

13

Mode 4: Issues and Ways Forward

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Introduction

A chapter about Mode 4 in a book about IT enabled services might appear to some as a contradiction in terms – on the one hand services that were traded through the movement of persons and on the other services that are enabled, or traded with the help of IT. But of course, this would be a very superficial take on the issue. Supplying a lot of these IT enabled services often requires, as an essential part corollary to this, associated Mode 4 movements. For instance, if you are trying to export software implementation services it might involve a person visiting prospective clients to make a sales pitch, a person spending a few days or a few weeks at a client's site to analyse their software needs and to discuss technical details and specifications, or it might involve making on-call visits to provide software maintenance services, or to address any technical problems as they may arise. All of these movements underpin much of the supply of IT enabled services, and are the type of movements that would fall under Mode 4 of the General Agreement of Trade in Services (GATS).

What is Mode 4?

When we talk about Mode 4 in WTO we are talking about services that are supplied by a service supplier of one member, and that service supplier may be either an individual (him or herself) or a person who is employed by a service supplier. Through the presence of natural persons, they are supplying services in the territory of any other member.

Category examples

If you take this distinction into account, you end up with a number of categories that WTO members have frequently used when they have undertaken market opening commitments to provide guaranteed access to certain types of natural persons. If the service supplier is an individual, that is the case of a self-employed person, otherwise called a 'professional' in most WTO member schedules. When the person is an employee of the service supplier, there are various kinds of movements, such as a person transferred from the head office to an affiliate (an intra-corporate transferee)

or an employee sent to a different country to provide some kind of service directly to the client on the basis of a contract that his original employer had concluded with the client abroad (what we call 'contractual service suppliers'). Then there are 'business visitors', people whose movement is mainly for the purpose of concluding contracts, establishing business contacts, setting up meetings and so forth.

It is easy to imagine, for instance, a person who is visiting prospective clients to make a sales pitch to fall under the category of business visitors; a person spending a few days at a client's site in another country for a purpose related to the implementation of the software might fall under the category of a contractual service supplier – in the territory of the client, there is not necessarily an affiliate, but he is just moving on account of his company having concluded a contract with the client concerned. You could even think of a role for intra-corporate transferees when an affiliate is established in foreign territory, and then the person has been moved to work for the affiliate, and provides, for instance, on-call client facing. This is already located and employed abroad, and s/he provides services that way. You could perhaps also imagine a self-employed independent professional providing any or all of these types of services by moving abroad and either making a sales pitch or being present at a client side, or making on call visits directly from abroad. All of these types of movements would be considered to fall under Mode 4 of the GATS.

It is also necessary to underline what Mode 4 is not, because when we negotiate in the WTO on Mode 4, it is important to understand the scope of the negotiation. Mode 4 does not cover persons who are seeking access to the employment market of another WTO member, and it does not cover measures that regard citizenship, residence, unemployment or employment on a permanent basis – which is why it is often referred to as 'the temporary presence of natural persons'. Neither does Mode 4 cover foreigners employed by domestic firms in the foreign market.

Given that Mode 4 is a sensitive issue for governments – not only in developed countries, but in most countries in the world – there is a specific provision in the GATS services agreement that reiterates governments are free to regulate the entry and temporary stay of foreigners within their territory, including by applying differential visa requirements, providing that these measures do not undermine the country's commitments in Mode 4.

Mode 4 commitments

Looking at the current situation in terms of Mode 4 commitments in the WTO, where do we now stand? The biggest categories concern movements that are somehow related to the existence of a commercial presence abroad. The two categories in which many developing countries have expressed an interest are contractual service suppliers

and independent professionals. Together they account for only about 7 per cent of all the Mode 4 categories to which WTO members have committed.

