

**COMMUNICATION FROM CANADA**

Mode 4 Commitments and Economic Needs Tests

The following communication, dated 20 June 2005, from the delegation of Canada is being circulated to the Members of the Council for Trade in Services and the Committee on Specific Commitments.

**I. SUMMARY**

1. According to WTO, UNCTAD and OECD analyses, GATS Article XVI:2(d) and the Scheduling Guidelines set out the rules, which Members have already agreed to, on economic needs tests (ENTs) with respect to mode 4. Members are not supposed to use ENTs to limit the number of natural persons; however, if Members wish to continue to use such ENTs, they are supposed to cite and describe them in their schedules. Some Members have indicated that ENTs or labour market tests are not applicable to certain categories of natural persons covered. However, because of the lack of transparency of their commitments or lack of available information on their national and subnational regimes, it sometimes looks as if ENTs or labour market tests are indeed operating. Other Members have not mentioned explicitly that ENTs or labour market tests do not apply to certain categories of natural persons covered and consequently, the nature and application of their ENTs or labour market tests are not clear. WTO, OECD, UNCTAD studies and submissions by some Members have pointed out that ENTs or labour market tests constitute a mode 4 barrier that needs to be addressed in the current negotiations, so that improved outcomes will result. As various analyses have suggested, Members could improve mode 4 commitments by adhering to the existing rules and scheduling guidelines on ENTs or by providing more details on their ENTs and labour market tests. Such collective action would significantly improve the quality and transparency of mode 4 commitments for the benefit of trade negotiators and service suppliers.

**II. INTRODUCTION**

2. The purpose of this paper is to promote further substantive discussion of economic needs tests (ENTs) with respect to mode 4 and to propose that Members exchange information on ENTs or labour market tests applicable to their mode 4 commitments.

3. Several delegations have mentioned the importance of ENTs in various fora, and brief discussion to date has shown that progress on commitments may be hindered if there is no common understanding of mode 4 ENTs. Furthermore, while some delegations may favour more disciplines on ENTs in a reference paper or model schedule, Canada thinks that Members should adhere to the

existing agreed rules and scheduling guidelines on ENTs and labour market tests, and engage in more discussion about them.<sup>1</sup> Some Members may disagree about the nature and definition of ENTs and with the existing rules and guidelines on scheduling such measures. However, it may well be that, consistent with the conclusions of several studies, mode 4 commitments could be improved significantly if Members understood ENTs better and adhered to the existing rules on them.

### **III. DESCRIPTION OF ENTs AND LABOUR MARKET TESTS**

4. As Members are aware, economic needs tests are not defined in the GATS. Several studies (e.g., see Appendix A) have analyzed mode 4 ENTs and linked them to labour market tests.<sup>2</sup> They have pointed out, for example, that ENTs are composed of various quantitative and qualitative factors and that these assessments may affect both domestic and foreign service suppliers or apply solely to foreigners. Furthermore, it is clear from these studies and from discussions with trade and immigration policy experts that labour market tests are the most common type of mode 4 ENT. Several studies have also shown that within the category of labour market tests, the most frequent factor is the availability of similar workers in the host country, or whether a foreign worker would be competing with or displacing a domestic worker. As well, analysis of the labour market tests of various Members shows that although differences exist in specific terminology and factors, they are composed of several common elements, whether they be general or specific. Appendix B is an illustrative list of some common elements.<sup>3</sup>

### **IV. EXISTING GATS RULES**

5. According to WTO, UNCTAD, and OECD studies, Article XVI:2(d) and the Scheduling Guidelines set out the existing GATS rules on mode 4 ENTs. ENTs or labour market tests should either a) not be applied to the categories of natural persons covered by a Member's mode 4 commitments or b) if applied be included in the Member's schedule of specific commitments.<sup>4</sup> Furthermore, the Scheduling Guidelines indicate that if a Member retains and lists an ENT or a labour market test, the criteria are supposed to be described in the schedule under Market Access.

