



Mode 4 issues at the WTO

SADC Workshop on Movement of
Natural Persons – Mode 4

10-11 November 2014

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Overview of the presentation



- Current GATS mode 4 commitments
- WTO mode 4 negotiations - State of play
 - Plurilateral LDC Mode 4 request
 - Recent accessions
- Mode 4 in regional agreements
- Mode 4 related requests in the collective LDC waiver request
- Issues related to inconsistency of GATS commitments and applied regime



Current GATS mode 4 commitments



Starting point

In comparison to the other three modes of supply, mode 4 commitments are the least liberal, due to limitation of commitments to certain categories, and proliferation of restrictions



A snapshot of commitments

- Governed by conditions applicable across all sectors (reflected in “horizontal commitments”)
- Absence of full liberalization: “Unbound except ...”
- Linked to commercial presence
- High-level of training/expertise required
- Limited duration of stay: 3 months to 5 years

Mode 4 commitments – An example



Modes of supply: 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons

Sector or subsector	Limitations on market access	Limitations on national treatment	Additional commitments
I. HORIZONTAL COMMITMENTS			
ALL SECTORS INCLUDED IN THIS SCHEDULE	(4)Unbound except for measures affecting the entry and temporary stay of natural persons with managerial and technical skills which are in short supply in Mongolia, and fall within the following categories: business visitors, intracorporate transferees and professionals under a service contract.	(4)Unbound except for measures referred to under market access	
II. SECTOR-SPECIFIC COMMITMENTS			
1.BUSINESS SERVICES A. <u>Professional services</u> B. (b) Accounting	(1)None (2)None (3)None (4)Unbound except as indicated in the horizontal section	(1)None (2)None (3)None (4)Unbound except as indicated under market access	



Main barriers scheduled

- Limited categories included
- Pre-employment requirements
- Economic Needs Tests/Labour Market Tests
- Quotas
- Residency and nationality requirem.
- Training/Education/Qualification of natural persons
- Authorisation, approval, registration requirements
- Training of local workers

“Typical” definitions of categories in commitments - ICT



- **“Intra-corporate transferees” (ICT)** – work for an enterprise established in the territory of a Member and are transferred to the enterprise’s commercial presence in the territory of another Member in the context of the supply of a service. Often as executives, managers, specialists.
- **“Executives”** – direct the management, have wide latitude in decision-making, are supervised only by board of directors or stockholders, do not provide service directly
- **“Managers”** – direct organization or department, hire/fire, have day-to-day discretion, supervise other staff
- **“Specialists”** – have essential knowledge at advanced level of expertise, proprietary knowledge of organisation

“Typical” definitions of categories in commitments - **BV**



- “**Business visitors**” (**BV**) are not engaged in supplying the service or making direct sales to the public, and do not receive remuneration from a source in host Member
- “**Sales**” **BV** – negotiate for the sale of a service, establish business contacts, attend business meetings and similar
- “**Set-up**” **BV** – set-up a commercial presence in another Member, where their employer has none



“Typical” definitions of categories in commitments - **CSS**

- “**Contractual service suppliers**” (**CSS**) – employees of a juridical person (which has no commercial presence in host Member) who supply a service on the basis of a contract their employer has concluded with a consumer in host Member
- The employee receives **remuneration** from the employer while abroad, has appropriate educational and professional qualifications, may not engage in other employment
- Commitment relates only to the activity which is the subject of the **contract**



