

Council for Trade in Services

**PRESENCE OF NATURAL PERSONS
(MODE 4)**

Background Note by the Secretariat¹

1. This Note has been prepared at the request of the Council for Trade in Services, with a view to stimulating discussions in the Council on the presence of natural persons (mode 4) under the GATS. It provides background information and updates a previous Note on the same topic (document S/C/W/75, dated 8 December 1998). This Note focuses on developments and issues considered to be most relevant to the GATS. It is not intended to provide a comprehensive account of issues surrounding cross-border flows of service professionals.
2. The Secretariat would point out that many of the observations contained in the previous Background Note on mode 4 remain pertinent. In respect to others, such as the statistical measurement of mode 4 trade, thinking has evolved.

I. INTRODUCTION

3. Mode 4 is one of the four modes of supply through which services may be traded under the GATS. Simply put, mode 4 occurs when a natural person of one WTO Member seeks to enter, or is present in, the territory of another Member in relation to the supply of a service. In other words, the GATS does cover the movement of people, but only to the extent that such movement is for the purpose of supplying a service.
4. Following this introduction, section II of this Note takes a close look at the scope of mode 4, an issue on which some divergence of views exists, while section III reviews the main categories of natural persons found in Members' schedules of commitments. The question of the statistical measurement of mode 4 trade is tackled in section IV, whereas section V discusses the potential economic implications of mode 4 liberalisation. Section VI explores the obstacles perceived to affect the presence of natural persons, and section VII provides an overview of Members' mode 4 commitments and MFN exemptions.
5. The discussion in this Note is based on an analysis of mode 4 commitments undertaken on a horizontal basis. Sectoral specificities with regard to the presence of natural persons are addressed in the other Background Notes the Secretariat is currently producing in a number of service sectors. Nevertheless, in the absence of a separate Note on health services, and given the interest expressed by Members, issues related to the migration of health professionals are discussed in Box 2.

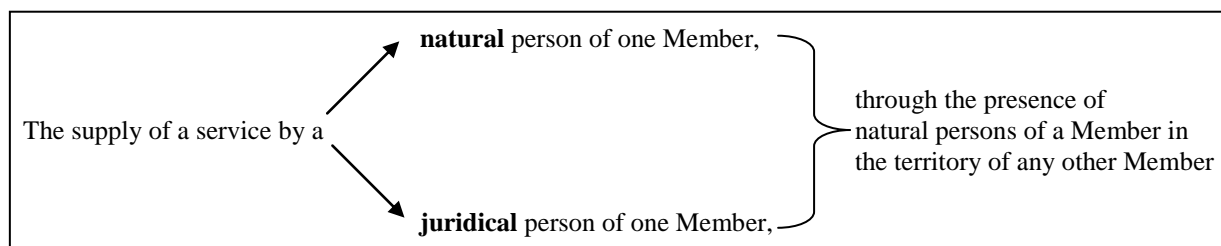
¹ This document has been prepared under the Secretariat's own responsibility and without prejudice to the positions of Members and to their rights and obligations under the WTO.

II. SCOPE OF MODE 4

A. ARTICLE I AND ARTICLE XXVIII

6. Article I of the GATS defines mode 4 trade 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".² Article XXVIII further defines a "service supplier" as "any person that supplies a service"³, and, in turn, a "person" means "either a natural or a juridical person".⁴ Figure 1 illustrates the scope of mode 4 by combining the definitions in Article I and Article XXVIII.

Figure 1. Defining mode 4 – Article I and Article XXVIII



7. Mode 4 always involves a natural person, through whose presence services are being traded. However, that natural person is not necessarily the "service supplier". Depending on the nature of the transaction, the service supplier may be another natural person, or a juridical person. In each case it is vital to identify the service supplier, to whom the obligations in the GATS are owed.

8. It is also important to determine the origin of the mode 4 service supplier, since the main substantive provisions of the Agreement, i.e. Most Favoured Nation treatment (Article II), market access (Article XVI) and national treatment (Article XVII), focus on "service suppliers of *any other Member*" [emphasis added].⁵ This is hardly surprising, as it is only service suppliers of other WTO Members, and not a Member's own suppliers or the suppliers of a non-Member, that are eligible for the treatment provided under the GATS.

9. Relevant origin definitions are found in Article XXVIII. A "natural person of another Member" is a natural person who resides in the territory of a WTO Member and who is either a national or, in certain circumstances, a permanent resident of that other Member.⁶ For the purpose of services traded through mode 4, a "juridical person of another Member" is a juridical person constituted or otherwise organized under the law of that other Member and engaged in substantive business operations in the territory of a WTO Member.⁷

² GATS Article I.2(d).

³ Article XXVIII(g).

⁴ Article XXVIII(j).

⁵ Hereinafter, service suppliers/natural persons "of another Member" will also be referred to as foreign service suppliers/natural persons.

⁶ Permanent residents are covered provided the Member concerned does not have nationals or, subject to additional qualifications, accords substantially the same treatment to permanent residents as to nationals. See Article XXVIII(k)(ii).

⁷ Article XXVIII(m)(i).

B. THE ANNEX – TWO TYPES OF NATURAL PERSONS

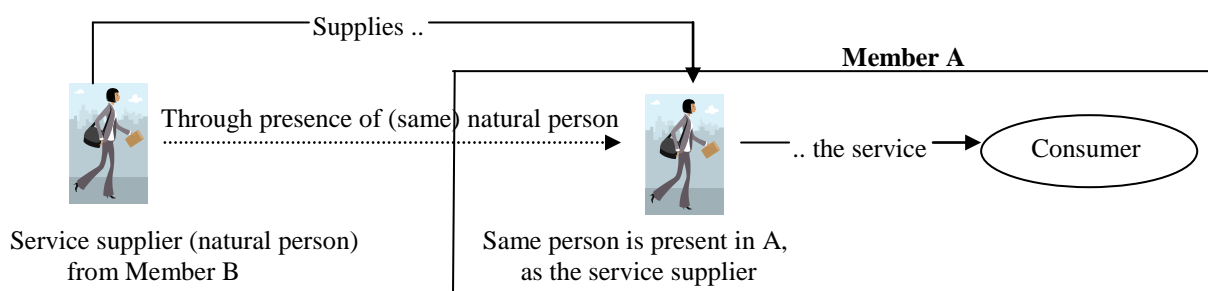
10. Further elaboration on the scope of mode 4 is provided in the Annex on the Movement of Natural Persons Supplying Services under the Agreement (hereinafter: the Annex). The Annex specifies two types of natural persons that are covered: (1) those who are (themselves) service suppliers⁸; and (2) those who are employed by a service supplier.⁹ The main definitional elements will be outlined below.

1. Type (1) - Natural persons as service suppliers

11. The first type, "natural persons who are service suppliers of a Member", involves only one and the same person, who is present and supplies a service in the territory of another Member. This would cover a self-employed person who is remunerated directly for the supply of a service by customers in the host country.

12. This case is illustrated in Figure 2.

Figure 2. Natural persons as service suppliers



13. The natural person must be the national (or permanent resident) of a Member other than that in which he or she is present to supply the service, i.e. the natural person must be of foreign origin from the host Member's perspective. For instance, services supplied in the United Kingdom by an Indian national would fall under mode 4, unlike the services supplied by a UK national (who is not a natural person of a Member in the territory of *any other Member*) or a Lebanese national (who is not a natural person of *a Member*).

14. The service supplier might operate either from a base in the host country (as per the relevant mode 3 commitments) or from a foreign base. A physician who supplies medical services through an office in the host country might be an example of the former type, a piano artist giving a concert abroad one of the latter.

2. Type (2) - Natural persons as employees of service suppliers

15. The second type covered according to the Annex are "natural persons of a Member who are employed by a service supplier of a Member". In other words, a distinction is made between the natural person and the service supplier. The service supplier can be a natural person as well, but it will be that person's employee who is present and delivers the service in the host Member. More commonly, however, the supplier will be a juridical person. The natural person and the service supplier need to be from a WTO Member, but not necessarily from the same Member.

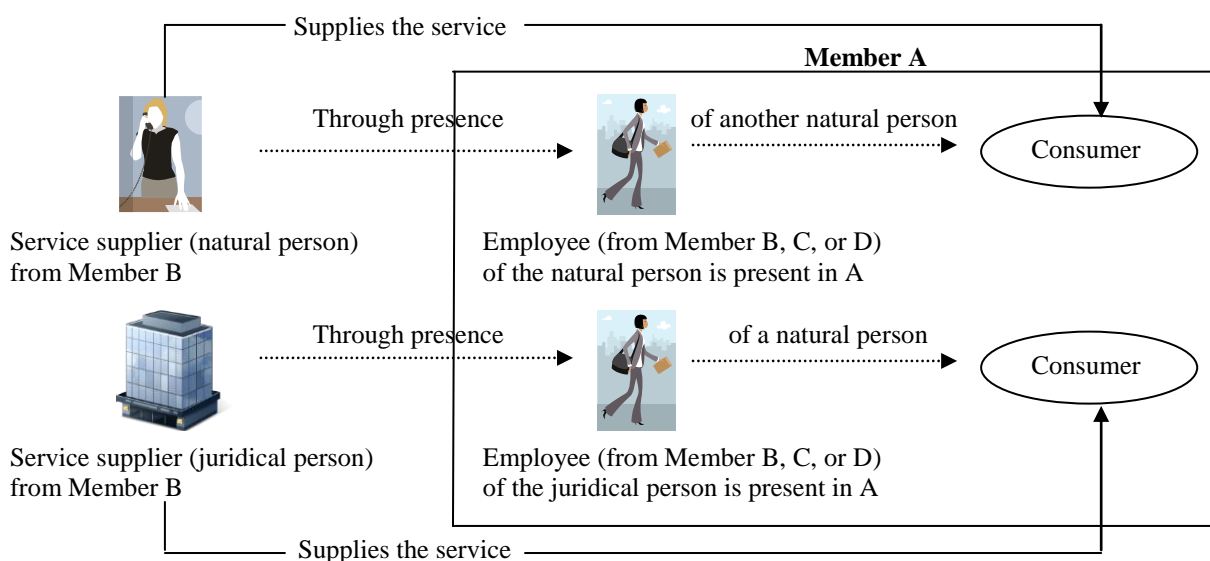
⁸ This type will also be referred to as "type (1)".

