

Working Party on Domestic Regulation

REPORT ON THE MEETING HELD ON 2 OCTOBER 2001

Note by the Secretariat

1. The Working Party on Domestic Regulation (WPDR) held its thirteenth meeting on 2 October. The agenda for the meeting is contained in Airgram WTO/AIR/1623 and /Corr.1. Discussion at this meeting was based largely on a new Chairperson's Note. Significant progress was made regarding the relationship between domestic regulatory measures falling under GATS Article I:4 and measures subject to scheduling under Articles XVI and XVII, as well as on a range of other issues. Members also further discussed the proposal to advance the work on professional services.

2. Before adopting the agenda, the Chairperson observed that there had been some "computer gremlins" at work on the airgram, and the item concerning a request for observer status from the International Association of Insurance Supervisors was mistakenly included. He said the item should be deleted.

(a) Development of Regulatory Disciplines under GATS Article VI.4

(i) *Discussion of Concepts Relating to the Development of Disciplines*

3. The Chairperson noted that the first item on the agenda was the discussion of concepts relating to the development of regulatory disciplines, which was directly related to the second item, the development of general disciplines for professional services. Members had excellent discussions under these two agenda items at the previous meeting of the Working Party on 3 July and, because of the progress made, he had circulated another Chairman's Note, distributed as JOB(01)/130, dated 14 September 2001, which attempted to lay down some further thoughts on the range of issues before the Working Party.

4. The Chairperson emphasised that Members should feel free to draw upon any contributions that were already part of the discussions, including the Accountancy Disciplines, as well as the range of negotiating proposals from the Council for Trade in Services' Special Session.

5. Members accepted the Chairperson's suggestion that discussions be held in informal mode, so as to encourage as free-ranging a discussion as possible.

General Issues

Examples of actual regulatory issues

6. The Chairperson observed that, at the previous meeting, Members had commented on the informal Secretariat paper, *Examples of Measures to be Addressed by Disciplines under GATS Article VI:4*, circulated as JOB(01)/62, dated 10 May 2001. Among the points raised was the need for additional examples, as well as for greater detail. Two delegations suggested additional measures to

be included, and another delegation questioned the inclusion in Annex I of the example “Restrictive regulations relating to zoning and operating hours”. As Chairperson, he had suggested that Members first consider the issues somewhat further before having the Secretariat undertake any revisions of the *Examples* paper.

Linkage between transparency and necessity

7. The Chairperson stated that, as indicated in his Note (para 5), it would appear as though previous discussions on this issue had engendered a useful exchange of views, which had been encapsulated in the *Informal Summary of Discussions* that appeared as an Annex to the Minutes. He was, however, unsure as to how much further Members could take this particular issue, and looked forward to any further thoughts that Members might have.

Relationship between GATS Articles VI:4 and Articles XVI/XVII

8. The Chairperson observed that, at the previous meeting, there had been a major discussion of this issue, with some very important points being raised. One Member, for example, stated that a single measure could have diverse effects. These different effects should be dealt with in different fora, with Article VI:4 effects dealt with in the WPDR while the market access and national treatment effects were dealt with in the schedules. Another delegation said the relationship sought between Article VI:4 and Articles XVI & XVII was one of complementarity, i.e. with no obvious overlap. Both aspects deal with trade restrictions, the delegation noted, albeit of a different nature.

9. As noted by the Secretariat, the issues were being clarified during the meeting as the discussion continued. “Measures” were defined very broadly under the GATS, the Secretariat noted, and covered laws, regulations, decisions and even unwritten practices. Licensing systems could be composed of both Articles XVI and XVII, and Article VI:4, measures. There was no overlap. The situation was similar to automatic and non-automatic licensing for goods, in that there was always a distinction between the administrative measures and the restrictions they administered. In the GATS context, there needed to be distinction between a licensing system and its various components, in terms of their different requirements and different measures. The existence of a licensing system did not necessarily mean it needed to be scheduled, provided it was composed only of measures within the scope of Article VI:4. The Secretariat also stated that Article VI:4 was not designed to handle measures scheduled under Articles XVI and XVII.