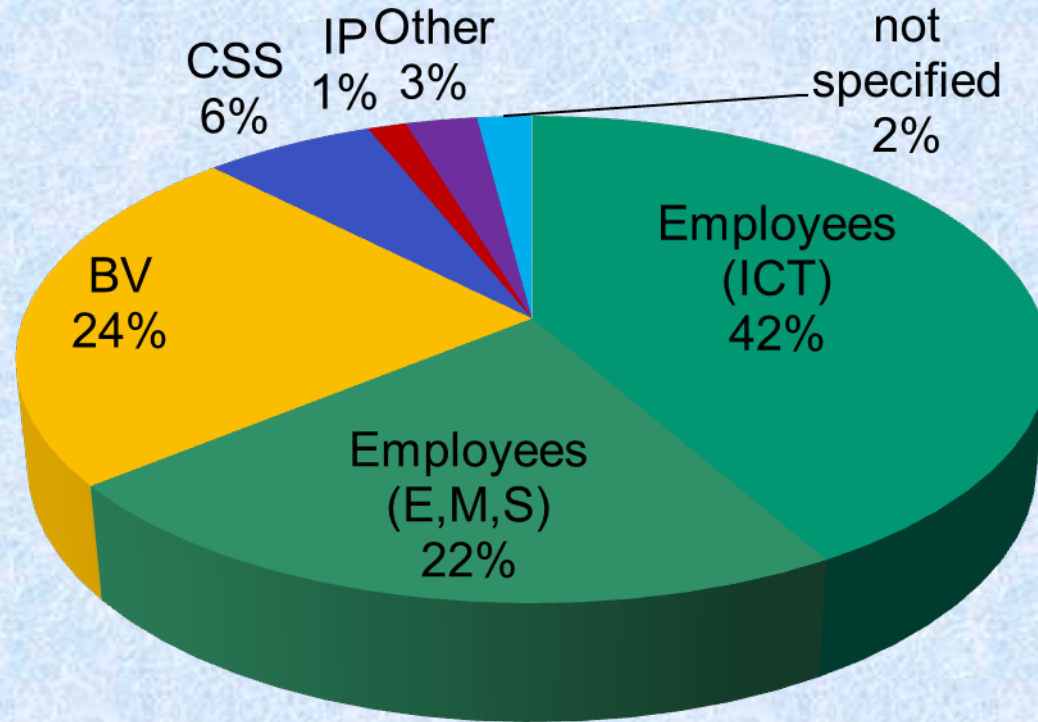
“Typical” definitions of categories in commitments - **IP**

- “**Independent professional**” (**IP**) – self-employed person based in the territory of another Member who supplies a service on the basis of a services contract with a consumer in the host Member
- IP has appropriate educational and professional qualifications
- Commitment relates only to the activity which is the subject of the **contract**

Categories included in mode 4 commitments



(% of total categories scheduled horizontally, 2009)



Employees of foreign suppliers - ICT = Intra-Corporate Transferees

Employees of foreign suppliers -E,M,S = Executives, Managers, Specialists

BV = Business Visitors

CSS = Contractual Service Suppliers

IP = Independent Professionals

Source: WTO Secretariat (2009)



Why less liberal commitments in mode 4?

- Political sensitivity?
- Regulatory concerns?
- Enforcement concerns (temporary entry leading to permanent entry)?
- Effect on labour market?
- Impact on wages of locals?
- Bilateral arrangements providing for greater flexibility?



WTO mode 4 negotiations - State of (non-)play

What was on the table - Mode 4 “offers”



- In 2005, out of around 70 offers submitted by WTO Members, only 30 (half by developed, half by developing countries) proposed some improvement to mode 4 commitments
- Number and quality of offers overall **unsatisfactory**, and mode 4 is no exception

“Few, if any, new commercial opportunities would ensue for service suppliers. Most Members feel that the negotiations are not progressing as they should.”

[Chair of CTSS, July 2005 (TN/S/20)]

Mode 4 improvements in offers



- A few additional categories, more broadly defined
- Some extension of periods of stay; possibility of renewal
- Limited clarification of the application/reduction of the scope of ENTs
- Some reduction of discriminatory measures
- Some improvements in transparency
- Expanded list of sectors (to which the horizontal commitments apply)



Since 2005....

- Two collective requests tabled in 2006:
 - By 15 developing countries, coordinated by India
 - By LDCs
- 2008 Signalling conference
- Accessions
- [TISA?]