⁹ This type will also be referred to as "type (2)".

16. According to Article I.2(d), the natural person must be in the territory of another Member, and, as discussed above, the service supplier must also be "of any other Member". Therefore they must be both of foreign origin. As nationally-owned service companies are not service suppliers "of another Member", any foreign natural persons they employ are therefore not covered by mode 4.¹⁰ Thus, host-country firms would not be entitled to claim GATS treatment from their own government regarding measures affecting foreign natural persons they employ or wish to employ. Only foreign juridical persons, or foreign natural persons who are service suppliers would be entitled to this treatment with respect to foreign employees.

17. Figure 3 outlines how mode 4 services are traded through natural persons employed by a service supplier of a Member.

Figure 3. Natural persons as employees of service suppliers



18. By definition, the natural person is present in the territory where the service is being supplied, whereas the service supplier is not necessarily there. In any case, it needs to be determined that the service supplier is "of another Member" according to the definitions in Article XXVIII.

3. Service suppliers vs. employees of service suppliers

19. It may not always be straightforward to determine if a person is an individual service supplier (self-employed), or is employed by a service supplier. In the case of mode 4, this distinction is critical when a national service company is involved. As previously mentioned, mode 4 covers foreigners who are themselves the service supplier and foreigners employed by a foreign service supplier, but not foreigners who are employees of a national service company or individual.

20. As a result, a foreigner supplying services to a host-country company on a contractual basis as a self-employed person would be covered by mode 4, whereas the same person would fall outside the scope of the mode 4 if they were an employee of that company.

¹⁰ For additional views on this issue, see, for instance, Self and Zutshi (2003), Chaudhuri *et al.* (2003), OECD (2004), Peng (2006).

21. The GATS offers no guidance on how to differentiate between an employee and a self-employed person. This distinction, however, is frequently drawn under national laws. It is often used to determine a person's entitlement to employment rights, social security benefits and fiscal treatment. Box 1 provides an illustration of the types of criteria that have been used in one jurisdiction.¹¹

Box 1. Self-employed vs. employees - Hong Kong, China's labour legislation

There is no one single conclusive test to distinguish a contract of employment from a contract for service. Some of the factors to be considered in identifying a contract of employment include:

(a) Control:

- Who decides on the recruitment and dismissal of employees?
- Who pays for the employees' wages and in what ways?
- Who determines the production process, timing and method of production?
- Who is responsible for the provision of work?

(b) Ownership of factors of production

- Who provides the tools and equipment?
- Who provides the working place and materials?

(c) Economic considerations

- Does he carry on business on his own account or carrying out the business for the employer?
- Does he involve in any prospect of profit or is he liable to any risk of loss?
- How are his earnings calculated and profits derived?

Source: Labour Department, Hong Kong, China, accessible at www.labour.gov.hk/eng/faq/cap57b_whole.htm

C. OTHER PROVISIONS IN THE ANNEX

22. One further qualifying element in relation to mode 4 is linked to its temporary aspect. The Annex specifies that the GATS does not apply to "measures regarding citizenship, residence or employment on a *permanent* basis" [emphasis added]. This explains why mode 4 is often referred to as the temporary presence of natural persons.

23. There is no specified timeframe in the Agreement to determine what might constitute temporary presence. Pursuant to the Scheduling Guidelines, each Member should specify in its schedule of specific commitments the permitted duration of stay for the categories of natural persons included therein.¹²

¹¹ See also the draft of the 6th edition of the IMF's Balance of Payments Manual (BPM6) and draft revised Manual on Statistics of International Trade in Services, as quoted in Magdeleine and Maurer (2008). The BPM6 recommendations for the identification of self-employed and employees are broadly consistent with those of the System of National Accounts 2008 as well as those in the Resolution concerning the International Classification of Status in Employment (ICSE-93) adopted by the 15th International Conference of Labour Statisticians (ICLS) in January 1993 and with other resolutions of the ICLS concerning the definitions of the economically active population.

¹² See paragraph 34 of the Scheduling Guidelines, document S/L/92, dated 28 March 2001.

24. The Annex also states that "the Agreement shall not apply to measures affecting natural persons seeking access to the employment market of a Member".¹³ It further clarifies that, regardless of their obligations under the GATS, Members are free to regulate the entry and stay of individuals in their territory, 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". It also provides that 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.

III. MODE 4 CATEGORIES IN MEMBERS' SCHEDULES

25. The scope of mode 4 is defined by the framework provisions of the GATS, rather than by Members' schedules of commitments. The fact that lower-skilled persons are generally absent from commitments (for further discussion, see section VII.A below), for instance, does not mean that they are not covered by mode 4. By the same token, the existence of commitments on the employment of foreigners by national suppliers could not be conceived to imply any modification to the scope of mode 4 as outlined in section II.

26. Members' schedules delineate the access conditions granted with regard to mode 4. In practice, the following categories of natural persons are customarily, but not mandatorily, found in commitments (the service supplier is from Member B, the service consumer is located in Member A).¹⁴

- (a) *Independent Professionals (IP)*: self-employed persons of B who are present in A to supply a service to a local client pursuant to a service contract. IP correspond to the self-employed service suppliers described in section II.B.1 above. The term 'professionals' might be somewhat confusing, however, since these persons are not supplying only 'professional services' as defined in the W/120 services classification list, but, at least in principle, many other services;
- (b) *Contractual Service Suppliers (CSS)*: employees of a service supplier of B without a commercial presence in A, who are present in A to provide a service pursuant to a service contract concluded between their employer and a local client.¹⁵ CSS receive their remuneration from their employer, and not from the client; they are "natural persons of a Member who are employed by a service supplier of a Member " and correspond to the lower part of Figure 3;
- (c) *Intra-Corporate Transferees (ICT)*: employees of a service supplier of B that has a commercial presence in A, and who are transferred to the affiliate in A. ICT fall under type (2) like CSS, but in their case the service supplier has set up a commercial presence in the host country, to which they are being transferred;

¹³ The Agreement offers no further guidance on this exclusion. Chaudhuri *et al* (2003) see this clause as implying that foreigners employed by host country companies are beyond the scope of mode 4. Differently, Peng (2006) argues that the focus in this sentence should be on the words "seeking access"; a person already employed in a Member's territory cannot be "seeking access" to that Member's employment market (because that person has already finished the access-seeking process and has found employment). According to this author, the meaning of the words "access", in combination with "seeking", cannot be equated to the notion of "employed".

¹⁴ For a more detailed description of the categories frequently used in Members' commitments, see document JOB(03)/195. Also, documents TN/S/W/31 and TN/S/W/32 propose possible common categories.

¹⁵ Employees of a service supplier of B that had a commercial presence in A could also fall under the CSS category, provided their presence in A were totally unrelated to, and independent of, the operations of the affiliate in A.

- (d) *Business Visitors (BV)*: employees of a service supplier of B who are seeking entry into A for the purpose of setting up a commercial presence or of negotiating the sale of a service on behalf of an enterprise. BV do not receive any remuneration from a source located within A and are not engaged in making direct sales to the general public or supplying services themselves. They are just facilitating future trade, which may take place through a variety of modes of supply.

27. A category not generally explicitly inscribed as such in Members' schedules is that of non-ICT temporary employees of foreign service companies in the host country.

28. One final point to note is that the use of these categories, which are predominantly based on the nature and presence of the service supplier, though widespread, is not universal. Some Members, for instance, have opted for a hierarchical categorisation and have bound access for, e.g., executives, managers and specialists, while others used different combinations of types of categories (see section VII.A).

29. Figure 4 below combines the definition of mode 4 as it emerges from the framework provisions of the GATS with the scheduling patterns normally used by Members.¹⁶

Figure 4. Categories of natural persons under mode 4

<i>The GATS covers services supplied by whom?</i>	Service supplier of another Member (i.e. foreign)		
<i>What form can a foreign service supplier take?</i>	Natural person	Juridical person	
<i>How are services supplied in the host country?</i>	By the same natural person, as self-employed service supplier, directly to consumer	Through an employee when the service supplier has no commercial presence in the host country	Through an employee when the service supplier has a commercial presence in the host country
<i>What corresponding categories of natural persons are generally found in Members' Schedules?</i>	Independent professionals	Contractual service suppliers	Intra-corporate transferees or non-ICT temporary employees

IV. MEASURING MODE 4 TRADE¹⁷

30. The measurement of mode 4 flows poses formidable challenges. No clearly defined statistical framework is currently in place to assess the value of mode 4 trade and, consequently, no reliable estimates exist. Conceptual work has nonetheless been undertaken over recent years, in the context of the drafting of the first revised version of the UN Manual on Statistics of International Trade in Services. The revised Manual accounts for revisions introduced in the System of National

¹⁶ Business visitors are not reflected in Figure 4 as the service delivery has yet to take place.

¹⁷ For a more comprehensive description of the research carried out over recent years with respect to the measurement of GATS mode 4, see Magdeleine and Maurer (2008).