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<sup>1</sup> "Members should reflect on the following aspects ... The specification of unspecified labour market tests from future commitments so as to ensure effective application of mode 4 liberalization. The elaboration of a common code of practice for economic needs tests with the objective to render them more specific and transparent, define their application criteria, make them non-discriminatory and impose a due process procedure could be highly desirable." (EU communication, S/CSS/W/45, 14 March 2001).

<sup>2</sup> A review of literature on mode 4 ENTs and labour market tests is beyond the scope of this paper. However, Members may wish to consult the selected studies or submissions listed in Appendix A.

<sup>3</sup> Members may wish to refine or add to that list.

<sup>4</sup> Article XVI:2(d) says: In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as: [...] limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test [...]."

6. The proper scheduling of ENTs was clarified as long ago as November 1993, in the WTO Secretariat's response to Members' questions (Addendum to "Scheduling of Initial Commitments in Trade in Services: Explanatory Note").<sup>5</sup> Moreover, these studies, which were based on content analysis of existing commitments, have pointed out that few Members with ENTs listed in their schedules have actually described the criteria adequately.<sup>6</sup>

7. In "The Scheduling of Commitments under the GATS, A Review of Basic Principles" (WTO Job(03)/186, 10 September 2003), Members are encouraged to describe the criteria and operation of ENTs, so that none are left unspecified.

## V. MODE 4 BARRIERS: ENTs AND LABOUR MARKET TESTS

8. Several studies have mentioned that ENTs or labour market tests are important barriers to the freer movement of service suppliers. Besides scheduling inconsistencies or the absence of described criteria, there is also a lack of transparency on the implementation or operation of specific ENTs. For example, some studies have pointed out that frequently no information is readily available on an ENT's scope, administration or changes to criteria. Although ENTs or labour market tests listed often relate to the availability of domestic workers or other factors, there are usually no references to specific domestic legislation or administrative requirements and procedures. Consequently, not surprisingly, this lack of transparency has led to concerns that certain unspecified ENTs or labour market tests are being carried out in an arbitrary or discretionary manner. More transparency would remedy this problem.

9. Furthermore, although several Members explicitly say that ENTs or labour market tests do not apply to certain categories of natural persons covered by commitments, it is not always clear, from an analysis of available information on their general immigration regimes, that those categories of natural persons are in fact *not* subject to the requirements of ENTs or labour market tests. Details on ENTs or labour market tests are not readily available. Information is often lacking on the relationship between a Member's mode 4 commitments and the relevant parts of its immigration laws and

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<sup>5</sup> Number 3 says: "With regard to market access limitations, such as numerical ceilings or economic needs tests, how detailed should the entries in schedules be?"

*The entry should describe each measure concisely indicating the elements which make it inconsistent with Article XVI. Numerical ceilings should be expressed in defined quantities in either absolute numbers or percentages; regarding economic needs tests the entry should indicate the main criteria on which the test is based, e.g., if the authority to establish a facility is based on a population criteria, the criterion should be described concisely.*

<sup>6</sup> For example:

a) WTO Secretariat paper, 1998, paragraph 40: "The predictability of actual entry conditions is further affected by Members' failure in most cases in which they have reserved the right to operate economic needs tests, to specify the relevant criteria. Fn: "Paragraph 3 of the addendum to the scheduling guidelines (MTN.GNS/W/164/Add.1) provides that "the entry should indicate the main criteria on which the [economic needs] test is based e.g. if the authority to establish a facility is based on a population criterion, the criterion should be described concisely".

