

LINKING MODE 4 AND DOMESTIC REGULATION

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I. INTRODUCTION

1. This note discusses some possible ways in which Mode 4 could be addressed within Article VI:4 on domestic regulation. More specifically it tries to show how qualification requirements and procedures, technical standards and licensing requirements may impact the movement of natural persons under Mode 4. This note is divided into two parts. The first part discusses the relationship between Mode 4 and domestic regulation and the current status of Working Party on Domestic Regulation (WPDR) discussions. This includes a brief analysis of how Mode 4 relates to each of the regulatory categories (qualification requirements, qualification procedures, licensing requirements, licensing requirements and technical standards). The second part, provided as an annex, gives a list of examples of regulatory measures that fall under Article VI:4 (compiled from various WTO documents) that can be linked to Mode 4.

II. BACKGROUND

2. Article VI:4 on domestic regulation calls for the adoption of disciplines to ensure that “qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services”. Potential Mode 4 linkages under Article VI:4 range from the more obvious, such as stringent skills recognition under qualification requirements, to the less obvious such as indirect and costly operating licences.
3. Member countries can address Mode 4 linkages to domestic regulation as a mechanism for removing barriers to and implementing the further liberalisation of movement of natural persons. Furthermore, the Mode 4 linkage may provide a strategic interest for developing countries and LDCs to further their engagement in Article VI:4 discussions. However, it must be kept in mind that Article VI:4 discussions are still at an early stage and many critical unknowns remain to be addressed before one can conclude on what potential outcomes negotiations can deliver for Mode 4. Any *potential* gains to Mode 4 must be weighed with the overall outcomes of disciplines on domestic regulation.

A. Why Link Mode 4 issues in Article VI:4 discussions?

4. Addressing Mode 4 within Article VI:4 may provide two appealing strategies for developing country Members. The first is to include a developing country/LDC issue of interest in Article VI:4 negotiations and second to increase liberalisation of Mode 4. Two questions that naturally flow from these observations, which must be addressed, are: 1) will developing countries and LDCs’ heightened engagement produce greater benefits in the outcome of negotiations? and; 2) will developing countries and LDCs’ achieve increased liberalisation of Mode 4 through Article VI:4 disciplines? Addressing these questions requires the analysis of where and how Mode 4 issues relate to Article VI:4, the political context of current WPDR discussions and in what ways they are able or unable to provide opportunities for potential gains.

B. WPDR Discussions are still at an early stage

5. Discussions at the WPDR are still at an early stage. Two fundamental issues on the scope of disciplines remain to be agreed upon before Members can constructively discuss Mode 4 issues.
6. The first major point of uncertainty is on what types of regulations fall under Article VI:4. Disciplines for domestic regulation are to apply to regulations that fall outside the scope of Article XVI on Market Access and Article XVII

on National Treatment or any other provisions or disciplines of the GATS agreement.¹ However, there appears to be a “grey area” where regulations do not obviously fall under Article XVI, Article XVII or Article VI:4. For example, licensing systems have separate components that can fall under Market Access, National Treatment and Article VI:4 measures and distinguishing which parts constitute requirements and procedures of Article VI:4 is not always easy. Another example is residency requirements. There is still discussion on whether all residency requirements should fall under National Treatment and therefore be subject to scheduling under specific commitments.² This issue provides a good example of how the scope of negotiations can impact the degree to which Mode 4 issues can be addressed under Article VI:4. If it is agreed that all residency requirements fall under National Treatment, then the *process* related issues (e.g. the process by which a foreign service provider obtains residency) may fall under Article VI:4. However if it is not agreed upon that all residency requirements should fall under National Treatment, then both the qualification or licensing *requirement* of being a resident and the *process* of residency conditions may be subject to Article VI:4 disciplines.

