

THE DEVELOPMENT DIMENSION OF THE GATS DOMESTIC REGULATION NEGOTIATIONS

SYNOPSIS

This Analytical Note discusses the implications GATS Article VI: 4 disciplines can have on developing countries and least developed countries and their pursuit for development through domestic regulations.

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I. Introduction

1. Negotiations to develop disciplines on domestic regulations mandated by the General Agreement on Trade in Services (GATS) Article VI: 4 are to be concluded before the end of the Doha Round of negotiations in the World Trade Organisation (WTO). Following this mandate from the Hong Kong Ministerial Declaration, negotiators have been extensively involved in finalising discussions for disciplines on how Members implement their qualification requirements and procedures, licensing requirements and procedures and technical standards.
2. This paper discusses the implications GATS Article VI: 4 disciplines on domestic regulation can have on developing countries and least developed countries (LDCs). After a brief overview of the state of regulatory capacity in developing countries, sections three and four analyse the implications the various disciplines, particularly their reach and scope, can have on developing countries' regulatory autonomy and especially on the use of regulations for development purposes. Section five analyses the GATS Working Party on Domestic Regulation (WPDR) Chair's consolidated Working Paper of the majority of proposals submitted by Members thus far. This section also aims to give a flavour of the current state of negotiations. In conclusion, recommendations are provided on how disciplines can be designed to be in line with developing country interests and development goals.

II. State of regulatory capacity in developing countries and development

3. It is widely acknowledged that proper regulations and regulatory institutions are necessary for successful economic development.¹ Efficient domestic markets (mainly in developed countries) are the product of sophisticated and complex systems of regulations that were utilised in the past to develop domestic industries to become the highly competitive players that they are today in the global market.² Markets that are not perfect also need regulations to ensure beneficial outcomes for society at large. For example, privatization and liberalisation reforms that took place in the telecommunication sector during the 1990s in many developing countries

¹ See Kaufmann, et al "Governance Matters IV: Governance Indicators for 1996 - 2004". Policy Research Working Paper No. 3630, World Bank. June 2005.

² See Chang, H. J. and Green, D. "The Northern WTO Agenda on Investment: Do as we Say, Not as Did", South Centre/ CAFOD, June 2003. on a discussion of how developed countries pursued regulations on foreign investment in their earlier stages of economic development to limit foreign investors' controls in the domestic economy, which led to fast growing economies.

were seen to be counterproductive and without gains due to a lack of proper institutional arrangements and effective regulations.³

4. Proper regulation for trade in services is particularly important to contribute positively to social welfare. Taking the example of infrastructure services, privatisation has shown to bring about economic and social gains only when overseen by proper regulations and regulatory frameworks. In developing countries, many studies have shown that benefits from privatisation are dependent on the post-privatisation regulatory framework.⁴
5. The state of regulatory capacity in developing countries is generally weaker (or non-existent at times) than in developed countries. A World Bank study measuring “government effectiveness”, defined as the ability of government to formulate and implement sound policies, showed developing countries falling far below developed countries in a percentile ranking⁵ of world regions (see Table 1).⁶ Of developing country regions, Sub-Saharan Africa ranked the lowest of developing country regions at 28th percentile and the Caribbean the highest at 67th. When compared with the OECD countries that on average rank at 90th percentile it is clear developing countries do not match the regulatory capacity levels of developed countries.

Table 1: Government Effectiveness recorded in 2004 for world regions. Regions are listed from “worst” to the “best”.

Country	Percentile Rank (0-100)
Former Soviet Union	24.1
Subsaharan Africa	27.6
South Asia	38.5
Latin America	42.1
East Asia	46.0
Middle East & North Africa	50.8
Eastern Europe & Baltics	62.2
Caribbean	65.7
OECD	89.7

Source: Kaufmann D., A. Kraay, and M. Mastruzzi 2005: Governance Matters IV: Governance Indicators for 1996-2004, World Bank.

³ Gillwald, Allison. “Policy and Regulatory Challenges of Access and Affordability” in Networking Knowledge for Information Societies: Institutions and Interventions, Delft University Press. 2002.

⁴ Kirkpatrick, C. and Parker, D. “Infrastructure Regulation: Models for Developing Asia”, Asian Development Bank Institute Research Paper Services No. 60, November 2004.

⁵ A percentile rank indicates the percentage of countries worldwide that rate below the selected country (subject to margin of error). The percentile rank number indicates the percentage of countries that rate worse while the percentile rank - 100 is the percentage of countries that scored best.

⁶ See Kaufmann, et al in “Governance Matters”. Policy Research Working Paper No. 2196, World Bank. October 1999. “Government effectiveness” involves several issues, which are the “quality of public services provision, quality of the bureaucracy, competence of civil servants, independence of civil service from political pressures, and credibility of government’s commitment to policies into a single grouping”, p. 8.

6. Studies by the World Bank and the United Kingdom Department for International Development continue to show the positive link between better governance and development in developing countries, which includes increased competitiveness and fulfilment of development policy objectives.^{7,8}
7. For these reasons, the GATS disciplines on domestic regulation must fully consider the weaker regulatory competency and capacity in developing countries. The disciplines must not hinder the future growth of regulatory capacities in developing countries nor straightjacket their regulatory tools through harmonization and strict parameters on regulatory mechanisms that are utilised for development.

III. The mandate, scope and reach of GATS Article VI: 4 disciplines

8. GATS Article VI: 4 (see Box 1) mandates WTO Members to develop disciplines to ensure that qualification and licensing requirements and procedures and the use of technical standards on foreign service providers do not intentionally or unintentionally result in restrictions on trade in services. This work is being undertaken by the WPDR -- a subsidiary body created by the Council for Trade in Services to undertake these negotiations. The main concerns and interests expressed in the negotiations by Members for each of the five areas under consideration and additional related issues are described below.

A. Article VI: 4 elements

(a) Qualification Requirements and Procedures

9. A definition for qualification requirements has not yet been agreed to by Members. The Note by the WPDR Chairman on a Consolidated Working Paper (WP)⁹ (see discussion of the Working Paper in Section V), however, has suggested the following definition, which seems to be generally accepted by most Members: "qualification requirements are substantive requirements relating to the competence to supply a service that a service supplier is required to demonstrate prior to obtaining authorization to supply a service." Qualification requirements are normally thought to include educational degrees or certificates, examinations, skills such as language competency, etc. Members are interested to ensure that these requirements are fair and not utilised intentionally as a barrier for foreign service providers.

⁷ See Kaufmann, et al in "Governance Matters". Policy Research Working Paper No. 2196, World Bank.

⁸ Better Government for Poverty Reduction: More Effective Partnerships for Change. Consultation Document. Department of International Development, United Kingdom, April 2003.

⁹ See *Disciplines on Domestic Regulation Pursuant to GATS Article VI: 4 Consolidated Working Paper*, Note by the Chairman. WTO Document Code: JOB(06)/225, 11 July 2006.

Box 1 - GATS Article VI: 4

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*:

- i. based on objective and transparent criteria, such as competence and the ability to supply the service;
- ii. not more burdensome than necessary to ensure the quality of the service;
- iii. in the case of licensing procedures, not in themselves a restriction on the supply of the service.

10. Similarly, Members are yet to agree on a definition for qualification procedures. The WP's suggested definition is: "qualification procedures are administrative or procedural rules relating to the administration of qualification requirements, including those aiming at verifying the compliance of candidates with qualification requirements as well as those relating to acquiring or supplementing such qualifications." Qualification procedures are considered to include the amount of time taken to process applications, the frequency of examination, the costs of applications or examinations, recognition of qualifications obtained in a third country, among others. Again the objective with disciplines with procedures is to ensure they do not create barriers to trade in services.

11. Some Members consider that disciplines for qualification requirements and procedures (QRP) will mainly apply to the movement of natural persons as service providers or Mode 4. In this regard, their approach to negotiations has been from the point of view of a mode 4 service supplier. However, qualification requirements can be applied on service suppliers in other modes of supply¹⁰. For example, service providers supplying online banking services (through mode 1) can be required to have in place a certain degree of security levels for their on line customers. This requirement for a mode 1 service provider meets the definition of qualification requirements (proposed above) to result in showing the "competence to supply a service that a service supplier is required to demonstrate...". In mode 3, for example a construction firm, may have to show successful completion of a number of construction sites before given authorization to establish a construction firm in another country. In the evolving world of services trade, it is difficult to see the use of

¹⁰ The four modes of supply in GATS are: mode 1: cross-border supply, mode 2: consumption abroad, mode 3: commercial presence and mode 4: movement of natural persons.

qualification requirements limited to mode 4. Given the ambiguity on whether what is required for non mode 4 authorization would fall under licensing or qualification requirements, some Members' proposals include the same types of disciplines falling under licensing (traditionally considered to apply to mode 3) requirements and procedures and QRP, e.g. disciplines on examination requirements.

Box 2 - Proposed definitions of Article VI: 4 elements by the Chair of the WPDR on 11 July 2006 in the Chair Consolidated Working Paper

- "Licensing requirements" are substantive requirements, other than qualification requirements and technical standards, with which a service supplier is required to comply in order to obtain or renew authorization to supply a service.
- "Licensing procedures" are administrative or procedural rules relating to the administration of licensing requirements for the supply of a service, including those relating to submission and processing of an application for a licence or renewal thereof.
- "Qualification requirements" are substantive requirements relating to the competence to supply a service that a service supplier is required to demonstrate prior to obtaining authorization to supply a service.
- "Qualification procedures" are administrative or procedural rules relating to the administration of qualification requirements, including those aiming at verifying the compliance of candidates with qualification requirements as well as those relating to acquiring or supplementing such qualifications.
- "Technical standards" are measures that lay down the characteristic of a service or the manner in which it is supplied. Technical standards also include the procedures relating to the enforcement of such standards.

Source: WTO Document Code: JOB(06)/225.

12. However, the mode 4 bias of some Members towards QRP is seen through proposals that provide a higher degree of detail for disciplines on QRP than for the other elements of Article VI: 4 measures. The most comprehensive proposal on QRP has been submitted by Chile, India, Mexico, Pakistan and Thailand on 1 May 2006. Although this and other proposals aim to provide carefully crafted and detailed disciplines to secure mode 4 commitments (particularly for developing countries), it must be kept in mind that these disciplines will also apply to other modes of supply and have to be complied by developing countries as well. India, for example, is experiencing a rise in the number of foreigners seeking services jobs cropping up from the outsourcing industry, e.g. jobs that require fluency in the foreign languages of the source countries of outsourced services. Additionally, Evalueserve, a leading Knowledge Process Outsourcing firm in India, projects a future shortage of Indian workers with foreign language skills to work in the

growing outsourcing industry thereby potentially increasing demand for foreign workers in India. Some foreign service commercial entities in India, such as eBookers, have already noted the delays in administrative procedures that “while it takes a week or two in Europe to process a visa, getting a work permit on the ground in India takes three or four months.”^{11,12}

(b) Licensing Requirements and Procedures

13. Concerns about licensing requirements include cumbersome or multiple levels of requirements, costly licensing fees, residency requirements. The definition for licensing requirement suggested in the WP is “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...” Concerns with licensing procedures include delays with licenses entering into effect, long time frames for application approval, amount of documentation, and lack of transparency on the reasons for denial. The suggested definition for licensing procedures is “administrative procedures relating to the submission and processing of an application for a licence...”
14. Among the proposals submitted by Members, the EC Proposal for Disciplines on Licensing Procedures (WTO Document Code: S/WPDR/W/25) is the most comprehensive. It aims to tackle specific issues such as documentation requirements, decision-making timeframes, transparency of various procedural matters, and mechanisms used to review rejected applications. The EC proposal presents a comparable level of specificity to licensing procedures as does the Chile et al proposal on QRP. Given the EC’s general interest in lowering market access barriers in Mode 3¹³, the decision to submit a proposal only on licensing procedures signals a bias to approach licensing issues mainly from a Mode 3 perspective.
15. Strict disciplines on licensing procedures can be quite harmful for developing countries particularly given their low level of technological development and sophistication of regulatory bodies and frameworks. The EC proposal is particularly worrisome on this front as it does not consider the resource constraints of developing countries and LDCs and their ability to comply with the provisions. It fails to recognise that developing countries do not always have the capacity to ensure streamlined procedures and quick responses to applications. A few of the particularly worrisome provisions call for:
 - Documentation format to not be “unreasonable”
 - Procedures to be “as simple as possible”
 - In principle, only one authority responsible for licence applications

¹¹ “Why foreigners love to work in India” by Nandini Lakshman. Businessweek, 12 January 2006.

¹² There is disagreement among Members on whether visa procedures are in fact included in Article VI: 4 disciplines. Many developing countries consider that they are, while many developed countries do not.

¹³ See *Whose Development Agenda? An Analysis of the European Union’s GATS Requests of Developing Countries*. World Development Movement, April 2003.

