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Categories of Natural Persons for Commitments under Mode 4 of GATS

The following communication, dated 17 February 2005, from the delegations of Argentina, Bolivia, Brazil, Chile, Colombia, India, Mexico, Pakistan, Peru, Philippines, Thailand and Uruguay is being circulated to the Members of the Council for Trade in Services.

I. INTRODUCTION

1. One of the most critical issues relating to Mode 4 is the categories of natural persons for whom commitments are being sought. It has been noted earlier that specific commitments in Mode 4 are primarily horizontal. The coverage of categories is also narrow and restricted mainly to personnel related to commercial presence. The coverage of categories de-linked from commercial presence is extremely low. Substantial improvements in the coverage of categories and the market access conditions for each of them is, therefore, key to improved market access in Mode 4.

2. Members have expressed interest in a broader coverage of categories horizontally as one means of improving the Mode 4 commitments. Recognition of common categories of movement both linked to as well as de-linked from commercial presence in the horizontal commitments of Members could prove useful and valuable.

3. Possible categories of interest have been indicated by Members in their negotiating proposals. This group had also broadly referred to them in its earlier proposal, TN/S/W/14, of July 2003. Further, the Secretariat paper, JOB(03)/195, has provided a description of the common categories used by Members along with certain common parameters. Based on the above and other discussions, this paper attempts to list out these common categories of interest to Members in general along with certain common parameters and the market access conditions that could be attached to each of them with the objective of practical but effective market access in Mode 4.¹ The group realizes that it may not be feasible to achieve full harmonization of domestic immigration regimes in respect of these categories, however, it may be useful in arriving at a common understanding of these categories and their specific elements. This would help in greater uniformity and clarity in the scheduling of commitments.

¹ This proposal is not a legal text. It is submitted solely for the purpose of negotiation and does not prejudice the position of any Member regarding the issues raised in it. The proponents reserve their right to modify or complement the contents of this proposal at a later stage.

II. DEFINITIONS AND COMMON PARAMETERS

1. Intra–Corporate Transferees (ICT)

4. Employees of a company/partnership/firm established in the territory of a WTO Member who are transferred temporarily for the supply of a service through commercial presence (either through a representative office, branch, subsidiary or affiliate) in the territory of another WTO Member.

The employees refer to:

- (i) Executives
 - Executives are those who primarily direct the management of the organization and exercise wide latitude in decision making.
- (ii) Managers
 - Managers are those who primarily direct the organization/department/subdivision and exercise supervisory and control function over other supervisory, managerial or professional staff.
- (iii) Specialists
 - Specialists are those who possess knowledge at an advanced level of expertise essential to the establishment/provision of the service and/or possess proprietary knowledge of the organization.
- (iv) Employees who are sent to the office of the juridical entity in the territory of another WTO Member for training in business techniques and methods or are transferred for career development purposes.
- (v) Other sub-categories
 - Any type of person who does not fall into one of the sub-categories listed above, for example, persons who enter to enable/facilitate providing a specific service to a specific client in the host country.

2. Business visitors

5. Representatives of a service supplier who enter the territory of another WTO Member temporarily for the sale of services or entering into agreements for such sale for that services supplier and/or employees of a juridical person for the purpose of setting up a commercial presence of that juridical person in the territory of another Member. This could include either the two sub-categories of (i) Service sellers and (ii) Persons responsible for setting up a commercial presence or could merge both these sub-categories into one.

6. Certain common parameters are as follows:

- (a) Representatives of such service suppliers or employees of such juridical persons will not be engaged in making direct sales to the general public or in supplying services themselves.

- (b) Refers only to employees of a juridical person not already having commercial presence in the territory of the other WTO Member.
- (c) Such representatives or employees will not receive any remuneration from a source located within the territory of the other WTO Member.

3. Contractual service suppliers – Employees of juridical person

7. Employees of a foreign based company/partnership/firm who enter the territory of another WTO Member temporarily in order to perform a service pursuant to a contract(s) between their employer and a service consumer(s) in the territory of the other Member.

8. Certain common parameters are as follows:

- (a) Restricted to employees of foreign based enterprises with no commercial presence in the territory of the other WTO Member.
- (b) Juridical person has obtained a service contract for the provision of a service in the territory of the other WTO Member.
- (c) Employees of such foreign based enterprise receive their remuneration from their employer.
- (d) Employees have appropriate educational and professional qualifications relevant to the service to be provided.

4. Independent Professionals

9. Natural persons who enter the territory of another WTO Member temporarily in order to perform a service pursuant to a contract(s) between them and any service consumer located in the territory of the other Member.