b) WTO Secretariat paper (S/CSS/W/118), 30 November 2001, page 3-4: "Of the 253 entries, 96 provide no guidance concerning the concerning the criteria on which the test is based. Of the 157 entries that provide criteria on which the tests are based, very few have described these criteria as set out in the Scheduling Guidelines. The 39 horizontal entries in mode 4 establish as the sole criterion for the admission of a service supplier the non-availability of qualified personnel in the local market. Other entries provide minimal indications on the objectives and criteria applied in the test. ENTs containing criteria are frequently phrased in a way that nevertheless leaves wide discretion as to their application. Typical formulations are "criteria include" or the relevant agency "shall have regard to, *inter alia*, the following criteria". Work from UNCTAD and the OECD has pointed out that the absence of a definition of ENTs in the GATS has led to scheduling inconsistencies and a lack of transparency as to the operation of ENTs."

regulations. GATS negotiators and policy analysts are usually not experts on the immigration or labour regimes of various Members. Consequently, without pertinent information, it is understandable why they have difficulty determining precisely if an ENT or labour market test applies or does not apply to a particular category.<sup>7</sup> More transparency would also remedy this problem.

10. The results of these studies, therefore, lead to several ways to improve the transparency and predictability of ENTs or labour market tests in mode 4 commitments. For example, Members could be more explicit about: a) the criteria and operation on which ENTs or labour market tests are based; b) the relationship between their mode 4 commitments and their general immigration laws, regulations and administrative procedures; and c) the requirements and procedures for work permits or visas for work. Such transparency would be a practical way to counter charges of arbitrary and discretionary application of ENTs or labour market tests. It would also reduce business costs and, because of known rules and regulations, encourage more service suppliers to seek temporary entry.

## **VI. CANADA'S LABOUR MARKET TEST**

11. Besides the standard immigration screening (for national security, health, criminality and bona fides) to determine if a visa for admission can be issued, a foreign business person seeking to work temporarily in Canada or the relevant Canadian employer or client, essentially face two, main regulatory requirements: assessments for a) a labour market opinion and b) a work permit. What Canada's commitments on temporary entry in international trade agreements basically do is exempt specific categories of business people from one or both of these requirements. For example, the labour market opinion does not apply to any of the categories of service suppliers covered by Canada's existing mode 4 commitments (business visitors, intra-company transferees, and several professionals). Canada has made this commitment more explicit in its initial offer on mode 4 by citing whether or not a labour market test or a work permit applies. Canada's initial requests have asked other Members to do the same thing.

12. Furthermore, in the interest of promoting more understanding and for greater transparency, attached to this paper (Appendix C) is a description of Canada's current labour market opinion (also referred to as a "job offer confirmation opinion" or an "assessment for a labour market opinion"). This labour market test does not apply to those categories of natural persons covered by Canada's existing mode 4 commitments and its initial and revised offers. Appendix C provides the relevant regulations and details on the criteria used in an assessment. This information is available publicly and the website addresses are provided.

## **VII. CANADIAN PROPOSAL**

13. As a first step, the Canadian delegation suggests that Members adhere to the existing agreed rules and scheduling guidelines rule on ENTs and labour market tests. Further, Members should engage in further substantive discussion on mode 4 ENTs or labour market tests and attempt to define mode 4 ENTs or to at least agree on common elements.

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<sup>7</sup> Canada's June 2005 paper on improved transparency of mode 4 commitments proposes that Members provide *inter alia* supplementary information on their mode 4 commitments or offers, so that trade negotiators and policy analysts of other Members could better understand and determine the "liberalization value" of commitments or offers. Attached to this transparency proposal is a completed template providing supplementary information on Canada's mode 4 commitments. Members may wish to review this document as it illustrates how Members might incorporate more details on their ENTs or labour market tests. Canada also submitted this completed template at the time it submitted its revised offer (TN/S/W/42).

14. To further increase transparency and understanding of mode 4 ENTs, the Canadian delegation encourages all Members to exchange information on their mode 4 ENTs or labour market tests in the coming months. In undertaking such an exchange of information, Members may wish to provide it in the format Canada has done in Appendix C or as supplementary information along the lines of the template attached to Canada's Communication TN/S/W/42 submitted at the time our revised offer was released. A few Members have already provided this information informally.

