

**BACKGROUND NOTE: ARTICLE VI (DOMESTIC REGULATION) WITH  
EMPHASIS ON PARAGRAPH 4 AND THE EU AND JAPANESE PROPOSALS**

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**I. INTRODUCTION**

1. Many subsectors within the service sector, such as infrastructure services, are regulated with the aim to ensure a certain level of quality, to protect consumers, or the environment. Further, in the financial services sector regulation is deployed to ensure a country's financial stability. Given the importance of regulation in services, governments are often cautious about adopting generalized rules. Acknowledging this caution, the GATS explicitly recognizes the right and need of members to enforce domestic policy objectives through regulation.
2. The reality that domestic regulations are often used for social and development reasons, and not primarily to promote market access, is a key point of consideration for the WTO Working Party on Domestic Regulation. Within this context it is important for each Member-State to determine the extent to which disciplines affecting domestic regulations can be based on principles of economic efficiency and market access.
3. Members have also to consider that implementation of disciplines resulting from deliberations on Article VI: 4, while involving technical considerations, will result in administrative costs and entail economic, cultural, social, and political consequences. Further, paragraph 4 has to be considered within the context of the GATS agreement and, in particular, the accompanying paragraphs in Article VI.

## II. ARTICLE VI: POTENTIAL SCOPE AND REQUIREMENTS, AND ISSUES OF CONCERN

4. There are ongoing discussions about whether the disciplines should be horizontal or sectoral. Article VI: 1 begins by singling out those “sectors where specific commitments are undertaken”. It is reasonable to assume that this phrase points to the intent of the trade negotiators who conceived this Article, namely that disciplines would cover **only** those sectors for which members have undertaken specific commitments.
5. Further, given the diversity that exists within the broad category of “the services sector,” both within and between countries, as well as the changing nature of services, any generalized, across the board approach towards domestic regulation would be rendered worthless from a practical point of view. In other words, it can be argued that the details of any discipline can only be useful in the context of the GATS if it is drawn up with a particular sector, and sometimes subsector, in mind.<sup>1</sup> This becomes even more apparent in the context of “measures relating to qualification requirements and procedures, technical standards and licensing requirements”, which to be useful can only be specified for a given service.
6. Article VI: 4 states: With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, inter alia:
  - (a) based on objective and transparent criteria, such as competence and the ability to supply the services;
  - (b) not more burdensome than necessary to ensure the quality of the service;
  - (c) in the case of licensing procedures, not in themselves a restriction on the supply of a service.

The WTO, in an informal note<sup>2</sup>, provides the following definitions to members:

*Qualification requirements:* these comprise substantive requirements which a professional service supplier is required to fulfill in order to obtain certification or a license. They normally relate to matters such as education, examination requirements, practical training, experience or language requirements.

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<sup>1</sup> This point is not meant to diminish the flexibility that a generalised approach will afford to trade negotiators.

<sup>2</sup> JOB(02)/20/Rev.7

*Qualification procedures:* these are administrative or procedural rules relating to the administration of qualification requirements. They include procedures to be followed by candidates to acquire a qualification, including the administrative requirements to be met. This covers inter alia where to register for education programmes, conditions to be respected to register, documents to be filed, fees, mandatory physical presence conditions, alternative ways to follow an educational programme (e.g. distance learning), alternative routes to gain a qualification (e.g. through equivalences) and organizing of qualifying examinations, etc.

*Licensing requirements:* these are substantive requirements, other than qualification requirements, with which a service supplier is required to comply in order to obtain formal permission to supply a service. They include measures such as residency requirement, fees, establishment requirement, registration requirements, etc.

*Licensing procedures:* these are administrative procedures relating to the submission and processing of an application for a license, covering such matters as time frames for the processing of a license, and the number of documents and the amount of information required in the application for a license.

*Technical standards:* these are requirements which may apply both to the characteristics or definition of the service itself and to the manner in which it is performed. For example, a standard may stipulate the content of an audit, which is akin to definition of the service; another standard may lay down rules of ethics or conduct to be observed by the auditor.

