

Capacity Building of Consultants in WTO Context

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Meaning of Capacity Building:

Capacity building means ensuring that organizations and individuals have skills, knowledge, structures and resources to realize their full potential. In the WTO context, capacity building shall have to involve individual's knowledge to comprehend the WTO provisions, negotiation skills, development of conforming Local regulations, building and strengthening relevant institutions, identification of WTO provisions offering incentives and privileges in particular conditions. For the consultants to providing the engineering services, capacity building will also have to include latest innovation in the architectural and engineering fields, adequate and relevant knowledge on information technology, state of the art management system and acquiring of qualification equivalence for international mobility and acceptability.

About WTO:

The acronym WTO stands for World Trade Organization which deals with rules of trade among the nations/countries. It's an organization aimed at freer trade among the nations by progressive liberalizations of trade barriers. WTO itself does not enter into trading; rather it provides forum for negotiations among the states called Members to agree on rules for trading among themselves. To enforce the implementation of these rules, WTO has developed a very effective Dispute settlement mechanism. WTO came into existence as an umbrella organization based in Geneva at the conclusion of Uruguay Round (1986-1994) and earlier such negotiations under the General Agreement on Tariffs and Trade (GATT). Whereas, the trade in goods is covered under GATT, the trade in Services is covered under General Agreement on Trade in Services (GATS). Construction and Related Engineering Services covered under WTO regime within services sector.

Historically efforts for rules based trading system initiated in 1944 wherein 44 countries met at Britton Woods which resulted in to creation of International Trade Organization (ITO) besides World Bank (WB) and International Monetary Fund.

However, due to opposition from countries specially USA; ITO charter could not be implemented and instead a provisional agreement signed by 23 countries including Pakistan came into force in January 1948 as a combined package of trade rules and tariff concessions known as "General Agreement on Trade and Tariffs (GATT)" GATT remained the only instrument governing international trade in goods from 1948 in 1995. The GATT, 1947 agreements were integrated to WTO as GATT, 94 incorporating all the agreements thereto. At the Conclusion of the Uruguay Round of negotiation, 'services' were also included under "General Agreement on Trade in services (GATS)". Thus the primary distinction between GATT and GATS is that whereas GATT deals with the agreements on goods, GATS deals with the agreement on services. As of now WTO

comprise of main three agreements such as GATT-94, GATS and TRIPS besides plurilateral agreements (meant for only the Members who signed it) and Disputes Settlement understanding.

WTO Services Sectors:

Services are intangible products and activities and often difficult to separate from goods with which they may be associated in varying degrees.

“Services are not separate entities over which ownership rights can be established. They cannot be traded separately from their production. Services are heterogeneous outputs produced to order and typically consist of changes in the condition of the consuming units realized by the activities of the producers at the demand of the customers. By the time their production is completed they must have been provided to the consumers.”¹

Services sector are dealt under the General Agreement on Trade in Services (GATS) brought under the preview of WTO at the conclusion of Uruguay Round in 1994. In 1991, the GATT secretariat produced a note setting out a classification of Service Sectors² resulting from the consultation with member countries. The list identified relevant sectors and sub-sectors with regard to national services regulations so that specific commitments on these regulations could be made and negotiated. The twelve major categories (sectors) are as under:

1. Business Services.
2. Communication Services.
3. Construction and Related Engineering Services.
4. Distribution Services.
5. Educational Services.
6. Environmental Services.
7. Financial Services.
8. Health Related and Social Services.
9. Tourism and Travel Related Services.
10. Recreational, Cultural and Sporting Services.
11. Transports Services.
12. Other Services not included elsewhere.

WTO Construction Sector: The construction service sector consists of two sub-sectors of services: (a) architectural and engineering design and (b) construction and related engineering services, termed “physical construction services” in this paper. Physical construction services as defined in GATS involve the implementation of an investment, project, and include the following sub-sectors: (i) general construction work, for buildings; (ii) general construction work for civil engineering; (iii) installation and assembly work; (iv) building completion and finishing work; (v) other, which refers to pre-erection work at construction sites, special trade construction work including foundation work; water well drilling, roofing, masonry, and renting of equipment for

construction or demolition of buildings or civil engineering works with operator. This work can be carried out either by general contractors who do the complete construction work for the owner of the project or on own account; or by subcontracting parts of works to specialized contractors.

Architectural and engineering design services are essentially intellectual activities, which require general and specialized skills and are knowledge and technology intensive in nature. Architectural and engineering design services are used throughout the development of an investment project, including the stages of pre-investment (e.g., feasibility studies), project execution (e.g., architectural and structural design) and project implementation (e.g., production activities). As defined in GATS, these include architectural services, engineering services, integrated engineering services and urban planning and landscape architectural services. The specifications for materials to be used and technological processes followed in general are determined by the architectural and engineering services. In practice this may influence significantly the ability of developing countries to provide services under the specific project.