Accounts and the Balance of Payments, as well as in Foreign Affiliates Statistics (FATS)¹⁸. It also includes a chapter that discusses the measurement of trade flows by mode of supply, in particular mode 4, and provides new recommendations on the compilation of trade in services information by modes of supply.¹⁹

31. Ideally, information on the value of trade and the related movement of persons (flows and stocks) would need to be collected. In terms of value, only the trade generated by CSS and IP²⁰ would prove relevant. In the case of ICT and other foreign employees of foreign service suppliers, the service is being supplied through the affiliate (and captured under mode 3, in foreign affiliates statistics), while the activities of BV do not, at least initially, involve financial transactions.

32. In terms of sources of information, the services transactions recorded in the Balance of Payments cover mode 4, although with serious limitations in terms of its identification. Balance of Payments services transactions are recorded when they occur between residents and non-residents with an underlying contract as the basis for the transaction. As such, they capture essentially modes 1, 2 and 4.²¹ However, determining the share of mode 4 in Balance of Payments data is, for the time being at least, problematic. Whereas certain transactions are clearly associated with specific modes, for example, a transaction relating to a physician providing medical diagnosis electronically to a patient abroad with mode 1, others involve a combination of modes of supply.

33. For example, under a single transaction (or contract) relating to the development of customised software, the service supplier may choose to send a specialist to the host country (client) to develop part of the software, while the rest is worked on in the supplier's home country. This bit of software is subsequently forwarded electronically to the specialist, who will finalize the project with the help of colleagues who had remained in the home country. In such cases, there is a need to single out the mode 4 part in existing Balance of Payments cross-border services transactions.

34. Mode 4 is deemed to be an important component of services trade in the Balance of Payments items construction services; computer and other information services; other business services (miscellaneous business, professional and technical services); and personal, cultural and recreational services (other, i.e. excluding audiovisual and related services).²² Table 1 shows the services items of the Balance of Payments where mode 4 is judged to be an important component. Although mode 4 accounts most probably only for a small proportion of the figures reported, Table 1 provides an indication of how trade in these sectors is evolving. Notably, over the period 2000-2007 world exports of all these services (with the exception of other personal, cultural and recreational services) have exhibited higher average growth rates than exports of total commercial services.

¹⁸ FATS statistics contain information on the local deliveries of services through foreign affiliates that is required to estimate the size of mode 3.

¹⁹ For more information on the statistical conceptualization of mode 4, see: <http://unstats.un.org/unsd/tradeserv/TFSITS/msits.htm>.

²⁰ In international statistical standards, CSS and IP are respectively referred to as 'CSS as employees of a juridical person' and as 'CSS as self-employed'.

²¹ Compensation of employees and workers' remittances are income measures in the Balance of Payments. The former measures the wages, salaries, and other compensation received by non-resident employees for the work performed for their resident employers, while the latter covers transfers back home by migrant workers employed in a foreign economy. Both these indicators are not measures of mode 4 trade, but of income flows originating from the movement of people or migration. Indeed, except in rare cases, these items will not cover most of the transactions relating to CSS and IP. (See also section V.B.1 below)

²² These sectoral definitions correspond to the Balance of Payments classification.

Table 1. World exports of services sectors where mode 4 is deemed to be an important component, 2007
(US\$ billion and annual percentage change)

	<i>Value</i>	<i>Share</i>		<i>Annual percentage change</i>			
	2007	2000	2007	2000-07	2005	2006	2007
Construction	70	1.9	2.1	14	20	17	23
Computer and information services	160	3.3	4.8	19	12	21	23
Other miscellaneous business, professional and technical services	550	15.3	16.2	13	13	14	20
Other personal, cultural and recreational services	10	0.3	0.3	11	18	18	25
Total commercial services*	3370	100.0	100.0	12	12	14	20

Services sectors correspond to the Balance of Payments classification.

* As defined in the Balance of Payments, essentially covering modes 1, 2 and 4.

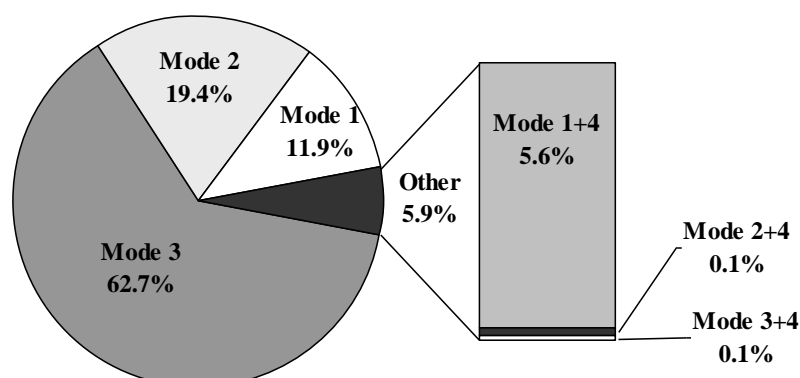
Source: WTO Secretariat (2009)

35. Available estimates suggest that, as a share of trade in services in all four modes, mode 4 trade accounts for less than 5 per cent.²³ However, for specific service sectors in a number of economies, the size of mode 4 trade may be significantly higher. Today, a very rough WTO Secretariat estimate based on the small number of studies carried out by national compilers places the value of mode 4 trade at around US\$150-200 billion.

36. Some Members have tried to estimate the weight of different modes of supply for a number of services sectors. For example, the breakdown of Australia's services trade by mode for the fiscal year 2002-03, based on Balance of Payments and FATS data, indicates that modes 1 and 4, counted together, amounted to 17.8 per cent. This breakdown could be further refined by distinguishing transactions deemed to be provided predominantly through mode 1 (such as in transportation, communication, financial and insurance services) from those where mode 4 is considered to be a significant element of the trade concerned (see above). Their respective shares in total services trade would be 11.9 and 5.6 per cent, as illustrated in Chart 1. The latter percentage would need to be further broken down to identify specifically the mode 4 elements.

²³ Magdeleine and Maurer (2008).

**Chart 1. Australia, exports of services broken down by mode of supply, 2002-03
(Percentage)**



Source: Magdeleine and Maurer (2008)

37. Although not compiled according to international statistical standards, the Australian International Legal Services Advisory Council has recently published results from a survey of Australian exports of legal services over the 2006-2007 financial year.²⁴ The survey valued services exported through the 'fly in-fly out' method as accounting for 17.5 per cent of total Australia's legal services export income. This category includes work undertaken by lawyers normally resident in Australia, either on a 'fly in-fly out' basis or from their 'desk' in Australia if it is not necessary to fly in to actually undertake the work. Though not corresponding precisely to mode 4 as defined in the GATS, this information provides a useful gauge of the relative importance of mode 4 trade.

38. Surveys asking respondents to allocate transactions to the most important mode of supply, in terms of associated time and resources, have been used also by the Reserve Bank of India, to collect data on exports of computer services from India. According to available figures, mode 4 exports are estimated to represent 13 per cent of India's total exports of computer services in 2002-2003.²⁵

39. Current statistics on the number of persons moving in connection with mode 4 trade, which are drawn mainly from enterprise surveys, border or passengers' surveys, and visa records, are imprecise and scarce, and do not generally distinguish between different categories of natural persons. The OECD, for instance, collects information on inflows of intra-corporate transferees (with no distinction between services- and goods-producing employers) and other temporary foreign workers, but the data are far from an exact match for mode 4.²⁶ Available information for intra-corporate transferees is reproduced in Table 2. Given the paucity of existing information, it is difficult to draw any conclusions or identify any clear patterns.

²⁴ In Australian Department of Foreign Affairs and Trade (2009).

²⁵ Reserve Bank of India (2005).

²⁶ For a discussion of the main limitations of these data, see Annex B of OECD (2004).

**Table 2. Entries of intra-corporate transferees in selected OECD countries, 2000-2006
(Thousands)**

	<i>Intra-corporate transferees</i>						
	2000	2001	2002	2003	2004	2005	2006
Australia	...	...	...	...	...	...	...
Austria	0.2	...	...	0.2	0.2	0.1	0.2
Belgium	...	...	...	...	...	...	...
Canada	1.6	1.8	3.0	3.8	4.2	4.5	5.7
Denmark	...	...	...	...	...	...	...
France	...	...	...	...	...	...	...
Germany	1.3	2.0	1.9	2.1	2.3	2.5	2.8
Italy	...	...	...	...	...	...	...
Japan	3.9	3.5	2.9	3.4	3.6	4.2	5.6
Korea	10.0	9.2	8.7	7.8	8.5	8.4	8.1
Netherlands	...	...	...	...	...	...	...
New Zealand	...	...	...	...	...	...	...
Norway	...	...	...	...	...	...	...
Sweden	...	...	...	...	...	...	...
Switzerland	...	...	...	14.4	7.5	1.8	4.0
United Kingdom	...	...	...	...	...	...	...
United States	55.0	59.4	57.7	57.2	62.7	65.5	72.6

Source: OECD (2007) and OECD (2009).

40. Tourism statistics break down international visitors according to the purpose of their trip, including business and professional purposes. International visitors are defined as persons present in an economy other than the one in which they reside for a period of less than one year and not employed by an enterprise of the economy visited. These statistics would thus potentially be relevant to gauge flows of, for instance, BV, IP and CSS. Table 3 provides information for the top-20 destinations in terms of arrivals of international visitors.