10. As he had indicated in his Note, the Chairperson believed that the Secretariat’s observations had usefully pointed the Working Party in the right direction and should probably form the basis of any understandings that the Working Party might be able to come to on this issue. It was fairly clear from the negotiating history and the work under the auspices of the Working Party on Professional Services that an overlap between Articles XVI and XVII, which belong to Part III of the GATS, and Article VI:4, which belongs to Part II of the GATS, was not desirable. Instead, the relationship would rather seem to be one of “complementarity” where Articles XVI and XVII and Article VI:4 both dealt with trade restrictions, albeit of a different nature.

Scope of GATS Article VI:4

11. The Chairperson noted that, as indicated in his Note (para 9), previous discussions had highlighted that most Members believed that Article VI:4 did not extend beyond the five items listed in the provision (namely, qualification requirements, qualification procedures, technical standards, licensing requirements and licensing procedures). Given the language of Article VI:4, as well as the mandate of the Working Party, there did not appear to be too much more to add to this. There were, of course, other issues that would probably require further consideration (e.g. applicability of horizontal disciplines to sectors where specific commitments had or had not been made), but these

would probably only be able to be fully answered at a later stage of the Working Party's work when the final shape of the disciplines became clearer.

Administrative burden

12. The Chairperson introduced this topic, noting that at the previous meeting, one Member had noted that emphasis in the revised *Checklist of Issues for WPDR* (JOB(01)/92 dated 19 June 2001) was placed on only one type of administrative burden, i.e. on prior comment, and said that more balance was needed. For example, the administrative burden associated with necessity provisions should also be considered. Another delegation said the requirement in Article VI:4 that measures be "not more burdensome than necessary" implied that measures could in fact be burdensome, and that the issue was to attempt to make measures less burdensome. There was a need to balance the various elements involved, including protecting the right to regulate and the interests of services suppliers and consumers. One Member stated that regulatory impact analysis led to better regulation and less burden in the longer-term, especially for small and medium-sized enterprises. As observed in his Note, these issues and concerns had been referred to in the *Informal Summary of Discussions*. It would be useful if Members could indicate whether there were any other issues or concerns that needed to be acknowledged by the Working Party at the current stage of the discussions.

Federal/sub-federal measures

13. The Chairperson stated that this issue, which now fell under the rubric of *General Issues*, but had previously been classified under *Transparency*, concerned how far-reaching any disciplines that the Working Party might develop would be. For example, would the disciplines that the Working Party might eventually develop apply only to measures at a federal or national level? Or, would they apply to measures at the sub-federal or sub-national level? He had touched upon this in his Note, and would be grateful for any comments from delegations.

Summary of informal discussions

14. The Chairperson summarized the informal discussions by noting that Members had very substantial, fruitful and constructive discussions of the *General Issues*, which showed they had given careful thought to the issues concerned. The results of these discussions would form the basis for further progress of the Working Party.

15. On the question of *examples of actual regulatory issues*, Members seemed to be increasingly focusing on this issue. It was important to get a better understanding of the range of regulatory issues relating to Article VI:4. The examples provided by the Secretariat paper, and from Members' interventions and written contributions, were seen as particularly useful. Some delegations also referred to the Special Session negotiating proposals as a source of additional examples. Following an exchange of views among Members over whether a revised Secretariat paper was required, it was agreed that the responsibility was upon Members to review all the available sources, with the intention to focus more on the substance and details of examples at the next meeting.

16. On the *relationship between GATS Articles VI:4 and Articles XVI/XVII*, Australia's contributions were very useful. There was a coalescing of Members' views around the ideas expressed in para 8 of the Chairperson's Note, especially the idea that these GATS Articles should be viewed as complementary to each other (i.e. they all dealt with trade restrictions, but with restrictions of different natures). There was agreement that para 6 of the Chairperson's Note, together with the meeting Minutes and the *Informal Summary of Discussions*, were an accurate reflection of Members' discussions.