- Where possible, accept applications in electronic format
16. In addition to the several reasonableness tests (which can have similar negative implications as the necessity test – see discussion below), the EC proposal uses terms such as “in principle” or “where possible” can also be used in a dispute settlement case as soft obligations. In other words, “where possible” a developing country that has in place information technological capacity could be obliged to process applications in electronic format even if such resources would be better spent in other areas to fulfil development goals and objectives.
17. The proposal by Australia et al (WTO Document code: JOB(06)/193) also proposes stricter disciplines for procedures (through necessity tests) than requirements. The Japan proposal (WTO Document code: JOB(03)/45/Rev.1) similarly is void of necessity tests for the provisions on requirements but includes on for licensing procedures. Even the US in its 11 July 2006 Communication titled “Outline of US Position on a Draft Consolidated Text in the WPDR”¹⁴ proposes “more developed disciplines [in licensing and qualification procedures], since over time best practices have developed and adopted on a regional or international basis”.
18. The push for strict disciplines on procedures ignores the challenges faced by regulators in many developing countries and LDCs that do not have the technical, financial and human resources in place to undertake streamlined, efficient and sophisticated procedures.
19. Finally, as Members have a tendency to associate QRP with Mode 4, there is also a tendency to associate licensing requirements and procedures (LRP) with Mode 3. However, similar to the reasoning discussed for QRP, Members should consider all the modes of supply in their negotiating objectives.
- (c) Technical Standards
20. Unlike trade in goods, technical standard for services have not been defined in the WTO. Although a definition similar to that used for the Agreement on Technical Barriers to Trade (TBT) for trade in goods (“requirements which may apply both to the characteristics or definition of the service itself and to the manner in which it is performed”) is suggested by the WP, many Members are still unclear on exactly what technical standards for services are.¹⁵
21. Without much clear understanding from a services perspective, some Members have tended to approach the negotiations to develop disciplines for technical standards in services from a goods perspective. Switzerland and

¹⁴ See WTO Document Code: JOB(06)/223.

¹⁵ See “Summary of the Informal Meeting held on 6 February 2006”, Note by the Chairman. WTO Document Code: JOB(06)/32 on 24 February 2006.

Mexico has done just that by submitting the most far reaching proposal on technical standards proposal based highly on the Agreement on TBT. In it, they¹⁶:

- i. Define technical standards to include conformity assessment procedures and call for their usage
 - ii. Discipline the use of voluntary (in addition to mandatory) standards
 - iii. Oblige compliance by non governmental organisations with government delegated authority and business associations without power delegated by government on a best endeavour basis
 - iv. Oblige and encourage the use of international standards¹⁷
 - v. Use of necessity tests and conformity assessment procedures
 - vi. Oblige giving equivalent treatment of importing Members' technical standards in fulfilling their national policy objective where feasible
22. Several concerns have been raised with the provisions listed above. The main concern, in addition to a lack of existence and hence understanding of standards for services, is the use of the TBT approach. Concerns have been raised on the potential wide scope of coverage of the proposed definition and whether standards applied for trade in goods and other areas, e.g. Annex on Financial Services, would also be disciplined. The use of a TBT-like definition also raises the question as to whether these technical standards are indeed relevant to international trade.¹⁸
23. The use of conformity assessment procedures has raised concerns as they are not commonly practiced for trade in services. The Switzerland and Mexico proposal also sets out that such procedures shall not create unnecessary barriers to trade (see discussion on necessity test below). However, without experience in such assessment procedures for technical standards in services, it may be difficult to consider what types of procedures create barriers to trade.
24. There also has not been enough research conducted to know whether certain technical standards can be met by fulfilling qualification and licensing requirements. For example, a foreign bank providing on-line banking services may fulfil its requirement to meet a technical standard -- that is to provide services with a certain degree of security protection -- by submitting a certificate of performance as a qualification or licensing requirement to prove its ability to provide the protection. Thus, here is a scenario whereby a qualification or licensing requirement in fact fulfils a technical standard.

¹⁶ See "Proposal for Disciplines on Technical Standards in Services" by Switzerland and Mexico. WTO Document Code: S/WPDR/32/Rev.1 on 28 October 2005.

¹⁷ Obligation to use international standards as the basis for national standards unless ineffective/inappropriate to fulfil national policy objectives.

¹⁸ See Summary of Informal Meeting held on 6 February 2006 (JOB(06)/32) and Summary of Informal Meeting held on 27 March 2006 (JOB(06)/124).

25. The Switzerland and Mexico proposal also aims to discipline voluntary standards, which can interfere with an important policy tool that allows governments to provide incentives to producers and consumers in order to meet national policy objectives. The use of voluntary standards can be especially useful (particularly for developing countries) where international standards do not meet the interests or incorporate the considerations of national policy objectives.
26. Proposals submitted by other Members are less detailed than the one by Switzerland and Mexico and mainly focused on notification and transparency provisions. These proposals submit a more cautious or less ambitious approach to disciplines, which reflect the low understanding and experience many Members have with technical standards in services. This is particularly so for countries (particularly developing countries) who do not have a national framework in place to develop standards for all sectors.

B. Additional areas of concern in negotiations

27. After many years of discussions and ambiguity, the negotiations on domestic regulation disciplines are today with fewer questions and in their final stage. With a first consolidation of proposals presented for discussion (see Section V), issues concerning coverage of disciplines have been informally settled while the details of the actual disciplines for qualification and licensing requirements and procedures and technical standards remain to be agreed.
28. As of today, there are two main issues that have been tentatively agreed¹⁹ by Members in the WPDR. First is on the coverage of disciplines. Members generally agree that disciplines are to apply only to measures relating to the services committed by Members in their GATS Schedules of Commitments. Second is that disciplines are not sector-specific and are to apply to all services sectors committed horizontally. Besides these minor achievements, the remaining details (which are a lot) of the disciplines have yet to be agreed. In addition to qualification requirements and procedures, licensing requirements and procedures and technical standards that were discussed above, there are several cross-cutting elements that shape the final set of disciplines in important ways, e.g. how to bring a dispute to a Member that is not complying with the disciplines.
29. Many proposals have been submitted by Members on these additional cross – cutting elements, and they are focused on the following:
- a) necessity test
 - b) right to regulate
 - c) treatment of developing countries

¹⁹ In other words, they have no longer been an item on the agenda of substantial discussion and converging views.

- d) international technical standards
 - e) prior comment and transparency
 - f) fees
30. This section will discuss each of these elements, the various positions presented by Members and their implications from a developing country perspective and objective to fulfil development policy objectives nationally.
- (a) Necessity test
31. One of the most controversial elements in the WPDR negotiations is the use of “necessity tests” in the disciplines. A necessity test is considered by some Members in negotiations because Article VI: 4 (see box 1) states that, among other objectives, disciplines are to ensure qualification requirements and procedures, licensing requirements and procedures and technical standards are “not more burdensome than *necessary* to ensure the quality of the service”.
32. The necessity test is a concept applied to determine whether something that is trade restrictive – in this case Article VI: 4 regulations and/or their processes – is absolutely essential or the only way possible to achieve a certain end (i.e. policy goal or objective).²⁰ The WTO Secretariat defines the necessity test as a means to balance between two potentially conflicting priorities: 1) promoting trade liberalization and 2) protecting the regulatory rights of governments.²¹
33. A necessity test is not new to the WTO. In GATS, a necessity test appears in Article XIV on General Exceptions. There is also a necessity test in the Agreement on Technical Barriers to Trade (TBT) and Agreement on the Application of Sanitary and Phytosanitary (SPS) Measures agreements and GATT Article XX on General Exceptions. Analysis on the potential outcome of the use of these necessity tests in dispute settlement cases by legal scholars, regulators and civil society organisations has shown that the right of governments to regulate in the manner in which they want and is best for them can be heavily impinged. Moreover, there is no one method for utilising a necessity test. WTO rulings have applied necessity tests in different manners and therefore are unpredictable regarding their implications on defendants.²²
34. Two dispute settlement cases in GATS, *Mexico – Telecommunications* and *US – Gambling* have used a necessity test in their proceedings. In *Mexico – Telecommunications*, the Panel utilised a necessity test in a manner that required the defendant to base reasoning on counterfactual information that is, on whether predatory pricing would occur in the absence of Mexico’s then

²⁰ Kennett, M. et al *Second Guessing National Level Policy Choices: Necessity, Proportionality and Balance in the WTO Services Negotiations*. Center for International Environmental Law, August 2003.

²¹ Informal WTO Secretariat note “Application of the Necessity Test: Issues for Consideration”, WTO Document Code: Job No. 5929, 19 March 2000.

²² “GATS Dispute Settlement Cases: Practical Implications for Developing Countries” South Centre Analytical Note (SC/TADP/AN/SV/10). January 2005, Switzerland, Geneva.

disputed uniform pricing policy – a very difficult exercise to accomplish and which Mexico was not able to do.

35. In *US – Gambling*, a necessity test was applied to balance various factors. They included the: 1) interests or values (in this case public morals and public order) the measure intended to protect; 2) extent the measure contributed to meeting these interests or values (policy objectives); 3) trade impact of the measure; and 4) whether a WTO-consistent least trade restrictive alternative measure was reasonably available. On the last criteria, the Panel found that the US had not undertaken an exhaustive exploration of alternative measures that are least trade restrictive²³ – again, an exercise that is very difficult to accomplish.
36. Three GATT cases, the *US – Section 337 of the Tariff Act of 1930, Thailand – Cigarettes* and *US – Reformulated Gasoline*, also utilised necessity tests. The decisions ruled that a measure was necessary only if no alternative, that 1) could have been “reasonably expected” and 2) was GATT consistent or least GATT-inconsistent, existed at the time the disputed measure was adopted.
37. It can be said that the use of necessity tests in dispute settlement requires a large amount of burden of proof by the defendant, which can be extremely resource intensive particularly for developing countries.²⁴ Furthermore, the use of necessity tests has allowed Panels to rule on actual policy objectives of regulatory measures. This encroaches on national sovereignty and sets dangerous precedents for the future use of necessity tests in a far-reaching and regulatory-intrusive manner.
38. If a necessity test is used through Article VI: 4 disciplines for ensuring that a regulation is “not more burdensome than *necessary* to ensure the quality of the service” then policy objectives other than the quality of the service are inferior. However, even if a necessity test was not linked to meeting the quality of a service and applied broadly to any policy objectives (which had been an early proposal by Brazil et al²⁵), there is not one uniform regulatory mechanism to achieve the same policy objective. A WTO Secretariat Note on the relationship between the TBT Agreement and the Import Licensing Procedures to Article VI: 4 noted that “it is unlikely to be possible to reach a common detailed definition of what is overly burdensome for all countries...”²⁶ In other words, one may be able to show that other Members

²³ “Antigua, US Gambling Dispute: Appellate Body Issues Mixed Report”, BRIDGES Weekly Trade News Digest, Vol. 9, Number 12, International Centre for Trade and Sustainable Development. 13 April 2005

²⁴ Ibid.

²⁵ See JOB(06)*** Communication from Brazil, Colombia, Dominican Republic, Peru and the Philippines, *Elements for Draft Disciplines on Domestic Regulation*, February 2006.

²⁶ See “The Relevance of the Disciplines of the Agreements on Technical Barriers to Trade (TBT) and on Import Licensing Procedures to Article VI:4 of the General Agreement on Trade in Services”, Note by the Secretariat, WTO Document Code: S/WPPS/W/9, 11 September 1996.

are able to meet the same policy objective in a less trade restrictive manner.²⁷ In addition to not factoring in resource and capacity factors, e.g. regulatory budgets, as well as other non-trade societal features, e.g. cultural norms, legal and governmental structures, social and economic priorities, necessity tests can heavily encroach on sovereign rights.

39. It is not surprising, therefore, that Members, both developed and developing countries, are concerned about an instrument that aims balance or trade-off liberalisation with regulatory rights. However, there is no unanimous agreement among Members whether to include a necessity test in the disciplines. Proponents argue that Members could not be held accountable to the disciplines without necessity tests. Opponents hold that disciplines would themselves be the rules by which a Member will be held accountable to (even in dispute settlement proceedings). Indeed there are other WTO disciplines on regulatory procedures that do not include a necessity test, for example the Agreement on Customs Valuation and Import Licensing Procedures.
40. Proposals to limit the use of a necessity test only to procedural matters have also been presented.²⁸ This limited use, however, still infringes on regulatory freedom. For example, the time taken for processing an application or the amount of documentation required for a license can also be considered as more burdensome than necessary, while the way in which such procedures are carried out is normally dependent on resources and the capacity of governments or even non-economic factors. This could be an argument particularly if another Member can process applications faster and with less paperwork.
41. Additionally, procedures may not always be separate from requirements. For example, a regulatory body may utilise a multi-step process to approve a license whereby a service provider must have met one requirement before being able to apply for the next requirement. This step-by-step procedure (particularly in countries where multiple government agencies handle specific aspects of regulatory processes), may be deemed more trade restrictive than necessary by some, while it is in fact important for managing information flow of an application. Thus, preventing a Member from applying certain types of procedures can hinder their ability to employ regulations for qualification and licensing requirements in manner that is effective and consistent with domestic factors (economic and non-economic).