Table 3. Top-20 (2007) destinations for arrivals of international visitors travelling for business and professional purposes, 2005-2007 (Thousands)

	2005	2006	2007
Italy	9,190	10,833	11,992
United Kingdom	8,773	9,717	9,496
France ^a	9,074	9,073	8,636
China ^b	4,598	5,548	6,961
United States ^c	5,637	5,569	6,785
Spain	5,940	4,915	5,275
Portugal	3,308	3,555	4,124
Poland	4,240	4,240	4,085
Hong Kong, China	3,572	3,862	3,516
Russian Federation	3,226	3,233	3,270
Singapore	2,549	2,886	3,168
Malaysia ^d	2,283	2,304	2,987
Macao, China	2,994	2,860	2,969
Saudi Arabia	1,951	1,603	2,659
Canada ^e	2,622	2,651	2,590
Belgium	2,366	2,492	2,440
Turkey	1,972	2,316	2,228
Indonesia	2,063	2,011	2,161
Thailand ^f	1,545	1,976	1,817
Finland	1,480	1,607	1,696

^a Business and pleasure.

^b Excluding arrivals from Hong Kong, China; Chinese Taipei; Macao, China; and overseas Chinese.

^c Overseas only, excluding arrivals from Mexico.

^d Peninsular Malaysia only.

^e Including convention.

^f Excluding nationals residing abroad.

Source: World Tourism Organization (2009)

V. POTENTIAL ECONOMIC IMPLICATIONS OF MODE 4 LIBERALISATION²⁷

41. It is difficult to fit mode 4 trade in a robust analytical framework. On the one hand, given its similarities with 'traditional' cross-border trade, conventional trade theory might prove appropriate. In this sense, the benefits expected from liberalising mode 4 would be similar to those of liberalising goods trade and would include strengthening competition, thus eliminating inefficiencies, reaping economies of scale, and importing better ways of doing business.²⁸ On the other hand, mode 4 shares some of the characteristics of 'ordinary' migration as people relocate, albeit temporarily, from one country to another, thereby potentially changing a country's factor (i.e. labour) endowment. Neither approach appears totally fitting to assess the implications of mode 4 liberalisation.

²⁷ The discussion in this section relies on the concepts of "temporary workers" and "temporary migrants", rather than confining itself to the narrower notion of "natural persons involved in mode 4 trade".

²⁸ See also Winters (2003).

A. EMPIRICAL STUDIES

42. Mode 4 was still a relatively unknown concept amongst economists at the time of the previous Secretariat Note, and no empirical work had been undertaken on the issue. Since then, however, several studies have attempted to quantify the potential economic impact of liberalising mode 4. Still, it needs to be noted at the outset that all these studies are seeking to estimate the effects of freeing up the temporary movement of workers, rather than of liberalising mode 4 as defined by the GATS.

43. Using a computable general equilibrium model, Winters (2003) estimates that if developed countries were to raise their quotas on the inward movement of temporary workers from developing countries to 3 per cent of their labour force, an overall yearly gain of US\$150 billion would be realised. This gain would be shared by developed and developing countries alike, with the largest benefits, for both origin and destination countries, coming from the movement of lower-skilled workers. This is explained by the greater difference in productivity (due to different capital endowments) between lower-skilled workers in developing and developed countries than in the case of high-skilled workers.²⁹

44. Winters notes, however, that such a vigorous liberalisation would "pose significant adjustment strains" in industrialised countries.³⁰ He argues that, over the long run, resulting strains could be mitigated using education to improve the human capital endowment of individuals in developed countries. For the short term, Winters identifies four possible approaches: leaving the most sensitive sectors out of the liberalisation process; making liberalisation proceed over long transitional periods; using specific trade-related compensation schemes; and relying on deeper general social protection systems.

45. In another study, Rodrik (2002) calculates the impact of a temporary visa scheme, with a quota set at 3 per cent of the developed countries' labour force. Under this scheme, developing countries' workers would be allowed employment in developed countries for 3 to 5 years, to be replaced by other workers upon return to their home countries. The gains from this system are calculated at US\$200 billion annually. However, Rodrik also points to the negative distributional effects of the scheme for local workers in industrialised countries, especially lower-skilled ones.

46. Using a gravity model augmented by a measure of temporary movement of workers, Jansen and Piermartini (2004 and 2005) show that, over time, an increase in the temporary movement of people generates also significant indirect effects on merchandise and services trade through other modes of supply. These effects ensue from skill and technology transfers, development of specific knowledge, creation of networks and overseas contacts, and reputation effects.

47. These empirical estimates are still very approximate. As mentioned, they suffer from significant methodological difficulties linked to the definition of mode 4, which lacks an easily identifiable correspondence in immigration regimes, and the absence of reliable statistical data. Generally, the studies undertaken consider types of movement that are different from and wider than mode 4. Also, there is often uncertainty about the existing level of protection in respect of mode 4 trade and, hence, about the baseline from which to measure any change. The perceived discrepancy between Members' commitments and the regimes in force at the national level could result in an overestimation of the impact of further mode 4 liberalisation. Measures that seek to moderate any

²⁹ Other studies that have relied on computable general equilibrium models to quantify the economic effects of greater temporary movement of persons include Walmsely *et al* (2005) for the Pacific region, Ahmed and Walmsley (2009) for India and Ben Romdhane (2008) for Tunisia.

³⁰ Winters (2003), page 86.

adverse effects of mode 4 trade further complicate the analysis. Economic needs tests, for instance, imply that mode 4 entry only happens when it is expected to have no negative impact on the domestic labour market.

48. The direct welfare-promoting effects of mode 4 liberalisation focus on the expected gains from a narrowing of wage differentials between developing and developed countries. However, in the regulated labour markets of many developed countries, domestic legislation limits or prevents downward adjustments of wages. Moreover, several host countries require that temporary workers be accorded equal wages and social protection as nationals at comparable levels of skills and expertise. As a result, the hypothesis of wage harmonisation is rather implausible, even if most of the models assume no more than a halving of wage differentials (because of differences in education levels, culture, social protection systems, etc). To the extent that downward pressures on wages are curbed, the expected gains from mode 4 liberalisation may be lower. However, the costs of adjustment will concurrently be lower as well.

49. Even if such problems are taken into account, however, the overall gains to be expected from mode 4 liberalisation are likely to remain significant. Moreover, opening up mode 4 trade is likely to benefit developing countries in particular, given their perceived comparative advantage in the area of the movement of persons unrelated to a commercial presence abroad. This is not to say, however, that developed countries would not also be positively affected by greater mode 4 openings. Indeed, significant potential for mode 4 movements does not exist solely between developing and developed countries, but also amongst these groups of countries.³¹

B. EFFECTS OF MODE 4 LIBERALISATION ON ORIGIN AND DESTINATION COUNTRIES

50. Leaving aside quantification attempts, this section will briefly discuss some of the potential implications of liberalising mode 4 for both origin and destination countries.³² Generalizations could prove misleading, however, as liberalisation may have a distinct impact depending on the countries and sectors concerned, the category and skill levels of the persons involved, as well as the governing regulatory framework.

1. Effects in origin countries

51. The potential beneficial effects associated with the expansion of mode 4 trade are manifold. From the origin country's perspective they include in particular:

- Reduced pressure on saturated labour markets. Departing workers may be expected to help reduce unemployment and lift wages. The actual impact will, however, depend crucially on the length of stay abroad, on whether the persons involved were already employed at home and on whether they are easily replaceable, and effectively replaced. The effects will differ depending on the categories of mode 4 natural persons involved. The most relevant effects are likely to be in the case of (non-ICT) workers who move to take up employment with foreign service companies in the host country.
- Income transfers. The transfers concerned are recorded in the Balance of Payments as remittances. Remittances are likely to be relevant essentially for ICT who are employed and remunerated by the foreign affiliate and non-ICT employees of foreign companies. The economic impact ultimately depends on the use to which remittances are put, i.e. consumption, saving or investment. Transfers are expected to be boosted by the temporary nature of mode 4

³¹ See also OECD (2002a).

³² This section relies in large measure on OECD (2002a).

movement, given the inverse relationship thought to exist between the amounts remitted, per equal time periods, and the duration of time spent abroad.³³ However, this relationship is likely to be mitigated by the highly-qualified nature of the persons generally involved in mode 4 trade. Available research suggests that highly-skilled workers tend to remit less, as a percentage of the income received, than lower-skilled migrants.³⁴

- Indirect trade-inducing effects. As discussed in section V.A, increased mode 4 trade is likely to be a vector for promoting foreign direct investment into the source country, through the ensuing overseas networks and contacts. Additionally, cross-border services trade could be stimulated by mode 4 movements. The presence of temporary Indian workers in the United States, for instance, has helped raise the awareness of the pool of skills available within India, thus, increasing US companies' inclination to deal with Indian workers and facilitating the eventual outsourcing of work to India.³⁵
- Human capital transfers. Upon return, the origin country's stock of human capital is likely to have increased. The enhanced skills of the returning worker, in terms of languages, experience, know-how, and business contacts, can potentially entail positive externalities.³⁶ However, suitable infrastructure and career opportunities must be available at home in order to make the most of the enhanced human capital embedded in returning workers. Mode 4 liberalisation may also potentially mitigate the danger of 'brain waste', which occurs when workers are unable to use their skills and training in a foreign labour market. 'Brain waste', which is mostly associated with irregular migration, results in a misuse of talent, a dissipation of the (often public) resources invested in education and may seriously affect the chances of the origin country's human capital being augmented upon return of the worker. By increasing access opportunities in the sectors concerned, deeper mode 4 commitments improve the chances that the person's qualifications and skills will be employed appropriately in the host country, while at the same time also providing an incentive to gain the relevant qualifications.³⁷

52. For origin countries, however, greater mode 4 trade may imply a threat of 'brain drain', i.e., the loss of skills and expertise as a result of highly-skilled workers going abroad, with the ensuing negative repercussions on a country's economic development. Indeed, workers who move across borders tend to be young, highly motivated and better educated and qualified than their counterparts at home.³⁸ Moreover, 'brain drain' may imply a transfer of public investment in education and training from the origin country to the destination country.³⁹

53. On the other hand, the temporary nature of mode 4 movements can help to moderate the purported disadvantages associated with 'brain drain'. The risk of 'brain drain' also needs to be considered against the backdrop of whether the persons involved would have been able to use their skills productively in their own country. The lack of adequate opportunities at home is, after all, often one of the driving factors behind the decision to migrate.

