

WTO DRAFT LANGUAGE ON ARTICLE VI.4 DISCIPLINES FOR DOMESTIC REGULATIONS	GLOBAL TRADE WATCH COMMENTS
<p>JOB(05)*** 25 October 2005</p> <p>Working Party on Domestic Regulation</p> <p>DOMESTIC REGULATION: PREPARATION</p> <p>FOR THE SIXTH MINISTERIAL CONFERENCE</p> <p>Note by the Chairman</p> <p>At the informal meeting held on 21 October 2005, Members requested that I submit a proposed draft text for the Sixth Ministerial Conference in Hong Kong. Members also requested that I produce a revised version of the illustrative list of possible elements compiled by one delegation, taking into account comments made by other Members at that meeting. Please find attached both documents.</p> <p>As you are aware, according to the current schedule of services meetings, I will be reporting to the Special Session of the Council for Trade in Services on Monday 31 October 2005 on progress in the Working Party with possible recommendations for the Sixth Ministerial Conference. I hope that the attached documents would facilitate this task.</p> <p>- 2 -</p> <p>Draft Ministerial Declaration – Chairman’s Proposed text on Domestic Regulation</p> <p>We call upon Members to intensify negotiations under Article VI:4 of the GATS with a view to developing disciplines on domestic regulation, as part of the final outcome of this round. These negotiations shall be based on work already undertaken and proposals submitted by Members, using the list of possible elements for Article VI:4 disciplines contained in [document reference].</p> <p>- 3 -</p> <p>Illustrative List of Possible Elements for Article VI:4 Disciplines</p> <p>INTRODUCTION</p> <p>The following is an illustrative list of possible elements for any necessary disciplines under Article VI:4 of the GATS. It has been compiled on the basis of proposals presented [1] and comments made by Members in the Working Party on Domestic Regulation. While this list reflects interests and concerns discussed by Members, there is no presumption that consensus has been reached on its elements. It does not prejudge the outcome of the negotiations under Article VI:4 of the GATS, neither in substance nor form. Further work on these elements will be pursued on the basis of current and future proposals by Members and without prejudice to the position of any Member regarding any of the elements.</p> <p>LICENSING REQUIREMENTS AND PROCEDURES</p> <p>Transparency: including services subject to licensing, licensing criteria, application procedures, documentation requirements, timeframes, appeal/review procedures, etc.; building on existing</p>	<p>In sum: This draft document outlines a long list of elements that would allow for the challenge of nondiscriminatory domestic regulations governing licenses and qualification procedures as well as technical service standards at the federal and subfederal level on various grounds including reasonableness, relevance, transparency/necessity and lack of conformity with international standards.</p> <p>Note: Any final disciplines on domestic regulations would also apply to government procurement at the federal and subfederal level as provided for in GATS Article XIII.</p> <p>Reference to a document we do not have.</p> <p>Note the unusual: “there is no presumption that consensus has been reached on its elements.”</p> <p>Critics have been concerned about the application of a necessity test to licensing requirements and procedures. While not applying a necessity test to this section, drafters have come up with obligations for relevance and reasonableness which may be equally subjective tests.</p>

principles and disciplines in Articles III and VI: pre-establishment, publicly availability and objectivity; accessibility by services suppliers.

Requirements:

- **Relevance** of licensing requirements to the activities for which authorization is sought.
- Residency requirements not subject to scheduling under Article XVII of the GATS.

Administration of licensing procedures: neutrality, **reasonableness**, **objectiveness**, and impartiality.

Procedures and related documentation: burdensomeness or reasonableness; relevance of documentation requirements; format of documentation; identification of deficiencies.

Review/appeal: availability; reasons for rejection; information on deficiencies; possibility of resubmission in case of deficiencies and incomplete information.

Timeframes: **reasonableness**; including submission, re-submission, renewal, decision, review/appeal, and entry into effect of license.

Fees: for licensing procedures; **reasonableness**, reflection of administrative costs, concessionary fees for applicants from developing countries, and treatment of auction or tendering.