²⁷ Incidentally in the *Mexico - Telecommunications*, the US put forth a successful similar argument against a measure (disputed by the US) that Mexico utilised to meet universal service provision. The US argued that since other countries met their universal service provision through other less trade restrictive ways therefore the Mexico measure was not "necessary". See Gould, E. *Telmex Panel Strips WTO of Another Fig Leaf*, Canadian Centre for Policy Alternatives. Briefing Paper Vol. 5 No. 2, July 2004.

²⁸ See Communication from Australia et al *Article VI: 4 Disciplines - Proposal for Draft Text*. JOB(06)/193, 19 June 2006.

42. Although Article VI: 4 disciplines do indeed aim to limit part of the independence and flexibilities of regulators, the question remains on how far Members are willing to curb such independence and flexibility. At least the majority of developing countries have expressed their answer to this question through their wide opposition to the necessity test in their proposals.²⁹ In short, the necessity test is a strong “discipliner” of regulatory practices of which the majority of WTO Members are not comfortable with.

(b) Right to regulate

43. Naturally, there are concerns that Members can maintain their right to regulate services after the Article VI: 4 disciplines are adopted. This is particularly acute for developing countries whose regulatory frameworks are often times weak, nascent or even non-existent. Many developing countries are also undergoing regulatory reforms in various services sectors that require flexibility to develop, adopt and implement regulations, particularly in line with their development objectives.³⁰

44. GATS seemingly enshrines the right to regulate in its Preamble by stating:

“Recognizing the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right;”

45. Developing country Members, however, still want to ensure this recognition is not watered down in the Article VI: 4 disciplines. Thus, several developing country proposals call for strong language on the right to regulate.³¹ Some WTO Members perceive including strong language on the right to regulate would nullify market access commitments since services liberalisation is solely managed through regulations.³² However, objectives behind regulations on services are rarely based solely on promoting international

²⁹ See WPDR proposals by the ACP Group on *Pro Development Principles for GATS Article VI: 4 Negotiations* JOB(06)/136, Rev. 1 on 13 June 2006; Communication by the African Group on Domestic Regulation, Room Document on 2 May 2006; Small, Vulnerable Economies on *Trade-Related Concerns of Small, Vulnerable Economies in the Working Party on Domestic Regulation* JOB(06)/66/Rev.1 on 2 May 2006; and Communication From Brazil, Indonesia and Philippines JOB(06)/133 on 2 May 2006. The US has also publicly opposed the use of a necessity test in its *Outline of US Position on a Draft Consolidated Text in the WPDR* (JOB(06)/223) on 11 July 2006.

³⁰ See African Group Room Document titled “Communication by the African Group on Domestic Regulation” dated 2 May 2006.

³¹ See WPDR proposals by the ACP Group on *Pro Development Principles for GATS Article VI: 4 Negotiations* JOB(06)/136/Rev. 1 on 13 June 2006; Communication by the African Group on Domestic Regulation, Room Document on 2 May 2006; Small, Vulnerable Economies on *Trade-Related Concerns of Small, Vulnerable Economies in the Working Party on Domestic Regulation* JOB(06)/66/Rev.1 on 2 May 2006; and Communication From Brazil, Indonesia and Philippines JOB(06)/133 on 2 May 2006.

³² “Services Cluster” Focuses on Domestic Regulation, LDC Treatment”, BRIDGES Weekly Trade News Digest, Vol. 10, Number 23, International Centre for Trade and Sustainable Development, 28 June 2006.

trade and are rather embedded with social and non-economic policy objectives. Thus the reduction in the freedoms to regulate can reduce the ability of countries to meet non-trade social objectives including development objectives.

46. Negotiations on Article VI: 4 disciplines are aimed at finding the right balance between regulatory rights and services liberalisation. Thus far, the majority of Members have signalled that this proportional balance tips more on the side of the right to regulate for them. This is because developing countries in general face two major challenges in comparison to developed countries, which are: 1) low level of development in the services sector and 2) weak regulatory frameworks. Developing countries will need to exercise full regulatory autonomy to improve and overcome these two challenges.

(c) Treatment of Developing Countries

47. Development issues (which include special and differential treatment provisions) have been presented in several proposals by developed and developing country Members. The most extensive and comprehensive one was submitted by African, Caribbean and Pacific Group (ACP Group) titled "Pro Development Principles for GATS Article VI: 4 Negotiations".³³ Among others, the development provisions proposed were:

- complying to disciplines at a later date and in accordance with individual country schedules of implementation based on development levels, differentiated for sectors and with the possibility of postponement
- exemption for domestic regulation that pursue national development objectives, including universal access to essential services, human development and technological development
- possibility to temporarily suspend implementation of the disciplines due to circumstances that result in resource constraints, e.g. economic, civil and environmental crises or domestic reform processes requiring reallocation of human or financial resources
- in the event of a WTO dispute settlement process, accounting for asymmetries in the degree of development of services regulations and institutional capacities in different developing countries in the interpretation and application of disciplines

48. Other proposals focused on general flexibilities such as longer implementation time frames, technical assistance and capacity building assistance both for complying with the Article VI: 4 disciplines and domestic regulations in export markets. Least developed countries (LDCs) face an even greater challenge in complying with disciplines given their resource and capacity constraints in addition to weak or lacking regulatory frameworks.

³³ See WTO Document code JOB(06)/136/Rev.1 on 13 June 2006.

For this reason, the ACP Group and other Members have proposed that LDCs are not bound by Article VI: 4 disciplines.

49. Developing countries are strongly interested in flexibility that allows them to pursue development policy objectives through careful and effective regulation. Thus, their regulatory right, particularly for development purposes, must not be hampered in any way by the disciplines. Development considerations and provisions must be an integral part of Article VI: 4 disciplines if developing countries are to improve and grow with proper regulatory frameworks.

(d) International Technical Standards

50. As mentioned above, the use of language and concepts from the TBT agreement has led some to introduce discussions on the treatment of international standards in services in the WPDR negotiations. However, since international standards in services barely exist, negotiating their disciplines poses unknowns. Thus far, international standards have been or are being developed in the information technology, accounting, auditing and education sectors.³⁴ The most well known international services standards is the International Standards Organisation (ISO), which has standards for services mainly on quality management (ISO 9000). The ISO itself recognises international standards in services are still an emerging area and has only recently identified services as part of its future work.³⁵ Other international organisations developing standards for services include the World Health Organization for health technologies; the World Maritime Organization for securing maritime and inter-modal transport; and the World Tourism Organization for the quality of tourism services.³⁶

51. Disciplines on international standards in the TBT agreement has not always resulted in positive or constructive outcomes for developing countries. The TBT agreement encourages Members to adopt national standards based on international standards. Where national standards are not based on international standards, the TBT agreement requires that national standards meet legitimate policy objectives where international standards cannot. This burden of proof requirement can be burdensome for developing countries. A burdensome effect can also create a "chilling effect" particularly for developing countries and LDCs that utilise national standards more conducive to national situations and environments than international standards.

³⁴ For example, the International Federation of Accountants develops international accounting education, auditing and assurance, ethics, and public sector accounting standards (see www.ifac.org/About). The ISO 9000 series applies to services industries by providing guidelines for quality management and quality assurance (see [www.http://www.iso.org/iso/en/iso9000-14000/understand/inbrief.html](http://www.iso.org/iso/en/iso9000-14000/understand/inbrief.html))

³⁵ ISO in brief: International Standards for a Sustainable World.

³⁶ See American National Standards Institute at www.ansi.org.

52. Adopting international standards or developing national standards based on international standards can remove part of the independence of regulatory decision making authorities. This has been felt by both developed and developing countries. Since developed countries can and do develop national standards “stronger” than international ones, they must undertake costly and burdensome processes to ensure their national standards are better (than international ones) at meeting national policy objectives. On the other hand, many international standards are too strong or burdensome for adoption by developing countries. Thus, adoption of international standards in trade in goods has proven to be costly for developing countries.
53. Developing countries also face challenges adopting international standards they did not help develop either through membership or as equal participatory Members in the decision making process of international standard setting bodies. Such shortcomings are addressed in the TBT and SPS agreements through technical assistance provisions aimed at increasing the participation of developing countries in international standardising bodies and special and differential treatment provisions to encourage and facilitate their active participation in international organisations.
54. Similar to proposals currently in the WPDR negotiations, these TBT and SPS provisions are not obligatory. These best endeavour provisions unfortunately have not shown to result in increasing the participation of developing countries in international standardizing bodies.³⁷ If the Article VI: 4 disciplines aim to improve the participation of developing countries in this regard, provisions will need to be stronger and obligatory.

(e) Prior Comment and Transparency

55. The United States has particularly pushed for the inclusion of prior comment provisions as part of transparency disciplines. In its proposal³⁸ the US states that Members shall, to the extent practicable, publish in advance any regulations of general application governing licensing requirements and procedures, technical standards and qualification requirements and procedures that are proposed for adoption and allow interested parties a reasonable opportunity to comment. Further, Members should address in writing substantive issues raised in these comments. Related elements include ensuring a period of time between publication of the final regulation and its date of effectiveness.
56. Many developing countries have raised concerns with the US proposal as being too intrusive of their regulatory decision-making processes. Such an

³⁷ Sanitary and Phytosanitary Measures and Technical Barriers to Trade Summary. Global Trade Negotiations Home Page. Center for International Development at Harvard University. See <http://www.cid.harvard.edu/cidtrade/issues/spstbt.html>

³⁸ WTO Document code JOB(06)/182 titled “Horizontal Transparency Disciplines in Domestic Regulation” on 9 June 2006.

agreement in Article VI: 4 disciplines would create a formal channel for foreign actors, be they governments or the private sector, a “legitimate” say in how a Member develops its regulations. The ACP Group proposal³⁹ reflects this concern by stating that prior comment “may be contrary to constitutional structures and legal systems in many developing countries as well as result in granting foreign-service suppliers opportunities to exert undue pressure on domestic decision making process, which is the core of sovereignty”. The Africa Group proposal⁴⁰ “recall[s] the many concerns developing countries have voiced as regards possible future obligations on prior comment” and call for disciplines that are “less intrusive of domestic regulatory prerogatives”.

57. Given the nature of power imbalances between developed and developing countries, it can be expected that developing countries are less able to resist pressure from developed countries to consider their comments. Developed countries more than developing countries have the political and economic power to ensure that their or their private sector constituencies’ comments are considered in the development of new regulations. Prior comment tools therefore will mainly be utilised successfully by developed countries. Furthermore, developing countries will likely face a greater burden from prior comment obligations as they are undertaking more regulatory reforms and regulatory developments than developed countries. As a result, there are more opportunities for prior comments of new regulations in developing countries.
58. The US proposal, however, is also veiled in ambiguous language. It calls on Members to undertake the obligations “to the extent practicable”. Although this may sound like a non-binding obligation, however, the determination of “extent practicable” of a Member does not guarantee that all developing countries can be exempt from prior comment obligations.
59. Still, others may argue that countries do already undertake prior comment practices autonomously as part of their domestic regulatory decision making processes. The difference with an autonomous practice and being bound to do so in Article VI: 4 disciplines is that the latter would formalise and legitimise this practice as a rule under the WTO and can lead to potential dispute settlement proceedings (if one Member finds another to be non compliant). Prior comment provisions can also be particularly intrusive and burdensome for sub-national lawmaking bodies.
60. The ultimate concern, therefore, is legitimising and accepting in the WTO disciplines that are intrusive to sovereign processes. This concern has been expressed by Members from the onset of WPDR discussions and most

³⁹ WTO Document code JOB(06)/136.Rev.1 titled “Pro Development Principles for GATS Article VI: 4 Negotiations” on 13 June 2006.

⁴⁰ WTO Room Document titled “Communication by the African Group on Domestic Regulation” dated 2 May 2006.

developing country Members are not in favour of such prior comment obligations in the WTO further.⁴¹

61. It is likely that the most costly obligations in Article VI: 4 disciplines will fall within transparency disciplines. In this regards, developing countries have proposed disciplines for transparency that are more general in nature and in line with their capacity levels. They mainly call for access to information and making available contact information. More specifically, they include:

- ensure access to information on Article VI: 4 type legislation and regulations in an accessible and understandable manner
- publish information on a regular basis through printed or electronic media
- notify measures prior to their entry into force through a designated official journal/gazette
- provide text of regulations through enquiry points
- make available names and addresses of responsible authorities
- provide relevant information related to measures upon request

62. In general, these disciplines do not go beyond what is already required in GATS Article III on Transparency. In other words, the proposals do not place additional burdens on Members above what is already required by GATS. Existing GATS transparency obligations are already extensive (requiring substantial resources) and there is no convincing evidence that greater levels of transparency can result in greater “good”.

(f) Fees

63. Licensing and qualification fees are used by countries for important and various regulatory functions including public funds. Concerned that Article VI: 4 disciplines may limit such uses, many developing countries have proposed⁴² to curb disciplines of fees to only those for administrative costs. In other words, non-administrative fees are not to be disciplined.

64. The Small, Vulnerable Economies proposal⁴³ had argued that in some countries, regulators utilised income from fees for part of their regulatory budgets. This practice, however, is not restricted to developing countries. The EC, for example, utilises administrative fees from electronic communication service providers to cover the costs of national regulatory authorities for managing the general authorisation system, assigning rights of use, policing competition and ensuring universal service provision. These charges can be used to cover costs of international cooperation, harmonisation

⁴¹ Report of the Meeting Held on 2 October 2001. Note by the Secretariat. WTO Document Code: S/WPDR/M/13 on 21 November 2001.

