thus, constitutional law inhibits both inter-provincial and international integration at present, but the increased importance of such integration on the social and political agenda might well change the picture so completely over time that constitutional law might well become an active agent of integration.

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64. Neither is a reversal of the Labor Conventions case altogether out of the question: Macdonald v. Vapor Canada, (1977) 2 S.C.R. 134.

Before moving to the next section, we examine the specific case of language legislation, where special factors are at work which (may) influence the free movement of people despite greater bilateral or multilateral integration of the Canadian economy and legal system.

### International Mobility of Persons Involved in Trade in Services and Language Legislation in Canada

It is an established fact that language laws can create barriers to the right to practice a profession in a given country. Canadian provincial law, in particular, often requires in many respects a working knowledge of the language spoken by most residents of the province. This can be so even in cases where such knowledge does not appear necessary for the purposes for which mobility is sought.

The extremely controversial nature of language legislation in Canada, and more specifically in Quebec, means that the Canadian federal and provincial governments would probably be wary of entering into international commitments that would have an impact on language legislation. As well, the re-allocation of legal power over the economy through the courts (a re-interpretation of the Constitution which would amount to an informal constitutional amendment) would probably stop short of stripping a province of its discretion over the linguistic aspect of the activities of the private sector. Such matters as the language of contract, the language of professional services, the language of the workplace, would probably remain a provincial responsibility for a long time to come, even if certain sectors

where these rules applied were strongly linked to the international economy.

The recent constitutional proposal known as the Meech Lake Accord would give the province of Quebec the status of a "distinct society". It is still unclear what precise legal content should be ascribed to this concept, but if it is to have any at all, that content would presumably have some linguistic connotations. Thus, the originality of Quebec language legislation could be buttressed by the Accord, if it becomes constitutional law.

Quebec is different, whether its "distinct society" is constitutionally recognized or not, because its principal language is other than the common language of the rest of North America, which also happens to be at present the language of international business. As long as the French language is preserved and used in Quebec, social unrest may flow from an attempt at international economic integration which would be insensitive to the delicate nature of social issues of this kind.

The Quebec requirement that professionals seeking a license to practice in the province must have an "appropriate knowledge" of French is contained in Bill 101<sup>65</sup>. Already, the Conseil de la langue française has expressed its fears about the impact of Canada-U.S. free trade on such a requirement<sup>66</sup>.

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65. Charter of the French language, L.R.Q. 1977, c.c-11, s.35 and 41.

66. M. Sparer, "Libre-échange et droit linguistique", Conseil de la langue française, Notes et documents, no 60, 1986, at 42.

## Conclusion

Ensuring total freedom of movement for those persons involved in the international delivery of services is obviously not an easy task. The problems encountered, from entry into the territory to the actual practice of a particular profession or activity and the general conditions of stay, raise sensitive issues and cannot be solved in an expeditious and simple manner. Depending on the intended level of trade liberalization, more or less complex solutions can be envisaged, ranging from outright prohibition of certain actions to bold transfers of competence from national to supra-national authorities. In view of the practical impossibility of moving at once from the present situation to one of total freedom of movement for persons involved in trade in services, the most urgent task for the moment is to develop some kind of step-by-step approach for dealing legally with such problems.

## SECTION 4: PROPOSALS FOR A GRADUATED NORMATIVE APPROACH

We have emphasized previously that norms designed to ensure the free movement of persons involved in the transborder delivery of services must necessarily take into consideration the nature of the problems raised (types of obstacles as well as their justifications), the geographical scope of application of the proposed norms (bilateral, regional, worldwide) and the level of economic integration pursued (free trade, customs unions,

common market). Furthermore, because economic integration is essentially a dynamic process, such norms can hardly be put in place without some views regarding their future development. Indeed, as pressure is growing in various quarters to adopt rules that would allow for the free movement of services in bilateral and regional settings, as well as world-wide, there is an urgent need to develop a graduated normative approach that could serve as a model for the realization of the desired objectives. For a country like Canada, involved simultaneously in both bilateral and multi-lateral trade negotiations, it could also serve as a useful tool to achieve greater consistency and rationality in its interventions.

Having in mind the typology of problems described in the preceding section, we shall now consider in this last section the various legal instruments that can be used to ensure the free movement of persons involved in the transborder delivery of services, together with their consequence from a systemic point of view, moving from the most basic approach that can be envisaged in a multilateral world-wide arrangement to more sophisticated approaches that can be developed in smaller, more integrated groupings.