³³ See, for instance, Dustmann and Mestres (2009).

³⁴ Faini (2007).

³⁵ Chanda (2003).

³⁶ For example, in India and Chinese Taipei, the return of highly-skilled migrants has had positive effects on the development of the native software and high-technology sectors. (OECD (2008).)

³⁷ According to Batista et al. (2007), almost 40 per cent of the university graduates of Cape Verde would not have enrolled in tertiary education had they not had the opportunity to migrate.

³⁸ See, for instance, Alburo and Abella (2002)

³⁹ To cover the costs involved, the Philippines has set up a system whereby nurses are allowed to work in the private sector or abroad if they repay their student loans. (The Economist (2008).)

54. Box 2 discusses the issue of 'brain drain' in the health sector. It considers the international movement of health professionals in general, rather than just mode 4 movements in the sector. Mode 4 is, in fact, likely to account only for an insignificant share of the flows of health personnel.⁴⁰

Box 2. The international migration of health professionals

The 'brain drain' phenomenon has attracted particular attention in the health sector, both because of its extent and potential consequences. In 2000, 75 and 70 per cent of the physicians produced by Mozambique and Angola, respectively, were working abroad.⁴¹ Focusing exclusively on OECD countries as destinations⁴², and comparing the number of doctors in the origin country with the number of expatriate doctors, African and Caribbean countries stand out as being disproportionately affected by the out-migration of physicians, some with expatriation rates above 50 per cent. The consequences of the associated 'brain drain' are particularly serious when the origin country exhibits low density ratios for doctors, as in the case of several French-speaking African countries. Expatriation rates for nurses are generally lower than for doctors, with some exceptions, notably in the Caribbean region, and Haiti and Jamaica in particular. This is not the full picture, however, since many nurses tend to move to non-OECD countries (e.g. from the Philippines to the Gulf region).

The World Health Organization (WHO) has identified 57 countries, including 36 Sub-Saharan African countries, as having a critical shortage of health personnel.⁴³ In such settings, even the temporary loss of skilled professionals can deal a serious blow to already fragile health systems. By way of response, the World Health Assembly of 2004 mandated the WHO Director General to develop a non-binding code of practice on the international recruitment of health personnel.⁴⁴ A first draft, prepared in August 2008, was subjected to a process of consultations and subsequently revised.⁴⁵ The code encourages the setting of voluntary standards for recruitment, aimed at providing an equitable balance of the interests of health personnel, origin and destination countries, with a special emphasis on countries experiencing a health-workforce crisis.

The contribution of international migration to the shortage of health personnel should, however, be put into perspective. OECD estimates suggest, for instance, that all African-born doctors and nurses working in OECD countries represent no more than 12 per cent of the total estimated shortage for the region, and that the share for South-East Asia is 9 per cent. The OECD concludes that "the needs in human resources in developing countries [...] largely outstrip the numbers of immigrant health workers in the OECD, implying that international migration is neither the main cause nor would its reduction be the solution to the worldwide health human resources crisis, even though it exacerbates the acuteness of the problem in some countries".⁴⁶

In a similar vein, the UK's Overseas Development Institute (ODI) argues that restrictions on the international recruitment of health personnel from countries that lack such human resources appear to be inappropriate if migration is not the root cause of skills shortages in origin countries.⁴⁷ By reducing formal channels of entry, restrictions on the inflow of health workers might simply increase the number of informal migrants and the associated risk of 'brain waste'. Tighter controls in some

⁴⁰ Foreign health workers tend for the most part to be employed by national, often publicly-owned, health facilities. As such, they would not be covered by mode 4.

⁴¹ Clemens and Pettersson (2007).

⁴² For a fuller discussion of the migration of health workers to OECD countries, see OECD (2007).

⁴³ WHO (2006)

⁴⁴ For a description of the elaboration of the code, see WHO (2009).

⁴⁵ See WHO (2008).

⁴⁶ OECD (2007), p. 179.

⁴⁷ See Cali, M. (2008).

destinations could divert migrants to other, less restrictive countries. The question also arises whether the workers involved would have been able to use their skills productively at home, and whether, by raising the expected returns on education, the opportunity to migrate acts as a stimulus to the skills base. In order to achieve a suitable level of adequate skills, therefore, the ODI suggests that origin countries institute strategies to promote development, and destination countries support these strategies while also elaborating migration-specific policies. Such policies could include funding the expansion of the tertiary training capacity of source countries; providing technical assistance to improve the regulatory and oversight capacity of these countries' training systems; and instituting mechanisms to facilitate return migration.

2. Effects in destination countries

55. For destination countries, one of the positive effects of mode 4 liberalisation lies in the potential to alleviate labour and/or human-capital shortages in individual service sectors. For example, the domestic workforce may lack the required skills and qualifications; certain positions may be deliberately left vacant by suitably qualified people, who prefer to engage in other, more attractive activities (e.g. in terms of the nature of the sector, employer, geographical location); or an ageing population may induce increased demand for specific services.

56. A survey of employers across 33 countries undertaken by Manpower in the first quarter of 2009 reveals that 30 per cent of surveyed companies were having difficulties filling positions due to the lack of suitable skills in their markets. The top 10 jobs that were found most difficult to fill were, in order: skilled trades⁴⁸, sales representatives, technicians, engineers, managers and executives, accounting and finance staff, labourers, production operators, secretaries and other office support staff and drivers.

57. However, mode 4 is likely to provide at best only a short-term easing of domestic supply bottlenecks. Even though human-capital shortages could theoretically be permanently resolved by a constant inflow of temporary workers, this is likely to be more costly than relying on permanent workers, in terms of replacement costs, loss of experience and repeated training of new arrivals. When needs are on-going, in addition, temporary admissions may carry the risk of delaying efforts at structural adjustments of national education and training programmes.

58. At the same time, though, by partially substituting for permanent settlement, mode 4 helps avert some of the associated social and political costs. Indeed, temporary movement tends to be less politically sensitive in the host country and also less costly in terms of use of public infrastructure and services, such as health and education.

59. For destination countries, mode 4 liberalisation can also offer the benefits of increased competition, better quality and broader choice. Consumers can gain from a wider choice of better and more varied services at lower prices. Firms can access skills and knowledge embodied in foreign workers at lower than domestic 'production' costs, thus enabling them to produce existing services at lower cost and possibly also entirely new services. In addition, given that competition comes from within the host-country, rather than from the outside, as is the case with 'traditional' cross-border trade, the related adjustment costs may be lower, as foreign workers consume part of their income in the host-country.

⁴⁸ In the Manpower survey, "skilled trades" refers to a broad range of jobs that require specialised skills, traditionally learnt over a period of time as an apprentice. Examples of skilled trades jobs include electricians, bricklayers, carpenters and plumbers.

60. However, mode 4 liberalisation may negatively affect, at least in the short-term, national workers who are in direct competition with foreigners to provide the same services. Mode 4 entry may thus exert an upward pressure on unemployment and a downward pressure on wages. In this sense, the impact of opening up mode 4 is no different from that of liberalising goods trade; any negative consequences on domestic employment, though, are bound to materialise more quickly and directly, as imports are immediately embodied in foreigners taking up domestic jobs or obtaining domestic services contracts. In the longer-term, nonetheless, the host-country's production structure is expected to adjust, and the costs of this adjustment will likely be transient, smaller than in the case of 'traditional' cross-border trade and counterbalanced by the benefits indicated before.

61. To ease adjustment pressures and popular resistance to increased inflows of foreign workers, quite a number of countries operate wage-parity requirements. Such requirements might also be justified on the grounds that foreign workers face the living costs of the host-country, and that temporary workers could be more vulnerable to exploitation if not fully subjected to local laws. On the other hand, wage gaps could reflect disparities in productivity between national and foreign workers. And while instances of exploitation certainly exist, the degree of mistreatment seems to be related more to the nature of the job performed than the temporary and foreign character of the workers, particularly given that mode 4 tends to involve the movement of highly educated and qualified persons.

62. Finally, mode 4 movements might be seen as a first step toward permanent migration. This is unlikely to be of particular concern when the switch happens legally, through a change of visa category. Indeed, developed countries in particular are increasingly using temporary migration schemes as a way of pre-selecting permanent residents.⁴⁹ Migrants overstaying illegally, instead, might be perceived as a potential risk of greater mode 4 access. While overstaying is a problem associated with any form of temporary entry⁵⁰, available data shows little evidence of large-scale shifts of workers from temporary to permanent status. Furthermore, by providing an alternative and orderly entry avenue, mode 4 liberalisation might contribute to reducing the pressure of irregular migration. Compared with other temporary migration schemes, in addition, access conditions bound in GATS mode 4 commitments offer a stable and predictable regime that is likely to be more conducive to regular and return migration.