⁴² They include proposals from Brazil, Philippines and Indonesia, the Small, Vulnerable Economies, Africa Group, and China and Pakistan.

⁴³ See “Summary of the Informal Meeting Held on 27 March 2006”, Note by the Chairman, WTO Document Code: JOB(06)/124, 26 April 2006.

and standardisation, market analysis, monitoring compliance and other market controls, as well as regulatory work involving preparation and enforcement of legislation and administrative decisions.⁴⁴ Additional fees for rights of use, e.g. charged for the use of radio frequencies, can also be used to cover regulatory authorities.⁴⁵

65. Fulfilling universal service obligations is also commonly met through fees by both developed and developing countries. For example, countries that require telecommunication service providers to contribute to a universal service provision fund include Australia, Argentina, Brazil, Canada, Chile, Colombia, France, Japan, Malaysia, India, South Africa, Switzerland and the US.⁴⁶
66. Thus, many developing countries are strongly in favour of protecting their ability to utilise fees particularly for fulfilling important policy objectives, which can also serve as an important development tool.

IV. Development and Domestic Regulations

67. Although it is commonly argued that Article VI: 4 disciplines do not impact the substance of regulations, they will, however, impact on the **way** a country regulates. These negotiations will aim to set parameters on how Members utilise regulatory tools to fulfil policy objectives. Limiting the use of policy tools can indeed limit the impact and effectiveness of the regulations as well as how regulations are developed. For example, if a country with resource constraints can afford to utilise only a specific type of policy tool or regulation and if it is made unavailable through Article VI: 4 disciplines (e.g. is more burdensome than necessary or falls outside of the disciplines), then that country would not be able to meet its policy objectives.
68. As already mentioned, domestic regulation is crucial for sound development policy objectives. This section provides a brief discussion on how each of the Article VI: 4 regulatory mechanisms are or can be used by developing countries to meet development goals and objectives. This section aims to justify the argument posed by the majority of developing countries that Article VI: 4 disciplines must fully consider the development dimension of domestic regulations. Article VI: 4 disciplines must not in any way preclude developing countries from exercising their right to regulate to meet

⁴⁴ Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive).

⁴⁵ *Regulating Market Access*. Europe's Information Society Thematic Portal. http://europa.eu.int/information_society/policy/ecommm/todays_framework/market_access/index_en.htm on 4 August 2006.

⁴⁶ "Rethinking Universal Services for a Next Generation Network Environment", Working Party on Telecommunication and Information Services Policies. DSTI/ICCP/TISP(2005)5/FINAL. 18 April 2006, OECD.

development goals and objectives through qualification and licensing requirements and procedures and technical standards.

69. Broadly, the concern of Article VI: 4 disciplines on development is its potential for straight-jacketing developing countries into using certain “acceptable” regulatory tools and frameworks. Unfortunately, what has worked for one country may not work for another.
70. Getting regulations right first requires proper “institutions” to house and carry them out. It should be noted that some researchers find institutions (defined as the combination of the rule of law and property rights) to be more important than economic for determining income levels in developing countries than integration or liberalisation.⁴⁷ Thus getting the institutions right first is of utmost importance.
71. Although developing countries can benefit from the ability to share information and knowledge from other countries on regulatory models and through financial assistance or capacity building, they still face two major limitations which are that: 1) models do not always consider the social, economic and political realities of individual countries and 2) existing limited understanding on how to build effective regulatory “institutions” for promoting growth and development.⁴⁸ Setting regulatory parameters based on foreign values or “best practices” ignores the unique historic, cultural, political and other important characteristics that shape the type of governance that is successful for a country.⁴⁹ In fact, even developed countries have different forms of regulatory norms and practices for their public sector, legal systems, corporate governance, labour markets, social insurance, etc.⁵⁰
72. Recognising that financial and technical assistance and capacity building efforts can only go so far, implementing Article VI: 4 obligations therefore should be undertaken only after developing countries have built the necessary regulatory capacity to do so. This will indeed require longer time frames for individual developing countries. A project undertaken by the United Kingdom Department for International Trade in Bangladesh found that completing reforms for better governance resulting in pro-poor change would take between ten to twenty years. With these real challenges in mind, developing countries, especially the ACP Group, the Small, Vulnerable Economies and the African Group submitted strong development oriented proposals in the WPDR negotiations.

⁴⁷ Rodrik, D. et al. *Institutions Rule: The Primacy of Institutions over Geography and Integration in Economic Development*, Center for Economic Policy Research, 2002.

⁴⁸ Ibid.

⁴⁹ *Better Government for Poverty Reduction: More Effective Partnerships for Change*, Consultation Document. Department of International Development, United Kingdom, April 2003.

⁵⁰ Rodrik, D. et al. *Institutions Rule: The Primacy of Institutions over Geography and Integration in Economic Development*, Center for Economic Policy Research, 2002.

73. More specifically, the extent to which Article VI: 4 disciplines can impact development will highly depend on the definitions of qualification and licensing requirements and procedures and technical standards. Depending on the definition, developing country Members may find many of their regulatory frameworks and processes ruled by Article VI: 4 negotiations or not.
74. Qualification requirements in particular can be used by developing countries to meet important development policy objectives. For example, requiring foreign service providers a certain degree of command of the local laws or language or other important customs can help ensure the services provision is not only consumer friendly but also locally accepted that can lead to a more conducive environment for hiring local workers.
75. In general, a license to provide a service outlines what a service provider is: 1) allowed to do, 2) not allowed to do, and 3) is required to do. A license to a service provider also communicates the rights and obligations to all stakeholders involved, including consumers and the government. In services particularly, licensing requirements are extensively used to meet policy objectives.
76. One of the most important development policy objectives is universal access to key services such as telecommunication, healthcare, water, sanitation, education and electricity. When it comes to private sector provision of these services, governments in both developed and developing countries normally ensure their universal access policy objective is met through licensing requirements.⁵¹ As part of the license agreement, service providers are obliged to ensure affordable prices and other aspects of universal access, e.g. availability of schools, equal quality of service for all customers. (See Box 2 for an example of licensing objectives for the telecommunication sector)
77. Licensing requirements can also require service providers to undertake impact assessments to ensure environmental and/or social costs are minimal or will be mitigated. Such requirements can fulfil development objectives such as ensuring the protection of the environment and human health or not displacing local employment or ensuring local employment.

⁵¹ Kirkpatrick, C. and Parker, D. "Infrastructure Regulation: Models for Developing Asia", Asian Development Bank Institute Research Paper Services No. 60, November 2004.

Box 3 - Licensing of Telecommunication Services: Policy Objectives

Governments normally have multiple licensing objectives for the telecommunication sector. They are commonly:

- provision of essential public service
- network roll-out and service coverage obligation (a major reason for licensing in many countries)
- specifies the ownership of the investor and expectations of the government
- ensuring viability and benefits of entry of new competitors
- conditions to establish a “level playing field” for competition and curb abusive dominant position of incumbent operators
- fair allocation of scarce resources, e.g. radio spectrum, numbers and rights of way
- generating government revenue
- consumer protection on issues related to price, service defaults, mandatory service provision, etc.
- regulatory certainty by outlining the rights and obligations of the operator and regulator

Source: Network for Capacity Building and Knowledge Exchange in ICT Policy, Regulation and Applications. Module on Licensing and Approvals. Washington State University Center to Bridge the Digital Divide.

78. Technical standards can also be important as development tools. For example, to ensure effective education services, a country may place standards on teacher-student ratios. Such a standard would fulfil the policy objective of ensuring students do receive adequate attention by teachers and hence achieve proper learning. Perhaps a country may require different (larger) ratios in poorer or disadvantaged communities.

79. Many countries, particularly developed countries, develop standards to promote a national policy objective. Technical standards are increasingly being developed domestically to promote not only competitiveness but also meet social objectives (e.g. health, safety, the environment, etc.).⁵² In the case of the US, standards developing organisations (SDO) develop national standards on issues ranging from energy distribution to security of telecommunication service provider networks. These standards are to meet national policy objectives as well as balance the interests of domestic stakeholders primarily. This is shown through the mission of the American National Standards Institute which is to build competitiveness of US business

⁵² ANSI – A Historical Overview. See http://www.ansi.org/about_ansi/introduction/history.aspx?menuid=1

and improve the American quality of life.⁵³ In other words, national standards are developed for national objectives.

80. Developing countries must also be allowed to utilise national technical standards for policy objectives that lead to domestic growth and development. GATS Article VI: 4 disciplines must not prevent this opportunity. The disciplines must not force developing countries to utilise international technical standards or shape national technical standards based on international standards that are not unique or appropriate for individual Members.

V. Current State of Play - Draft disciplines for Article VI: 4

81. On Tuesday 11 July 2006, the Chair of the WPDR presented a Chairman's Working Paper (WP), titled "Disciplines on Domestic Regulation Pursuant to GATS Article VI: 4 Consolidate Working Paper"⁵⁴ (see Annex 1 for a table comparing several developing country proposals and their incorporation in the WP). The WP is stated to be a consolidation (i.e. merging) of proposals submitted by Members. The WP is supposed to present "clear alternatives" and be as inclusive as possible. Given that this is likely to be the document on which future discussions will be based, this section provides a technical analysis of the WP with the objective of the degree to which it reflects developing country positions. The section also provides recommendations to ensure developing country positions are included in future negotiations on a text for adoption.

General Comments

82. The WP in its covering note quickly shows that the document falls short of being inclusive. Firstly, it is not clear whether Members' views and interests expressed outside of written proposals were included. The Chair has not included all submitted proposals. An obvious omission was the majority of the ACP Group proposal (submitted initially on 2 May 2006), which the Chair excluded based on the reasoning that further discussion was required. The reason for omitting this proposal is inconsistent with the inclusion of others that were submitted at a later date, e.g. the initial submission by Australia, et al for a proposal on a draft text on 9 June 2006. The Australia, et al proposal was discussed in a fewer number of WPDR meetings and yet seemed to be understood as receiving more discussion. Further, the Chair has omitted proposals that were not formulated in specific text. Members can raise the issue as to whether Members had formally agreed only proposals with specific texts would be included in the WP and if so, was there adequate opportunity to prepare such texts for inclusion.

⁵³ See www.ansi.org

⁵⁴ See WTO Document Code JOB(06)/225.

83. Perhaps in an attempt to explain omissions the Chair indicated that the paper is not a “compilation” because such a paper was “not useful at this stage” – without elaborating on why. Furthermore, the Chair indicated he was not able to submit a text with compromised language due to the fact that there are still divergent views in some areas. Members should question whether excluded proposals have an opportunity to be included in the next Chair text. This will be particularly important given the fact that this WP will be the basis to move forward on negotiations. What is omitted by the Chair may send the message that the excluded proposals are not considered equally important or fairly treated.
84. The Chair also indicated that the excluded proposed elements were not a “closed” list and additional elements could still be excluded. Although the exclusion of certain elements that are not agreed to by the majority of Members, e.g. the necessity test, could be favourable, however, the Chair has clearly presented a non-compromised or non-convergent text, which means that anything without convergence is to be included -- particularly proposals presented by a large number of countries such as the ACP Group.
85. Another area of concern is the decision made by the Chair to exclude proposals on the scope of application and exceptions based on a vague assumption that these disciplines will be an “integral part of the GATS”. Including text on scope and exceptions are important to give legal clarity of the disciplines and the reach of dispute settlement procedures. The Chair has also indicated that the disciplines are mode-neutral. Besides the somewhat ambiguous reasons given for these exclusions, it can be read that the Chair assumed convergence on these areas – it can be questioned whether his assumptions are correct. Finally, the Chair should have indicated exactly which “definition of concepts already used in GATS” he has excluded to ensure that Members are in agreement with his decision.

Element Specific Analysis

86. For certain issues the WP has undertaken a compilation approach than a consolidated one. One important issue that received such treatment is the necessity test. The Chair has included a necessity test nine times in the WP -- each time accompanied by a footnote that reads “Many delegations have made no proposals on the concept of necessity and have expressed their opposition to its inclusion in the disciplines”. It must be noted from the outset that the inclusion of necessity tests goes against the sentiment of the majority of WTO Members who have expressed they are not in favour of them. By embedding necessity tests in the WP, the Chair did not aim to present “clear alternatives” on this matter.
87. With regards to the **Objectives** section, the WP seemingly presents both sides of the coin with paragraph one referring explicitly to the right to regulate and

paragraph three reproducing the Article VI: 4 chapeau, which includes a necessity test. Further, the treatment of the right to meet universal service provisions has been restricted or limited with the “GATS obligations and commitments”. Thus, Members would not be given total freedom in the way they choose to pursue universal service obligations.