15. The Canadian delegation looks forward to hearing the views of other delegations on this subject and to them joining the information exchange. Further discussion and more transparency will help lead to a better understanding of mode 4 ENTs or labour market tests and improve the transparency, predictability and relevance of our mode 4 commitments for trade negotiators and business people.

Appendix A

**Selected References**

1. Presence of Natural Persons (Mode 4), Background Note by the Secretariat, Council for Trade in Services, WTO, S/C/W/75, 8 December 1998, (98-4927)
2. Preparations for the 1999 Ministerial Conference, General Council discussion on mandated negotiations and the built-in agenda, 23-24 November 1998, *Communication from Pakistan*, WT/GC/W/131, 22 December 1998, (98-5148).
3. Preparations for the 1999 Ministerial Conference, Movement of Natural Persons under GATS, *Communication from Pakistan*, WTO, Geneva, WT/GC/W/160, 1 April 1999, (99-1336).
4. "Lists of Economic Needs Tests in the GATS Schedules of Specific Commitments", UNCTAD, Geneva, UNCTAD/ITCD/TSB/8, 6 September 1999, GE.99-53I84
5. "Assessing the Barriers to Trade in Services", OECD, Paris, TD/TC/WP(2000)11/Final, 10 November 2000.
6. Assessing Barriers to Trade in Services, the Scheduling of Economic Needs Tests in the GATS: Follow-up Work, OECD, Paris, TD/TC/WP(2001)5, 25-26 January 2001.
7. Communication from the European Communities and their Member States, GATS 2000: Temporary Movement of Service Suppliers, WTO, Geneva, S/CSS/W/45, 14 March 2001.
8. "Service Providers on the Move: A Closer Look at Labour Mobility and the GATS", OECD, Paris, TD/TC/WP(2001)26, 20-22 June 2001.
9. "Economic Needs Tests", Note by the Secretariat, Council for Trade in Services Special Session, S/CSS/W/118, 30 November 2001 (01-6155).
10. Symposium on Movement of Natural Persons (Mode 4) under the GATS, Joint WTO-World Bank Symposium, Geneva, 11-12 April 2002, [www.wto.org/ature/tratop\\_e/serv\\_e/symp\\_mov\\_natur\\_perso\\_april02\\_e.htm](http://www.wto.org/ature/tratop_e/serv_e/symp_mov_natur_perso_april02_e.htm).
11. "Some Comments on the Economic Needs Tests and the Provision of Services under Mode 4" by Georgina Luna de la T./Ecuador, UNCTAD Expert Meeting on Market Access Issues in Mode 4 (Movement of Natural Persons to Supply Services) and Effective Implementation of Article IV on Increasing the Participation of Developing Countries, Geneva, 29-31 July 2003.
12. "The Scheduling of Commitments under the GATS, A Review of Basic Principles", WTO, Geneva, Job (3)186, September 2003.
13. OECD, World Bank, IOM Seminar on Trade and Migration, Geneva, 12-14 November 2003, [www.iom.int/documents/officialtxt/en/agenda.pdf](http://www.iom.int/documents/officialtxt/en/agenda.pdf).
14. Communication from Switzerland, WTO, Geneva, TN/S/W/21, 8 September 2004, "On the Importance of Improving the Scheduling of GATS Commitments".
15. Communication from Hong Kong, China, WTO, Geneva, JOB(04)/171, 22 November 2004, "Economic Needs Tests".

Appendix B

**Economic Needs and Labour Market Tests**

**Illustrative List of Common Elements**

1. Skills. Does the foreign worker being sponsored to come into a country meet minimum skill thresholds there?
2. Salary. Would the foreign worker's salary be at or above a certain level stipulated for the prospective job?
3. Economic Impact. What effect would the foreign worker have on the domestic economy?
4. Job Classification. Is the prospective job recognized in the national occupation classification system?
5. Labour dispute. Would the foreign worker adversely affect an ongoing labour dispute?
6. Advertisement & Recruitment. Before offering the job to a foreign worker, has the sponsoring employer advertised the job adequately or considered domestic candidates sufficiently?
7. Other elements (Views of other Members?)