VI. OBSTACLES TO MODE 4 TRADE⁵¹

63. The main obstacles discussed in this section reflect those relating to mode 4 mentioned in an attachment ("Sectoral and modal objectives as identified by Members") to the Report by the Chairman of the Special Session of the Council for Trade in Services to the Trade Negotiations Committee (document TN/S/23).⁵²

64. Visa and work permit-related requirements and procedures are among the main measures affecting mode 4 trade. Eligibility criteria tend to be strict, with a bias towards categories of persons who are highly-skilled and -educated, at elevated functional levels. Their movement tends to be associated with a commercial establishment in the host country and contingent upon a prior period of employment with the home-country company. Permits are granted for durations of stay that are not

⁴⁹ Switzerland, for instance, has a policy of renewing seasonal work permits that allows the worker, after four consecutive seasons, to apply for a permanent resident permit (OECD (2002a)).

⁵⁰ In principle the cross-border movements of people associated mode 2 trade should raise similar, if not bigger, concerns.

⁵¹ No judgement is implied on the status of these obstacles under the GATS.

⁵² Annex C of the Hong Kong Ministerial Declaration cross-refers to this attachment, with a footnote indicating that it has no legal standing.

always tailored to the needs of mode 4 service suppliers, and are often non-renewable. There are also quantitative restrictions frequently placed on visas and work permits, expressed as numerical quotas and/or economic needs tests (ENTs). The latter may take the form of labour market tests, management needs tests, manpower manning requirements, or other types of tests and conditions. ENTs conducted in the absence of clearly defined criteria and procedures are comparable in effect to the absence of any policy binding.

65. Procedures relating to visas and work permits can act as an additional impediment to mode 4 trade.⁵³ Application procedures often tend to be cumbersome, costly, and administratively complex; processing times are likely to be lengthy; rejection rates can be high and the costs of reapplying important. Two separate procedures, one for an entry visa and one for a work permit, are often necessary. Permits are generally not transferable from one employer to the next, and extension and renewal processes are not necessarily streamlined. Procedures, particularly work-permit related ones, rarely distinguish between temporary and permanent movement of labour, and are therefore particularly ill-suited for the temporary, and often time-sensitive, types of movement that mode 4 involves. Opaque and arbitrary procedures are also mentioned amongst the problems associated with entry and work permit procedures.

66. Discriminatory measures affecting mode 4 trade consist mainly of nationality and residency requirements, non-eligibility under subsidy schemes, discriminatory tax treatment, and obligations on foreigners to provide training to domestic workers. Other issues of concern include restrictions affecting the mobility of family members; the non-portability of social security benefits; and wage-parity requirements.

67. However, even non-discriminatory regulatory requirements and procedures may seriously affect mode 4 trade. For instance, the assessment of an applicant's credentials may take into account only formal qualifications, rather than considering also skills and experience, and the process may be inclined towards local knowledge and norms. Approval procedures may be complex and discretionary, particularly where no specified criteria exist for judging equivalence, of unpredictable duration, non-transparent and costly. Multiple layers of approval may be required, for instance at different government levels or with different professional bodies.

68. Qualifications and skills obtained abroad, furthermore, are rarely recognised in the host country. The impact of non-recognition is likely to vary depending on the category of persons involved (IP probably being more affected than ICT), type of supplier (smaller enterprises encountering more difficulties than large corporations), sector (regulated services being significantly more concerned than unregulated ones), country (depending on the relative differences of the regulatory regimes involved).

69. Mutual Recognition Agreements (MRAs) are one mechanism to assess qualifications.⁵⁴ They are mostly concluded for licensed professions with established international standards and practices, but are not necessarily a viable option for occupations where skills and experience are judged mainly through a concrete demonstration of work or after a period of service. MRAs mostly involve neighbouring (developed) countries, partners of broader integration initiatives, or countries with former colonial or linguistic ties. MRAs rarely award 'pure' recognition, and most require a significant amount of regulatory cooperation and often some regulatory adaptation. Since negotiating Mutual Recognition Agreements is generally complex, time- and resource-intensive, MRAs tend to

⁵³ Ng and Whalley (2005), for instance, have estimated the worldwide costs of processing visa/work permit applications to represent around 0.3 per cent of world GDP.

⁵⁴ For an extensive discussion of MRAs, see, for instance, OECD (2002b).

happen only for commercially attractive areas, with a view to exploiting promising market opportunities abroad or filling domestic skill shortages.⁵⁵

70. In the absence of MRAs, the assessment of competence may be carried out through case-by-case evaluations of prior qualifications, a potentially time-consuming and opaque process, or the passing of examinations in the host-country, which can be costly and entail considerable delays. To remedy gaps in education, training or experience, and before being eligible to take a professional examination, foreigners may also be required to take courses that replicate, at least to some extent, prior education, or to undergo training that duplicates part of the training previously undertaken, or to acquire fresh experience, irrespective of past practice.

71. The financial cost of the regulatory requirements faced by the Indian professionals who entered the United States in a particular year between 1995 and 2000 has been estimated by Mattoo and Mishra (2009) at US\$750 million. This estimate is based on the fees paid for visa, professional examination and licence, plus the average income forgone due to differential requirements (e.g. taking additional courses).

72. However, the authors caution that it may be difficult to determine whether these costs are 'excessive', as at least some of the regulatory requirements may be justified by the need to ensure compliance with locally desired standards of competence and remedy any resulting gaps in education, experience or training.

VII. COMMITMENTS AND MFN EXEMPTIONS CONCERNING MODE 4

A. MODE 4 COMMITMENTS⁵⁶

73. Mode 4 commitments have been undertaken on a horizontal basis by the vast majority of WTO Members.⁵⁷ Horizontal commitments apply only to the sectors inscribed in the schedule. While reflective of the generally homogenous nature of immigration regimes in many countries, the absence of sectoral differentiation may imply, in practice, that the 'lowest common denominator' determines access conditions across all committed service sectors. In light of this peculiarity of mode 4 scheduling, the following analysis has been conducted solely on the basis of horizontal commitments, abstracting from any sector-specific variations.⁵⁸

74. Overall, the degree of mode 4 access bound in current GATS schedules is rather shallow.⁵⁹ In most instances, Members have scheduled an initial "unbound" and then qualified it by a positive undertaking to grant specified levels of access, mostly linked to selected categories of persons based on functional and/or hierarchical criteria, with a marked bias towards persons linked to a commercial presence and highly skilled persons (executives, managers and highly-educated specialists). Table 4 provides information for the main mode 4 categories found in Members' horizontal commitments.

⁵⁵ It should be borne in mind that MRAs have the potential to be trade distorting rather than trade creating. They may generate trade patterns based on geographical proximity, former colonial or linguistic ties, rather than patterns of comparative advantage. See Mattoo (2000).

⁵⁶ Unless otherwise mentioned, EC Member States have been counted individually.

⁵⁷ 121 Members out of a total of 153. There are exceptions, in particular among those countries that have assumed relatively few commitments. For example, only 9 out of 32 LDC Members have inscribed mode 4 commitments in the horizontal section.

⁵⁸ A comprehensive analysis of sectoral mode 4 commitments would have proven too time- and resource-intensive within the context of this exercise, and is to some extent rendered futile by the near-simultaneous submission of Background Notes on several service sectors, which address specificities with regard to mode 4 commitments. Moreover, the additional information would most likely not have changed the general picture.

⁵⁹ No Member has undertaken fully liberal mode 4 commitments at the horizontal level. Even at the sectoral level, "none" entries have been inscribed only by a handful of Members.

**Table 4. Mode 4 categories
(horizontal commitments)
July 2009**

		Entries by individual categories	Entries by aggregate categories	Share of total entries (%)	Members by aggregate categories
ICT	<i>Executives</i>	69	206	41.8	70
	<i>Managers</i>	68			
	<i>Specialists</i>	67			
	<i>Others</i>	2			
Executives		32	110	22.3	43
Managers		37			
Specialists		41			
BV	<i>Sale negotiation</i>	64	116	23.5	64
	<i>Commercial presence</i>	52			
CSS		31	31	6.3	31
IP		7	7	1.4	7
Other*		13	13	2.6	13
Not specified**		10	10	2.0	10
Total***		493	493	100.0	

* Includes other separately identified categories (e.g. "installers", "foreigners to implement foreign investment", etc).

** Covers indistinct references to "foreigners", "aliens", "employees", etc.

*** Total number of entries found in the schedules of those 121 WTO Members with horizontal mode 4 commitments.

Source: WTO Secretariat

75. Due to the absence of agreed definitions for the different mode 4 categories, and because of the vague inscriptions in some schedules, the results presented in Table 4, and discussed in more detail below, are necessarily subject to interpretation problems. Difficulties frequently encountered concern, for instance, the classification of executives, managers and specialists⁶⁰, the identification of intra-corporate movements⁶¹, and the categorization of IP.⁶²

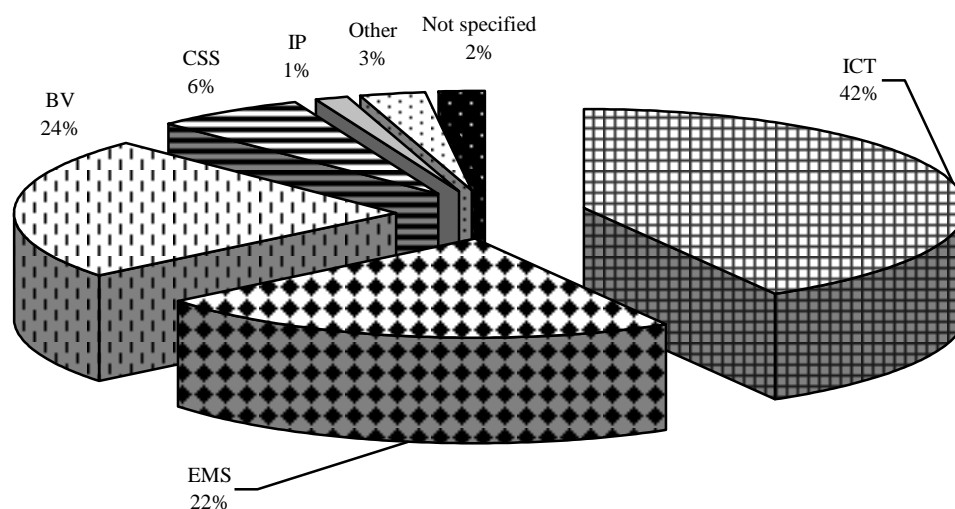
76. Chart 2 below illustrates the relative incidence of the various categories.