88. The **Scope of Application** seems to somewhat present a convergence by the majority of Members that disciplines are to apply to sectors where commitments have been made, however, fails to mention the modes thereby creating uncertainty on the exact scope of coverage.
89. There is a strong focus on the use of international standards in the **General Provisions**. The WP does in a limited manner include the concern of losing regulatory space if Members were not allowed to impose standards beyond international ones. In this regard, TBT language is used whereby only “legitimate” national policy objectives (NPOs) are exempted from the use of ineffective international standards. It is unclear from which Member(s) proposal the use of the adjective “legitimate” with NPOs is found. This may be of concern since Members had successfully requested Mexico and Switzerland in their proposal on technical standards to remove this term in a subsequent version – showing that there is strong interest among Members (even one of the strongest proponents: Switzerland and Mexico) to not include this potentially risky term in the disciplines.
90. On **Transparency**, many developing countries are concerned with the level of burden of disciplines and encroachment on policy space. In this regard, some Members are also not in favour of prior comment obligations. The WP does not adequately consider these concerns as all options presented are highly burdensomeness and include prior comment. Paragraph three seems to be burdensome with its eleven item checklist of information Members would be obligated to provide for Article IV: 4 elements. Many of these items are also repeated in the other elements. For example, there are also proposals under each of the licensing and qualification requirements and procedures and technical standards elements for measures to be transparent and publicly available. Particularly worrying is paragraph 3 (k), which introduces a negative listing obligation for Members to provide information based on “the last of service activities subject to licensing” without qualifying such services to only those committed to.
91. Proposals i and ii under Transparency also fails to consider the above mentioned concerns. With the use of the term “shall endeavour” (which is unclear as to what level of obligation this requires), proposal i would require Members to: 1) publish in advance and provide prior comment opportunities of proposed domestic regulations; 2) to respond to substantive comments in writing; and 3) provide reasonable time between adoption and the effective date of new regulations. Proposal ii, also with “shall endeavour”, would require half of the obligations of proposal i, which is to publish in advance

and provide prior comment opportunities of proposed domestic regulations. Both of these proposals are not in line with some developing country positions who oppose prior comment disciplines even on a best endeavour basis.

92. Finally, paragraph one under Transparency lists a discipline applying to “measures of general application to licensing requirements and procedures, qualification requirements and procedures and technical standards...”. This language (found in Article VI: 1) widens the scope beyond the mandate of Article VI: 4, which refers only to “measures relating to qualification requirements and procedures, technical standards and licensing requirements [and procedures]...”. Given the burdensomeness of the obligations in this paragraph, Members should be cautious of applying such requirements beyond the scope of Article VI: 4.
93. **Licensing Requirements** have in place the least amount of proposals with only three paragraphs. However two out of the three paragraphs include necessity tests (one applied to residency requirements on a best endeavour basis) and the third paragraph on transparency and relevance. The ambiguous term “pre-established” also appears for the first time in this element (reappearing under licensing procedures, qualification requirements, and qualification procedures). Such ambiguous terms should be defined.
94. Under **Licensing Procedures**, paragraph two has the potential of intruding on regulatory authority by preventing *any* service supplier from decision-making processes. This could exclude government suppliers or designated through governmental authority as part of national decision-making processes for licenses.
95. In addition to disciplines on transparency and impartiality in decision-making, the Chair presents three proposals under Licensing Procedures. The first states that licensing procedures should not be a restriction in themselves and the second that procedures and related documentation should not impede fulfilment of licensing requirements. The third proposal is quite comprehensive and detailed. It calls for procedures and related documentation requirements to be not more burdensome than necessary to ensure the fulfilment or compliance with requirements; applications where feasible to be processed at any time and be accepted in electronic format; applicants are notified if applications are complete and if not to identify the additional information required and provide opportunity for resubmission; applicants to be notified without undue delay of the status of their applications; and endeavour to establish and publicise processing timeframes for procedures.
96. The treatment of fees does somewhat reflect the concerns of developing countries by not including fees utilised for a limited number of public policy objectives such as universal service provision in the disciplines. It does not go

far enough, however, from excluding fees to meet any national policy objective from the disciplines – which has been proposed by some developing countries.

97. Proposals under **Qualification Requirements** are comprehensive and detailed, particularly in comparison to licensing requirements. Specific areas of interest of some developing countries have been included, such as ensuring requirements are related to licensing activities, that recognition and verification mechanisms are established, and recognition of the role of Mutual Recognition Agreements and ensuring accession of developing countries. Some Members, however, have raised concerns on balancing the comprehensive nature of horizontal disciplines with a lower level of specificity.
98. Qualification Procedures has the most detailed proposals and one of the higher levels of specificity in comparison to other elements. Being mindful of this, developing countries should consider how to approach the likely discussions on lowering the level of specificity on this area as well as the qualification requirements and licensing procedures sections for a balanced set of disciplines.
99. There is a difference with treatment of fees under Qualification Procedures in comparison to Licensing Procedures. Unlike Licensing Procedures, there is no footnote clarifying that disciplines do not include fees utilised for certain public policy purposes, despite proposals by many countries to treat fees under licensing and qualification similarly.
100. On **Technical Standards**, concern has been expressed by some developing country Members on the lack of understanding of national and international standards for services. As a result, a more cautious approach should be favoured without detailed proposals such as those along the lines of the TBT agreement. Given that TBT like language has been included on encouraging the use of international standards over national standards (with a “legitimate” policy objective caveat), developing country Members should strongly analyse the implications of such a provision on trade in services.
101. Recognising the cautious approach needed in the treatment of international standards, some developing countries have proposed addressing the lack of equal and effective participation of developing countries in international standard setting organisations. These proposals, however, have not been included and the issue is addressed only through a “maximum transparency” obligation of plurilateral standards (which is also the only best endeavour provision among the others).
102. The WP also fails to recognise the disapproval by some developing country Members against the inclusion of voluntary standards in these disciplines.

103. On **Development**, the proposals submitted by Members early in the WPDR discussions seem to be incorporated. The more recent proposals by developing countries, particularly on technical and capacity building assistance, however, are presented with omission of certain terms such as “financial assistance” or “guarantees”. Paragraph eight of this section refers only to “assistance” ambiguously for building supply and compliance capacity of developing country service providers. Moreover, the LDC paragraph does not provide an option to exclude LDCs from the obligations of complying with the disciplines despite the African Group proposal calling for such a provision. Finally, half of the Development section is presented as non-mandatory obligations (i.e. in best endeavour language).
104. As mentioned above, a major development oriented proposal by the ACP Group has been omitted. Another major omission is the proposal for according developing country longer time frames to comply with the disciplines. These two areas should be further discussed for inclusion in the next Chair text for negotiation.
105. With regards to the **Institutional Provisions**, paragraph one proposes to establish a committee to oversee the implementation of issues beyond Article VI: 4 disciplines (into other Article VI paragraphs) and operationalise future (perhaps sectoral) work. It should be cautioned that without agreement by all Members on future work, such commitments should not be made. Further, it would be more advisable to agree to future work only after assessing the experience of the Article VI: 4 (as well as the Accountancy Disciplines).
106. Finally, a review and assessment mechanism is positive and should include the objectives of validity, appropriateness and impacts of disciplines (as was proposed by the African Group) among other development oriented objectives.
107. The analysis of the WP shows that the objectives of consolidation and presentation of alternatives were not fully met. The WP has at times not included alternatives that present developing country proposals and interests. The exclusion of the majority of the ACP Group proposal shows a major disregard for impartiality and balance in the document. The prominent treatment of the necessity test ignores the majority position of membership calling into question again the balance of the document.
108. The WP presents a “high ambition” outlay, e.g. highly prescriptive provisions, stringent transparency clauses, and numerous encouters of the necessity test, of the current state of negotiations, which is not shared by the majority of developing countries. Annex 2 provides an indication of which country(ies) proposals were considered and included in the WP. It is clear proposals with a higher level of ambition such as those by Australia et al, Chile et al and China and Pakistan. The WP does not adequately present an

alternative with a lower level of ambition of disciplines that is in line with many developing country proposals (see Table 1).

109. Finally, what may be more worrisome is that around one-third of the WP is not easily found in Member proposals. The Chair has seemingly presented such text mostly under licensing and qualification procedures. In some instances “new” text is of high concern, for example the use of “legitimate policy objectives” and other TBT like language under technical standards. With such practice, the Chair breaches the request Members made of him to develop a WP based on their proposals.

VI. Development Recommendations and Conclusion

110. The WP does not adequately reflect developing countries’ general lack of resources and capacity for well functioning regulatory systems. The fact that regulatory offices in developing countries are in general small, lack human resources in numbers and in knowledge and training, require or take up larger percentages of GDP, and do not have in place proper decision making tools, must not be ignored.

111. In this light, the final set of disciplines must fully incorporate the concerns raised in the Small, Vulnerable, Economies proposals regarding the low government resources and capacity their Members face. They state that as a result of low resources, regulatory frameworks in services trade are less comprehensive than for trade in goods. Further, some service sectors are not yet being regulated. Regulatory systems are also often dispersed among multiple bodies that result in a complex overall system of oversight.⁵⁵

112. Similarly, the call of the ACP Group proposal to consider the fact that the state of regulatory and institutional frameworks in developing countries are still at an emerging stage or at times non-existent must not be ignored. Many developing countries are still undertaking reforms of their services sectors, which involve introducing new laws and regulations to result in proper regulatory capacities and institutions.

113. To ensure that Article VI: 4 disciplines do not hinder the development of regulatory capacities in developing countries and the ability of developing countries to utilise regulations and regulatory procedures/mechanisms to achieve national policy objectives that lead to development, the concerns expressed by these developing countries must be included in the final set of disciplines. Thus, the following recommendations must be included in the Article VI: 4 disciplines (these have been proposed by the ACP Group and SVE as well as other developing countries):

⁵⁵ WTO Document Code: JOB(06)/66/Rev.1

- Clear affirmation of the right to regulate
- No transparency obligations that are resource intensive
- No obligation (even on a best endeavour basis) to allow foreign stakeholders to comment on regulations being developed and no obligation (even on a best endeavour basis) to consider such comments
- No application of the necessity test
- Flexibility for developing countries to apply the disciplines at the degree and pace conducive to their regulatory and economic development levels
- Exemption from applying disciplines on regulations for development objectives
- Opportunity to temporarily suspend application of the disciplines in the event of dire circumstances

Table 1. Comparison on the Chair Working Paper on Domestic Regulation's reflection or incorporation of development concerns and interests.

Issue	Development concerns and interests	Are the concerns and interests reflected ⁵⁶ in the Chair Working Paper's?
<u>Necessity test</u>	No application of a necessity test	No.
<u>Right to regulate</u>	Not to be traded off against market access	Somewhat. With the inclusion of necessity tests, the recognition of the right to regulate can be less effective.
<u>Special and differential treatment</u>	One of the most important aspects and can be achieved through timeframes, fees, procedures, etc.	Somewhat. Longer time frames and other SDT proposals have not been considered.
<u>Technical standards</u>	<p>Not in favour of conformity principles</p> <p>Not in favour of TBT language</p> <p>Ensuring developing countries are equal and effective participants in the standard setting process</p> <p>Concern that reference to "international standard setting organisation" can result in loss of policy space if Members are not allowed to impose standards that go beyond international standards</p>	<p>No.</p> <p>No.</p> <p>No.</p> <p>Somewhat. There is an obligation to draw on international standards except where they are not effective/appropriate for legitimate policy objectives.</p>
<u>Transparency</u>	<p>Not burdensome</p> <p>No prior comment – even as a best endeavour obligation</p>	<p>No.</p> <p>No.</p>
<u>Fees</u>	Not to discipline fees other than administrative costs	Yes.
<u>Disciplines in general</u>	Not too prescriptive	No.

⁵⁶ In other words, whether the WP includes options, possibilities or alternatives that reflect the development concerns and interests.

114. Developing countries are not at the same level of regulatory development as developed countries. Therefore, compliance with Article VI: 4 disciplines will undoubtedly be more challenging for developing countries than their developed trading partners. More importantly, developing countries must be given the space, time and resources to develop their domestic regulations in order to meet important national policy objectives. At a minimum, developing countries must be allowed to comply with the Article VI: 4 disciplines at their own pace and only when it is in line with their national policy strategies for development.
115. In conclusion, one of the most important recognitions in the WPDR negotiations must be that there are multiple policy objectives behind one regulation. For developing countries, distributive, poverty reduction and other social and developmental objectives are at times given a greater weight over economic factors by regulators. This can cause challenges for developing countries to ensure efficiency and effectiveness in domestic regulations strictly on economic terms.
116. Evaluating all possible alternative and available regulatory instruments that are “not more burdensome than necessary” also requires adequate resources and capacity, which developing countries lack.⁵⁷ In this light, Article VI: 4 disciplines can create a trade-off between development and liberalisation objectives of regulations. This trade-off, however, must fall on the side of development for developing countries if they are to benefit through pro-poor regulations.
117. Regulatory systems do not always follow economic theory – particularly for developing countries whose priorities are on social and other non-economic objectives. Scholars who study regulation and developing countries go as far as calling for governments to provide “statutory guidance” to regulators to ensure that they meet their social objectives, e.g. through proper budgeting. They place a greater priority on developing countries meeting these objectives than on saving costs through “efficient” regulatory methods.⁵⁸ Article VI: 4 disciplines must be based on such thinking for developing countries – development over efficiency.