7. The second fundamental issue lies with the question of whether Article VI:4 disciplines will apply only to measures for sectors where and the extent to which Members have undertaken commitments. If disciplines applied only to commitments, the relationship between Mode 4 and Article VI:4 would be limited to regulatory measures applicable to existing commitments and offers, which currently are mostly for highly skilled workers. If disciplines are applied to all regulations committed or not, the linkages between Mode 4 and Article VI:4 is vast. Members could dispute any relevant Mode 4 barrier whether committed or not. In order for Members to effectively discuss potential Mode 4 barriers, they first need to decide on the scope of Article VI:4 disciplines.

III. ANALYSIS OF EXAMPLES OF REGULATORY MEASURES RELATED TO MODE 4

8. The second part of this note (Annex) provides lists of examples of regulatory measures with Mode 4 linkages that may be addressed by disciplines under Article VI:4.³ This section provides a brief discussion of the main observations made from compiling these lists and opportunities for addressing Mode 4 linkages within each of the different regulatory categories. It must be

¹ See *Article VI:4 Of The GATS: Disciplines On Domestic Regulation Applicable To All Services. A Note By The Secretariat*. (WTO Document Code: S/C/W/96) dated 1 March 1999; and *Report On The Meeting Held On July 1 2003*. (WTO Document Code: S/WPDR/M/22) dated 22 September 2003.

² See *Examples Of Measures To Be Addressed By Disciplines Under GATS Article VI:4. Informal Note By The Secretariat*. (WTO Document Code: JOB(02)/3/Rev.7) dated 22 September 2003.

³ These lists were compiled from the following WTO documents: *Examples of Measures to be Addressed by Disciplines Under GATS Article VI:4* (WTO Document code: JOB(02)/20/Rev.7) dated 22 September 2003 and *International Regulatory Initiatives in Services* (WTO Document code: S/C/W/97) dated 1 March 1999.

noted here that there is still dispute over which Article VI:4 measure a specific regulation falls under, e.g. is a visa procedure a qualification procedure or a licensing procedure? This section presents the current thinking based on WPDR discussions and does not present conclusive identification of which Article VI:4 measure a specific regulation falls under.

A. Qualification Requirements

9. This category presented a high number of regulation examples with Mode 4 linkages. The major Mode 4 linkage with qualification requirements is recognition. Mode 4 barriers may result from a lack of recognition of qualifications and qualification requirements that are not relevant for performing job duties. These types of recognition requirements are also often linked with prior employment requirements. According to the Global Economics 2004 report by the World Bank, prior employment requirements are one the most frequent restrictions applied to foreign service providers.⁴
10. Furthermore, requirements and procedures under other regulatory categories can also indirectly present challenges to meeting qualification requirements. For example, a foreign service may in addition to fulfilling skill qualification requirements be required to obtain licenses for operating in a particular area.

B. Qualification Procedures

11. more salient Mode 4 issue here falls under visa and work permit procedures. Delays, expensive fees and the requirement of large amounts of information and documentation to acquire a visa or work permit my present Mode 4 barriers. The absence of a streamlined visa procedure could be introduced in this discussion. Cumbersome and delayed procedures administered for performing economic needs test or labour market assessments is another area with a Mode 4 linkage to domestic regulation. For example, the United States Department of Labor states that their Foreign Labor Certification process may involve four separate government agencies.⁵

C. Licensing Requirements

12. This category presented the highest number of regulation examples with Mode 4 linkages. The main types of examples are the large number of licenses required to perform one service (e.g. a bus or taxi driver may require a license to drive, a license to operate in the territory (which may require a separate license for different states), and a license to operate the vehicle), different requirements at the federal and sub-federal levels, and mandatory registration

⁴ World Bank. *Global Economic Prospects 2004. Chapter 4 on Labor Mobility and the WTO: Liberalizing Temporary Movement.*

⁵ See U.S. Department of Labor Employment and Training Administration. [www.workforcesecurity.doleta.gov/foreign\)hiring.asp](http://www.workforcesecurity.doleta.gov/foreign)hiring.asp)

with or memberships in professional organisations in order to receive a license (membership requirements and fees may pose additional barriers).

