

## PRESENCE OF NATURAL PERSONS – MODE 4

Carlo Gamberale

New York, 15 March 2006

### I. INTRODUCTION

1. Mode 4 (Movement of Natural Persons) is one of the four modes of supply covered by the GATS (General Agreement on Trade in Services). It covers natural persons, who are service suppliers (such as independent professionals) as well as natural persons who work for a service supplier of a Member, and move temporarily to another Member to supply a service.

2. Under the GATS, WTO Members negotiate and undertake binding commitments on market access for services and service suppliers, including when services are supplied by natural persons (Mode 4). The commitments undertaken (*i.e.*, the access granted) by a WTO Member on Mode 4 are granted to all services and service suppliers of other WTO Members on a non-discriminatory basis (Most Favoured Nation principle).

### II. DEFINITION OF THE SECTOR

3. Article I.2(d) of the GATS defines trade in services, *inter alia*, as the supply of a service by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member. This is commonly referred to as the fourth mode of supply (*i.e.*, Mode 4). The Annex on Movement of Natural Persons Supplying Services under the Agreement ("the Annex"), clarifies the definition of Mode 4, indicating that it applies to "natural persons who are service suppliers of a Member, and natural persons of a Member who are employed by a service supplier of a Member, in respect of the supply of a service".

4. The Annex further states that "the Agreement shall not apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis". There is no specified timeframe in the GATS of what constitutes "temporary" movement; this is defined negatively, through the explicit exclusion of permanent presence. Each Member should specify in its schedule of specific commitments the timeframes applicable to the categories of natural persons, which it includes in its specific commitments (depending on the category concerned in the existing schedules Members have specified duration of stay varying between 3 months and five years).

5. In practice, the definition of Mode 4, based on the combined reading of Article I.2(d) of the GATS and of the Annex, results in the coverage of temporary entry by the following four main categories of natural persons:

(1) Self-employed persons who supply a service. Typically professionals, but also lower skilled workers;

(2) Intra-corporate transferees, employees of a juridical person, which is a service supplier established in a WTO Member, who are transferred to an office of that juridical person in another WTO Member;

(3) Business visitors and services salespersons, foreign natural persons seeking entry into another Member's territory for the purpose of setting up a commercial presence or for the purpose of negotiating for the sale of a service on behalf of a juridical person;

(4) Contractual service suppliers, employees of a foreign based juridical person, who enter the territory of another WTO Member in order to perform a service pursuant to a contract between their employer and service consumers in the territory of the other Member.

6. Finally, the Annex clarifies that, regardless of their obligations under the Agreement, Members are free to regulate the entry and stay of individuals in their territory, including through measures necessary to protect the integrity of, and ensure the orderly movement of natural persons across, their borders, provided that the measures concerned "are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment". The operation of visa requirements only for natural persons of certain Members, but not for others, is not per se regarded as nullifying or impairing such benefits. It is considered below (VI.B) how this special regime for visa requirements / work permits may affect the application of disciplines on domestic regulation to Mode 4 trade.

### **III. ECONOMIC IMPORTANCE**

7. Since the entry into force of the GATS in 1995, no comprehensive statistical framework for the measurement of the movement of natural persons has been developed. At present, there exists no systematic data collection by regional or international organizations for data on temporary labour movements. Countries follow different classifications and compilation methodologies, thereby hindering cross-country comparability. This lack of reliable and comparable international statistics makes it difficult to measure the importance of Mode 4 trade flows.

8. Balance of Payment (BOP) statistics on "compensation of employees" and "workers' remittances" have been used to measure the value of Mode 4 flows. These indicators provide, for a large number of countries, internationally comparable quantitative information on the movement of workers across countries. However, they do not provide specific information on foreign workers employed in services, let alone on natural persons covered by Mode 4 of the GATS.

9. Compensation of employees comprises "wages, salaries, and other benefits, in cash or in kind, and includes those of border, seasonal, and other non-resident workers". Temporary workers employed in any economic sector (not only services) are covered by this measure, which would lead to an overestimation of Mode 4. At the same time, this indicator only includes workers staying abroad for less than one year, while Mode 4 covers temporary stay of up to five years, which would lead to an underestimation of Mode 4.