### The GATT Framework

It is sometimes suggested that the easiest way to implement free trade in services at the world level would be to simply transpose the GATT principles and obligations to services. But apart from the fact that such an initiative meets with serious resistance from many contracting parties - particularly developing countries - who consider that trade in services has

quite different implications in terms of economic, political and cultural impact than trade in goods - difficulties also arise because the GATT text, in itself, leaves a number of problems unanswered when it is applied to trade in services. At the Punta del Este ministerial meeting, which officially launched the Uruguay Round of trade negotiations, a last minute compromise opened the door to the discussion of services-related problems outside the GATT, but under a single negotiating committee simultaneously responsible for trade in goods discussions, leaving for later the question of how to relate the results of their negotiations on services to the GATT structure.

If the solution eventually retained is to incorporate the proposed new rules directly into the General Agreement, through a formal amendment, this has a certain number of implications. First of all, since such an amendment can only come into force, according to article XXX of GATT, when two-thirds of the contracting parties have assented to it, it means that only the most basic type of framework acceptable to the greatest number of states can be envisaged. We shall come back later to that. Secondly, it means that serious work will have to be done in order to reach agreement on a common definition of services: the great number of states involved, the disparity of interests and means between them, make it all the more difficult to agree on a definition acceptable to all the contracting parties; yet, in the absence of such a definition, it is difficult to see how true reciprocity could be achieved. Finally, incorporation of the new set of rules on services into the GATT means that the conflict resolution mechanism for trade in services problems will be that of GATT and nothing else.

If, on the other hand the contracting Parties decide to proceed with a distinct agreement somewhat along the lines of the codes agreed upon during the Tokyo Round, the implications are quite different. First of all, a services agreement would in that case constitute a self-contained agreement, which means that a separate consultation and dispute resolution mechanism would be required. Secondly, to the extent that it would come into force, upon signing and ratification by a minimum number of states - twenty for example - chances are that the level of obligation envisaged would go further than if the rules on trade in services were integrated in the GATT itself, if only because of the smaller consensus required. Thirdly - and this is essentially a consequence of what precedes - it could easily end up as an agreement between developed countries - and perhaps some newly industrialized ones - judging from the attitude of most developing countries. And finally, if this were to be the case, it could contribute to the gradual demise of GATT as a world-wide instrument. If we add to this last conclusion the fact that an important part of the market for trade in services is to be found precisely in the developing countries, then it must be admitted that an agreement which is intended to be world-wide in scope but that would end up as some kind of inter-regional agreement between Europe, North America and some Pacific Basin countries, does not present as much interest as an agreement integrated within the GATT itself.

Assuming that the GATT amendment is the solution that prevails, what does it mean now with regard to the free movement of persons involved in the delivery of services? The basic obstacle to entry into a country's territory is normally to be found in the limitations imposed by its immi-

gration act and regulations. In the case of Canada and the United States, as we have seen, this refers back to provisions that are intended either to exclude certain categories of persons for security, health or economic reasons, or else to control the stay of certain other categories of persons who are admitted for a limited period of time or under specific conditions with an entry permit or visa.<sup>67</sup> Free trade, or even freer trade, in services can hardly take place if those who supply the services cannot enter the potential importer's territory, or enter under such conditions, that the result is essentially the same: they are prevented or inhibited from selling their services. On the other hand, eliminating all controls at the frontier is impossible, particularly at the world level; even in the European Community, as pointed out, restrictions based on public order, public security or public health are accepted. However, in a context where countries are basically free to impose whatever restrictions they see fit on the entry of foreigners, it is a very big step if only to obtain agreement that restrictions be limited to those that can be justified on such grounds of public order, public security or public health.