Globally, the construction and housing industry account for 10-12% of GDP and 7% of employment. The housing and construction industry has enormous forward and backward linkages and according to a modest estimate, 35-40 industries move in tandem with this sector. Therefore, the industry has the greatest employment generation potential. It can also create low-paid jobs of Chowkidars and ordinary construction workers to medium-paid jobs of Masons, Carpenters, Electricians, Painters, Plumber etc; and highly paid jobs for architects, engineers, designers, decorators, contractors etc.

Central Product Classification: Unlike harmonized product classification under GATT, the services classifications and identification have been made under United Nations provisional Central Product Classification (CPC). Central Product Classifications for Architectural, Engineering Services and Construction Sector circulated by the WTO Secretariat are identified by distinct numerical code for sectors and sub-sectors up to five digits.³

Mode of Trade in Services:

Unlike trading of goods under GATT, trade in services is provided under the following mode of supply stipulated in Part – I of GATS:

- **Mode 1 - Cross Border Supply:** When the supply of services takes place from the territory of one member into the territory of another Member, it is known as cross boarder supply. In this mode presence of natural person or commercial presence is not essential.⁴
- **Mode 2 - Consumption Abroad:** Under this mode of supply, a member consumer consumes the services available in another member's territory. Generally travel involves for such consumption.

- **Mode 3 - Commercial Presence:** Under such mode, branch office along with natural and/or juridical persons from one member country is established to another member Country for the purpose of providing the services there. Licensing/Registration for the Foreign Service providers are generally required under this mode.
- **Mode 4 - Presence of Natural Persons:** Under this mode, natural persons from one member country travel and temporarily stay into another member country for the purpose of providing to services contracted for. Such movement is distinct from immigration or other leisure travels. Presence of natural person sometime is also a part of Mode-3 but not always essential.

Specific Commitments: Part III of GATS set out rules which together with the basic categories of services listed (or scheduled) define individual commitments of members to admit foreign service providers. The three Articles (XVI to XVIII) deal mainly with market access and national treatment. The main principles of Part III defines equal treatment (MFN) to all service providers, foreign or local in terms of market access and national treatment, only for scheduled sectors (i.e. sectors which are committed for opening). Members are required to specify limitations to market access and national treatment in specific commitment lists.

- i. **Market Access** deals with the entry of foreign services providers into (domestic) markets. Where market access is committed-limitations may be imposed, (Article XVI.2):
- ii. **National Treatment** deals with conditions and qualifications, which modify MFN treatment after Foreign Service provider gains entry into domestic market. The biggest difference between GATT and GATS commitments is that the right to equal national treatment for services is restricted whilst national treatment for goods applies equally to all, once a product or goods has gained market access. The reason for this differential treatment is that; entry of goods (GATT) into domestic market can still be controlled by import duties, quantitative restrictions, and other border measures, whilst under GATS once foreign service provider gains entry into domestic market particularly where services are provided by commercial entity or personal presence will in practice enjoy virtually free access to that market if given domestic treatment. Other factors pertaining to Specific Commitments are as follows:
 - **Horizontal Commitments** are across the board commitments for all sectors of services and include market access and national treatment;
 - **Binding or Bound** is commitment or committing to measures affording free or freer market access or national treatment to specified sector;
 - **None** typically implies that no restrictions are imposed on market access, or free access and national treatment is afforded to the sector listed;

- **Unbound** essentially makes no commitment by the Member Country to a specific sector i.e. the Member is at liberty not to provide access.

Role of Engineering Consultants:

There is no separate classification for the engineering consultancy services under WTO. Rather the engineering service is lumped with “Construction and Related Engineering Services” and notably unlike our conventional understanding; construction is classified under WTO as one of the services. Although monetary percentage of the engineering consultants is approximately up to ten percent of a construction project, however, role of engineering consultants in making feasibility study, design, supervision, project management is a key for successful project. Further, a consultant must have the capacity to understand and comprehend the construction details for an effective consultancy.

Capacity Building of the Consultants:

TCDPAP being involved in trade in services and more particularly in engineering consultancy services, capacity building will be focused in the context of improving individual architect/engineers and other allied professionals rendering the architectural/engineering services.

WTO classified the countries under three categories i.e. developed, developing and least developed countries. Developing and least developed countries, more particularly the least developed countries have been given some relaxation from the binding provisions in order to allow them capacity building. If developing and least-developed countries build their capacity adequately, they will not only improve their skills and quality of services but will also be able to export their services to the world. In this global village, those service providers will be leading others who have equipped themselves according to the provisions of WTO.