“India-coordinated” mode 4 Collective Request



- From 15 developing to 9 developed countries, coordinated by India
- Seeks commitments on skilled CSS and IP (with diploma or university degree, or demonstrated experience)
- Commitments are called for in a number of sectors, falling under business, construction, environmental, tourism and recreational services
- Asks for the removal/clarification of ENTs
- 1 year minimum duration of stay, with renewal
- Elimination of wage-parity requirements

2006 LDC Collective Request (1)

- Addressed to all other Members
- Commitments sought for the following **categories**:
 - IPs
 - CSS
 - BV
 - Other categories not linked to commercial presence, i.e.:
 - Installers and servicers (of machinery and/or equipment)
 - Transport personnel (mainly seafarers)
 - Graduate trainees (pursuing post-study work experience)
 - Personnel performing a services contract concluded between their employer and a government of another Member
 - Personalities of internationally recognised reputation
 - Artists, sportsmen and other public performers
 - Fashion models
- Commitments sought in nearly all **sub-sectors**
- Reduction of **quotas** and substantial reduction/removal and clarification of **ENTs**

2006 LDC Collective Request (2)

- No **wage-parity** requirement (whereas the fixation of a certain minimum wage is not precluded)
- **Full national treatment** for the categories committed to
- Set up a **single window** to provide applicants with all information needed to submit request^s for admission
- Set up of **facilities to recognise skills and competencies** within a period of 6 months from the end of the DDA. Endeavour to facilitate and accelerate the verification and recognition of skills, competences and qualifications of LDC service suppliers.

July 2008 – “Signalling Conference”



- Members exchanged indications on their own new and improved commitments, as well as on the contributions expected from others
- Overall, positive indications were given about commitments across all major services sectors and modes of supply
- “Most participants indicated their **readiness to improve access conditions for mode 4**. In several statements, these signals were expressly linked to the development character of this [negotiation].”

[Report by the Chairman of the TNC, 30 July 2008 (JOB(08)/93)]