17. On the issue of the *scope of GATS Article VI:4*, the Chairperson observed that para 9 of his Note, especially the last part regarding when a decision should be made on the applicability of disciplines with respect to scheduled and unscheduled measures, had produced much discussion. It was timely to again have a discussion of this question, he stated, and many Members were interested in pursuing the issue further. The Secretariat intervention regarding the negotiating history had been useful, and the issue needed further discussion.

18. Concerning the question of *administrative burden*, the Chairperson stated that Venezuela's point was important and, in his view, the issue of the administrative burden of regulatory disciplines on developing countries was particularly important. On para 11 of his Note, regarding *federal/sub-federal measures*, he observed that this was also an importance issue for Members, with a number of insightful comments made, and further reflection would be necessary.

Necessity

19. The Chairperson noted that the next group of topics was the issue of necessity. As he had noted during the last meeting, the revised *Checklist*, items 6 to 8, contained a range of issues relating to necessity that the Working Party would need to work through. At the previous meeting, one Member (supported by a number of other delegations) said they had come to the conclusion that it was probably "more burdensome than necessary" to develop a list of *legitimate objectives*, as the result was likely to be either overly restrictive or too broad to be of much guidance. In para 13 of his Note, he had asked whether this was a fair assessment of the discussions and, if so, whether would it be appropriate if this issue was put to one side until such time as the Working Party had made more progress on the final shape of the disciplines that are envisaged by Article VI:4.

20. On the question of the *criteria for the necessity test*, as well as the "*third aspect*" of the *necessity test*, his Note observed that the Working Party had made good progress, but it still needed to come to a better understanding on the various terms that were currently on the table. In so doing, he believed that Members should continue to bear in mind the necessity test that was developed for the *Disciplines on Domestic Regulation in the Accountancy Sector*. In his view, this test continued to provide the basis for anything that the Working Party might be able to develop on a more horizontal basis.

Summary of informal discussions

21. Following comments by Members, the Chairperson summarized by noting that Members continued to attach considerable importance to further discussions on necessity, highlighting the importance of the accountancy disciplines in this regard as well as the linkages between necessity and transparency. There was a general consensus that the discussions of *legitimate objectives* could be put to one side for the time being.

Transparency

22. The Chairperson noted that the next issue for the Working Party was that of transparency. Once again, the revised *Checklist*, in items 9 to 14, contained a range of issues relating to transparency that the Working Party would need to work through. In this regard, he had raised a number of questions in paras 16 and 17 of his Note in relation to each of the issues relating to transparency. He then opened the floor to any comments that delegations might wish to make.

Summary of informal discussions

23. Following discussions by Members, the Chairperson summarized by stating it was clear that Members attached importance to transparency, and that more focused discussions were needed

regarding the substantive details of the aims and objectives of transparency disciplines. The discussions on issues such as *prior comment provisions*, and *notifications related to prior comment provisions* could probably be put aside for a moment to focus on *transparency objectives*. Members' interventions had usefully clarified the substantive issues for further discussion, including the role of GATS Article III and the relevance of the accountancy disciplines. Regarding the *definition of regulations*, he noted this was linked to the *General Issues*, and stated that it would be more appropriate to discuss it there.

Equivalence

24. The Chairperson then stated he wished to continue discussions on the “new” topics introduced in the revised *Checklist*. The first was the issue of equivalence. As he had stated at the previous meeting, the revised *Checklist* posed a short question for the Working Party to consider in relation to equivalence – namely, whether Members thought that the concept of equivalence was relevant to the Working Party's work on Article VI:4 disciplines. He noted that Members should feel free to introduce, or draw upon, the contributions on professional services in continuing discussions on more horizontal disciplines not only in relation to equivalence, but all other areas of the Working Party's work.

