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COMMUNICATION FROM BULGARIA, CANADA, THE EUROPEAN COMMUNITIES AND ROMANIA

Mode 4 – A Common Approach to Scheduling

The following communication, dated 17 February 2005, from the delegations of Bulgaria, Canada, the European Communities and Romania is being circulated to the Members of the Council for Trade in Services.

NB: This paper and the suggestions made in it are not intended to be a substitute for discussions on market access. Neither should re-scheduling commitments according to the common approach suggested be used as an opportunity to reduce the level of commitments of an individual Member. As with sector-specific classification proposals, the question of how to handle the transition in schedules to the common approach indicated below needs to be addressed.

1. It can be difficult to assess (and in some cases even understand) the market access opportunities offered through WTO Members' horizontal Mode 4 commitments. This is due not least to the divergent ways in which these commitments have been scheduled. A large number of Members have scheduled their commitments by category of Mode 4 service supplier (e.g. intra-company transfers, business visitors, contractual service suppliers). Others have scheduled with reference to the job type covered (e.g. managers, executives, specialists) without indicating what service supplier categories are covered. Yet others refer instead to general requirements for entry with no specific reference to any service supplier category or job type and a further group limit their entry to a reference back to national laws and regulations without indicating what market access restrictions/permissions these contain. Finally it should be noted that a small number of Members – mostly countries which have commitments in only a few sectors or sub-sectors - have scheduled no horizontal Mode 4 commitments/restrictions, but have dealt with this issue on a sector specific basis. Nevertheless, for this last group, there is usually identical scheduling language for each sector specific commitment on Mode 4.

2. In our view, the clarity of GATS schedules in relation to Mode 4 would be improved if WTO Members were to follow a common approach to formatting their Mode 4 commitments. Trade policy analysts and negotiators would be able to compare and contrast offers and commitments and in the end more accurately assess their real "liberalization value". Individual business people and companies of all sizes would be able to understand the commitments better and see if and how they facilitate temporary entry and reduce the costs of doing business in other countries. This paper suggests how this common formatting could be achieved and is intended to provide a non-binding tool for Members as they prepare their revised (or initial) offers.

3. The lack of transparency can be a major barrier to international trade in services through Mode 4 and, because of inter-linkages between the modes of supply, through the other modes as well. Better information in the schedules - whilst not an end in itself - will foster more trade and investment in services in both developing and developed countries.

4. A common and comparatively easy to read format would be achieved if WTO Members were to schedule their commitments according to common categories of service providers. This is the currently the single most favoured way of scheduling amongst WTO Members (note that all recently acceded WTO Members have scheduled in this way and a number of initial offers have moved towards this approach) and leaves less room for ambiguity than an approach based on job type. Using this approach, WTO Members would:

- i) use the same terminology for each main category and sub-category of service provider. As such, commitments would be listed under five main headings: (a) "intra-corporate transferees - ICT", (b) "business visitors - BV", (c) "contractual service suppliers - CSS", (d) "independent professionals – IPs" and (e) "other". These would in turn be divided where necessary into sub-categories such as "senior managers" and "specialists" for ICTs, "service sellers" for BVs. Annex 1 provides a summary explanation of the different categories and sub-categories proposed. If some Members wished to continue to use existing names from their national temporary entry regimes, for comparability and transparency, they could put that name in parenthesis next to the common terminology: e.g., Business visitors ("*service sellers*") or Contractual Service Suppliers ("*Professionals on contract*"). Where no commitments are being made for a particular category or sub-category, Members would not list the (sub-)category in question.
- ii) list the definitional elements that are relevant for each category (or sub-category). The Secretariat's note on "Categories of Natural Persons subject to commitments under Mode 4" (Job (03)/195) shows that there are common definitional elements used by many WTO Members. Under the common format approach, Members would be encouraged to ensure that their definitions incorporate as many common elements of the definition as possible. Members would not be asked to adopt a specific definition of a particular category, but rather to describe or define the categories covered by their commitments as much in conformity as possible with the illustrative list of common elements. In this way, Members would be able to retain flexibility to adapt the definitions to reflect their national temporary entry regimes. To assist Members, Annex 1 to this paper also provides an illustrative list of common elements in the definitions of each category, adapted from Job (03)/195 and taking into account the definitions used in the DDA offers that have been made to date.
- iii) indicate – where applicable – the market access and national treatment conditions which are relevant for each category and where necessary each sub-category. Where there are no limitations to MA or NT, it would not be necessary for Members to say so explicitly in their commitments.
- iv) indicate the length of temporary entry and stay permitted for each category as well as whether multiple entries and extensions are possible.

Members would continue to have the opportunity to include generic elements which are applicable to all categories of Mode 4 service supplier.

Annex 1

Main categories and sub-categories, with common definitional elements.

(a) Intra-corporate transferees (ICTs):

Whether or not WTO Members have scheduled explicit commitments for this category, all countries facilitate the movement of intra-corporate transfers of certain personnel either in law or in practice to some degree. This is because countries recognise that – if they wish to attract and retain investment – they must respond to investors' needs. And in an increasingly inter-connected and inter-dependent work, companies – particularly those in the services sector – need to be able to move their personnel internationally if they are to implement their global business strategy and – even more crucially – to respond to clients needs and to provide services effectively and efficiently.

The relevant sub-categories would be (i) executives, (ii) senior managers, (iii) specialists, (iv) persons entering for career development purposes and (v) others (for example, persons providing in-house services). NB: Some WTO Members have merged the sub-categories "executives" and "senior managers" in their schedules. They would continue to be able to do so under this approach.