⁵⁷ Kirkpatrick, C. and Parker, D. “Infrastructure Regulation: Models for Developing Asia”, Asian Development Bank Institute Research Paper Services No. 60, November 2004.

⁵⁸ Ibid.

ANNEX 1

The table below aims to list the specific elements of the WPDR proposals of the ACP Group (Room Document in WPDR of 2 May 2006), African Group (Room Document of 2 May 2006), SVE (JOB(06)/66/Rev.1 of 2 May 2006), and Brazil, Indonesia and the Philippines (JOB(06)/133) indicating where similar elements are reflected in proposals and where they are not in the left and middle columns. The right column indicates whether these elements have been included in the working paper and to what extent. Additional language not in these select developing country proposals but found in the working paper are also included.

General Objectives and Principles	Proposals	Incorporation in the Chair Consolidation Working Paper
Shall preserve the right to regulate	All proposals	No. There is no language on preservation.
Shall not prescribe development of (existing and) future legislation to meet (individual) national policy objectives and development needs	All proposals	Yes. In addition, disciplines are not to "impose" particular regulatory approaches or provisions.
Shall not prevent development of (existing and) future legislation to meet (individual) national policy objectives and development needs	All proposals	Yes. Disciplines shall not be construed to prevent the right to regulate.
Implementation of disciplines shall be consistent with financial, administrative and institutional capabilities	SVE, African Group, ACP	No.
Disciplines shall be subject to general and other exceptions and not prevent Members from undertaking measures for prudential reasons	African Group, ACP, Brazil, Indonesia + Philippines	No. Chair has explicitly excluded this.
Disciplines shall apply only to measures (regulatory aspects) affecting services sectors inscribed in a Member's schedule	SVE, Brazil, Indonesia + Philippines	Yes.
Clear coverage of visa related issues/ measures regulating the entry of natural persons	African Group, Brazil, Indonesia + Philippines	No.
Not be subject to a necessity test	ACP	Yes/No. There are nine necessity tests throughout the working paper which includes footnotes to indicated that many delegations have not

		proposed the concept of necessity and are opposed to its inclusion.
<p>Inclusion of an assessment mechanism on the validity, appropriateness and impacts of disciplines and the extent of meeting national policy objectives (and international development goals) and whether modifications are necessary</p> <p>Review operation of disciplines, including SDT, not later than 5 years of entry and propose appropriate amendments to Ministerial Conference</p>	<p>African Group</p> <p>Brazil, Indonesia + Philippines</p>	
<p>Shall not prevent establishing measures or mechanisms to support regional economic integration</p>	SVE	No.
<p>Accounting for particular need of developing countries to regulate and introduce new regulations</p>	Brazil, Indonesia + Philippines	Yes. Based on asymmetries with the degree of development of services regulations in different countries.
<p>Members have right to maintain or establish its own universal service obligation</p>	Brazil, Indonesia + Philippines	Yes/No. States that disciplines are not to prevent introduction and maintenance of universal service regulations in a manner consistent with GATS obligations and commitments (the latter part aims to limit this regulatory right)
<p>In determining compliance, special account take of international standards of international organisations (definition provided)</p>	Brazil, Indonesia + Philippines	Yes. Includes an alternative definition for international organisations.
<p>Definition of terms provided</p>	Brazil, Indonesia + Philippines	Yes/No. Definitions for licensing requirements, licensing procedures and qualification procedures go beyond the Brazil et al proposals. Definition for qualification requirements have a lower coverage than the Brazil et al proposal. The technical standards definition detracts from and adds to the Brazil et al proposal.

		Additional proposals
		Members shall ensure measures are not formulated, introduced, implemented, administered or applied with a view to create unnecessary barriers to trade.
		Encourages Members to follow international standards.
		Disciplines are not to prevent use of measures for legitimate policy objectives that has higher requirements than international standards.
Qualification Requirements	Proposals	
(Scope and number of) examination requirements (and any other requirements) are to be related to activities for which authorization is sought	African Group, Brazil, Indonesia + Philippines	Yes. The working paper, however, does not refer to the scope and number of examinations
Recognition and verification measures shall include non-paper/formal based mechanisms, such as experience and others	SVE	Yes.
Recognise the role of Mutual Recognition Agreements and ensure accession of developing countries to them	African Group	Yes.
Requirements are transparent and made publicly available	Brazil, Indonesia + Philippines	Yes.
		Additional Proposals
		Shall ensure qualification requirements are not adopted or applied with a view to creating obstacles to trade in services and be based on objective criteria.
		Shall ensure that deficiencies in an applicant's qualifications are identified and shared with the applicant and advised of any additional qualification requirements. Applicants shall have the opportunity to fulfil additional requirements in the home country, host country or third country unless proof of justification that additional

		<p>requirements can be met only in the host country is provided.</p> <p>If qualifications are recognized as equivalent or additional requirements met, then the service supplier shall be allowed to supply the service.</p> <p>Shall give positive consideration to applicant's professional experience as a substitute or complement to academic qualifications, and to their membership in relevant professional associations.</p> <p>Shall ensure language requirements are based on specific needs. In respect of the language used in competency assessment, Members shall ensure consideration is given to facilitate foreign applicants.</p>
Qualification Procedures	Proposals	
Fees charged by competent authorities should not be an impediment to service delivery (and not preclude recovery of additional costs of verification of information, processing and examinations)	SVE, African Group, Brazil, Indonesia + Philippines*	Yes. Including tat fees have regard to the administrative costs.
Shall establish mechanisms to demonstrate that education, (work) experience, (examination requirements), licenses and certification granted are comparable (verified and recognised) abroad	SVE, Brazil, Indonesia + Philippines	
Procedures and related documents (and their required format) should be reasonable, not an impediment to trade/fulfilling qualification requirements and undertaken in reasonable time	African Group, Brazil, Indonesia + Philippines	Yes.
Qualification verification must shall be conducted only to establish minimum qualifications	SVE	

Developing countries shall not be precluded from recovering fees to meet national policy objectives	SVE	Yes. Under the Development section.
Procedures are transparent and made publicly available	Brazil, Indonesia + Philippines	Yes.
Time required for verification of qualifications acquired in another Member is reasonable	Brazil, Indonesia + Philippines	Yes.
Examinations shall be held at reasonably frequent intervals and available to eligible applicants; and reasonableness in period for submitting applications	Brazil, Indonesia + Philippines	Yes.
Additional requirements needed for a successful application be made known and the possibility of resubmission (except where prohibited by law)	Brazil, Indonesia + Philippines	Yes.
		Additional Proposals
		<p>Shall ensure procedures and related documentation requirements are not more burdensome than necessary to ensure applicants meet the requirements and are not in themselves a restriction on the supply of service.</p> <p>Examinations as part of the application process for a license, qualification or equivalent form of permission are to be non-discriminatory at reasonable intervals and not too costly.</p> <p>Shall ensure examinations are administered on subjects relevant to the activity. Residency requirements not subject to scheduling under Article XVII shall not be a prerequisite for competency assessment and other examinations. Work experience shall be considered a prerequisite only if for meeting national policy objectives.</p>

		<p>Shall ensure the competent authority considers means to facilitate foreign applicants in undertaking examinations, including through electronic means or conducting examinations abroad.</p> <p>Procedures should be as simple as possible and only one competent authority responsible for qualification procedures.</p> <p>Qualifications procedure applications shall be possible at any time and receipt of applications shall be acknowledged. Shall endeavour to establish and publicise the processing timeframe.</p> <p>Shall ensure rejected applicants shall be informed in writing without delay. An unsuccessful applicant shall be informed upon request of the reasons for rejection and the possibility and timeframe for an appeal. An applicant shall be permitted to resubmit the application.</p> <p>Applicants should be able to supplement their incomplete applications and be permitted to submit a new one.</p>
Licensing Requirements	Proposals	
Fees charged by competent authorities should not be an impediment to service delivery (and not preclude recovery of additional costs of verification of information, processing and examinations)	SVE, African Group, Brazil, Indonesia + Philippines*	Yes. Under licensing procedures.
Examination requirements/licensing requirements are to be related to activities for which authorization/license is sought	African Group, Brazil, Indonesia + Philippines	Yes. However, it refers only to licensing requirements and not examination requirements.

Disciplines on fees shall have regard to costs of administrative activities without inappropriately reducing regulatory budgets	African Group	Yes/No. Under licensing procedures, however, does not refer to not reducing regulatory budgets. Under Development, it is stated that Members are not prevented from charging fees to meet national policy objectives.
Requirements are transparent and made publicly available	Brazil, Indonesia + Philippines	No.
		Additional Proposals
		<p>Shall ensure licensing requirements are pre-established, objective, transparent and publicly available.</p> <p>Shall ensure licensing requirements do not act as barriers to trade and are not more trade restrictive than required to fulfil national policy objectives.</p> <p>For residency requirements that do not fall under Article XVII, Members shall consider less trade restrictive means to achieve their purposes.</p>
Licensing Procedures	Proposals	
Procedures and related documents (including those for renewal) should be reasonable, not an impediment to trade and undertaken in reasonable time (including for reaching a decision)	African Group, Brazil, Indonesia + Philippines	Yes.
Measures shall aim to ensure minimal complexity and costs, including lower licensing and other fees	SVE	Yes. Under Development section.
Procedures are transparent and made publicly available	Brazil, Indonesia + Philippines	Yes.
Reasons for rejection of application made known upon request and possibility of resubmission	Brazil, Indonesia + Philippines	Yes. However, the working paper is more specific by requesting that such reasons are communicated in writing and without delay.
License once granted enters into	Brazil, Indonesia +	Yes.

effect without delay	Philippines	
		Additional proposals
		<p>Shall ensure licensing procedures and related documentation requirements, are not more burdensome than necessary to ensure applicants' fulfilment or compliance with the licensing requirements.</p> <p>Application shall, where feasible, be possible at any time and processed upon receipt and be accepted in electronic format.</p> <p>Notify applicants whether their application is complete and if not identify the additional information required and provide opportunity to correct deficiencies within a reasonable timeframe. Applicants are to be notified without undue delay the status of their applications.</p> <p>Shall endeavour to establish and publicise processing timeframes for procedures.</p>
Technical Standards	Proposals	
Members shall notify measures relating to national or international technical standards in reasonable time/ensure standardisation procedures and technical standards are transparent and made publicly available	SVE, Brazil, Indonesia + Philippines	Yes.
Members should ensure transparency in plurilateral standard setting bodies and processes/*ensure standardisation procedures are transparent and made publicly available	SVE, Brazil, Indonesia + Philippines	Yes.
Members shall grant technical assistance on mutually agreed terms and conditions on establishing technical standards and participation in international standardizing bodies	SVE, African Group	No.

Further investigations on technical and international standards set by International Organisations to improve understanding	African Group	No.
Account shall be taken of international standards of relevant international organisations, which exclude organisation where developing country participation is short of effective, informed and sustained	African Group	No.
		Additional Proposals
		Notify through the WTO Secretariat measures relating to national or international technical standards.
		Should ensure maximum transparency on standards developed and applied by non-governmental standardisation bodies.
		Shall ensure technical standards are not prepared, adopted, or applied with a view to creating unnecessary obstacles to trade and not be maintained if their need no longer exists.
		Requirements should be based on objective and transparent criteria.
		Where relevant international standards exist or their completion imminent, Members shall use them as a basis for their technical standards, except when they would be an ineffective or inappropriate for fulfilling the legitimate national policy objective.
Transparency	Proposals	
Members shall ensure access to information on legislation and regulation; qualification and licensing requirements and procedures; and technical standards (that is accessible and understandable to developing	SVE, African Group, Brazil, Indonesia + Philippines	Yes. However, it goes further to say that regardless of manner information must be made publicly available to interested persons.

country suppliers) /publication on a regular basis of newly adopted measures through printed or electronic media		
Not in favour of prior comment obligations	African Group, ACP	No. There are two alternative proposals with prior comment obligations on a “shall endeavour” basis.
Members shall establish appropriate, transparent and accessible administrative and judicial channels for reviewing decisions	SVE	No.
Disciplines shall consider the constraints and burdens on African countries	African Group	No.
Availability of names and addresses of authorities responsible for measures	Brazil, Indonesia + Philippines	Yes.
Provision upon request of relevant information on measures	Brazil, Indonesia + Philippines	Yes. To ensure mechanisms available to respond to inquiries, which could include through Articles III and IV mechanisms.
		Additional proposals
		<p>Members are to provide information on 11 specific items in an easily accessible manner.</p> <p>Alternative proposal i is for Members to (shall) endeavour to publish in advance and provide prior comment opportunities of proposed domestic regulations and when adopted to respond to substantive comments in writing and provide reasonable time between adoption and effective date of new regulations.</p> <p>Proposal ii is calls on Members to (shall) endeavour to publish in advance and provide prior comment opportunities of proposed domestic regulations</p>