QUALIFICATIONS REQUIREMENTS AND PROCEDURES

Transparency: including criteria of qualification requirements, administrative or procedural rules relating to administration of qualifications requirements, appeal/review procedures, etc.; pre-establishment, publicly availability, and objectivity; accessibility by services suppliers.

Recognition of working in other international organizations: reference to ongoing work in other multilateral mechanisms, like the UNESCO and IMO, towards more accessible procedures to

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facilitate appropriate recognition of qualifications across borders and to existing relevant international conventions.

Requirements:

- **Relevance** of qualification requirements and scope of examinations to the activities for which authorization is sought.

The word "necessity" does not appear here as a core requirement for licensing standards. Instead we find the equally subjective word "**relevance**." Would a government have a harder or easier time justifying the relevance of a measure before a WTO tribunal than the necessity of a measure? Would innovative green construction requirements be deemed relevant to the provision of construction as a service?

The word "**reasonableness**" is as concerning as "relevance" above. The word "**burdensome**" is synonymous for least trade restrictive. **So the requirement here is for reasonable OR least trade restrictive licensing procedures** which apply to services sector businesses or individuals (a firm might need a state license to offer loans to consumers and an individual electrician may also need a state license to perform electrical work). We have to assume that licensing procedures are those that involve the paperwork of obtaining a license and are not the core standards that must be met to obtain a license. While this is a narrower category, it still implicates many procedures at the state and local level that might be considered unreasonable and subjects them to challenge as barriers to trade.

Reasonable time frames are also required but not defined.

Concessionary fees for applicants from developing countries likely to be a controversial element in developed countries.

Comment: The choice of the words "**relevance**" and "**reasonableness**" in this section and below is quite clever. Not only is it difficult to be against relevant and reasonable regulation, but by choosing words with little or no history in trade disputes, negotiators may be hoping that the lack of a paper trail on these words will calm critics. Yet the tests seems as subjective as a necessity test and compound the uncertainty about how a WTO dispute panel might rule

Qualification requirements relate to how you demonstrate you are qualified to obtain a particular license to provide services. This section is geared towards facilitating the cross border supply of service providers and professionals via "relevant" and "reasonable" exams as well as relevant, reasonable and "least burdensome" procedures. This would be a highly controversial element in most countries where licensing and qualifications requirements are highly regulated and often set by subfederal governments.

The mention of organizations like UNESCO and the International Maritime Organization foreshadows an international harmonization mandate that recognizes the standards of international standard setting organizations as the presumptively "trade legal" standards, and domestic standards as unnecessarily burdensome if they exceed the international norm. Many such international standard setting organizations are opaque and industry dominated.