Indeed, it can be seriously questioned whether it is possible in the present GATT negotiations to reach a consensus on the principle itself that persons involved in the delivery of services are allowed to enter each contracting party's territory without restrictions, save for those agreed upon in advance. Such a possibility raises, in the eyes of developed countries in particular, very difficult problems in terms of control of migration.<sup>68</sup> Thus, if one adopts a broad definition of services, so as to in-

67. See above, p. 46.

68. In a conference in Washington in September 1987, Sylvia Ostry, Canadian Ambassador for the GATT Multilateral Trade Negotiations did acknowledge that temporary entry of persons was a very sensitive topic for a number of developed countries.

clude for instance catering services or any other type of service that does not require a high level of formal education, one can easily imagine the number of persons across the world that would be glad to offer their services in Canada, the United States or any other developed country. Naturally, one could always define services so as to exclude such types of services. But if the definition ultimately adopted applies only to specialized professional services essentially produced in developed countries, one can just as easily imagine the reluctance of developing countries to conclude an agreement so one-sided in its implications. Similarly, for those East European countries that are already members of GATT, it is difficult to see how they could let persons involved in the delivery of services enter their territory without being actually involved in a business relationship with one or another governmental agency.

This being said, it does not mean that the recognition of some basic right of entry for persons involved in the delivery of services cannot be recognized at the GATT level. What it does mean is that the common denominator acceptable to all contracting parties will probably consist of nothing more than a right of entry for a limited period of time, subject to certain exclusions and valid for certain types of activities. By implication, this excludes the granting of a general right of establishment, that is a general right to set up a business base within any of the contracting parties; but the problem there is so inextricably linked to those of investment and migration that it has practically no chance of being successfully tackled at the world level for the time being.

Where does that leave us in terms of facilitating the entry of persons involved in the delivery of services? The gains at first sight would not be important, consisting essentially in a consolidation of the basic rules that apply in most countries with regard to the entry of foreigners for the purpose of temporary work, a kind of formalized standstill clause together with a guarantee of most-favored-nation treatment. But translating these rules and practices into a single principle with agreed exceptions constitutes indeed an important step forward as it opens the door to international supervision and the development of a new dynamic<sup>69</sup>. The real gains, assuming that the principle is accepted, would have to be assessed five or ten years later.

However, dealing with right of entry is only one aspect of the problems associated with the free movement of persons involved in trade in services. A second important aspect is that of controls over the practice of specific professions and activities. It is one thing to admit people into one own's territory, it is a quite different thing to ensure that they are not effectively prevented from working because of so-called professional controls. These controls are quite varied, as was seen previously<sup>69</sup>, and while most of them are genuinely intended to protect the public, some aim directly at excluding foreigners, or impose conditions upon their right to deliver services that are manifestly intended to protect the local producers of the same services. The problems associated with the first type of controls can only be solved through efforts to coordinate and harmonize

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69. See above, p. 46 ff.

69. See above, p. 46 ff.

national legislation dealing with such questions: it appears hardly appropriate at this stage for treatment at the world level, considering the fact that they still raise serious difficulties in a much more integrated setting such as the European Community, not to mention federal states such as Canada. But the second and third types of controls, discriminatory and protectionist in nature, should definitely be a matter of concern in an eventual GATT agreement on services.

It is difficult to see why GATT contracting parties which are ready to open their territory for the purpose of allowing freer trade in services would maintain residence, domicile, or a fortiori citizenship as an absolute prerequisite for the practice of a professional or semi-professional activity. Citizenship as such is obviously incompatible with any notion of free trade in services, whatever the interpretation given to it. Domicile and residence may perhaps be seen as a valid concern in matters of establishment; but with regard to the temporary entry into a contracting party's territory for the purpose of delivering a service, it certainly does not appear essential<sup>71</sup>. In a GATT agreement on services, such requirements should be eliminated.

At the same time, and in order to favor the granting of a right of access as wide as possible, consideration should be given to the solution adopted in EC directive 77/249 with regard to lawyers: member states are explicitly allowed to require foreign lawyers to work in conjunction with a

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71. See on this article 5 of Directive 77/249 of the EC which deals with the freedom of lawyers to provide services; residence as a means of control is excluded.

local lawyer. This may be seen as an important restriction in itself; but at the world level, it may just be what will make the principle of freedom of access acceptable. It could, in other words, do for free movement of persons involved in trade in services what tariff negotiations have done trade in goods in GATT.