Developing Country Members	Proposals	
<p>Adequate time to upgrade institutional capacity for compliance with disciplines (and appropriate sequencing)</p> <p>Longer time frames (and application periods for all developing countries that are not generally applied but individually based by developing countries that can be determined through regulatory and institutional assessments from technical assistance) to maintain developing country exports</p>	<p>SVE, African Group, ACP</p> <p>ACP, Brazil + Philippines, Africa Group</p>	<p>No.</p> <p>Yes. Without the proposal inside the parantheses.</p>
<p>Technical and capacity building (and financial) assistance to build regulatory and institutional frameworks to meet national policy objectives (is guaranteed and determined by the receiving Member) on mutually agreed terms and conditions</p>	<p>African Group, ACP, Brazil, Indonesia + Philippines</p>	<p>Yes/No. Does not include financial assistance and is without guarantees and determination by the receiving Member.</p>
<p>Technical and capacity building assistance shall be provided (on mutually agreed terms and conditions) to help SVEs/developing countries (and in particular LDCs) meet requirements and procedures in export markets</p>	<p>SVE, ACP, Brazil, Indonesia + Philippines</p>	<p>Yes. However, it only refers to "assistance" and includes the possibility of providing assistance to service providers directly with best endeavour requirement for those receiving exports from the assistance seeking Members.</p>
<p>Measures shall be adopted and implemented to ensure full, equal and effective participation of SVEs in international standard setting bodies and complying with their standards, including assistance to service suppliers for meeting standards</p> <p>Members shall encourage and facilitate active participation of developing countries, particularly those facing resource constraints, in relevant international organisations</p>	<p>SVE</p> <p>Brazil, Indonesia + Philippines</p>	<p>No.</p> <p>Yes.</p>

Account for special development, financial and trade needs of developing countries and not creating unnecessary obstacles to developing country exports	African Group, Brazil, Indonesia + Philippines	Yes.
Concessionary fees to developing countries	African Group, Brazil, Indonesia + Philippines	Yes.
Technical and capacity building assistance and various types of flexibility, including adequate time frames, shall be provided to build developing country capacity to implement disciplines	SVE, African Group	No.
LDCs exempt from undertaking disciplines	African Group, ACP	No.
SDT on the extent of developing country compliance with disciplines related to capacities	African Group	No.
Assist service suppliers to improve qualifications to compete in global market.	African Group	No.
Disciplines should ensure assistance leads to enhancement of developing country exports	ACP	No.
		Additional Proposals
		LDCs shall not be bound by any future disciplines that will affect their specific interests. The extent and the timing of compliance should be related to the implementation capacity of individual LDCs.

ANNEX 2

Indication of which proposals were seemingly represented by the “Disciplines on Domestic Regulation Pursuant to GATS Article VI: 4 Consolidated Working Paper” Note by the Chairman on **July 2006, JOB(06)/225.

A. OBJECTIVES

1. These disciplines shall not be construed to prevent Members from exercising the [right to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives **[JOB(06)/133 by Brazil et al]**, and given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right is recognized] **[JOB(06)/136/Rev. 1 by the ACP Group]** These disciplines also shall not be construed to prescribe or impose any particular regulatory approaches or any particular regulatory provisions in domestic regulations.

2. These disciplines shall not be construed to prevent a Member from exercising the right to introduce or maintain regulations to ensure provision of universal service, in a manner consistent with its obligations and commitments under the GATS.

The objective of these disciplines is to ensure that measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards do not constitute unnecessary barriers to trade in services and that they are *inter alia*:

- (a) based on objective and transparent criteria, such as competence and the ability to supply the service;
- (b) not more burdensome than necessary to meet specific national policy objectives including to ensure the quality of the service⁵⁹; and
- (c) in the case of licensing and qualification procedures, not in themselves a restriction on the supply of the service.

B. SCOPE OF APPLICATION

1. These disciplines apply to measures by Members relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards affecting trade in services in sectors where specific commitments are undertaken. They do not apply to measures, which constitute limitations subject to scheduling under Article XVI and XVII.

C. GENERAL PROVISIONS

1. Each Member shall ensure that measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards are not

⁵⁹ Many delegations have made no proposals on the concept of necessity and have expressed their opposition to its inclusion in the disciplines.

formulated, introduced, implemented, administered or applied with a view to creating unnecessary barriers to trade in services.⁶⁰ [JOB(06)/193 by Australia et al]

2. Members recognize the role of international standards in facilitating trade in services, and are encouraged to consider following international standards of relevant international organizations⁶¹ in respect of measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards. In determining whether a Member is in conformity with the obligations in these disciplines, account shall be taken of international standards of relevant international organizations applied by that Member.

3. Nothing in these disciplines shall be construed to prevent a Member or one of its competent authorities, in pursuing its legitimate national policy objectives, from adopting, maintaining or applying any measure that results in a higher level of requirements than would be achieved if the measure were based on the relevant international standards.

D. DEFINITIONS

1. "Licensing requirements" are substantive requirements, other than qualification requirements and technical standards, with which a service supplier is required to comply in order to obtain or renew authorization to supply a service.

2. "Licensing procedures" are administrative or procedural rules relating to the administration of licensing requirements for the supply of a service, including those relating to submission and processing of an application for a licence or renewal thereof.

3. "Qualification requirements" are substantive requirements relating to the competence to supply a service that a service supplier is required to demonstrate prior to obtaining authorization to supply a service.

4. "Qualification procedures" are administrative or procedural rules relating to the administration of qualification requirements [Room Document of 1 May 2006, Chile et al], including those aiming at verifying the compliance of candidates with qualification requirements as well as those relating to acquiring or supplementing such qualifications.

5. "Technical standards" are measures that lay down the characteristics of a service or the manner in which it is supplied. Technical standards also include the procedures relating to the enforcement of such standards.

E. TRANSPARENCY

1. Each Member shall ensure that measures of general application relating to licensing requirements and procedures, qualification requirements and procedures, and

⁶⁰ *Id.*

⁶¹ [Proposal i]: The term "relevant international organizations" refers to international bodies whose membership is open to the relevant bodies of at least all Members of the WTO. [Proposal ii]: The term "relevant international organizations" refers to international bodies whose membership is open to the relevant governmental and non-governmental bodies (as per Article I:3(a)(ii) of the GATS) of at least all Members of the WTO. International standards that were not approved by consensus or by international organizations that do not follow the principle of "one country-one vote" are not eligible for the provisions in this paragraph.

technical standards are made publicly available by publication through either printed or electronic means, through designated publications or other publicly accessible channels, or otherwise made publicly available in such a manner so as to enable any interested persons (to become acquainted with them). **[JOB(06)/193 by Australia et al, except for the section in parentheses. A part of original Australia et al proposal is not included]**

2. Each Member shall maintain or establish appropriate mechanisms for responding to enquiries from (any) interested persons regarding any measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards. Such enquiries may be (addressed) through the enquiry and contact points established under Articles III and IV of the GATS or any other mechanisms as appropriate. **[JOB(06)/193 by Australia et al, except for the section in parentheses. A part of original Australia et al proposal is not included]**

3. Each Member shall ensure that the following information are made publicly available or, where making publicly available is not practicable, made available when responding to enquiries (in an easily accessible manner, and, where possible, by electronic means:)

- a) whether any authorization, including application and/or renewal where applicable, is required for the supply of specific services;
- b) the official titles, addresses and contact information of the relevant competent authorities;
- c) any applicable licensing requirements and criteria, terms and conditions of licences, and the licensing procedures and fees;
- d) any applicable qualification requirements, criteria and procedures (including fees) for verification and assessment of qualifications, and any competency assessment including examination requirements and their content and procedures;
- e) any applicable technical standards;
- f) the normal timeframe for processing of an application;
- g) any channel for appeal or review of an application;
- h) any monitoring, compliance or enforcement procedures including notification procedures for non-compliance; **[JOB(06)/193 by Australia et al]**
- i) the eligibility of persons, firms and institutions to make such applications;
- j) where there is public involvement in the licensing process, information on how that involvement is provided for; and
- k) any exception, derogation or changes in or from the rules concerning licensing procedures or the list of service activities subject to licensing.

[Proposal i]

Each Member shall endeavour to:

- a) publish in advance any measures of the type referred to in paragraph E.1 that it proposes to adopt;
- b) provide interested persons and other Members a reasonable opportunity to comment on such proposed measures; **[JOB(06)/182 by the United States, however it does not use “shall to the extent practicable” as used in the proposal]**
- c) at the time it adopts such final measures, address in writing substantive issues raised in comments received from interested persons with respect to the proposed measures; and
- d) allow a reasonable period of time between publication of such final (measures) and their effective date. **[JOB(06)/182 by the United States, however “regulations” instead of “measures” is used in the proposal]**

[Proposal ii]

Each Member (shall endeavour to ensure that) any measures of general application it proposes to adopt in relation to matters subject to these disciplines are published in advance, and a reasonable opportunity is available for interested persons, including those of other Members, to comment on such proposed measures. **[JOB(06)/193 by Australia et al, except for the section in parentheses, which is different in the original Australia et al proposal]**

F. LICENSING REQUIREMENTS

1. Each Member shall ensure that licensing requirements are pre-established, objective, transparent and publicly available. Licensing requirements shall be relevant to the activities to which they apply.
2. Each Member shall ensure that licensing requirements do not act as barriers to trade in services and are not more trade restrictive than required to fulfil national policy objectives.⁶² **[JOB(06)/158 by China and Pakistan]**
3. Where residency requirements not subject to scheduling under Article XVII of the GATS apply in licensing requirements, each Member shall consider whether less trade restrictive means could be employed to achieve the purposes for which these requirements were [established] (taking into account costs and local conditions).⁶³ **[JOB(03)/45/Rev. 1 by Japan except “imposed” is used in the proposal instead of “established” in the brackets], [JOB(06)/193 by Australia et al, except for the section in parentheses]**

⁶² Many delegations have made no proposals on the concept of necessity and have expressed their opposition to its inclusion in the disciplines.

⁶³ *Id.*

G. LICENSING PROCEDURES

1. Each Member shall ensure that licensing procedures are pre-established, objective, transparent and publicly available.

2. The decision of and the procedures used by the competent authority preparing, adopting or applying licensing procedures shall be impartial with respect to all market participants. In particular, it shall be separate from any supplier of services for which a licence is required.

3. [Proposal i]

Members shall ensure that licensing procedures are not in themselves a restriction on the supply of services. **[JOB(06)/158 by China and Pakistan]**

[Proposal ii]

In the application of licensing procedures, each Member shall ensure that licensing procedures and related documentation, including those for renewal, where applicable, should not in and of themselves unduly impede the applicants' fulfilment of licensing requirements.

[Proposal iii]

Each Member shall ensure that licensing procedures and related documentation requirements, including those for renewal where applicable, are not more burdensome than necessary to ensure that applicants fulfil or comply with the licensing requirements and are not in themselves a restriction on the supply of service.⁶⁴ **[JOB(06)/193 by Australia et al. A part of original Australia et al proposal is not included]**

4. Application procedures and, where applicable, renewal procedures shall be as simple as possible **[JOB(06)/158 by China and Pakistan. Does not include "application forms" from the proposal]**. Applicants shall be allowed a reasonable period for the submission of licence applications. Applicants shall, in principle, have to approach only one competent authority in connection with an application for a licence.

5. Each Member shall ensure that the documentation requirements including requirements on format are reasonable and relevant to the activities to which the licensing requirements apply. **[JOB(06)/193 by Australia et al. A part of original Australia et al proposal is not included]**

⁶⁴ *Id.*

6. Application for licences shall, wherever feasible, be possible at any time, and shall be processed upon receipt. Wherever possible, applications should be accepted in electronic format under the same conditions of authenticity as paper submissions.

7. The establishment of the authenticity of documents shall be sought through procedures which are pre-established, publicly available and, wherever possible, authenticated copies should be accepted in place of original documents. **[S/WPDR/W/25 by the European Community]**

8. The competent authority shall, after receipt of an application, inform the applicant whether the application is considered complete under the Member's domestic laws and regulations and in the case of incomplete applications, identify the additional information that is required to complete the application and provide the opportunity to correct deficiencies within a reasonable timeframe. **[S/WPDR/W/25 by the European Community]** The competent authority shall notify the applicant without undue delay of the status of its application. **[JOB(06)/182 by the United States, however it does not use "shall to the extent practicable" as found in the proposal]**

9. Each Member shall ensure that, if a licence application is rejected by the competent authority, the applicant **[S/WPDR/W/25 by the European Community]** (shall be informed in writing and without delay). An unsuccessful applicant shall be informed upon request of the reasons for rejection of the application, (as appropriate, and of the possibility and timeframe for an appeal against the decision.) An applicant shall be permitted, within reasonable limits, to resubmit applications for licensing. **[JOB(03)/45/Rev.1 by Japan. Text in parentheses is not in the proposal]**

10. (Each Member shall ensure that processing by the competent authority under licensing procedures, including) reaching a decision on an application for a licence after receiving a complete application, is completed within a reasonable timeframe **[JOB(06)/182 by the United States. The part in parentheses is not included in the proposal and other parts of the proposal is not included]**. In particular, each Member shall endeavour to establish and publicise the normal processing timeframe under the licensing procedures.