Recently acceded Members –

Mode 4 commitments

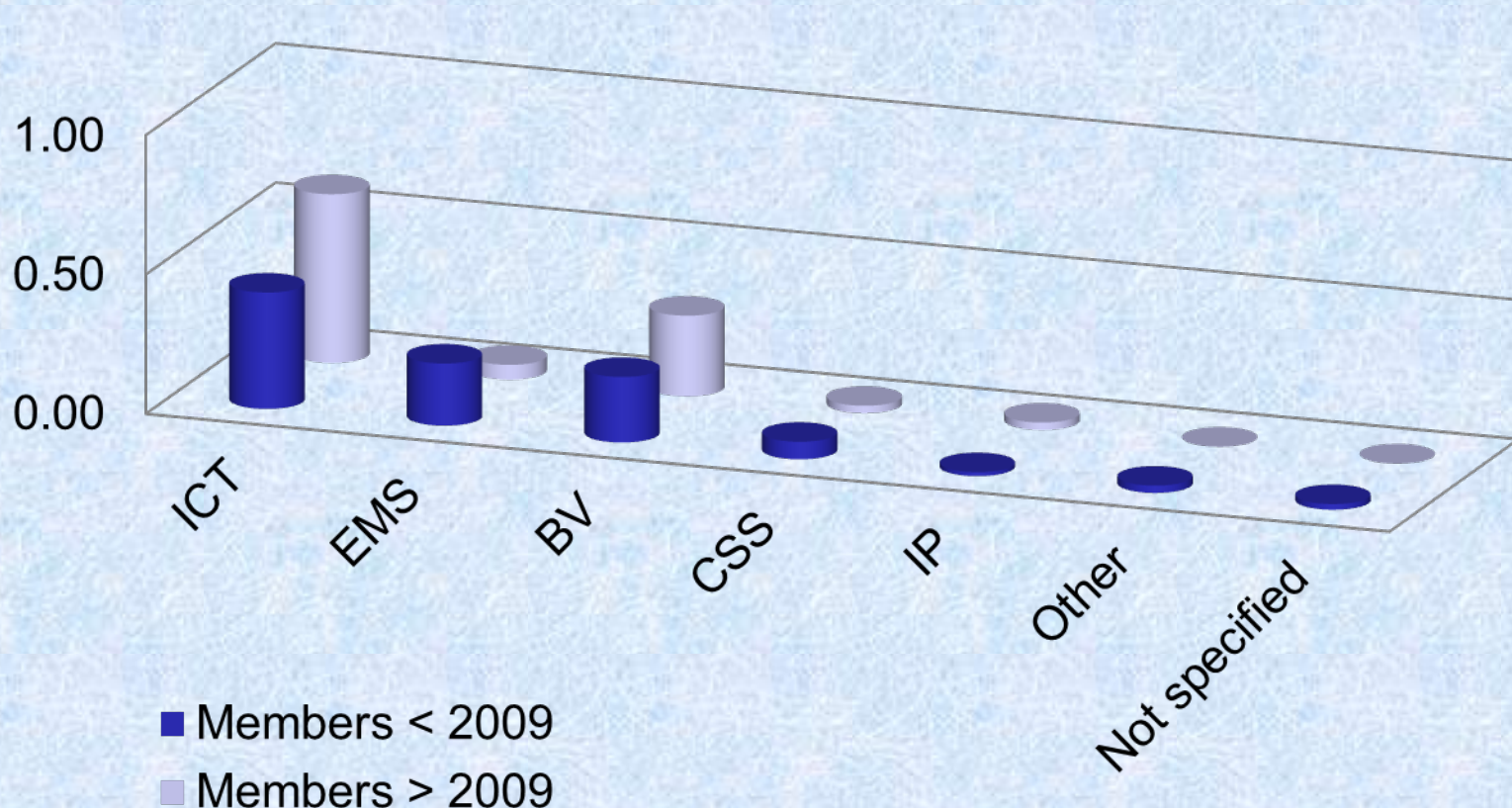


- Overall, little variation compared with “older” Members, both in terms of committed categories, definitions used and restrictions scheduled
- Where there are differences, these concern:
 - Inclusion of ICTs as “graduate trainees”
 - More frequent recourse to ENTs, at times on top of quotas, which apply also to ICTs
 - Unanimous 1 year pre-employment requirement
 - Relatively shorter duration of stays (e.g. ICTs: maximum 3 years; BV: 60 days; etc.)

Recent accessions – Mode 4 categories commitments



(% of total categories scheduled horizontally)



■ Members < 2009
■ Members > 2009

ICT = Intra-Corporate Transferees
E,M,S = Executives, Managers, Specialists
BV = Business Visitors
CSS = Contractual Service Suppliers
IP = Independent Professionals

Source: WTO Secretariat

[Plurilateral Trade in Services Agreement (TISA)]



- Currently being negotiated by 23 Members
(Australia, Canada, Chile, Colombia, Costa Rica, EU, Hong Kong, Iceland, Israel, Japan, Korea, Liechtenstein, Mexico, New Zealand, Norway, Pakistan, Panama, Paraguay, Peru, Switzerland, Chinese Taipei, Turkey, USA)
- Mode 4 Annex being discussed
- Publicly available information suggests possible disciplines could be developed on:
 1. Transparency
 - All relevant information (categories; application requirements and procedures for initial/renewed entry, stay, work, etc.) to be made publicly available and kept updated
 - Specific contact points for suppliers to be established
 2. Application procedures
 - Expeditious
 - Notification of additional documentary requirements
 - Notification of status and outcome of application,



Mode 4 in Regional Integration Agreements



Are Regional Economic Integration Agreements (EIAs) an alternative avenue for liberalisation?


- Between 2000 (start of services negotiations) and October 2012, over **90 EIAs** covering services trade have been concluded (and notified to the WTO)
- Nearly **half** have been concluded between just 2009-2012
- **All cover mode 4**, and a few include also a separate chapter dealing with the “temporary entry of business persons”

Mode 4 and EIAs – An assessment



- Overall, EIAs grant some advances over GATS commitments, but if compared to current GATS offers, few are significant
- Most **progress achieved** in the “**other**” category, which includes “employees”, “traders and investors”, “spouses” (effect of separate chapter on temporary entry?) and “**business visitors**”
- Increased clarity in scheduling (more used of standardized categories)
- Progress on “**contractual service suppliers**” and “**independent professionals**” more **limited**, mainly on the part of developing countries, especially in EIAs with each other (e.g. India)
- Offer opportunity for tailor-made commitments (e.g. Japan for nurses and health care personnel in agreements with the Philippines and Viet Nam)

Why are EIAs not offering much greater mode 4 access?