The third and last category of problems associated with the free movement of persons involved in trade in services concerns the general conditions of their stay. Here, whether one deals with the right to contract, the right to acquire property, the right to appear before the courts, or more generally the right of foreigners under the laws of the contracting party concerned, the basic solution lies in the granting of national treatment, as is already the case with respect to the movement of goods in GATT. The formulation should be somewhat different from that found in article III due to the differings circumstances and in order, to allow for exceptions or gradual implementation where necessary, but the principle of national treatment should be expressed clearly<sup>72</sup>. In some cases, admittedly, national treatment as it exists in one or another contracting party may be seen as well below expectations. Unless it does not conform to the minimum standard of customary international law, as sometimes happen in the administration of justice or when property is expropriated, there is not much that can be done to alleviate such concern.

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72. Interesting remarks about national treatment are made in the Final Report of the Task Force on Trade in Services set up by Canada. It is argued among other things that "the notion of national treatment as a general, a fortiori concept for trade in services trade is questionable."

What has been said so far on liberalizing the movement of persons involved in trade in services at the world level may be seen as a timid beginning. But if one adds to that the recourse to a consultation mechanism and a conflict resolution mechanism, such as those that already exist in GATT, and the insertion of a federal state clause such as article XXIV (12), particularly as it has been interpreted recently, it is an important beginning. Beyond the principles and rules themselves, such mechanisms and rules bring life to a process of economic integration that may be seen as moving haltingly, but nevertheless making progress. As a matter of fact, just to make trade in services part of that process of integration at the world level would be in itself progress. With the example of regional groupings, such as the EC, which are forging ahead with efforts to liberalize their trade in services, the pressure at subsequent rounds of GATT negotiations to do the same could bring about significant improvements on what can justifiably be considered for the moment as a timid beginning. The real danger, as a matter of fact, is to aim for too much, both in the negotiations, where it could lead to a failure to reach agreement, and in an eventual agreement itself, where it could lead to non-compliance.

### Regional Groupings

In regional groupings, the free movement of persons involved in trade in services is easier to realize if only because of the geographic, political, economic and cultural proximity of the member states that usually characterizes such groupings. Nevertheless, in those arrangements that aim for a low level of economic integration, such as traditional free trade

agreements, achieving free trade in services, and the free movement of persons involved in services, has never until recently been a preoccupation.

In the non-binding declaration on services that accompanies the more recent Israel-U.S. free trade agreement, there is no provision dealing as such with the movement of persons involved in trade in services, although articles 2 and 3 of the declaration could be seen as covering by implication some of the problems associated with the movement of persons involved in such trade. Article 2 states in general terms that each party "will endeavor to achieve open market access for trade in services with the other nation", while article 3 reads:

"Each Party will endeavor to assure that trade in services with the other nation is governed by the principle of national treatment. Each Party will endeavor to provide that a supplier of a service produced within the other nation is able to market or distribute that service under the same conditions as a like service produced within the first nation, including situations where a commercial presence within the nation is necessary to facilitate export of a service from the other nation or is required by that Party."

Whether and to what extent, in the affirmative, this last provision covers the restrictions to entry that derive from each party's immigration act and regulations is not quite clear. Although not a matter of national treatment as such, the right of entry would appear to be implicit in the wording of the provision as well as in the general terms of article 2; what is much more problematic is the position of the parties on the exceptions that usually accompany such a principle: we can only speculate on their

nature and extent. As for the restrictions that derive from controls over professional qualifications and practice, they can hardly be covered by the national treatment stipulation of articles 3 and 5 as it is usually the national requirements themselves that constitute the problem. Finally, discrimination in the general conditions of stay appear to be covered by the national treatment stipulation. But there is no indication that the eventual granting of a full right of establishment is envisaged in the declaration of principles; on the contrary, the definition of "trade in services" in article 1 appears to exclude that possibility ("trade in services takes place when a service is exported from the supplier nation and is imported into the other nation").

As a first example of a free trade agreement dealing with services, the Israel-U.S. one is interesting in many respects. As far as concerns the elimination of obstacles to the free movement of persons involved in services, it clearly shows the danger of relying too heavily on one basic principle, the national treatment principle, to solve the multi-faceted problems that arise. The result of this approach is that such an important question as the right of entry itself is not adequately treated, while another recurring problem, that of the conditions of access to specific professions or activities, is implicitly treated in a vague undertaking "to endeavor to achieve open market access". A more systematic approach, taking more closely into consideration the nature of the problems raised, and expressing more clearly the goal pursued in each case, will be necessary if these provisions are to be translated into effective binding obligations. This is where perhaps recourse could be had to a list of specific

instances of discrimination, such as found in the General Program of the EC, and following the technique used in GATT for subsidies. As it stands, the declaration of principle does not go much beyond what one would normally find in a GATT agreement on trade in services. One would have expected also some specific reference to the problems of coordination and harmonization associated with the right of access to professional or semi-professional activities. Even article 4, which addresses the problem of services regulated by political subdivisions appears weaker than the obligation imposed on federal states in article XXIV (12) of GATT.