25. During the previous meeting, one delegation drew attention to the existing requirements of Article VII and said, if used appropriately, they could lead toward some convergence with respect to the recognition of qualification requirements, etc. New requirements should not be imposed, the delegation stated. In addition, the delegation said it would be interesting to hear if any Member had used the MRA Guidelines developed earlier for professional services. Another Member raised the issue of the additional requirements to demonstrate equivalence imposed by Members on professionals holding foreign qualifications, and said that the issue which needed to be further discussed was whether these additional equivalency requirements were more burdensome than necessary. A third Member noted that the concept of equivalency was already reflected in the accountancy disciplines.

International standards

26. The Chairperson then noted that the second of the “new” topics was international standards. As was the case for equivalence, the revised *Checklist* posed a very short question for the Working Party to consider in relation to international standards – namely, did Members think that international standards were relevant to the Working Party's work on Article VI:4 disciplines. At the last meeting, he had stated that a lot of the information that had been discussed under professional services could inform and help the work on the development of generally applicable disciplines. It was noticeable that several Members' papers referred to the same international body – the International Union of Architects – when discussing the question of international standards.

Summary of informal discussions

27. Following discussions by Members, the Chairperson noted that Members had a useful exchange of thoughts on international standards, including their applicability and relevance to the work of the WPDR. He concluded by stating that Members would revert to this and the previous item in more detail at the next meeting, taking note of the comments made during the discussion.

(ii) Development of Disciplines for Professional Services

28. The Chairperson noted that the second main item for the meeting concerned the development of disciplines for professional services. At the previous meeting, one delegation was concerned that professional services had languished, and thought that Members might “jump start” the work on

professional services by first focusing on a smaller grouping of professions. The choice of architects, engineers, and land surveyors was due to the fact that consultations in these sectors seemed to be further advanced. It was emphasized that this suggestion was an initial idea, and not a formal proposal.

29. As he had highlighted in his Note, he did not see the work on professional services and more horizontal disciplines as being mutually exclusive, but rather complementary. He would therefore welcome any initiatives that would see the work on professional services and on the development of more horizontal disciplines being brought together more effectively. He noted that the work in both areas of the Working Party's mandate could benefit from adopting a more unified approach. He emphasized, however, that the ultimate decision as to how the Working Party approached the work on professional services in the future was in the hands of the Members. To assist in this process, he suggested that Members took another look at the *Synthesis* paper (*Synthesis of Results to date of the Domestic Consultations in Professional Services (Fourth Draft)*, JOB(01)/145), dated 26 September 2001) that was prepared by the Secretariat as this encapsulated the reports that the Working Party had received from Members and might help Members when they considered how the work on professional services could be better advanced.

30. The Chairperson also noted that, since the last meeting, two delegations, Switzerland and Thailand, had submitted written reports on their domestic consultations, circulated as documents S/WPDR/W/16, dated 4 September 2001, and S/WPDR/W/18, dated 28 September 2001. He then asked Switzerland and Thailand like to introduce their reports.

Summary of informal discussions

31. The Chairperson summarized discussions by stating that Member had a very useful exchange, with several themes emerging from the discussion. One point was that the work under this agenda item and under the previous agenda item was mutually supportive, as shown by the links with the earlier discussion of concepts relating to the development of disciplines. Members also noted there was much useful information in the *Synthesis*, but that the level of reporting was still quite low. Members were again urged to complete their domestic consultations.

32. On the proposal to "jump start" the work on professional services, a number of Members were open to the idea, but others highlighted that the time was not ripe for sectoral work. The Chairperson concluded by observing that the Secretariat background paper S/C/W/97 was still relevant to this agenda item, and provided additional context.