10. Workers' remittances refer to current transfers of migrant workers who are employed in a foreign economy in which they are residents. This measure relates to foreign workers employed in any economic sector, not specifically the service sector, and also cover transfers

made by permanent migrants, both factors leading to an overestimation of Mode 4. Remittances, besides, represent only the portion of workers' compensation saved and sent back to the home country, which leads to an underestimation of the actual value of the workers' activity. This effect is reinforced by the fact that a significant portion of remittances does not flow through official channels and may not be recorded in the figures at all.<sup>1</sup>

11. Labour, migration, and census statistics of selected countries often provide a higher level of detail on the employment of foreign workers, which makes it possible to estimate the size of a country's Mode 4 trade in services. In the United States data from the H1-B visa<sup>2</sup> for "professional workers in specialty occupations" provide an indication of Mode 4 imports. Based on the H-1B data, U.S. imports of services delivered by newly entered professionals in special occupations are estimated at about US\$ 6.5 billion in 2000, approximately 0.1 per cent of the GDP of the United States. In the United Kingdom estimates based on work permits granted to non-EU workers show that in 2000 services imports through the movement of non-EU temporary workforce amounted to nearly US\$ 2.5 billion, equivalent to 0.2 per cent of the UK's GDP. The reliability of this data to measure Mode 4 trade is undermined by the fact that self-employed temporary workers are not included in this category of work permits.

12. Notwithstanding the difficulties discussed above, remittances have been used as a proxy to measure global Mode 4 trade flows. According to the IOM, officially recorded workers' remittances amounted to USD US\$ 72.3 billion in 2001.<sup>3</sup> In 1997, based on remittances figures, the OECD conservatively estimated the value of Mode 4 at USD US\$ 30 billion.<sup>4</sup>

#### **IV. POTENTIAL ECONOMIC BENEFITS OF LIBERALIZATION**

13. Mode 4 liberalization may generate direct welfare effects on originating and receiving countries as well as indirect welfare effects on merchandise trade and services trade through other modes of supply.

14. Direct welfare effects from further Mode 4 liberalization can benefit originating and receiving countries alike. Beneficial effects in the originating country include, *inter alia*: (i) reduced pressure on the labour markets and wages caused by high levels of unemployment; (ii) technology transfer and development of human capital, as temporary migrants make their experiences acquired abroad available to the home country upon return (thus averting the costs of brain drain, typically associated with permanent migration); (iii) financial inflows of remittances. Beneficial effects on the receiving country include *inter alia*: (i) addressing temporary and long term labour shortages; (ii) alleviating the demographic challenge caused by the ageing population and therefore helping to re-equilibrate the share of the working population; (iii) reducing the pressure of illegal immigration providing an alternative through temporary movement.

---

<sup>1</sup> See, "World Trade Report 2004", "Selected Issues in Trade and Trade Policy, the liberalization of Services through the Temporary Movement of Natural Persons".

<sup>2</sup> The H-1B visa is inscribed in the Mode 4 specific commitments of the United States.

<sup>3</sup> See, International Organization for Migration, World Migration 2003: Managing Migration Challenges and Responses for People on the Move, Volume 2, World Migration Report Series, IOM, Geneva, 2003.

<sup>4</sup> See, OECD, "Service Providers on the Move: Labour Mobility and the WTO General Agreement on Trade in Services", Policy Brief, OECD Observer, Paris, August 2003.

15. It has been estimated that increased mobility of natural persons (especially lesser skilled workers) equivalent to 3 per cent of receiving countries' work force would generate annual gains ranging between US\$ 150 billion<sup>5</sup> and US\$ 200 billion.<sup>6</sup> These gains would be shared between developing and developed countries.<sup>7</sup>

16. Although the liberalization of trade in services under Mode 4 can generate gains both for the importing and the exporting country, it also imposes some adjustment costs, arising from factors such as the temporary unavailability of skilled workers in the labour exporting country and competition between domestic and foreign workers in the labour importing country. In both cases an appropriate regulatory framework would ensure that the benefits of liberalization are obtained and that the flow of workers responds to the needs of the economy, thus minimizing the risk of disruptions in the domestic labour market.<sup>8</sup>

17. The welfare effects of Mode 4 trade liberalization are not only limited to its direct effects, but also include significant indirect effects on merchandise trade and trade in services under other modes.