D. Licensing Procedures

13. This category presented a high number of regulation examples with Mode 4 linkages. The main types of Mode 4 barriers are lengthy time frames for processing or renewing a licence, expensive fees, licence applications requiring a high degree of information and licences permitted only by industry associations. The last example can introduce an added burden if it requires membership of the association.

E. Technical Standards

14. This category had the least number of examples. The main type of Mode 4 restriction here is based on unreasonably stringent standards that prevent a person from performing the job duties in the host country.

IV. DISCUSSION

15. This note has provided some insight into possible ways of introducing and addressing potential Mode 4 barriers under Article VI:4 disciplines. Some key areas discussed were lack of recognition, cumbersome visa procedures and burdensome licensing requirements. Although developing country and LDC Members may use these opportunities to increase engagement in WPDR discussions and further implement mechanisms for increasing liberalisation of Mode 4, the results of negotiations for Article VI:4 disciplines will ultimately come down to trade-offs. One important observation to make here is on the fact that many developed countries offers under Mode 4 are more restrictive than what existing temporary foreign labour regulations would allow (especially through bilateral and regional agreements such as the North American Free Trade Association). According to some analyses, this is partly attributed to developed countries' desires to maintain flexibility in their labour market policies for any cyclical, seasonal or security changes.⁶ Another crucial issue is visa procedures. Some developed country Members continue to resist the idea of including visa procedures under Article VI:4. Similarly, there may be a push by developed countries to move Mode 4 issues into the realm of National Treatment.⁷ This would limit the ability to include Mode 4 issues within Article VI:4 disciplines.

⁶ World Bank. Global Economic Prospects 2004. Chapter 4: Labor Mobility and the WTO: Liberalizing Temporary Movement.

⁷ See *Examples of Measures to be Addressed by Disciplines Under GATS Article VI:4* (WTO Document code: JOB(02)/20/Rev.7)

16. The pace and progress of WPDR discussions is also important in the analysis of potential outcomes. There is currently increasing momentum amongst developed countries to further and conclude these negotiations. This is seen by the latest Japan proposal for an annex of disciplines and the European Commission (EC) proposal on licensing procedures. Furthermore, the proposal submitted by Japan excludes the issue of Mode 4. Latest press releases by the European Services Forum calls on the EC to push for movement in negotiations. Based on the political realities of current negotiations, introducing Mode 4 into Article VI:4 discussions must be undertaken with caution.

17. Recognising that developed countries may not be willing to offer much in Mode 4 in the current and foreseeable future, developing country and LDC Members must be careful with accepting small gains in Mode 4 for large losses in national sovereignty within the overall disciplines for domestic regulation. It must be well understood that increasing movement of natural persons would still mostly be realised through specific commitments. Article VI:4 disciplines cannot induce developed countries to increase Mode 4 offers to middle and lower skilled levels. However, one may look at implementation of existing commitments to assess whether certain skill levels have more regulatory barriers than others. For example, are independent contractors likely to face more barriers than intra-corporate transferees? A lot of the discussion within the WPDR has focused on utilising the Accountancy Disciplines as a framework for disciplines. Can the accountancy disciplines adequately capture all relevant Mode 4 issues? Further analysis is needed on these overarching issues in order to approach the Mode 4 in WPDR discussions in a more comprehensive manner.

ANNEX 1

Following are lists of examples of domestic regulation with Mode 4 linkages that may be addressed under Article VI:4 disciplines.

Examples of qualification requirements with a Mode 4 linkage

From *Examples of Measures to be Addressed by Disciplines Under GATS Article VI:4: Informal Note by the Secretariat*. JOB(02)/20/Rev.7. 22 September 2003.