7. According to Article VI and previous discussions of the Working Party<sup>3</sup>, there are four concepts on which potential disciplines can be based: transparency; equivalence; necessity; and international standards. These concepts directly link Article VI with Articles III (Transparency) and VII (Recognition). Members will need to clarify these links, particularly when establishing disciplines.

### III. PROPOSALS FROM THE EC<sup>4</sup> AND JAPAN<sup>5</sup>

8. The EC's proposal addresses the scope of future disciplines under Article VI: 4, and suggests "elements for possible disciplines on licensing procedures". In terms of the former it notes that disciplines can be both horizontal and

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<sup>3</sup> JOB 2800

<sup>4</sup> S7WPDR/W/25

<sup>5</sup> JOB(03)/45/Rev.1

sectoral: Paragraph 5 states that the “EC is of the view that these two approaches should not be seen as mutually exclusive.” However, one can argue that given the diversity of the services sector, from a practical point of view a sectoral approach can best address the concerns of the Members. Further, the precedent set by the agreement in the accountancy sector confirms and underlines this point. In other words, operational disciplines cannot be developed in generalized forms, they can only be written for a particular service sector, such as transport.

9. In addition, paragraph 2 notes that disciplines should not be “applied with a view to undermine commitments negotiated”. This raises another question about the scope of the disciplines: will they only cover commitments already **negotiated**, or will they cover both current and future commitments? Given the dynamism and diversity within the services sectors is it feasible that disciplines for services yet to be defined can cover commitments yet to be negotiated? On the other hand, from a practical point of view, will it be possible to differentiate between those committed sectors from newly committed sectors? What implications will this have for the integrity of the GATS?
10. The EC lists 6 elements for possible disciplines in the context of licensing procedures. They: (i) “are pre-established, publicly available, and based on objective criteria; (ii) identify activities, terms and conditions; (iii) include all critical information for valid completion of applications; (iv) include relevant timeframe and critical deadlines (at least indicative ones); (v) identify the competent authority; and (vi) identify the appeal procedure”. These elements raise several questions for Member-states, including: How many members have these procedures in place? For those who do not, what will be the potential administrative costs of doing this, the time frames, and in the end would it be cost effective? In other words, will the investments “that will flow in” off set the costs incurred? What are the ways in which consumers will benefit, or not, and development will be facilitated, or stymied?
11. Japan’s contribution to the debate is in the form of a draft annex. The proposal is detailed however, given its horizontal bent, and the fact that disciplines of this nature can only be concretely developed and effectively implemented at a sectoral level, it is not analysed in any detail here. See the attached Annex for a list of questions prompted by the proposal.
12. Japan proposes that “new disciplines” resulting from Article VI: 4 “could take the form of an Annex”, thereby ensuring that the disciplines therein will be an integral part of the GATS. WTO members will have to consider if this is necessary. Japan intends that it will “apply to sectors or sub sectors where specific commitments are undertaken by each Member”.
13. The proposal states that the “core” of the Annex should be applied to “measures” relating to “licensing requirements and procedures, qualification requirements and procedures as well as technical standards”. “Measures” as defined in the GATS Article I are: “measures taken by: (i) central, regional or

local governments and authorities; and (ii) non governmental bodies". Thus, Members have to consider the extent to which this proposed deepening and widening of the scope are appropriate and relevant for their various sectors.