## Appendix C

### **Canada's Labour Market Test**

Note: The labour market test described below does not apply to business visitors, intra-company transferees and the categories of professionals covered by Canada's existing mode 4 commitments in the GATS. Nor does it apply to the categories of business persons covered by other international trade agreements to which Canada is a signatory (e.g., NAFTA and the Canada-Chile FTA). Furthermore, under Canada's initial and conditional GATS mode 4 offer, this labour market test would not apply to the categories of service suppliers it covers if and when they become final commitments.

1. 2002 Immigration and Refugee Protection Regulations (June 2002)

(Source: Canada Gazette, Extra Vol. 136, No. 9, Part 9 <http://canadagazette.gc.ca/partII/tempPdf/g2-136x9.pdf>)

203. (1) *On application under Division 2 for a work permit made by a foreign national other than a foreign national referred to in subparagraphs 200(1)(c)(i) and (ii), an officer shall determine, on the basis of an opinion provided by the Department of Human Resources Development, if the job offer is genuine and if the employment of the foreign national is likely to have a neutral or positive economic effect on the labour market in Canada.*

(2) *The Department of Human Resources Development shall provide the opinion referred to in subsection (1) on the request of an officer or an employer or group of employers. A request may be made in respect of*

- (a) *an offer of employment to a foreign national; and*
- (b) *offers of employment made, or anticipated to be made, by an employer or group of employers.*

(3) *An opinion provided by the Department of Human Resources Development shall be based on the following factors:*

- (a) *whether the work is likely to result in direct job creation or job retention for the benefit of Canadian citizens or permanent residents;*
- (b) *whether the work is likely to result in the creation and transfer of skills and knowledge for the benefit of Canadian citizens or permanent residents;*
- (c) *whether the work is likely to fill a labour shortage;*
- (d) *whether the wages and working conditions offered are sufficient to attract Canadian citizens or permanent residents to, and retain them in that work;*
- (e) *whether the employer has made, or has agreed to make, reasonable efforts to hire or train Canadian citizens or permanent residents; and*
- (f) *whether the employment of the foreign national is likely to adversely affect the settlement of any labour dispute in progress or the employment of any person involved in the dispute.*

### **2. Assessment for a Labour Market Opinion**

(Source: <http://www.hrsdc.gc.ca/en/epb/lmd/fw/tempOffers.shtml>)

*In almost all cases, foreign workers must have a valid work permit to work in Canada. When hiring a foreign worker, you, the employer must generally:*

1. *Submit an [HRSDC Foreign Worker Application](#) for a labour market opinion (LMO) to the [HRSDC Foreign Worker office](#) responsible for your area.*

*Before confirming a job offer, HRSDC considers whether :*

- *The job offer is genuine;*
- *The wages and working conditions are comparable to those offered to Canadians working in the occupation;*
- *Employers conducted reasonable efforts to hire or train Canadians for the job;*



- *The foreign worker is filling a labour shortage;*
- *The employment of the foreign worker will directly create new job opportunities or help retain jobs for Canadians;*
- *The foreign worker will transfer new skills and knowledge to Canadians; and*
- *The hiring of the foreign worker will not affect a labour disputes or the employment of any Canadian worker involved in such a dispute.*

*Inform the foreign worker to apply for a [work permit](#) from Citizenship and Immigration Canada (CIC).*

*Next, CIC decides whether the foreign worker will get a work permit according to the requirements to work and reside temporarily in Canada.*

### **HRSDC LABOUR MARKET CONFIRMATION**

*To assist your company in the application process, below is a description of the factors that HRSDC takes into consideration when reviewing your job offer. Submitting a complete application and providing information on these factors can result in faster decisions by HRSDC and CIC officers and reduce delays in the recruitment of your foreign worker.*