{All Sectors}

- Only persons who have specific certification from a government agency can take up managerial posts (e.g. managers of an insurance company must have certification from the insurance agency in that country).
- Requirement for fluency in language of the host country which in some cases is not relevant to ensure the quality of service.
- Different sub-federal regulations for recognition of qualifications.
- Minimum requirements for local hiring (accountancy).
- A large number of documents is required (application procedures).
- Need for in-country experience before sitting examinations (accountancy).
- [Subject to Members' interpretation.] The chairperson of the board and the general manager of an engineering consulting firm are both required to be licensed professional engineers of the host Member (engineering services).
- At least half of all the directors or shareholders who are actually conducting the business of an engineering consulting firm shall be licensed professional engineers (engineering services).
- At least one third of the directors should be medical professionals (hospital services).

{Non-Accountancy Sectors}

- Residency requirements.
- The scope of examinations of qualification requirements goes beyond subjects relevant to the activities for which authorization is sought.
- Requirements needed for eligibility to take exams are more burdensome than necessary and not relevant to ensure the quality of service (e.g. must stay in that country at least 3 years to be eligible to take exam).
- Qualification requirements other than education, examinations, practical training, experience and language skills.
- Examinations that do not appear to be directly related to the concerned qualifications are required.
- Educational background in certain countries/regions is the prerequisite for granting of licenses, while the academic background of foreign professionals is not recognized.
- Requirements of previous working experiences in host markets: Natural persons applying for professional licenses should have certain years of working experiences in the host markets.
- Requirements which do not take account of foreign qualifications.

- Local training requirements exceeding 12 months.

From (S/C/W/97). *International Regulatory Initiatives in Services*. 1 March 1999

- Three EC Directives allow for access to all fields of law, including representation services and host country law. Non-European lawyers who are qualified outside the European Union cannot invoke the Directives. Individual EU Member States regulate the access of foreigners into their legal services. Foreign lawyers who practice are required to submit to the deontology of both home and host state and be assisted by a local lawyer for in-court services (the latter especially could present challenges).
- NAFTA does not have binding provisions on the mutual recognition of qualifications but includes transparency, objectivity and licensing in professional services.
- citizenship/residency requirements

Examples of qualification procedures with a Mode 4 linkage

From *Examples of Measures to be Addressed by Disciplines Under GATS Article VI:4: Informal Note by the Secretariat*. JOB(02)/20/Rev.7 22 September 2003.

{ All Sectors }

- [Subject to Members' interpretation.] In a certain sector, prior approval is required by the competent authority to the employment of managers, assistant managers and supervisors of certain departments as designated by the authority (banking services).

{ Non-Accountancy Sectors }

- Long delays in the verification of an applicant's qualifications acquired in the territory of another Member.
- Lack of a legal framework for accepting professionals with foreign qualifications, or lack of internal consistencies of such a framework.
- Non-recognition of foreign qualifications (including engineering, construction, financial and sporting services).
- Limited or no recognition of foreign qualifications (architecture, legal services).
- Non-recognition of qualifications obtained in country of origin (e.g. not accepting cooking certificate from a government institute) and refusal to consider past working experiences and/or apprenticeship in country of origin.
- Common exclusion of developing countries from mutual recognition agreements
- Unreasonable intervals for examination of applications.
- Limited openness of process (all eligible applicants do not benefit from the same level of openness).
- Unreasonable period of time for the submission of applications.
- Excessive administrative costs that do not reflect fees charged.
- Residency requirements for sitting examinations (not subject to Article XVII).

Examples of licensing requirements with a Mode 4 linkage

From *Examples of Measures to be Addressed by Disciplines Under GATS Article VI:4: Informal Note by the Secretariat*. JOB(02)/20/Rev.7 22 September 2003.

{ All Sectors }

- Federal and sub-federal licensing and qualification requirements and procedures are different, making a license or qualification recognition obtained in one state not valid in other states.
- Overly burdensome licensing requirements (e.g. minimum age required for a physiotherapist is 25 years old).