- Political sensitivity?
 - Enforcement concerns?
 - Binding nature of concessions?
 - Insufficient coordination between trade and migration/labour ministries?
 - Or just good old protectionism...?!? (≠BLAs..)
- **WTO would still offer some potential advantages:**
- increased scope for trade-offs
 - greater credibility of bindings
 - forum for regulatory policy cooperation



LDC Services Waiver- Mode 4 in the collective waiver request

- Background: WTO agreed in 2011 to allow for preferences to LDCs in trade in services (WT/L/847)
- In July 2014, the LDC Group presented a collective request on preferences that it seeks from other Members
- Request covers all modes and a sectors



Mode 4 element of the collective request

Horizontal Preferences

- Waive residency requirements
- Waive discriminatory measures on salary, health and other benefits
- Waive fees related to residence and work permits, or licences, and all processing fees
- Waive fees associated with applications for patents, trademarks, geographical indications
- Expedite visa, licence residence, work permit procedures
- Simplify documentation requirements for visa, permits, licenses
- Waive financial security requirements where visa is sought for 90 days or less
- Provide reasons for denial of visas, and guidance on how to correct errors



Mode 4 element of the collective request

Horizontal Preferences

- Create category of “**Contract service suppliers**” and “**Independent professionals**”
 - Without labour market test
 - Without wage-parity requirements
- Allow entry for “**installers and servicers of machinery**” for 90 day period of stay
- **Recognition:**
 - Enable more agreements with LDC institutions
 - Waive any reciprocity requirements
 - Enable assessment of skill verification in not more than 2 months
 - Waive testing requirements where person has been educated in that language
 - Allow for online testing instead of testing in host country

Mode 4 element of the collective request



Sector-specific M4 preferences

- Tourism/hospitality:
 - waive restrictions on the entry of LDC tour guides, tour operators catering and hospitality service providers under CSS and IP category (incl. trainees for 3 y, renewable)
 - Expedite permits to allow for exchange and training in hotel and hospitality institutions
- Transport/Logistics
 - Waive restrictions on nationality of driver's licenses
 - Provide preferential treatment to LDC Intra-corporate transferees to provide services in host country express delivery and logistics companies

Mode 4 element of the collective request



Sector-specific M4 preferences

- Information Communication Technology
 - Waive M4 restrictions for Business Process Outsourcing Services (call centres, back office services, etc.)
 - Waive M4 restrictions for software development, computer programming and implementation services
 - Preferential visas for intra-corporate transferees from LDCs
 - Waive financial security requirements where visas are sought for 90 days or less
- Creative Industries
 - Waive social security deductions for LDC performers who enter for less than 6 months.
 - Waive financial security requirements as a precondition to apply for visas or permits for performers who want to enter for 90 days or less



Implications of requests under the Waiver on SADC negotiations

- Collective request is made also from SADC LDCs to SADC non-LDCs
- Any preferences granted under the waiver are to be extended to all 48 LDCs
- Any preferential commitment made in SADC context only extends to SADC MS , and legally binding

- Which path is more attractive for SADC LDCs and SADC non-LDCs?
- WTO Waiver or SADC integration?

What to do if GATS M4 commitments are more open than the existing laws and regulations?



- GATS commitments only apply to sectors listed in GATS schedule
 - For any new sector added in the SADC negotiations, the existing regime can be scheduled
- To the extent that the existing treatment is more open than GATS commitments (more categories, fewer restrictions) MS are free to bind existing treatment in SADC schedules



Different solutions for different scenarios

- **Category coverage is unclear (e.g. blanket reference to laws, rather than description of category)**
 - Clarify sector coverage in SADC schedule (to avoid backtracking - possible minimum would be legal situation at the time the commitment was made).
- **Existing restrictions are not listed in the schedule**
- **Access for categories in the schedule does not exist in practice**
 - Eliminate restrictions for sectors scheduled under GATS, or expand access for categories in the schedule
 - or improve overall mode 4 commitments otherwise (improve duration of stay, expand category coverage, reduce other restrictions) to create “better” overall commitments (note: what is “better” is subject to negotiation)

Implications



- Within SADC, possible inconsistencies can be addressed and clarified through negotiation
- WTO commitments remain in place for all other WTO Members
- If a SADC MS feels that it cannot honour its WTO M4 commitments in full (i.e. some additional restrictions apply), it can notify the intent to modify its commitments
 - Need to offer compensatory adjustments to its schedule of the same value as modified commitment
 - After SADC negotiations are completed, this should be easy
 - For Mode 4 “cost” of commitments is likely minimal
 - For LDC Members, requirement to compensate could be waived.



THANK YOU