The only other example of a free trade agreement dealing specifically with services is the Canada-U.S. free trade arrangement of January 1988, which is not yet in force. However, it is already clear that this agreement, if it does indeed come into force, will go much further than the Israel-U.S. agreement in ensuring the free movement of persons involved in services. Regarding entry, first of all, chapter 15 specifically covers the temporary entry of business persons, recognized professionals and persons engaged in sale or after-sale operations. Entry for the purpose of setting up a commercial presence is equally ~~in~~ covered in chapter 14, although little is said about establishment except in the provisions on tourism. Concerning the right of access to specific professions or activities, it is to be facilitated through mutually agreed understandings in various sectoral areas, architecture being singled out in an annex as such an area of further development (article 1403). General conditions of stay, finally, are covered by the principle of national treatment as well as by more detailed rules to be included in sectoral understandings (article

1402). Although it is somewhat surprising to find that two states as close as Canada and the United States were unable to go further in terms of ensuring the temporary entry and right of establishment of persons involved in trade in services, the fact remains that the Canada-U.S. free trade agreement goes beyond any other trade agreement in this area except the EC Treaty.

If we compare now the Israel-U.S. agreement and the proposed Canada-U.S. agreement in their approach to the free movement of persons involved in the transborder delivery of services, we are almost faced with two extremes. In the case of the Israel-U.S. agreement, the approach is very general in nature, relying essentially on the national treatment principle in order to realize its objectives. Periodic consultation is the only mechanism put in place to solve potential problems and further developments are left to a review of the working of the agreement 18 months after its entry into force. Chances of moving much beyond what one would expect to find in a GATT agreement on services, in short, appear very small. In the case of the Canada-U.S. agreement, on the contrary, just about every possible means of ensuring the free movement of persons involved in trade in services is included, and potent institutional mechanisms are put in place to make sure that real progress in that direction is realized. But all this is done in a rather confused manner and it remains unclear how a right of commercial presence can be included while temporary entry itself is made subject to national measures "ensuring border security and protecting indigenous labour and permanent employment" (art. 1501). Similarly, the emphasis put

on sectoral negotiations, including the three annexes on architecture, tourism and telecommunications and computer services, and the projected annex dealing with the transportation sector, is somewhat baffling. In the case of architecture, for instance, it builds upon the work of two professional bodies which are in the process of recommending mutually acceptable standards regarding education, examination, experience, codes of ethics and professional development; on the basis of their recommendations, the parties will encourage adoption of necessary legal changes by the states and provinces leading to mutual recognition by no later than 1990. What "encourage" means by reference to "not later than" 1990 is not clear; what leaves no doubt, however, is that such an understanding cuts into some very sensitive areas of provincial jurisdiction, such as education, not to speak of language, with the result that a real agreement could well be further away than expected. Whether this approach can serve as a prototype for the negotiation of further agreements dealing with other professions such as those of lawyers or accountants remains to be seen. Somehow, one gets the feeling that the Canada-U.S. agreement loses sight of the fact that it is a free trade agreement and not a common market agreement. By attempting to go too far too quickly, it also runs the risk of failing to deliver the goods.

The truth is that in regional groupings such as free trade areas, there is a fundamental limit to their ability to implement the free movement of persons involved in trade in services. That limit lies in the political desire of the parties not to go beyond a certain level of economic integration. If the participating states have refused to entrust to cen-

tral institutions the responsibility of developing uniform or harmonized norms where this is necessary to realize full freedom of movement, it is doubtful that they will acquiesce in other developments that would similarly restrict their margin of action. More or less permanent negotiations designed to gradually eliminate obstacles to the free movement of persons involved in trade in services may be less threatening and yield positive results. But they cannot replace central institutions. If they do, then chances are that the parties have implicitly accepted to work within the context of a common market rather than that of a free trade area.