Developing countries have clearly identified Mode 4 as one area where they have an export interest, because they feel it is where they could effectively make use of their comparative advantage. But it is fair to say that current commitments in the WTO on Mode 4 are rather shallow. They tend to be limited, first and foremost, by these categories – so access is not guaranteed for all types of movements of persons, but only for specific ones. They are often also limited by other restrictions including by numerical quotas or by what we call ‘economic needs tests’ or ‘labour market tests’ (whereby access to the market is determined or guaranteed on the basis of certain – often unspecified – labour market or economic needs in the importing market concerned).

Moreover, commitments are skewed in favour of relatively highly skilled movements and movements that are often associated with a requirement to have a commercial presence in the market. So, for instance, in the case of intra-corporate transferees, it is clearly necessary to establish a commercial presence abroad, before you are allowed to move your staff member onsite as a natural person. This has been identified as an issue of concern by many developing countries, and they have been seeking, in the current round of negotiations, for ways to redress this imbalance in commitments towards relatively highly skilled movements, and movement associated with a commercial presence. The focus of their requests in the negotiations has been on two categories of persons in particular that are dealing from a commercial presence: contractual service suppliers and independent professionals.

Improvements to Mode 4

There have been two rounds of offers where members have submitted their offers of improvements with respect to commitments (in general and in Mode 4) and they overall have been deemed unsatisfactory. If we consider that there are about 70 offers on the table, only about 30 of them propose some kind of improvement to the Mode 4 commitments.

To summarise the main improvements, they concern some additional categories, but a lot of business visitors where they had not been committed before, and not a lot of improvement on the categories that were of greatest interest: contractual service suppliers and independent professionals. There were some more broadly defined categories, such as fewer years of experience required, for example, or a reduced period of pre-employment required before the person could be transferred. Some other improvements concerned the actual fact of adding new sectors to the commitments. This would imply that Mode 4 commitments, which are generally scheduled for all the sectors that are then included in the schedule, would then be applicable there. There was also some increase in the permitted duration of stay. There was nothing, though, that would dramatically change the picture outlined above.

Results of the Hong Kong Ministerial

In terms of negotiations, there were two significant developments at the 2005 Hong Kong Ministerial meeting. First, members agreed a set of objectives to guide them through the rest of the negotiations. There are specific objectives that refer to Mode 4, whereby members are called on, to the maximum extent possible, make new or improved commitments, in particular on the categories delinked from commercial presence, as well as, of course, giving some sort of balance on intra-corporate transferees and business visitors. Also, these objectives target the elimination or reduction of these economic needs tests, because there are often highly discretionary implications or (as well as the objective targets) the duration of stay is sometimes not indicated. Again, this leaves some significant leeway to change things along the way or target the possibility of extending the duration of stay.

The second development that came out of the Hong Kong Ministerial was the launch of a plurilateral process. There has been a plurilateral request specifically targeting Mode 4, which was sponsored by 15 developing countries and addressed only to developed countries – to nine of them in particular. To some extent, the request reflects the same concerns and objectives that had been highlighted in the past by developing countries: greater commitments on categories that do not require a commercial presence, improved commitments for particular services (business services, for instance, of which IT services would be a sub-sector, construction, environmental, tourism and recreational services) as well as targeting the reduction or removal of economic needs tests. It is also noteworthy that the least developed countries submitted another request on Mode 4, which is fairly similar in scope. As a result of this plurilateral process, there have been meetings between the requesting and the requested members, and it is still too early to tell whether this process will result in concrete results as these will only materialise once we see further, revised offers.

Since Hong Kong, we have seen indications of what some of these improved commitments and offers might look like. In July 2008, at what was called a ‘Signalling’ Conference members exchanged signals – indications of where they might be offering further improvements. The indications were that overall positive signals were given in many service supplier and modes of supply, including on Mode 4, where a number of participants stressed the link between Mode 4 and the development character of the current round of negotiations – the Doha Development Agenda, as it is called. However the Signalling Conference was actually not successfully concluded and at the moment, the negotiations (in particular on services) are to some extent stalled by advances or any progress that might be made in agriculture or non-agriculture market access. So that is more or less where we stand at present in terms of commitments, and where we might be heading in terms of improved commitments in the current negotiations.