11. Each Member shall ensure that any licensing fees⁶⁵ have regard to the administrative costs involved and do not in themselves represent an impediment to [engaging] in the relevant activity **[JOB(03)/45/Rev.1 by Japan, however "practicing" is used in the proposal instead of "engaging" in the brackets]**. This shall not preclude the recovery of any additional costs of administering licensing requirements and any other administrative activities related to the regulation of the relevant services **[JOB(06)/193 by Australia et al, except for the section in parentheses]**.

12. Each Member shall ensure that a licence, once granted, enters into effect without undue delay. **[JOB(06)/133 by Brazil et al]**

⁶⁵ Licensing fees refer to fees charged specifically for the administrative activities related to licensing. These do not include payments for auction, tendering or other non-discriminatory means of disposing concessions, or mandated contributions to universal service provision.

H. QUALIFICATION REQUIREMENTS

2. Each Member shall ensure that qualification requirements are pre-established, objective, transparent and publicly available [**JOB(06)/133 by Brazil et al only with “transparency and publicly available”**], [**Room Document of 1 May 2006, Chile et al on “pre-established, objective and publicly available”**]. Qualification requirements, including examinations, shall be relevant to the activities to which they apply.

3. Each Member shall ensure that qualification requirements are not adopted or applied with a view to creating obstacles to trade in services and shall be based on objective criteria, such as competence and the ability to supply the service. [**JOB(06)/158 by China and Pakistan**]

4. Members note the role which autonomous and mutual recognition can play in facilitating the process of verification of qualifications and/or in establishing equivalency of education [**Room Document of 1 May 2006, Chile et al**], experience or examination requirements. Where possible, autonomous recognition shall be accorded to qualifications where they are found to be equivalent to those required for the supply of a service.

5. Each Member shall ensure that mechanisms with adequate procedures exist for the verification and assessment of qualifications held by services suppliers including those of any other Members. Such mechanisms shall be based on criteria that are pre-established, objective and apply to both local and non-local qualifications.

6. Each Member shall ensure that, in verifying and assessing qualifications, the competent authority identifies any (deficiency) in an applicant's qualifications. The applicant shall be advised of any additional qualification requirements to meet the (deficiency). Such additional qualification requirements shall be based on objective (means) such as course work, examinations, training and work experience. [**JOB(06)/193 by Australia et al, except for the section in parentheses, which is different from the original Australia et al proposal**] Each Member shall provide the opportunity to service suppliers to fulfil such additional requirements in the home country, host country or third country, wherever possible. Each Member shall provide justification in case such additional requirements can be met only in the host country. [**Room Document of 1 May 2006, Chile et al with some parts of the original proposal not included**]

7. Where qualifications have been recognized as equivalent to those required for the supply of the service or the service supplier has met the identified additional requirements, each Member shall allow the service supplier to supply the service, subject to any applicable registration requirements. [**Room Document of 1 May 2006, Chile et al**]

8. Each Member shall ensure that, in verifying and assessing qualifications, the competent authority gives positive consideration to professional experience of the applicant as a substitute or complement to academic qualifications, and also to the membership of the applicant in the relevant professional associations in the home country or a third country.

9. Each Member shall ensure that any requirements of language skills for supplying a service are based on (specific) needs of supplying the service in general. [**JOB(06)/193 by Australia et al, except for the section in parentheses, which is different from the**

original Australia et al proposal] Each Member shall ensure that, in respect of language used for conducting competency assessment including examinations, consideration is given to facilitating foreign applicants in general in taking part, subject to resource constraints and practical feasibility.

I. QUALIFICATION PROCEDURES

1. Each Member shall ensure that qualification procedures are (pre-established, objective,) transparent and publicly available. **[JOB(06)/133 by Brazil et al except for section in parentheses] [Room Document of 1 May 2006, Chile et al except for section in parentheses]**

2. **[Proposal i]**

In the application of qualification procedures, Members shall ensure that qualification procedures and related documentation should not in and of themselves unduly impede the applicants' fulfilment of qualification requirements; and that the format required for such documentation be reasonable. **[JOB(06)/133 by Brazil et al]**

[Proposal ii]

Each Member shall ensure that qualification procedures and related documentation requirements are not more burdensome than necessary to ensure that applicants meet the qualification requirements and are not in themselves a restriction on the supply of service.⁶⁶ **[JOB(06)/193 by Australia et al]**

3. Examinations⁶⁷ required as part of the application process for a licence, qualification or equivalent form of permission are to be offered on a non-discriminatory basis at reasonable intervals and not at a cost designed to limit the number of applications. **[JOB(06)/182 by the United States. Part of the proposal is not included]**

4. Each Member shall ensure that examinations are administered on subjects relevant to the activity subject to the applicable qualification requirements. Residency requirements not subject to scheduling under Article XVII of the GATS shall not be a (pre-requisite) for [taking part in competency assessment including] examinations. **[JOB(03)/45/Rev.1 by Japan. "Required" instead of "pre-requisite" is used in the proposal. Parts in the brackets are not in the proposal]** Work experience in the host country shall also not be considered a pre-requisite unless necessary for meeting national policy objectives.⁶⁸

5. Each Member shall ensure that examinations, (if required), are scheduled at reasonably frequent intervals, and are open for all eligible applicants, (including foreign and foreign qualified applicants.) **[JOB(03)/45/Rev.1 by Japan without "if required" in parentheses]** Applicants shall be allowed a reasonable period for the submission of applications. **[JOB(06)/193 by Australia et al, except for the section in parentheses,**

⁶⁶ Many delegations have made no proposals on the concept of necessity and have expressed their opposition to its inclusion in the disciplines.

⁶⁷ This paragraph shall not apply to qualifying examinations administered or offered by financial service regulators or self-regulatory bodies or organizations, such as clearing agencies, or securities or futures exchanges or markets, as part of the application process for licences or applications relating to financial service suppliers.

⁶⁸ Many delegations have made no proposals on the concept of necessity and have expressed their opposition to its inclusion in the disciplines.

which is different from the original Australia et al proposal. A part of original Australia et al proposal is not included], [JOB(06)/158 by China and Pakistan only for reference to scheduling examinations at reasonable intervals]

6. Each Member shall ensure that the competent authority considers means to facilitate foreign applicants in taking part in such examinations, wherever feasible having regard to the costs and administrative burden involved, including conducting examinations by electronic means or conducting examinations abroad.

7. The qualification procedures should be as simple as possible [JOB(06)/158 by China and Pakistan. "Application and renewal forms" and other parts of the proposal are not included], and applicants should be required to approach only one competent authority for qualification procedures as far as practicable.

8. Each Member shall ensure that the documentation requirements including requirements on format are reasonable and relevant to the activities to which the qualification requirements apply. The documentation deficiency of any incomplete application shall be identified and the applicant shall be allowed the opportunity to redress the deficiency.

9. Application under the qualifications procedures shall, where feasible, be possible at any time, and receipt of applications shall be acknowledged. Each Member shall ensure that processing by the competent authority under the qualification procedures, including verification and assessment of a qualification after receiving a complete application, is completed within a reasonable timeframe. In particular, each Member shall endeavour to establish and publicise the normal processing timeframe under the qualification procedures. Where additional qualification requirements have been identified, reasonable timeframe shall be allowed for the applicant to meet such additional qualification requirements.

10. Each Member shall ensure that any fees charged for qualification procedures [have regard to the administrative costs involved (and do not in themselves represent an impediment to engaging in the relevant activity).] [Room Document of 1 May 2006, Chile et al for section in brackets] This shall not preclude the recovery of any additional costs of administering qualification requirements and any other administrative activities related to the regulation of the relevant services. [JOB(06)/193 by Australia et al, except for the section in parentheses]

11. Each Member shall ensure that if an application for verification and assessment of qualification is rejected by the competent authority, the applicant shall be informed in writing and without delay. An unsuccessful applicant shall be informed upon request of the reasons for rejection of the application, as appropriate, and of the possibility and timeframe for an appeal against the decision. An applicant shall be permitted, within reasonable limits, to resubmit the application.

12. Applicants should be provided opportunity to supplement their application in case of incomplete application identified by the relevant authority and they should be permitted to submit a new one that addresses the reason for denial of the previous one. [JOB(06)/158 by China and Pakistan. Parts of the proposal are not included]

J. TECHNICAL STANDARDS

1. Members shall ensure that technical standards are pre-established, publicly available and objective.
2. Members shall in reasonable time publish a notice (in a publication, print or electronic, and notify other Members through the Secretariat,) of the establishment and application of measures relating to national or international technical standards (relating to services and service providers). **[JOB(06)/66/Rev.1 by the SVEs except for sections in parentheses]**
3. As a matter of good practice, Members involved in the development and application of measures relating to plurilateral standards, and standards developed and applied by non-governmental standardisation bodies should ensure maximum transparency of relevant processes for the benefit of other Members. **[JOB(06)/66/Rev.1 by the SVEs]**
4. Members shall ensure that technical standards are not prepared, adopted or applied with a view to creating unnecessary obstacles to trade and shall not be maintained if the circumstances of objectives giving rise to their adoption no longer exist or if the changed circumstances or objectives can be addressed in a less trade restrictive manner. Requirements should be based on objective and transparent criteria.⁶⁹
5. Where technical standards are required and relevant international standards exist or their completion is imminent, Members shall draw on them or the relevant parts of them as a [basis for their technical standards, except when such international standards (or relevant parts) would be an ineffective or inappropriate means for the fulfilment of the (legitimate) national policy objective pursued.] **[JOB(06)/158 by China and Pakistan. Parts in parentheses are not in the proposal. Parts of the proposal are also not included]**

K. DEVELOPMENT

1. Members shall take into account the special development, financial and trade needs of developing Members in the implementation of these disciplines. **[JOB(06)/193 by Australia et al]**
2. While fees charged by the competent authority should not be an impediment in themselves to practising the relevant activity, developing country Members are not precluded from charging fees utilised to meet national policy objectives.
3. A concessionary fee for licensing or qualification procedures may be considered for applicants from developing Members. **[JOB(06)/193 by Australia et al] and [JOB(06)/133 by Brazil et al]**

⁶⁹ Many delegations have made no proposals on the concept of necessity and have expressed their opposition to its inclusion in the disciplines.

4. Where circumstances allow scope for the phased introduction on new qualification requirements and procedures, licensing requirements and procedures and technical standards, longer time-frames for compliance with regulatory measures may be accorded to services and services suppliers of developing countries so as to maintain opportunities for their exports. **[JOB(06)/133 by Brazil et al]**

5. Members shall, in the preparation and application of measures relating to licensing requirements and procedures, qualification requirements and procedures, and technical standards, take account of the special development, financial and trade needs of developing country Members, with a view to ensuring that such measures do not create unnecessary obstacles to exports from developing countries.⁷⁰ **[JOB(06)/193 by Australia et al]**

6. Members shall ensure that licensing procedures applied by a competent authority are of minimal complexity and entail minimal costs for meeting requirements and fulfilling procedures for entry into export markets. Members may grant reduced licensing and other related fees to service providers from developing country Members.

7. Members shall provide developing Members and in particular least-developed country Members (LDCs), upon their request, technical assistance on mutually agreed terms and conditions. Technical assistance shall be aimed, *inter alia* at:

- a) strengthening institutional and regulatory capacities to regulate the supply of specific services and to implement these disciplines;
- b) assisting developing country (and in particular LDCs) service suppliers to meet the relevant requirements and procedures in export markets; **[JOB(06)/133 by Brazil et al, except for section in parentheses]**
- c) facilitating the establishment of technical standards and participation of developing countries and in particular LDCs facing resource constraints in the relevant international organizations.

8. Developed country Members, and developing country Members declaring themselves in a position to do so, shall provide, through public or private bodies, assistance to developing country Members for purposes of assisting their service providers in building their supply capacity and in complying with domestic regulation in their export markets. Such assistance may also be provided directly to the respective service providers. If the relevant export market is the market of the Member from whom such assistance is requested, this Member shall use its best endeavours to provide the required assistance.

9. In light of paragraph 11 of the modalities for the special treatment for LDCs, we agree that LDCs shall not be bound by any future disciplines that will affect their specific interests. The extent and the timing of LDCs' obligations to comply with these disciplines should be related to the implementation capacity of individual LDCs.

⁷⁰ *Id.*

L. *INSTITUTIONAL PROVISIONS*

1. The Council for Trade in Services shall establish a Committee on Domestic Regulation to oversee the implementation of these disciplines and the operation of Article VI of the GATS including any further work under Article VI:4 of the GATS⁷¹. **[JOB(06)/193 by Australia et al]**

2. The Council for Trade in Services shall review regularly the operation of these disciplines, including the special and differential treatment provisions, and make recommendations as appropriate for any necessary modifications or additions to these disciplines. The first review shall be conducted no later than five years after the date of entry into force of these disciplines. **[JOB(06)/193 by Australia et al]**

⁷¹ This includes any tasks assigned to the Working Party on Professional Services in the Decision on Professional Services (S/L/3) and Decision on Disciplines Relating to the Accountancy Sector (S/L/63) and the Working Party on Domestic Regulations in the Decision on Domestic Regulations (S/L/70).

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