In our view, a graduated normative approach designed to ensure the free movement of persons involved in trade in services should concentrate, at the level of a free trade area, on those issues that require for their solution a greater homogeneity of interests and views than is normally to be found at the world level, without necessitating the intervention of some supranational institutions. Thus, regarding the right of entry, one would expect to find not only some fairly explicit rules concerning the right of entry for a short period of time, but equally some basic rules addressing the issue of entry for the purpose of setting up a more permanent basis within the country, that is entry for the purpose of establishment. Questions such as who exactly benefits from the right of entry, what exceptions apply to it, what kind of control, if any, is exercised over the presence of nationals of other member states, must be answered in a clear manner. Conditions of access to the practice of a particular profession or activity that are directed (as such) at nationals of other countries should be eliminated and some general standard is needed for assessing the compatibility

of regulations designed to protect the public with the agreed goal of freer trade in services. As long as the member states object to the setting up of central institutions that have the power to establish binding rules applicable to them, care should be taken not to venture too far in the direction of coordinating and harmonizing national legislation that relates to the exercise of specific professions or activities. This is a very difficult matter, as evidenced by the experience of the European Community, and in the context of a less integrated economic grouping, such as a free trade area, it could derail the whole effort to achieve the free movement of persons involved in trade in services. In the context of the proposed Canada-U.S. free trade agreement, furthermore, it could easily meet with stubborn resistance on the part of the provinces. What could and should be done perhaps in this area in order to facilitate the conclusion of sectoral agreements is the development of a model procedure for discussing the problems inherent in a specific profession or activity, a model that would be submitted to the competent authorities with an obligation upon them to undertake negotiations in good faith upon that basis. Such a model procedure, after stating the general goal of the exercise, should move systematically from identification of the limits and constraints imposed, to consideration of their justifications, a search for common denominators in approaching the problems encountered, an agreement on basic principles, a schedule of implementation and finally, in case of disagreement, an undertaking to pursue discussions on a periodic basis. With regard to the general conditions of stay, finally, particular attention should be paid, for the purpose of facilitating establishment, to the difficult problem of access to and portability of social security benefits, the basic rule again

being that of national treatment. But here also, no attempts should be made as such to harmonize social security legislations. In the Canada-U.S. context, there already exist a certain number of social security agreements; a useful approach perhaps would be to gradually extend those to cover a wider range of situations.

Now if we move up in the ladder of economic integration, to the level of a common market or an economic union, the greater degree of institutional support that characterizes such groupings makes it possible in theory to aim for the elimination of all obstacles, direct or indirect, voluntary or involuntary, to the free movement of persons involved in trade in services. As mentioned before, however, it is not an easy task. Even in a federal state such as Canada, full freedom of movement for professionals is not yet a reality. In the European Community, progress has indeed been realized in that direction, but by comparison with the free movement of goods, it remains an elusive goal. This makes it all the more important to understand the process of economic integration in this particular area.

In section 2 of our study, we discussed the EC's approach to the free movement of services and the right of establishment. It is a two-pronged approach that prohibits, on the one hand, all forms of discrimination, and on the other requires the member states to harmonize their laws and regulations. The first type of measures are part of what has been termed a negative integration process - that is a process based essentially on prohibitions - while the second type of measures are seen as part of a positive integration process, a process that relies on recommendations, directives

or regulations. As we move up the economic integration ladder, the emphasis on negative integration in the earlier stages switches to positive integration in the later stages. At the level of GATT, thus, free movement of persons involved in trade in services is essentially a matter of interdictions (non-discrimination), with some weak recourse to positive duties (transparency requirements) and a low level of institutional support (GATT's conflict resolution mechanism). Moving up to the level of a free trade area, interdictions tend to become more detailed while positive integration measures occupy more room, with the active support of some form of permanent consultation and review mechanism; it is usually left to the latter to hear complaints by member states where no specific conflict resolution mechanism is available. At the level of a common market or an economic union, finally, any type of action by the member states that is incompatible with the goal of free movement is prohibited and this prohibition is implemented by a very effective integrating device, that is, a binding tribunal. Positive integration measures for their part gradually develop into a comprehensive set of community rules at the initiative of central institutions, with powers of their own, which supersede those of the member states<sup>73</sup>.