(b) Annual Report on the Activities of the Working Party to the Council for Trade in Services

33. The Chairperson next noted that Members had come to the time of the year when each of the subsidiary bodies provided an annual report to the Council for Trade in Services on their activities for the past year. A draft had been prepared by the Secretariat and this had been circulated as S/WPDR/W/17, dated 21 September. He noted that the draft would obviously need to be updated in para 2 to take into account Thailand's recent contribution, and then opened the floor to comments from delegations.

34. Following comments from Members, the annual report was adopted, with amendments, by the Working Party.

(c) Date of Next Meeting

35. In accordance with the practice of grouping meetings of subsidiary bodies close to meetings of the Council, the Chairperson suggest that the next meeting be held in connection with the meetings of the Council and other subsidiary bodies. Members agreed to the Chairperson's suggestion.

(d) Other Business

36. The Chairperson noted that a corrigendum to the minutes of the previous meeting had been issued, as document S/WPDR/M/12/Corr.1, dated 2 October 2001.

ANNEX

INFORMAL SUMMARY OF DISCUSSIONS ON THE *CHECKLIST OF ISSUES FOR WPDR*

(As requested by Members, this informal summary of discussions has been continually updated on the Chairperson's responsibility to reflect the current views of Members on the topics addressed in the revised *Checklist of Issues for WPDR* (Job No. 5067/Rev.1, dated 19 June 2001). Like the *Checklist*, this summary does not prejudice the scope or content of the issues discussed, nor the ability of Members to raise other related issues.

General issues

Members agreed that the work on professional services and the creation of horizontal disciplines were not mutually exclusive activities, but instead complementary. One Member stated that consideration should be given to the temporary nature of GATS Article VI:5. The Secretariat was asked to comment, and stated that Article VI:5 would need to be addressed following the creation of regulatory disciplines under Article VI:4. One delegation asked the Secretariat to comment on the objectives intended by the drafters of Article VI:5. The Secretariat replied that Article VI:5 was an effort to operationalize the objectives stated in VI:4, the most important of which was the necessity test. Several Members stated that the development of rules on domestic regulation should not in any way affect the financial services prudential carve-out.

1. Examples of actual regulatory issues:

Members agreed to have the Secretariat list examples of the kinds of measures that would be addressed by disciplines under GATS Article VI:4, based on contributions by Members and a review of the Working Party on Professional Services (WPPS) accountancy materials by the Secretariat. The Secretariat paper was to list specific measures not already found in the accountancy disciplines, which were also not XVI/XVII measures. The Chairman noted that the elaboration of this list would not preclude parallel discussions among Members on the same issue. The Secretariat subsequently presented the informal paper, *Examples of Measures to be Addressed by Disciplines under GATS Article VI:4*, circulated as JOB(01)/62, dated 10 May 2001.

Many delegations supported the *Examples* paper, but said it needed to be expanded and the examples made more precise. Some delegations also referred to the Special Session negotiating proposals as a source of additional examples. Two delegations suggested additional measures to be included, and another delegation questioned the inclusion in Annex I of the example "Restrictive regulations relating to zoning and operating hours". The Chairperson suggested that Members first consider the issues somewhat further before having the Secretariat undertake any revisions of the *Examples* paper.

2. Linkage between transparency and necessity:

Delegates referred to both the advantages (increased accountability) and disadvantages (additional administrative burden) of greater transparency. Several delegations stated that greater transparency in the regulatory process could contribute to ensuring that regulations would not be more trade restrictive than necessary. Others said that both transparency and necessity were important: transparency alone had its limits, and therefore could not be a substitute for regulatory disciplines. Some delegations said Members should instead focus on deciding the contents of the regulatory disciplines to be developed.

One delegation said differences in legal frameworks should be considered. Another delegation said Members should not distinguish between types of measures, as the same requirements

could be implemented via a variety of legal mechanisms. A third delegation said that Members should be careful not to prejudge what kinds of disciplines were needed.

With respect to the question under this item in the *Checklist*, i.e. “To what extent can greater transparency play a role in determining whether a measure is necessary?”, one delegation said the test should be whether a measure is “more burdensome than necessary”, rather than simply “necessary”.