⁶⁰ For example, the Secretariat has counted "administrators" under "executives"; "senior personnel" and "senior managerial personnel" under both "managers" and "executives"; "experts" and "technicians" under "specialists".

⁶¹ "Executives/managers/specialists associated with a commercial presence", for instance, have been counted as "executives/managers/specialists", as no intra-corporate requirement is specified. Foreigners "to implement foreign investment", instead, have been counted under the category "other".

⁶² Natural persons have been counted as IP as long as they are not required to be employed locally.

**Chart 2. Horizontal mode 4 commitments, by category
July 2009
(Percentage)**



ICT = Intra-corporate transferees

EMS = Executives, managers, specialists (not necessarily as ICT)

BV = Business Visitors

CSS = Contractual Service Suppliers

IP = Independent Professionals

Source: WTO Secretariat

1. Intra-corporate transferees

77. Seventy Members, out of the 121 with horizontal mode 4 commitments, have explicitly included the category of ICT in their schedules. ICT are usually confined to executives, managers or specialists, and all three sub-categories are normally covered, accounting for a total of around 200 entries. Only in two instances have other types of ICT been included in Members' schedules.

78. A significant number of African and Caribbean Members has not inscribed ICT in their schedules. However, the absence of an explicit entry does not imply that no commitments have been undertaken for ICT. For instance, those Members that have opted for a functional classification, and included executives, managers and/or specialists (EMS) in their schedules, have usually defined them in a broad manner that does not exclude the intra-corporate movement of such persons. Indeed, the majority of Members without commitments for ICT have however inscribed in their schedules EMS that would include both transferred and non-transferred employees.

79. Out of those 70 Members having committed explicitly on ICT, only nine have subjected them to quotas.⁶³ Similarly, only few ICT commitments are coupled with economic needs tests⁶⁴, and, if so, these concern mostly ICT who are specialists.⁶⁵

⁶³ A quota scheduled by Nepal is to be further liberalised 5 years after the date of the entry into force of its commitments.

⁶⁴ The ENTs applicable to mode 4 horizontal commitments generally establish as the sole criterion for admission the non-availability of suitably qualified persons in the local market. Only in very few instances are additional indications provided, which are mainly investment-related (e.g. value thresholds).

⁶⁵ The number of horizontal entries subject to an element of discretion is even higher, however, as unspecified government approval, work and residency permit requirements may need to be added as well.

80. In terms of duration of stay, ICT are generally granted permission to stay for between 2 and 5 years. Nearly all commitments on ICT include a pre-employment requirement, which is generally of one year (in one instance it is shorter and in two cases longer).⁶⁶

2. Executives, managers and specialists

81. Forty-three Members have used a functional classification and undertaken commitments on executives, managers and/or specialists. These Members are nearly all developing countries, and include most of the LDCs with horizontal mode 4 commitments. As discussed, EMS are generally defined in schedules as covering employees in the relevant function(s) who are working in the Member concerned, without further details as to the nationality and localisation of their employer. As a result, EMS often include ICT executives, managers and/or specialists that have not been specifically identified as such.⁶⁷ Of the three functions, specialists tend to be included slightly more frequently and executives a little less. Generally, required levels of education and experience tend to be very high.

82. Concerning the possible overlap between ICT and EMS, it is interesting to note that only five Members have inscribed entries under both categories. Of these, two are recently acceded Members.

83. Over 80 per cent of all commitments on EMS are restricted by either a quota or an ENT. EMS are more frequently subject to quotas than ICT, in about one-third of all instances. As a general pattern, these quotas restrict foreign EMS to less than 10-15 per cent of the total local workforce (or to a specific number per company) and 20-25 per cent of total salaries paid. Quotas have been inscribed relatively more often by Central and Latin American countries. One-half of the commitments on this category are subject to economic needs tests. In three instances, ENTs have been used in combination with quotas.

84. The maximum duration of stay is not specified for over 70 per cent of all EMS. Those 12 Members that have indicated a period of stay have generally admitted EMS for periods between 1 and 4 years.

3. Business visitors

85. Business visitors have been included in the horizontal commitments of 64 Members. Notably, all newly acceded Members except one have done so. Schedules contain slightly more BV as sales negotiators than as commercial presence representatives. In total, 64 entries were recorded for the former and 52 for the latter.

86. Members without such commitments are mostly Latin American and African countries. Only one developed country has not included business visitors in its horizontal mode 4 commitments.

87. BV are not concerned by quotas, possibly because they are not employed in the host country. However, two Members have subjected them to ENTs. The average permitted duration of stay for BV is 90 days per year, with variations as to the possibility of renewal.

⁶⁶ Panama requires a pre-employment period of only 6 months; Chile of two years and Saudi Arabia of three years.

⁶⁷ In certain instances, CSS could also be seen as falling under the category of "specialists". If the services company employing these foreign specialists is not explicitly required to be based in the Member concerned, rather than abroad, CSS would fit the customary definition of "specialists".

4. Contractual service suppliers

88. Only 31 Members have inscribed CSS in their schedule. These are almost exclusively EC Member States or newly acceded Members, in particular those that acceded most recently.

89. CSS are not generally affected by quotas, as these tend to be applied to foreigners who are employed locally, and ENTs are also quite rare. However, CSS are often restricted in the number of sectors for which they are allowed access, even if the relevant commitment is inscribed in the horizontal section of the schedule.⁶⁸ The focus is mostly on 'business services', and within these chiefly on 'professional services', for which mode 4 regulatory requirements are likely to be particularly heavy.

90. The permitted length of stay concerning CSS employees is quite variable. The most frequently scheduled duration is 3 months, sometimes renewable. A pre-employment requirement is also often also imposed.

5. Independent professionals

91. The IP category is the one least recorded in schedules. Only seven Members have included it in their horizontal mode 4 commitments. Barring two, these are newly acceded Members, and mostly the same Members that have also inscribed CSS in their commitments.

92. No specific quotas and only one ENT apply to IP, but access is often restricted to a few service sectors, again mostly falling under 'professional services'.⁶⁹ The duration of stay allowed for IP is very variable, extending from 3 months to 3-5 years.

6. 'Other' and 'not specified'

93. The residual category 'other' is designed to include categories of persons that are separately and specifically identified in schedules, but do not fall easily under any of the main categories (i.e. ICT, EMS, BV, CSS and IP). For instance, entries such as "installers", "doctors" and "legal representatives" are counted under 'other'. There are 13 such entries, and the only recurrent one relates to "foreigners to implement foreign investment". These persons might be seen as falling under either BV or ICT, but the absence of further information prevents a precise categorisation. In seven out of eight cases, "foreigners to implement foreign investment" (either as executives, managers and/or specialists) have been inscribed by Sub-Saharan African countries as their sole mode 4 category, with no indication as to the length of stay allowed.

94. The 'not specified' category covers indistinct references to "foreigners", "aliens", "employees", etc. that are encountered in the schedules of ten Members, mostly as their sole mode 4 entry. These entries are nearly always associated with either a quota or an economic needs test, and the permitted duration of stay is for the most part not indicated.

⁶⁸ A cursory look at sectoral commitments reveals a high degree of variation also in the application of the horizontal commitments for CSS.

⁶⁹ As for CSS, IP-related commitments also appear to display significant variations in the levels of access granted in individual sectors.

7. General observations

The commitments undertaken by developed and developing countries do not exhibit large differences: both groups appear to have been equally cautious in opening up mode 4 trade. However, there is some diversity in the degree of precision used. The schedules of Caribbean and African countries in particular tend to include relatively vague entries. Depending on the specific wording, such entries could result either in the coverage of more types of mode 4 movements than possibly intended or lay the ground for significant administrative discretion.

95. Overall, the commitments of newly acceded WTO Members tend to be more significant than those of the Uruguay Round participants at comparable levels of development. However, in the case of mode 4, the difference is relatively modest. The main exception concerns the higher incidence of CSS and IP, and the slightly more infrequent use of quotas and ENTs. Even the concessions granted in Preferential Trade Agreements have only provided for rather limited advances over GATS mode 4 commitments.⁷⁰

96. As shown by the choice of categories liberalised, most Members prefer confining their access commitments to highly-qualified individuals. Depending on the exact wording, only CSS, BV who seek access to negotiate the sale of a service and the 'other' category could potentially cover lower-skilled/educated persons. Furthermore, the focus of existing commitments is on employed persons, as reflected in Members' frequent use of pre-employment requirements, which usually range from 3 months to 1 year.

97. While commitments should include the duration of stay, as stated in the Scheduling Guidelines, 48 schedules contain no such indication. Furthermore, several other schedules indicate the period of stay only for some of the mode 4 categories they include.