10. Certain common parameters are as follows:

- (a) The natural person supplies the service as a self-employed person.
- (b) The natural person has obtained a service contract in the territory of the Member where the service is to be provided.
- (c) The remuneration for the contract is to be paid solely to the natural person.
- (d) Natural person possesses appropriate educational and other qualifications relevant to the service to be provided.

5. Other categories

11. Any other category that a WTO Member may like to include not covered by any of these four categories. This could be a catch all category to draw special attention to particular needs like "Installers" etc. Further, Members could also include types of service suppliers specific to a sub-sector(s) which could be included in the sector specific commitments.

III. CONDITIONS OF MARKET ACCESS WITH RESPECT TO THE ABOVE CATEGORIES

12. The purpose of having a common understanding on categories is to facilitate directly improvements in the levels of commitments on Mode 4 in this round. Merely having an understanding on categories without linking it to market access may not be meaningful. Hence, it would be useful to consider the conditions of market access with respect to these categories that Members could use for the purpose of scheduling commitments. While recognizing each Members' right to decide on such conditions, given the importance attached to market access in this mode and the existing asymmetry in Mode 4 commitments compared to other modes of supply, some common elements of market access are delineated below based on existing commitments, initial offers, proposals made by Members and experience in bilateral negotiations. Individual elements listed below would need to be discussed in detail.

1. Inter – Corporate transferees

- (a) Employees will be restricted to personnel with requisite qualifications to fill positions responsible either for management of operations, or provision of services at a level of complexity and specialty that require, at a minimum, a diploma or a university degree, or demonstrated experience.
- (b) Period of prior employment with home country juridical person will be clearly specified and will not exceed a particular time period.
- (c) Duration of stay for one year with provision for renewal.
- (d) Economic Needs Tests will not be applied except under exceptional circumstances which should be specifically stated. If they are required to be applied under exceptional circumstances, they should be applied on a non-discriminatory basis. In such a case, details concerning the following should be specifically mentioned:
 - (i) The service sectors and occupations to which the ENT shall be applied,
 - (ii) The definition, criteria and conditions to be used in applying the ENT,
 - (iii) The duration of application of the ENT.

2. Business Visitors

Duration of stay for six months with provision for renewal.

3. Contractual services suppliers

- (a) Employees of foreign based enterprises will be restricted to personnel with requisite qualifications to fill positions responsible either for management of operations, or provision of services at a level of complexity and specialty that require, at a minimum, a diploma or a university degree, or demonstrated experience.
- (b) Wage parity will not be a pre-condition of entry.
- (c) List of sectors/occupations to which this category will apply will be clearly specified through a positive listing of all such sectors or possibly indicating those sectors where it would not apply.

- (d) Economic Needs Tests will not be applied except under exceptional circumstances which should be specifically stated. If they are required to be applied under exceptional circumstances, they should be applied on a non-discriminatory basis. In such a case, details concerning the following should be specifically mentioned:
 - (i) The service sectors and occupations to which the ENT shall be applied,
 - (ii) The definition, criteria and conditions to be used in applying the ENT,
 - (iii) The duration of application of the ENT.
- (e) Duration of stay for one year or for duration of contract (if longer) with provision for renewal.
- (f) Employees can perform services related only to the service activity which is the subject of the contract.

4. Independent Professionals

- (a) Natural persons will be restricted for provision of services at a level of complexity and specialty that require, at a minimum, a diploma or a university degree, or demonstrated experience.
- (b) Wage parity will not be a pre- condition of entry.
- (c) List of sectors/occupations to which this category will apply will be clearly specified through a positive listing of all such sectors or possibly indicating those sectors where it would not apply.
- (d) Economic Needs Tests will not be applied except under exceptional circumstances which should be specifically stated. If they are required to be applied under exceptional circumstances, they should be applied on a non-discriminatory basis. In such a case, details concerning the following should be specifically mentioned:
 - (i) The service sectors and occupations to which the ENT shall be applied,
 - (ii) The definition, criteria and conditions to be used in applying the ENT,
 - (iii) The duration of application of the ENT.
- (e) Natural person can perform services related only to the service activity which is the subject of the contract.
- (f) Duration of stay for one year or for duration of contract (if longer) with provision for renewal.

IV. CONCLUSIONS

We believe that substantive discussions on this issue in the CTS – Special Session could greatly contribute to Members providing effective market access on Mode 4 in their revised offers, an area identified as being of crucial significance by many Members. We look forward to active engagement of all Members on this proposal. We also believe that this may be a useful tool for

conducting work under "Implementation of Paragraph 15 of the Guidelines and Procedures for the Negotiations on Trade in Services (S/L/93)".