{ Non-Accountancy Sectors }

- Absence of pre-determined, clear criteria for licensing requirements (including postal and courier, and distribution services).
- Unreasonable restrictions on licensing (legal services).
- Restrictive licensing practices (tourism).
- Unclear licensing and approval requirements (energy services).
- Unspecified approval and licensing requirements (environmental, financial and tourism services).
- Irrelevant requirements to obtain license (e.g. jewellery artists must obtain a permit or license from the National Bank).
- Non-transparent registration procedures; unpredictable timeframe for registering process.
- Restrictions on registration (e.g. residency requirements), which prevents foreign engineers from signing off on drawings and managing projects.
- Unduly burdensome requirements.
- Onerous licensing requirements (consulting, engineering, construction, and distribution services).
- Registration is required both at the central and local governments (or local commercial courts); the procedures at the local level are often not transparent and taking a long time without adequate explanation for the delay.
- Residency requirements (including computer, telecommunications, audiovisual, construction, distribution, energy, financial, sporting, and tourism services).
- Residency requirements for advertising production professionals filming in some countries and/or for employees of the advertising firm.
- Mandatory membership of a Chamber of Commerce or a local association required as a pre-condition to operate business in local areas.
- To be licensed as a professional, there is a requirement or pre-requirement to be a member of an affiliate organization. This organization has no regulatory authority over the profession (i.e. union, country club). To be a member of this organization, the licensee must be a resident of the territory or have lived in the territory for the past six months.
- Requirement to have numerous different legal entities as a pre-condition to apply for a business operation license.
- Applicant must possess indemnity insurance or be bonded prior to licensing.
- Licensing fees that are considered as expensive by international standards.
- Registration/approval is required in order to provide services.
- Special registration requirements for firms to operate in individual countries (construction service).
- Authorization requirements are cumbersome: e.g. a permit is required for every single project.
- Residency requirements

- Minimum capital requirements.

From (S/C/W/97). *International Regulatory Initiatives in Services*. 1 March 1999

- for legal services, NAFTA mandates consultation with professional bodies on matters such as associations and partnerships between locally licensed lawyers and foreign legal consultants
- international code of ethics for lawyers

Examples of licensing procedures with a Mode 4 linkage

From *Examples of Measures to be Addressed by Disciplines Under GATS Article VI:4: Informal Note by the Secretariat*. JOB(02)/20/Rev.7. 22 September 2003.

{ All Sectors }

- Authorization may not be handled through a single point.
- Inability of applicants to file complaints regarding review of their applications.

{ Non-Accountancy Sectors }

- Work history and letters of reference from all previous employers unrelated to the authorization sought.
- Documented proof of physical and mental well-being.
- Overly complicated licensing procedures (e.g. have to go through many steps in many agencies in order to obtain a license).
- Excessive, vexatious formalities, lacking in transparency, for professional licensing purposes, etc.
- Only original documents will be accepted.
- Only documents translated or authenticated by that country's embassy will be accepted, causing unnecessary delays and expenses (especially if additional documents for an application are required at short notice).
- Delays in receiving an application.
- Delays in informing the applicant of the decision (unreasonable time).
- Where government approval is required but denied, no reasons are given for denial, and no information is given on what must be done to gain approval in the future.
- No possibility for the applicant of correcting minor errors in its application form.
- No possibility of resubmitting applications for licensing after a first rejection.
- Delays in implementing the terms of the licence
- Lack of transparency.
- The period of time required for the processing of a license application is not very clear.
- The processing period for a license application is long.
- A great deal of documents must be submitted throughout several stages in order to obtain authorization.
- Excessive application and processing fees (including postal and courier, distribution, and educational services).
- Authorization procedures are costly.
- Authorization procedures take up a considerable amount of time.
- Applications to more than one licensing authority in any given jurisdiction for a particular service are required.

Examples of technical standards with a Mode 4 linkage

From *Examples of Measures to be Addressed by Disciplines Under GATS Article VI:4: Informal Note by the Secretariat*. JOB(02)/20/Rev.7 22 September 2003.

{ All Sectors }

- Local standards requirements: in some federal system Members, the sub-federal governments maintain different technical standards from one another, which has constituted severe impediments to foreign construction firms contracting projects.
 - [Subject to Members' interpretation.] Restrictions on fee-setting, and restrictions/prohibitions on marketing and advertising.
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