98. Other conditions attached to horizontal mode 4 commitments, in order of frequency, include: compliance with domestic minimum-wage legislation, often coupled with similar limitations regarding conditions of work, working hours and social security; limitations with regard to real estate, likely to impinge in particular on activities requiring stays of significant duration; 'technology transfer clauses', i.e. requirements to train local staff, which apply mainly to managers and specialists and have been included only by developing country Members, mainly in Latin America and Africa; entries reserving the right to suspend commitments in the event of labour-management disputes; and restrictions with regard to geographical or sectoral mobility.⁷¹

B. MFN EXEMPTIONS

99. It is difficult to provide a comprehensive overview of the MFN exemptions affecting mode 4. This is mainly for two reasons. First, MFN exemptions are not generally expressed in modal terms. Many of them, not least in the area of professional services, may affect both the presence of natural persons and commercial presence. Second, a variety of exemptions relate to regional agreements that are described in such general terms, sometimes merely by name, that it is next to impossible to infer their coverage. Despite such uncertainties in many cases, there are 40 MFN exemptions with comprehensive sectoral coverage dealing with mode 4. Their content is summarized in Table A1.

⁷⁰ For a detailed discussion, see Carzaniga (2008).

⁷¹ References to the need to comply with national labour and immigration laws, without any further indication of scope and content, have been ignored.

100. Of these exemptions, 36 are of a preferential nature. In the remaining cases, the treatment covered is either purely reciprocal or, in two cases, it is at the same time preferential and reciprocal. The preferences granted are rarely mirrored by similar exemptions on the part of the beneficiary countries. Among other factors, this could reflect asymmetries in treatment or governments' failure to seek an exemption in time.

101. The countries covered are not always clearly identified. For example, two exemptions simply refer to "traditional sources" of supply and one exemption to countries identified in national legislation. In two cases, mention is made of geographical zones whose borders are not clearly defined, and in eight instances the reference is to regional organizations rather than to their members, possibly implying the wish to have also any future members covered. Similarly, several exemptions relate to all countries with whom the Member concerned maintains, or may conclude in future, agreements of a certain type.

102. In many cases, the underlying measures are not, or not precisely, defined. Most of the exemptions that have been specified in more detail relate to the granting of work or residency permits, the waiving of economic needs tests or nationality requirements, or improved access to certain – not usually defined – activities. One exemption waives limits on the duration of stay, the proportion of foreign employees and their payroll share. Three exemptions apply to what seem to be peripheral aspects from the perspective of mode 4 trade, namely the amount of consulate duties collected (one case) and social security agreements.

103. One important point to note is that the MFN obligation relates only to the treatment of services and service suppliers. Thus, natural persons who are not "service suppliers" do not need to be accorded MFN treatment. A preference given to employees of a particular nationality, for instance, would only be inconsistent with the MFN obligation to the extent that the preference discriminated also with respect to the service suppliers who employed them and the services these supplied.

104. The vast majority of exemptions, 32 in total, are destined for an indefinite (or not specified) period. Of these, however, two provide for periodic reviews by the national authorities. Five additional exemptions are linked to the duration of the agreement covered, two apply until the completion of an integration process, and one is explicitly limited to ten years.

105. Given the paucity of information contained in many MFN exemptions, it would often have been necessary to consult the underlying agreements or legislation to obtain a clearer picture of the measures covered, preferences conferred and intended beneficiaries. However, this is generally true for all types of MFN exemptions.

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ANNEX

Table A1. Overview of MFN exemptions with comprehensive sectoral coverage dealing with mode 4⁷²

WTO Members	Beneficiaries	Treatment covered	Duration
Austria	Switzerland	Waiving of visa requirement and other measures	Indefinite
Brunei	Traditional sources	Preferences for entry and stay	Indefinite with periodic national review
Cape Verde	Countries of Portuguese language - Angola, Brazil, Guinea-Bissau, Mozambique, Portugal, Sao Tome and Principe and Timor	Waiver of nationality requirements for the exercise of certain activities and professions	Duration of the agreement concerned
Cape Verde	Members of the Economic Community of West African States	Extension of full national treatment	Subject to the duration of the agreement concerned
Cyprus	EC Member States	Permission for limited numbers of EC nationals to be employed or to exercise professions in specific occupations in accordance with criteria to be established unilaterally or in future agreements with EC	Until the time of full EC membership
Cyprus	Australia, UK, Egypt, Greece, Austria, Canada, Province of Quebec, and any country with whom an agreement may be concluded in the future	Provision of bilateral agreements on social security	Indefinite
EC and/or Member States	Switzerland	Measures with the objective of providing for the movement of all categories of natural persons supplying services	Indefinite
EC and certain Member States	San Marino, Monaco, Andorra, Vatican State city	Right of establishment for natural (and legal) persons, waiving the requirement of work permits	Indefinite
EC Member States	States in Central, Eastern and South-Eastern Europe including Russia, Ukraine, Belarus and Georgia, and in the Mediterranean basin	Guarantee of work permits in limited number for temporary contract work	Indefinite or, for certain countries, until an economic integration agreement is concluded or completed
Egypt	Greece, Iraq, Jordan, Libya, Qatar, Sudan, United Arab Emirates, Yemen and possibly other countries	Full national treatment	As long as the agreements remain in force
Estonia	All countries with whom labour market integration may be mutually desirable	Preferential treatment when granting permits for entry, stay, and work to natural persons (other than the essential persons appearing in the schedule of commitments) on the basis of reciprocity established by agreements between Estonia and these countries	Indefinite
France	Francophone African countries, Algeria, Switzerland and Romania	Facilitation of access procedures for the exercise of certain services activities	10 years
Indonesia	Malaysia, Singapore, Brunei Darussalam, Papua New Guinea, Australia	Measures concerning movement of personnel (semi-skilled workers). Limited access to low level occupations	Indefinite

⁷² EC refers to EC-12.

WTO Members	Beneficiaries	Treatment covered	Duration
Italy	States in Central Eastern and South Eastern Europe and in the Mediterranean Basin	Guarantee of work permits for seasonal workers	Indefinite
Jamaica	Caricom Members: Antigua and Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Montserrat, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Trinidad and Tobago	Waiving of work permits	Indefinite
Jordan	Nationals of Arab Countries	Differential treatment with regard to service fees and annual work permit fees in all sectors	Indefinite
Jordan	Turkey, Philippines, Pakistan, Egypt	Extension of national treatment regarding social security	Indefinite
Liechtenstein	Switzerland	Mutual granting of temporary stay and permanent residency	Indefinite
Liechtenstein	EC and EFTA countries	Preferential treatment of persons from traditional recruiting areas with regard to permits for entry, stay and work (applies to persons other than the essential persons appearing in the schedule of commitments).	Indefinite
Liechtenstein	All countries	Reciprocity concerning the "right of presence of natural persons"	Indefinite
Malaysia	All countries	Differential treatment for measures affecting the movement of semi-skilled and unskilled workers on a regional, religious and cultural basis	Indefinite
Malta	European Union Countries	Preferential treatment in the granting of licences and permits to provide services	Indefinite
New Zealand	Kiribati	Most favourable entry conditions possible for up to 20 nationals each year	Indefinite
New Zealand	Tuvalu	Most favourable entry conditions possible for up to 80 nationals each year	Indefinite
Panama	Guatemala, El Salvador, Nicaragua, Costa Rica, and Honduras	Preferential treatment for suppliers of services of different kinds	Indefinite
Panama	United States	Preferential treatment for suppliers of services under the Panama Canal Treaties	Indefinite
Peru	All countries	Waiving the limitations of: three years as maximum duration, 20% of the total number of employees and 30% of the payroll	Indefinite
Philippines	"All countries" /countries with whom a treaty on entry rights for traders and investors has been concluded	Waiving labour market test and simplifying entry procedures	Expiry or termination date of the bilateral treaties
Portugal	Angola, Brazil, Cape Verde, Guinea Bissau, Mozambique, Sao Tome and Principe	Waiving of the nationality requirement for the exercise of certain activities and professions	Indefinite
Sierra Leone	Mano River Union and ECOWAS countries	Full national treatment	As long as agreements remain in force or are extended
Singapore	"Traditional sources"	Measures regarding unskilled, semi-skilled, and skilled persons except specialists and professionals. (Purpose: prevent overpopulation and maintain social order)	Indefinite (periodic national review)
Solomon Islands	Members of the Melanesian Spearhead Group: Vanuatu, Papua New Guinea	Waivers for measures affecting the entry and temporary stay of natural persons	Indefinite
Sweden	Switzerland	Measures with the objective of providing for the movement of all categories of natural persons supplying services	Indefinite
Switzerland	Liechtenstein	Mutual granting of temporary stay and permanent residency	Indefinite

WTO Members	Beneficiaries	Treatment covered	Duration
Switzerland	EC and EFTA countries	Preferential treatment of persons from traditional recruiting areas with regard to permits for entry, stay and work (applies to persons other than the essential persons appearing in the schedule of commitments)	Indefinite
Tunisia	"All countries" (probably with whom Tunisia has or will have agreements)	Bilateral social security agreements: extension of social security and health benefits to citizens of other countries	Not specified
Turkey	Libya	Restrictions on the transfer of premiums for long-term insurance schemes and on employment of foreign-workers by foreign companies is waived (not applied de facto).	Indefinite
Turkey	All countries	Consulate duties: if the amount of the consulate duties collected from Turkish nationals by any country is higher than the amount written in the tariff list, the consulate duties collected from the nationals of that country will be increased reciprocally.	Indefinite
United Kingdom	Members of the British Commonwealth	Waiving of the requirement of a work permit for citizens having a grandparent born in the UK	Indefinite
United States	All countries with whom the United States has a friendship, commerce and navigation treaty, a bilateral investment treaty; or certain countries described in Section 204 of the Immigration Act of 1990	Movement of persons for trade and investment: issuance of "treaty trader or treaty investor non immigrant visas" to nationals of the countries concerned engaged in substantial trade in services or in developing an investment.	Indefinite