<ul style="list-style-type: none"> - Language requirements: linkage to service requirements to legitimate objectives including quality of service and protection of consumers. - Residency requirements not subject to scheduling under Article XVII of the GATS: relevance as pre-requisite for eligibility for examinations. <p>Specification, assessment and verification of qualifications, including educational qualifications and professional competence:</p> <ul style="list-style-type: none"> - availability of pre-established mechanisms for verifying foreign qualifications including examinations; - specification relating to education, course work, examinations, training, work experience; - identification of additional requirements relating to education, training or work experience in case of deficiencies; - possibility of meeting deficiencies through course work, training or work experience and where possible in home country; <p>Examinations: relevance; reasonableness of frequency; eligibility and accessibility; facilitating participation of foreign service providers; residency requirements.</p> <p>Procedures and related documentation: burdensomeness or reasonableness; relevance of documentation requirements.</p> <p>Review/appeal: availability; including non-acceptance of qualifications, examinations, submission and re-submission of applications.</p> <p>Fees: for examinations and other qualification procedures; reasonableness, reflection of administrative costs; concessionary fees for applicants from developing countries.</p> <p>Mutual recognition agreements</p> <p>TECHNICAL STANDARDS</p> <p>Transparency: including services subject to technical standards and information on technical standards, etc.; pre-establishment, publicly availability, and objectivity; opportunity for comments and taking the results into account; review of necessity.</p>	<p>This is an improvement over consideration of language requirements as a de facto trade barrier, but the inclusion of language requirements at all on this list of elements needing discipline is concerning.</p> <p>“Facilitating participation of foreign service providers” may require that governments provide assistance to foreign applicants superior to what is provided to its own citizens.</p> <p>“Reasonableness of frequency” raises the questions – what frequency would be unreasonable?</p> <p>Residency requirements are listed as a work item here. Obviously residency requirements pose barriers to trade for foreign service providers, so it is likely the desired outcome is for foreign services provider to be able to take qualification exams overseas and not in the home state. I assume that very few states allow this type of cross-border qualification procedure. And, note that procedures must also be least trade restrictive OR reasonable. Clearly cross-border testing would be less trade restrictive.</p> <p>The requirement here is for relevant, least trade restrictive OR reasonable qualification procedures.</p> <p>Licensing fees that were a reflection of administrative costs, would eliminate the potential for using licensing fees for other funding purposes i.e. Europe uses TV fees to fund public broadcast or licensing fees for alcohol establishments to assist with law enforcement efforts. Concessionary fees for applicants from developing countries are likely to be a controversial element.</p> <p>MRAs can be defined very differently so it is not clear what is meant here other than some mechanism to recognize the licensing and qualifications standards of one nation in another. MRAs are controversial instruments even in Europe where the differences between nations may not be terribly wide.</p> <p>Technical Standards are not defined here, but the term often covers both mandatory government regulations related to services and non-mandatory industry standards.</p> <p>NECESSITY TEST: Critics of the disciplines on domestic regulation have been most worried about the potential application of a necessity test to domestic regulations that would allow WTO panels to review the necessity of federal, state and local technical standards relating to services in relation to their trade restrictiveness. In the 11 WTO cases where the necessity of a goods measure has been challenged, only one measure was upheld as necessary. The word “necessity”</p>
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<p>Conformity assessments: application of regulatory control on compliance with the standard.</p> <p>- 5 -</p> <p>International and national technical standards: use of relevant international standards and deviation from such international standards; presumption of consistency with disciplines if in compliance with relevant international standards.</p> <p>International professional bodies: recognition of role in establishment and promotion of best practices.</p> <p>REGULATORY TRANSPARENCY (INCLUDING TRANSPARENCY ELEMENTS NOTED ABOVE)</p> <p>Mechanisms to respond to inquiries: establishment of mechanisms to respond to inquiries from interested persons; concerning laws regulations and measures of general application governing Article VI:4 elements.</p> <p>Publication: of laws and regulations of general application government Article VI:4 elements; publicly available to interested persons; including any requirements to obtain, maintain or renew licenses, certificates, etc.; any established application processing deadlines; any rights of appeal; notification of violations of terms of license.</p> <p>Notice and comment: advance publication of new or amended regulations; reasonable opportunity for interested persons to comment on such regulations; publication in plain/clear language; address in writing substantive concerns received; reasonable period of time between publication and going into effect.</p> <p>Transparency in licensing: establish clear, publicly available</p>	<p>makes its first appearance here as a subset of Technical Standards and as a subset of Transparency of Technical Standards. This appears to be somewhat of a shell game. This wording appears to place a burden on (federal, state and local) governments to review the necessity of their service standards at the time of their promulgation. Some jurisdictions may already do this, but it is unlikely that the majority of US jurisdictions make a practice of this. At a minimum this represents a costly new obligation upon governments to produce some sort of regulatory impact assessment justifying the application of the service standard. In addition, since a WTO panel would likely be permitted to review the sufficiency of any such impact statement, it is not clear that this editorial move (of placing necessity under transparency) really satisfies critics who are worried about the application of a broad necessity test to technical standards.