WTO has developed enormous materials and provided fully downloadable to its website which can be the primary source of learning about the WTO. WTO has also special program and technical assistance for building individuals capability and institutional capacity. Short and diploma courses on WTO in selected institutions and incentives to the participants in services for obtaining such diplomas may provide desired result.

Although trade in services are carried out under the above four modes by private sectors, However, negotiations to frame WTO rules are made by Government functionaries leading to a gap of actual negotiations on the negotiation table.

WTO provisions permits all member countries to maintain Local Regulations conform to the WTO provisions. The individual member countries can protect their interests by framing and maintaining the Local Regulations. It should be also noted that without

achieving the ability of in-depth analysis of WTO provisions, most of the 3rd world countries negotiators cannot gain WTO incentives for them.

“The procurement guidelines adopted by the financial institutions and the developed countries have to be amended to ensure that the funds made available to implement construction projects truly benefit the receiving country in terms of human resources development, transfer of technology and poverty alleviation. More specifically, they have to contribute to the development of an efficient local construction sector which could gain from trade liberalization in obtaining a share of the regional and international markets. The establishment of joint ventures with local firms should be recognized as a precondition for foreign firms to operate in local markets, and countries must be free to include this requirement in their national legislation. This is because joint ventures are the best tool for local companies to upgrade their expertise and benefit from trade liberalization in the construction services sector. Local laws, policies and regulations should be complied with by all actors in the construction services field since their aim is promote the development of the local construction services sector. Developing countries have a competitive advantage in the sector because of their relatively cheaper labor and the availability of skilled professionals. Developed countries need to further liberalize the delivery of services through mode 4 of the GATS to enhance the movement of natural persons from developing countries as construction services providers.”⁵

Constraints in Capacity Buildings:

Primary constraints in capacity buildings particularly in the developing and least developed countries may be summarized as under:

- **Institutional inadequacy:** Understanding the WTO requires fundamental understanding at least for the some, which can not be achieved without going through systematic studies in graduate or post graduate level. Such studies can be imparted through introducing WTO subject in course contents, conducting short course and diploma courses besides deliberation in workshops and seminars. WTO provided in its website thousand of pages besides over 550 pages of Legal Texts. Without understanding basic concept, philosophy, legal provisions, negotiation instruments; it is impractical to assume that benefit from the WTO can be derived.
- **Negative Rhetoric:** Majority of the developing and developed countries suffers from their negative rhetoric, primarily because of their frustration in the negotiation table with the developed countries. WTO is the forum which provided equal opportunity in negotiation to its 150 members.
- **Negotiation by the Government:** Although the WTO provisions for trade by the private parties, negotiations are carried out by the government of member countries. Negotiators are mainly bureaucrats having inadequate exposure to business interests. In most cases they also do not consult the stakeholders prior to negotiations.
- **Uncertainty in WTO:** Due to prolonged and inconclusive negotiations under Doha Round, frustration among the members are increasing particularly due to

the insistence of the developed countries that are not ready to sacrifice protectionism but asking the poor countries to remove trade barrier to protect their own interests.

Country Initiative Required:

Among several others, each of the member countries are required to take initiative for the following two areas which are so vital to protect the National interests under WTO contexts:

Regulatory Regime: Article VI of GATS allows Members to maintain their regulatory regime to maintain technical standards, administrative or licensing procedures for regulating services sectors where specific commitments have been made. It is the regulatory regime through which capacity building in a systematic manner can be ensured.

Parliament of Pakistan enacted the Pakistan Engineering Council Act in 1976 to regulate the engineering profession of Pakistan in respect of engineering education, construction and engineering consultants. Pakistan Engineering Council (PEC) under vested authority through the above enactment has prepared following regulatory Bye-laws to regulate constructions and engineering sectors in Pakistan:

- (i) Construction & Operation of Engineering Works Bye-laws, 1976 as amended (S.R.O 568(I)/87).⁶
- (ii) Conduct & Practice of Consulting Engineers Bye-laws, 1986 as amended (S.R.O 809(I)/86).⁷

These Bye-laws provide regulatory framework for providing construction and engineering services to be undertaken in Pakistan whether by the domestic or Foreign Service providers. Some of the relevant provisions of the PEC regulatory regime are as follows:

Salient Provisions of PEC Regime:

1. Domestic as well as foreign engineers, constructors, operators, consultants to be licensed.
2. Foreign constructors/consultants cannot work in Pakistan without joint venture with a Pakistani Counterpart in the ratio of non-availability of expertise.
3. Foreign inputs of technology transfer are entitled without any J/V restrictions.
4. Award and execution of contracts to follow PEC framework documents for bidding, evaluation, construction and consultancy contracts.
5. Engineering works should be undertaken, managed and performed by the licensed engineers only.