*When assessing a job offer, HRSDC considers primarily :*

- *the [occupation](#) that the foreign worker will be employed in;*
- *the [wages and working conditions](#) offered;*
- *the employer's [advertisement and recruitment](#) efforts;*
- *the [labour market benefits related to the entry](#) of the foreign worker;*
- *[consultations](#), if any, with the appropriate union;*
- *whether the entry of the foreign worker is likely to affect the settlement of a [labour dispute](#).*

*For your information, please note that CIC may also require additional criteria when issuing work permits to foreign workers in [regulated occupations](#).*

#### **Occupation**

*HRSDC and CIC use the National Occupational Classification (NOC) system to categorize the job you are filling based on the majority of duties you expect the foreign worker to perform. HRSDC also uses the NOC occupation to identify wages and labour market trends when assessing your job offer.*

*The NOC system can help you as an employer more accurately describe the duties and identify the occupation that the foreign worker will be expected to perform, noting that HRSDC officers will work with you if the NOC does not precisely reflect your employment needs.*

- *Find a detailed NOC [job description](#) .*
- *Learn more about the [NOC](#) in general.*

#### **Wages and Working Conditions**

*HRSDC reviews the wages that you are offering the foreign national, and compares them to wages paid to Canadians in the same occupation based on labour market information from Statistics Canada, HRSDC,*

provincial ministries, and other reliable sources. If you are offering wages below rates paid to Canadians in the occupation, HRSDC will not confirm your job offer.

HRSDC also expects you to provide working conditions that are consistent with federal and/or provincial standards for the occupation and workplace.

- Learn more information about [federal and provincial labour standards in Canada](#) .

### **Advertisement and Recruitment**

HRSDC generally expects that you show recruitment efforts to find qualified Canadians before applying to hire foreign workers.

Demonstrating comprehensive advertisement to attract Canadians in local and national newspapers, recognized INTERNET job banks, job-specific and professional publications, etc. before making offers to foreign workers will help your application. Clearly presenting wages offered and job duties required for the position in your advertisement will also help HRSDC in making a decision.

In addition to advertisement, showing active recruitment of Canadians through such means as job fairs, CO-Ops, apprenticeship programs, etc. will also support your application.

- Learn more about HRSDC supports for employers on [human resources planning and recruitment](#) .

### **Labour Market Benefits to Canadians**

HRSDC will consider direct labour market benefits from the hiring of the foreign worker(s). Showing how the entry of the foreign worker(s) will transfer skills and knowledge to Canadians, fill a labour shortage, or directly create or retain job opportunities for other Canadians will support your application.

### **Union Consultation**

If the position being filled by the foreign worker is part of a bargaining unit, the following information will support a positive HRSDC decision and will reduce delays in the recruitment of the foreign national:

- An explanation of the union's position on hiring a foreign national for your job. If you have not contacted the union, explain why you have not done so.
- An indication of whether you actively work with union officials to identify unemployed Canadians.
- Confirmation that the conditions of the collective agreement (e.g. wages, working conditions) will apply to the foreign worker.

Please note that HRSDC may contact the applicable union for additional information when reviewing your application

### **Labour Disputes**

Please be aware that HRSDC and CIC will not confirm the hiring, or issue a work permit to the foreign national if you are making an offer to a foreign national for a position that may affect a labour dispute at your workplace, or affects the employment of any Canadian worker involved in such a dispute.

Also, please be aware that CIC will not issue a work permit if the foreign worker does not meet certification and licensing requirements for regulated occupations in Canada (e.g. doctors, engineers, tradespersons). Making the necessary arrangements with the regulatory body for certification and licensing is the employer's and the foreign worker's responsibility.

To learn more about regulated occupations in Canada, please visit [Work Destinations](#) .

*To learn more about the requirements to work in specific regulated occupations, visit the [Regulated Occupations Data Base](#) .*

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