</p> <p>Conformity assessment is usually a process for testing or verifying that the technical standards are being met.</p> <p>This item indicates the inclusion of a harmonization mandate such as the one contained in WTO goods and foods agreements. This means that national standards for a service provision that are more rigorous than voluntary industry standards developed in international standard setting bodies (where consumers and other public interest advocates are not represented) could be challenged as barriers to trade.</p> <p>This harmonization mandate will apparently be extended to professional qualifications via "international professional bodies" such as the International Accounting Standards Board. Such standards bodies constitute industry self-regulation. Perhaps for certain industries where there is not a very significant public interest this could be appropriate, but for many industries such as accounting where practitioners can have a direct and significant impact on the lives and livelihoods of millions, industry self-regulation is not appropriate. Indeed, some experts argue that the international standards in the accountancy sector are much weaker than US domestic standards which were already sufficiently weak to have a role in the giant accountancy scandals of Enron, Worldcom and the like. Services such as education and the teaching profession are likely to pose even greater concerns about the imposition of standardization.</p> <p>This section contains many of the elements suggested by the United States which affirms that its only interest in these negotiations is transparency. However, the issue of transparency alone raises many concerns.</p> <p>In the United States, for instance, the federal government has a process for notifying the public about federal regulations called the Administrative Procedures Act. When working properly, the APA could be considered to meet these requirements. State and city governments however would all be required to implement these transparency elements including publication of rules, contact points to respond to questions, notice and comment rulemaking, etc. The APA is an extremely costly and cumbersome system. At this time of dwindling state resources, will the federal governments provide funds to subfederal governments to implement a similar system? Negotiators have repeatedly insisted on the application of the proposed new GATS disciplines to subfederal governments, so national governments would be required to secure compliance by its states, cities and counties.</p> <p>Here, the obligation to be reasonable and timely is, once again, very</p>
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<p>procedures to obtain/renew licenses, etc.; including information about requirements and documentation; provide a decision within a reasonable time after submission of application; timely notification of status of application; notification of reasons for denial of an application; qualifying examinations on non-discriminatory basis, offered at reasonable intervals and at a cost not designed to limit number of applications.</p> <p>Implementation: consistent with existing GATS Articles III, IIIbis, XIV, XIVbis, and the Annex on Movement of Natural Persons. Shall not apply to the promulgation or application of regulations or other procedures concerning issuance of travel documents or authorizations to natural persons traveling to a Member's territory.</p> <p>OBJECTIVES, SCOPE AND APPLICATION</p> <p>General considerations</p> <ul style="list-style-type: none"> - Objectives of Article VI:4 disciplines: - Right to regulate in line with the GATS, specifically the right of regulators to regulate and to introduce new regulations to meet national policy objectives; - Scope and application of Article VI:4 disciplines and relationship with existing GATS provisions, specifically Article VI:4 disciplines not to prejudice rights and obligations under Article XVI/XVII and other GATS provisions; - 6 - <p>DEFINITIONS</p> <p>Definitions for qualification requirements, qualification procedures, licensing requirements, licensing procedures, and technical standards.</p> <p>DEVELOPMENT CONSIDERATIONS</p> <p>Compliance: compliance taking account of degree of development of regulations, institutional regulatory capacity, need to regulate and introduce new regulation to meet national policy objectives, and the level of development of individual development Members.</p> <p>Implementation: implementation taking account of needs of developing country Members differential implementation including differential timeframe for compliance.</p> <p>Technical assistance: technical assistance for building institutional capacity, and strengthening ability for compliance.</p> <p>Recognition of the needs and regulatory capacities of developing and least developed countries, and facilitation of their services exports.</p>	<p>subjective and leaves scope for unpredictable WTO dispute panel rulings</p> <p>Does not apply to visitor's visas.</p> <p>The scope section does not limit the application of these rules to scheduled GATS commitments. Thus, we must conclude that these rules are intended to apply across the board to all service sectors. Plus, there is no indication of any attempt to limit the scope of the disciplines in light of the administrative burden that would be imposed on subfederal levels of government</p> <p>This is a reiteration of the GATS preambular language. But there is no suggestion of how this right could be preserved while negotiators are simultaneously creating the legal grounds for WTO challenges to legitimate domestic regulation.</p> <p>New disciplines should not conflict with market access and national treatment commitments. However, how such conflicts will be avoided is yet to be determined. If a regulatory requirement is exempted from scheduled commitments but could be deemed to be "unreasonable" or "not relevant" by a dispute panel, the scheduled exemption would appear to be jeopardized by the new VI:4 disciplines. This section is a concession to developing countries who are resistant to many of these disciplines, such as the ones on transparency which would place a heavy burden on under-developed regulatory systems. Similar burdens would be placed on subfederal governments which are not granted similar flexibility on timeframe or technical assistance.</p>
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