6. Domestic preferences in bid evaluation are allowed by Govt. and various lending agencies.

One of the most important and crucial regulation by any country is the provision of Licensing to the Domestic as well as Foreign Service providers when the services are to be provided in the domestic market. Purpose of licensing for the service providers (for natural or Juridical persons) are to ensure quality of the engineering services and national objective are fulfilled. Licensing requirements are applicable not only in Pakistan but also in Japan, USA, EU countries, Australia, Malaysia, and Singapore Philippines etc. with varied degree of strictness. Other than transfer of technology projects, a foreign constructor or consultant require to make Joint Venture with Pakistan counterpart not only to ensure technology transfer but also to assist the domestic services providers in their capacity building by sharing the works for which domestic expertise are available. Commensurate with the GATS provision, the procedure of licensing in Pakistan is transparent and not restrictive to trade, whereas, share of works are stipulated by Pakistan in its Horizontal and specific commitments during Uruguay Round are in accordance with market Access limitation provision set out by GATS.

Movement of Natural Persons: Movement of Natural Persons is another key area where export of trade in services from the developing country to the developed country is prevented by not allowing the natural persons to move to the developed countries to provide the services. There are several Annexes to GATS adopted in Marrakesh during the closing Act of the Uruguay rounds⁸. The Annex on Movement of Natural persons provides the following:

1. Applies to movement of natural persons in respect of supply of service.
2. Shall not apply for seeking employment permanent basis, residence or citizenship.
3. Members to negotiate in specific commitments for all categories of natural persons supplying services under the Agreement.
4. Members can regulate entry, stay, and movements of the natural persons to protect its integrity, borders, and territory not contrary to its specific commitments.

Negotiations on Movement of Natural Persons still remained un-resolved and developed countries are bent upon to various restrictions such as visa restrictions, qualification equivalence etc. Engineering and architectural services relies primarily on the presence of National Persons specifically under modes-3&4.

Since the engineering degree of many of the Developing countries, such as Pakistan is recognized in the universities of the western countries, as such, generally it is believed that Pakistani engineers would move freely to these countries to provide services, however, contrary to this; efforts are being made on behalf of the Engineers Mobility Forum (EMF) to register the "International Professional Engineer". Pakistan is to enter into serious dialogue that Pakistani Engineers degree shall be accepted on minimum international benchmark and minimum qualification for providing the engineering services. Higher profile such as Professional Engineer can be adjusted by the Pakistan Engineering Council to be in line with the Professional Engineering license of USA.

Recommendations:

In order to get benefit from the WTO provisions, Developing countries are to adapt two prong strategies. On one hand, they are to build the capacity to negotiate in WTO forum collectively by taking along all those countries who can be strategic allies in this regard. On the other hand, it has to assist the domestic construction and consultancy sector to build its capacity not only to be able to undertake major constructional activities in their respective countries but also will be able to export services abroad in open competition. Some of the specific measures suggested are as under:

1. Review for non-preparedness and take immediate remedial measures including establishment of transparency and rule of law in all tier of governance.
2. Convert comparative advantage in construction/consultancy sector to competitive advantage by following the measures suggested by UNCATAD for developing countries as discussed above.
3. Create and ensure compliance of Country regulations for construction and consultancy sectors.
4. Award mega projects not as turnkey contracts to foreign contractors but package the project into several smaller or medium sized modules so that Local constructors/ consultants can participate in the bid and can undertake the project for which foreign expertise are not required.
5. Government to negotiate in WTO for level playing field so that Construction Services can be exported. Under mode-4 the government should ensure that Local Engineers and labors remain exportable without any hindrances.
6. Country Regulatory Body should initiate re-structuring of engineers/architects category and enter into serious discussions with relevant international forums for qualification equivalence issue.
7. Leading constructors and engineering consultants should be encouraged to acquire relevant ISO-9000 certification and use of international standards with special emphasis to environment.
8. Government of Pakistan may initiate public private partnership to create consortium to undertake mega projects in the Country, if necessary by hiring the foreign experts into that consortium towards capacity building.
9. Initiate advance studies in relevant institutions for project management and quality controls including use of state of the art machinery, equipment in the construction/consultancy sector.

Conclusions:

In the present day world the terminologies of WTO are being used in transacting International trade which cannot be conceived without learning the WTO. Each member countries commit their Market Access and National Treatment commitments in Specific Schedule of Commitments which are publically accessible for determining the business strategy of individuals and consulting firms. Whereas, it is important that individuals and organizations must learn the latest subject matters related to their fields as discussed above, however, without understanding these schedules, the commitment and monitoring them regularly, benefit of WTO membership cannot be achieved.

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