Definitional Elements:

- Work within a juridical person established in the territory of another WTO Member;
- Are temporarily transferred in the context of the provision of a service through commercial presence (Mode 3) to the territory of the WTO Member taking the commitment;

(a).1. Executives

- Primarily direct the management of the organisation, exercising wide latitude in decision making;
- Do not perform tasks directly related to the provision of services by the commercial presence.

(a).2. Senior managers

- Primarily direct the organisation, or a department or sub-division thereof;
- Have discretionary control over day-to-day activities, including personnel actions;
- Supervise and control other supervisory, professional or managerial staff;
- Do not include first-line managers, unless those supervised are professionals.

(a).3. Specialists

- Possess knowledge at an advanced level of expertise;
- Possess proprietary knowledge of the organisation;
- Includes members of licensed/regulated professions.

(a).4. Persons entering for career development purposes

- Are being transferred for career development purposes or to obtain training in business techniques or methods.

(a).5. Other sub-categories

Any type of person which does not fall into one of the sub-categories listed above, for example persons entering to provide services in-house, or persons who do not fall within one of the sub-categories listed above and who enter to enable the commercial presence in the host Member to provide a specific service to a specific client.

(b) Business Visitors:

As with ICTs, all WTO Members allow business visitors to enter their country, either under a specific regime, or through general short stay visas which are also used by tourists.

Possible sub-categories would include (i) service sellers and (ii) persons responsible for setting up a commercial presence. Those WTO Members that have merged these sub-categories in their schedules would continue to be able to do so.

Definitional Elements:

- Are representatives of a service supplier of another WTO Member;
- Do not engage in making direct sales to the general public or in supplying services themselves;
- Do not receive remuneration from a source located within the host Member.

(b).1. Service sellers

- Enter to negotiate or conclude agreements on the sale of services for that service supplier;
- Carry out similar activities, including attending business meetings, sales fairs and conferences.

(b).2. Persons responsible for setting up a commercial presence

- Are responsible for setting up a commercial presence of the service supplier in the host Member;
- The service supplier has no commercial presence in that Member;
- Work in a senior position within the service supplier.

(c) Contractual service suppliers (CSS)

This category is also sometimes referred to in schedules as "Professionals" or "persons (of an enterprise) engaged in substantive business activities". It covers those cases where a foreign-based service supplier has won a contract to provide services to a client in the Member taking the commitment which requires the presence of employees of the service supplier in that Member in order to deliver the service. Because there does not have to be a commercial presence in the Member taking the commitment, the contractual service supplier category is of particular interest to developing countries and to small and medium sized enterprises in any country.

Definitional Elements:

- Enter as employees of a commercial presence based in another Member which has obtained a bona fide contract to provide services in the WTO Member taking the commitment, where the person(s) entering will not be in a dependent working relationship with the client;
- Persons entering have appropriate educational and professional qualifications relevant to the service to be provided;
- The person(s) entering can only provide services directly related to the service activity which is the subject of the contract;
- Receives remuneration from his/her employer and not from the client.

(d) **Independent professionals (IP)**

In this case, the service supplier is a natural person, who has won a contract to provide services to a client in the Member taking the commitment which requires his/her presence in that Member in order to deliver the service.

Definitional Elements:

- Are self-employed persons primarily based in the territory of another WTO Member;
- Have obtained a bona fide contract to provide services in the WTO Member taking the commitment, where the IP will not be in a dependent working relationship with the client;
- The IP has appropriate educational and professional qualifications relevant to the service to be provided;
- The IP can only provide services directly related to the service activity which is the subject of the contract.

(e) **Other:**

Mode 4 service suppliers which:

- *do not fit into one of the three categories enumerated above, for example ships crews, an internationally known musical or theatre troupe on tour, foreign correspondents, and/or athletes and their entourage (coach, physiotherapist etc) participating in a sporting event. Without prejudice to the question of whether or not they are covered by the scope of the GATS by virtue of the Annex on Movement of Natural Persons, those WTO Members that have scheduled commitments for persons seeking entry on the basis of employment contracts would also fall within this ambit.*

or

- *a WTO Member wishes to draw special attention to, such as "Installers".*

could be included in the horizontal section of the schedule under a catch-all category "Other". Alternatively, where the type of service supplier is specific to a sub-sector (or small group of sub-sectors), WTO Members may wish to include scheduling language only in the sector specific part.

Nota Bene: Whilst we suggest that the category headings above are respected by all WTO Members to allow for easier reading and comparison of the schedules, some types of service supplier defy easy categorisation because of differences in national laws and practices¹. From a domestic perspective, this categorisation can be important because it will determine what migration regime applies including – for example – whether or not a work permit is required. WTO Members should be free to decide under which of the five categories outlined in this paper commitments relating to any particular type of service supplier would be scheduled based on the specificities of their own national laws and practices. It is not the intention of this paper to suggest that any one categorisation be imposed on WTO Members.

¹ A case in point is a category which we shall refer to – for the purposes of this paper - as "After-sales service providers". When machinery and/or equipment is purchased, a condition of purchase may be that the installation, maintenance and/or repair of that product is carried out by the supplier or by a company which is sub-contracted by the supplier to do this. The persons who undertake this installation, maintenance and/or repair are the "After-sales service providers". Depending on the national migration law in question, a WTO Member may consider these persons to be "Business Visitors", "Contractual Service Suppliers" or a separate category altogether.