18. The stay of people in a foreign country, both permanently and temporarily, may enhance merchandise trade insofar as: (i) the presence of migrants increases the demand for foreign products (*preference effect*); (ii) migrants' knowledge about their country of origin may favour trading opportunities from the host country towards the originating country (*information effect*); and (iii) migrants' knowledge of their country of origin local business law and practice may facilitate a stronger enforcement of international contracts between the host country and the originating country (*enforcement effect*).<sup>9</sup>

19. The impact of Mode 4 on trade in services through other modes of supply will depend on whether Mode 4 is a substitute or a complement for other modes of supply, or if it is simply the only mode available to deliver the service. When a service may be provided under several modes of supply, liberalization of trade under Mode 4 may be expected to have a negative impact on trade under other modes (for instance a foreign lawyer travelling under Mode 4 may provide legal services that otherwise would be supplied under Modes 1, 2 or 3), unless Mode 4 is the only mode available to supply the service. However, Mode 4 liberalization is more likely to complement liberalization under other modes of supply rather than replace it. For instance, direct preliminary contacts with clients might be needed for a service supplier who wants to provide services under Mode 1 or attract new clients who will travel abroad to consume the service under Mode 2. The link is even stronger with Mode 3, as a natural person may be transferred by a company to an establishment in another country or may be sent by a company to prepare the establishment of a commercial presence. In both instances Mode 4 complements and enhances trade under Mode 3.

20. A recent study has found that a 10 per cent increase in temporary movement of persons to provide services would increase U.S. imports by around 3 per cent and exports by

---

<sup>5</sup> See, Winters, A. and T.L. Walmsley, (2002) "Relaxing the Restrictions on the Temporary Movements of Natural Persons: A simulation Analysis", CEPR Discussion Paper 3719.

<sup>6</sup> See, Rodrik D. (2002) "Feasible Globalisation", NBER Working Paper, 9129.

<sup>7</sup> See, "The Economic Implications of Liberalising Mode 4 Trade", by Alan Winters, Centre for Economic Policy Research, London and Centre for Economic Performance, London School of Economics, London, 8 April 2002.

<sup>8</sup> See, "World Trade Report 2004", above footnote 1.

<sup>9</sup> See, "World Trade Report 2004", above footnote 1.

a percentage between 1.8 to 2.7. As far as the relationship between trade in services under Mode 4 and under other modes is concerned, the same study has found that a 10 per cent increase in the temporary movement of people would increase: (i) services imports under Mode 1 by 4.7 per cent and exports by 2.9 per cent; and (ii) regarding Mode 3, inflows of foreign direct investment by 8 per cent and outflows by 7 per cent.<sup>10</sup>

## V. SPECIFIC COMMITMENTS

### A. OVERVIEW OF EXISTING COMMITMENTS

21. Existing specific commitments on Mode 4 were negotiated during the Uruguay Round and more substantively in the follow up negotiations that ended in July 1995. While the Uruguay Round commitments covered almost exclusively movement of natural persons linked to a commercial presence (in particular intra corporate transferees), in the follow up negotiations a restricted number of countries (Australia, Canada, the European Communities, India, Norway and Switzerland) made some modest progress in guaranteeing opportunities for independent foreign professionals, not linked to a commercial presence.

22. Mode 4 commitments have been undertaken mostly on an horizontal basis, *i.e.*, applicable without distinctions to all sectors inscribed in a Member's schedule of commitments. Generally speaking, the level of liberalization of Mode 4 trade under the GATS is very limited as compared to the other modes of supply. Those Members who have undertaken Mode 4 commitments (108) have limited the scope of these commitments to selected categories of workers, with a marked bias towards natural persons linked to a commercial presence and highly skilled persons, mostly executives, managers and specialists (only 17 per cent of all Mode 4 horizontal entries cover lower-skilled persons). Among the main limitations scheduled are: (i) defined duration of stay (depending on the category of persons); (ii) quotas; (iii) economic needs tests and/or labour market tests; (iv) pre-employment requirements; (v) residency requirements; (vi) labour market conditions (such as domestic minimum-wage legislation and limitations regarding conditions of work, working hours and social security); (vii) technology transfer (*i.e.*, requirements to train local staff); and (viii) local content (personnel) requirements.