#### IV. RECOMMENDATIONS AND AREAS OF CONCERN

14. Developing countries have to decide on their terms of engagement in this debate on domestic regulation. What is/are the best way(s) to engage in order to have the maximum gain? This will vary depending on the Member's position in services trade, and within this it is important to disaggregate at the sectoral level. The majority of developing countries are not suppliers of services internationally. Given that potential disciplines will most likely facilitate trade for those Members that are exporters of services, it is critical that developing countries also identify the potential benefits for those Members who are **service importers**. In other words, those developing countries who are exporters of services, for example computer related services or services provided through Mode IV will need to formulate their position on this Article based on the ways in which it can facilitate their exports. At the same time those Members-States who are services importers will have to consider the ways in which this Article can facilitate foreign direct investment and technology transfer without foreclosing opportunities for the development of local service industries.
15. The latter can be done at different levels. Countries that are service importers may be affected at different and multiple levels: (i) local service supplier (who may be forced to close up shop); (ii) consumer (who may stand to gain from lower prices and more choice or lose because of higher prices and loss of job, etc); (iii) governments may have additional costs related to formulating and implementing new disciplines; and (iv) accompanying effects on development goals and the ability of governments to facilitate such goals.
16. In this regard, Members may want to consider the following questions: (i) is it useful from a national perspective to consider the elements of each proposed discipline for each sector under consideration; (ii) identify its relevance or irrelevance (as the case maybe) for that particular sector from a regulatory and an economic and development perspective; and (iii) assess the overall potential costs and benefits. In this context the following additional questions may be useful for developing countries to consider: does the regulation in question constrain trade in any way? If so, will the proposed discipline erase that constraint? From an economic point of view, is the accompanying administrative burden defensible given the supposed economic gains? If not, does it make sense, from an efficiency point of view, for the government to implement the discipline? Does it make sense from a development point of view? To what extent are other disciplines necessary, should the focus be on improving the implementation of existing obligations?
17. Members may need additional concrete examples of measures relating to qualification requirements and procedures, technical standards and licensing

requirements that are present in sectors for which they both have an export interest and want to develop disciplines, e.g., Mode IV or Tourism or IT.

18. In addition, it is critical that trade negotiators from developing countries continue to keep sight of those regulations that they want to keep for development and social reasons (even if they are barriers to service exporters). If Members wish to preserve their right to support the development of an indigenous services sector, this objective may need to be translated into the schedule of commitments (in the form of limitations etc).
19. In terms of the scope of Article VI, it can be argued that if disciplines are applied on a horizontal basis the flexibility of the GATS will be compromised. However, one can argue that this will not necessarily be the case because of the flexible nature of the horizontal commitments. Further, given the differences within services sectors, Members will have to decide whether horizontal or sectoral disciplines can best address their concerns about recognition, transparency etc.
20. Members, and in particular, LDCs, may want to consider whether the administrative burden of new disciplines on domestic regulation will necessitate the need for special and differential treatment. Also given that regulatory responsibilities tend to be spread across ministries, state and local agencies, including finance, justice, construction, transport, health and education, and non governmental organizations, a variety of actors will have to be consulted in order to formulate regulations that are operational.
21. It may be useful input into the discussion to know what has resulted from the disciplines in the telecommunication and accountancy sectors, namely, how have suppliers, consumers and the larger society in developing countries been affected? To what extent are these disciplines susceptible to adoption in other sectors?
22. Further, Members may want to conduct an investigation into the disciplines that result from bilateral and regional agreements between developing countries. Could they be useful and relevant for informing this debate at the WTO? Can developing countries use them to inform this discussion, or are they already more intrusive than developing countries would want?
23. Given that domestic regulation aims to promote both efficiency and equity, it would be useful for trade policy makers to consider the extent to which the former is gained at the expense of the latter before formulating disciplines. In this context specific questions can be considered:
  - In what ways are the proposals beneficial from the point of view of the trade negotiator?
  - In what ways are the proposals beneficial from the point of view of the domestic regulator at the national level?

- In what ways are the proposals beneficial from the point of view of a developing country service provider who is able to compete internationally?
  - In what ways are the proposals beneficial from the point of view of a developing country service industry supplying locally?
  - In what ways are the proposals beneficial from the point of view of the local consumer (civil society)?
  - In what ways are the proposals beneficial from the point of view of civil society?
  - In what ways are the proposals beneficial from the point of view of the current service providers (i.e., members of the Quad)?
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