3. Relationship between GATS Article VI:4 and Articles XVI/XVII:

Several delegations said there should be no overlap between domestic regulatory measures under Article VI and measures under Articles XVI and XVII, and that there was a need to differentiate between these measures.

Other delegations said there appeared to be a certain overlap between Article VI and XVI/XVII measures, e.g. in the case of limits on the number of licenses granted. One Member said they appreciated why some Members wanted to maintain a clear distinction for legal reasons, but were not convinced this was feasible in practice. The distinct effects of a particular measure needed to be considered, the Member stated. One delegation noted that it would be difficult to imagine that Article VI:5 would be applicable to measures scheduled under Articles XVI and XVII, and stated it was critical that the Working Party reach a consensus on these issues.

One Member stated that a single measure could have diverse effects. These different effects should be dealt with in different fora, with Article VI:4 effects dealt with in the WPDR while the market access and national treatment effects were dealt with in the schedules. Another delegation said the relationship sought between Article VI:4 and Articles XVI and XVII was one of complementarity, i.e. with no obvious overlap. Both aspects deal with trade restrictions, the delegation noted, albeit of a different nature.

The Secretariat observed that the issues were being clarified as the discussion continued. Licensing systems could be composed of both Articles XVI and XVII and Article VI:4 measures. There was no overlap. In the GATS context, there needed to be distinction between a licensing system and its various components, in terms of their different requirements and different measures. Article VI:4 was not designed to handle measures scheduled under Articles XVI and XVII.

4. Scope of GATS Article VI:4:

Nearly all the delegations making comments felt that GATS Article VI:4 did not extend beyond the five items listed. The definitions in paragraph 4 of S/C/W/96 were generally felt to be acceptable, but could be reviewed if necessary. A number of delegations said any horizontal disciplines should only be applicable to sectors where specific commitments have been made; other delegations felt this was also an issue for negotiation. Some delegations said that, in accordance with GATS Article VI:1, any horizontal disciplines should only be applicable where specific commitments have been made. Many Members stated that the issue of the applicability of disciplines with respect to scheduled and unscheduled measures should be given increased priority.

5. Administrative burden:

A significant number of Members agreed that the administrative burden of any regulatory disciplines that were developed was a central consideration. A number of delegations said that, before creating disciplines, it was necessary to analyze whether regulatory disciplines would create too heavy an administrative burden on developing countries.

One Member noted that emphasis in the *Checklist* was placed on only one type of administrative burden, i.e. on prior comment, and said that more balance was needed. For example, the administrative burden associated with necessity provisions should also be considered. Another delegation said the requirement in Article VI:4 that measures be “not more burdensome than necessary” implied that measures could in fact be burdensome. The issue was to attempt to make measures less burdensome. There was a need to balance the various elements involved, including protecting the right to regulate and the interests of services suppliers and consumers.

One delegation stated that regulatory impact analysis led to better regulation and less burden in the longer-term, especially for small and medium-sized enterprises.

6. Definition of regulations:

One delegation stated it wished to clarify that, in the context of transparency disciplines, legislative processes were excluded from consideration by the Working Party as one of the types of regulation to which prior comment requirements could be applied. Other delegations agreed, but felt there may be no need for a new definition, as regulations were already included under the GATS term “measure” as defined in Article XXVIII. One representative said the “measures” mandate was clear, but that it was in the context of developing “any necessary disciplines”. The representative said that it was still early in the process, and that Members were setting their sights too low if they focused exclusively on all measures in respect to transparency disciplines.

A number of delegations were of the view that it would not be appropriate to have some disciplines applicable to measures, and others applicable to only a subset, i.e. regulations. One delegation suggested that, in such cases, Members could instead consider additional commitments in schedules as an alternative option. Another delegation said that some flexibility may be required in terms of the application of specific disciplines. A third delegation noted the different realities and legal systems among Members, and said it was necessary to be realistic, and focus on disciplines applicable to all.