The difficulty that arises with the gradual move from negative integration to positive integration is that it calls for lengthy negotiations between the parties every time a new intervention is envisaged. The difficulty is even greater when the decision to go ahead must be taken unani-

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73. See in general on this question George Close, "Harmonization of laws: use or abuse of the powers under the EEC Treaty?" (1978) European Law Review, p. 461.

mously. Until very recently, this was the case in the European Community, with the result that the adoption of directives for the purpose of implementing free trade in services in general, and free movement of persons involved in services in particular, has lagged seriously behind schedule. The decision to accelerate the process by making greater use of majority voting, while yielding some results, does not appear to have solved all the problems.<sup>74</sup> Indeed, one gets the impression that the efforts made to coordinate and harmonize national legislations have involved the Community in an immense legislative task. And what is worse, point out C.J. Berr and Louis Reboud in a recent article, the Community may never see the end of its efforts as new obstacles will inevitably replace those that have disappeared.<sup>75</sup> Instead of trying to control each new obstacle that is created, they suggest that a more useful approach could be to consider first the basic goals and objectives that lie behind the multiplicity of modes of intervention of the member states, to determine afterwards what is negotiable, and then only to attempt to coordinate the action of the member states. This analysis is interesting in that it appears to reflect at least in part some of the conclusions of the Commission itself in its White Paper on the Completion of the Common Market, particularly where it affirms that a minimum recourse should be had to coordination and harmonization of national interventions, and a greater stress put on "home country con-

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74. C.J. Berr, Louis Reboud, "Pour une politique communautaire des services", Revue du Marché commun (1985), p. 264.

75. Thus, a proposed directive on the mutual recognition of diplomas in the field of architecture was blocked during 17 years by Germany before being adopted in 1986: see V. Hirsch, "Marché intérieur: une nouvelle impulsion grâce à l'Acte unique?", Revue du Marché Commun, no 303, 1987, p.1

trol". Such conclusions apply perfectly well to the strategy developed in the EC in order to realize the free movement of persons involved in trade in services.

One can go further and suggest that they effectively set a limit to the gains to be realized through economic integration. To the extent that the dynamic of economic integration requires the gradual elimination of barriers to trade in goods, services and capital, as well as the free movement of workers and a certain degree of legislative harmonization, there is likely a point beyond which increasing uniformity in the modes of intervention of the member states, in their economic and political culture so to speak, brings about diminishing economic returns. If diversity and specialization is the name of the game in international trade, and this is brought about by comparative advantages determined not only by a country's specific endowment in capital and labour, but also to a large extent by the way its government intervenes in the society and economy, there are indeed reasons to fear that a constant push towards greater uniformity may eventually cause greater harm than good. In our graduated normative approach designed to ensure the free movement of persons involved in trade in services, therefore, uniformization of national interventions is not considered as a goal to be pursued in itself.

## CONCLUSION

To sum up, it appears to us that the following points must be kept in mind in approaching the task of implementing free movement of persons involved in trade in services, whether such task is to be achieved bilaterally, regionally or multilaterally. First of all, it must be clear that the task is not one that can be achieved simply by turning the stated objective, free access, into an operating principle. The problems encountered are much more complicated than that and the little experience we have in dealing with them suggests that there is danger in relying exclusively on broad principles to solve them. Second, it must be clear that no useful and effective solution can be found without proper identification of the obstacles that exist and their justifications. Some barriers can be eliminated almost immediately, others gradually, and others will have to be accepted until new and less restrictive methods of protecting the public interest can be found. Third, it appears essential to avoid fixing objectives that can simply not be met. Each desired level of economic integration should have goals in this area that correspond to the political will of the parties and to the institutional support that is available. Lack of realism, here as elsewhere, often leads to the absence of compliance. In the recently signed Canada-U.S. free trade agreement, for instance, some of the objectives proposed with regard to the movement of persons involved in trade in services appear more typical of a common market than of a free trade area, in particular those having to do with the development of mutually acceptable professional standards and criteria. If the attempt made

to develop such standards and criteria in the field of architecture fails, chances are that the further sectoral negotiations envisaged under section 1405 will simply not take place. Fourth and last, setting up in motion a process of liberalization is what really matters. If the rules adopted favor that process, they will be judged positively; if, notwithstanding their intent, they hinder that process, they will be severely criticized. Immediate and total success is not expected; but at the same time complete absence of progress could rapidly be seen as a sign of failure.