23. About 38 MFN exemptions clearly cover Mode 4. The number of exemptions covering Mode 4 trade could, however, be higher, considering that MFN exemptions are not generally expressed in modal terms and that many of them may affect both movements of natural persons and commercial presence (especially in the professional services sectors). Moreover, several exemptions relate to regional agreements – notwithstanding the provisions of Article V and Vbis of the GATS – and are described in such general terms, that sometimes it is almost impossible to infer their coverage.<sup>11</sup>

---

<sup>10</sup> See, "The Impact of Mode 4 Liberalization on Merchandise Trade and on Other Modes of Trade in Services", by Marion Jansen and Roberta Piermartini, Economic Research and Statistics Division, World Trade Organization, 2004.

<sup>11</sup> For a more detailed account of existing specific commitments on Mode 4, please refer to the Secretariat Background Note on Presence of Natural Persons of 8 December 1998, contained in document S/C/W/75.

## B. MODE FOUR IN THE DOHA ROUND OF NEGOTIATIONS (DDA)

24. Mode 4 represents a key element in the on-going GATS Article XIX negotiations, within the Doha round of negotiations. Developing and least developed countries have identified Mode 4 as the key area of export interest in services and have requested significant progress on Mode 4 in return for their more active engagement in sectors and modes of supply of interest to developed countries. Such progress has been identified in the expansion of Mode 4 commitments as to cover more categories of natural persons not linked to commercial presence (*e.g.*, contractual service suppliers and independent professionals) and in the elimination of core restrictions, such as quotas, economic need tests, residency requirements and limited periods of stay. Some developing countries have also proposed additional commitments on Mode 4 to address transparency issues and administrative obstacles relating to procedures on entry and stay (such as visas and work permits).

25. Industries in developed countries favour progress on Mode 4, with a strategic interest in further liberalization of categories of persons linked to commercial presence (intra-corporate transferees and business visitors), which are seen as important to underpin existing and future Mode 3 specific commitments. The business community in developed countries is also in principle not opposed to improved commitments on categories of natural persons not linked to Mode 3. In this respect Mode 4 is seen as a flexible instrument (albeit limited in scope) to address problems such as demographic changes and labour shortage in developed countries.

26. In spite of industry's positive attitude towards Mode 4, many developed countries are unwilling to engage in further liberalization of Mode 4, because of broader policy concerns relating to permanent migration and national security. This remains the case even though the GATS contains a broad exception allowing Members to take any necessary action to protect their essential security interest (Article XIV).

## C. CONTENT OF DDA OFFERS

27. In spite of the emphasis that the DDA negotiations have put on the opening of sectors and modes of supply of interest to developing countries and, therefore, on the improvement of Mode 4 commitments, thus far the quantity and quality of new and improved Mode 4 commitments in the DDA offers are widely considered to be disappointing.

28. As in the Uruguay Round, virtually all new and improved Mode 4 commitments have been scheduled in the horizontal section of the offers (*i.e.*, applicable to all sectors in the offer). Out of 68 offers (including 24 revisions) only 32 offers include improvement to Mode 4 horizontal commitments. Although some Members have included new categories of natural persons not linked to a commercial presence (such as contractual service suppliers, independent professionals and graduate trainees) and have removed some restrictions, this is still a limited phenomenon. Only a handful of Members, which had no Mode 4 commitments in the Uruguay Round, have made new commitments. A number of Members, which have failed to improve their Mode 4 commitments, have nevertheless updated their Uruguay Round commitments on the basis of the most recent commonly defined categories. Even in the absence of substantive commitments, this is to be welcomed insofar as it injects clarity and comparability into the schedules of commitments.

29. Most schedules nevertheless still fail to cover categories of natural persons not linked to Mode 3, and maintain important restrictions such as nationality and residency requirements, quotas, economic needs tests, and short duration of stay.

30. Finally only two Members have included some additional commitments on issues such as transparency of regulations and obstacles relating to administrative procedures and visa requirements affecting Mode 4. As considered below, this is an issue that could be addressed by each Member in its offer through the instrument of additional commitments or by all Members multilaterally through the elaboration of a set of disciplines or guidelines applicable to administrative procedures and visa requirements affecting Mode 4.

## **VI. MAIN ISSUES ARISING IN THE NEGOTIATIONS**

### **A. MAIN MARKET ACCESS (XVI) AND NATIONAL TREATMENT (XVII) BARRIERS TO MODE 4 TRADE**

31. As considered above under V the negotiations are focusing on the expansion of market access through the inclusion of more categories of natural persons, in particular natural persons not linked to a commercial presence, which are excluded from the schedules of commitments of many Members. These include independent professionals (IPs) as well as contractual service suppliers (CSSs). Some countries also insist on a better coverage for lower skilled and unskilled persons. At the same time Members are focusing on the extension of periods of stay (including possible renewal) and the elimination of scheduled restrictions such as quotas, economic need tests, citizenship, residency requirements and labour market conditions. A proposal put forward by a group of developing countries sets forth minimum market access standards (relating to the elimination of the most restrictive limitations and the provisions of minimum periods of stay subject to renewal) to be followed in scheduling Mode 4 commitments.

### **B. REGULATORY ISSUES (ARTICLE VI AND XVIII GATS)**

32. In addition to market access and national treatment restrictions, significant barriers to Mode 4 movement are represented by administrative procedures and visa requirements affecting the entry and stay of natural persons. Some negotiating proposals have suggested the development of disciplines on domestic regulation addressing the trade restrictive effects on Mode 4 of administrative procedures and visa requirements. These disciplines could take the form of multilateral disciplines applicable to all Members which undertake specific commitments on Mode 4 (similar and parallel to the disciplines on Domestic Regulation which are being developed under Article VI:4 of the GATS) or of a set of additional commitments to be adopted by Members with their schedule of commitments (on the model of the Reference Paper on Basic Telecommunications).

33. Although many Members agree that administrative procedures and visa requirements constitute significant barriers to Mode 4 trade, which have the potential of undermining negotiated specific commitments, the development of disciplines in this area raises some difficult legal questions under the GATS. First, some Members argue that there is no mandate for multilateral disciplines in this area, considering that the mandate in Article VI:4 (which refers to licensing, qualifications and standards) does not extend to administrative procedures and visa requirements affecting the entry and stay of natural persons. Other Members argue for a broad interpretation of licensing requirements and procedures to cover

visas, but this position is not shared by all Members. As an alternative, Members could choose to develop such disciplines as a set of additional commitments (on the model of the Reference Paper on Telecommunication Services) to be attached to their specific commitments according to Article XVIII of the GATS and thus falling within the scope of the negotiating mandate of Article XIX of the GATS.

34. Under both scenarios, however, any new disciplines must be consistent with the language of paragraph 4 of the Annex on Movement of Natural Persons, which sanctions measures regulating the entry and stay of natural persons (including administrative procedures and visa requirements) only insofar as these measure nullify or impair specific commitments (*i.e.*, in dispute settlement only through a non-violation case). To some Members disciplines in this area would be unacceptable insofar as they would expand the scope of application of the GATS to administrative procedures and visa requirements beyond the regime envisaged in the Annex (*i.e.*, to violation cases). It has been suggested that a possible solution might consist in including these type of disciplines in a non binding instrument (guidelines or another instrument not subject to dispute settlement).

35. Other Members have also emphasised the importance of domestic regulation for Mode 4 suppliers not linked to Mode 3, by putting forward proposals on qualification requirements and procedures and on recognition measures in the context of the negotiations of disciplines on domestic regulation in the Working Party on Domestic Regulation.

#### C. CLASSIFICATION ISSUES (MODE 4 CATEGORIES)

36. While in the Uruguay Round an attempt was made to use common categories in scheduling Mode 4 commitments, in practice many Members used national definitions and often disagreed on the definition and coverage of common categories when these were used. In the current negotiations significant progress has been achieved in the area of classification, as Members have held extensive multilateral discussions on the definition of common categories of natural persons to be used to undertake specific commitments. This is of great importance to the negotiations as the use of common categories significantly improves the clarity and comparability of specific commitments and may in turn act as a catalyst for new and improved commitments.

37. Two negotiating proposals have put forward proposed categories for undertaking commitments on movement of natural persons. These two proposals use virtually the same categories and represent a very useful point of convergence in the negotiations. Both proposals built on a Secretariat paper from 2003 on categories used in the schedules of commitments (JOB(03)/195). In practice, the proposals have been used by some delegations who have recently submitted initial or revised offers and it can be safely assumed that, if further progress is made on Mode 4, these categories will represent a common tool to be used in the scheduling of new and improved commitments. The following categories of natural persons are included in the proposals: Intra-Corporate Transferees; Business Visitors; Contractual Service Suppliers; Independent Professionals; Other Categories. Both proposals contain detailed definition for each category.

---