One delegation said that Members should consider whether regulations as defined under the GATS were equivalent to those as defined under the TBT and other WTO agreements, and whether notification requirements should only apply in areas where no international standards existed. One Member suggested that perhaps the Working Party could explore an agreed set of minimum standards for transparency, which would be subject to an annual review process. Another Member asked if it was intended that the minimum standards would not be subject to dispute settlement.

7. Federal/sub-federal measures:

Some Members said the focus of transparency should be the central government level, while others disagreed and noted that most restrictions were to be found at the sub-national levels. A number of Members stated that the issue of federal/sub-federal measures should be discussed under the *General Issues*, and that greater emphasis should be placed by the Working Party on this issue. Several Members stated that disciplines should cover measures at all levels of administration, including sub-federal measures. One delegation reminded Members that GATS coverage included measures at all levels of administration.

Necessity

8. Legitimate objectives:

Many Members making comments favoured the creation of a concise, non-exhaustive, illustrative list of legitimate objectives. Many also felt a listing of "non-legitimate objectives" would be too limiting, and was undesirable. A number of delegations stated they were not necessarily opposed to a positive list, but simply had some doubts as to whether it would actually be possible to put together a positive list, as it could become too large or too difficult to reach a consensus on a smaller list. One Member said that international standards, while still not very widespread in services, could nonetheless be referred to in this respect. Several delegations said the determination of legitimate objectives rested solely with Member governments.

One delegation asked what kind of function Members had in mind for a listing, and whether a necessity test would still be required in respect to agreed legitimate objectives. A number of Members expressed concern that a listing could potentially restrict their autonomy to regulate, and some asked whether the existing wording of VI:4 was already sufficient. One Member observed that the protection of consumers was not specifically mentioned in VI:4. Some delegations did not wish a listing to be legally binding, but instead only provide guidance for regulators. One delegation said that, for sensitive issues, Members should not be too specific in listing legitimate objectives. Another delegation said that, according to the GATS Preamble, the national policy objectives as defined by Members were already legitimate and, therefore, did not need further clarification. Several Members noted that the Appellate Body to date had never questioned the legitimate objectives set by governments.

Several delegations were of the view that Members should give more consideration to the existing Article XIV provisions; another delegation pointed out that VI:4 disciplines were obligations, while XIV measures were exceptions to GATS provisions. Several Members stated that priority should now be given to the creation of specific disciplines, and the listing of legitimate objectives should come afterward. Other Members explicitly disagreed. The issue of horizontal-versus sectoral-level listings of legitimate objectives was generally thought to be an issue for negotiation.

9. Criteria for the necessity test:

The Chairman noted that documents on this topic had been submitted by Members. Several delegations said they had begun domestic analyses of the implications of the differences in terminology. One Member asked where the burden of proof would lie in respect to necessity. Another expressed concern over the Working Party attempting to define terms whose application extended beyond services trade and should be defined by panels or the Appellate Body. A number of Members asked what the objectives of the necessity test would be, i.e. whether it was intended to discipline regulators, or to help give them guidance.

One delegation said the concept of proportionality could be useful for assessing the trade impact of a measure. Many Members had proportionality provisions in the way they applied their domestic legislation, the delegation stated, and the Working Party needed to give "flesh" to the term "not more burdensome than necessary". Several Members expressed concerns on proportionality, especially regarding measures that were considered as disproportionate. Another delegation said Members should be careful in respect to introducing new criteria for necessity. A third delegation said the concept seemed possibly subjective.

One Member said that general provisions on necessity should be horizontal in nature, to ensure coherence across sectors, with possible additional provisions to address sector specificities.

Another Member agreed the possibility could be considered, while a third Member said caution was required with respect to the question of sectoral necessity provisions.

One delegation stated that, regarding the question of whether regulatory autonomy was constrained by the necessity test, the chapeau of the GATS, which unequivocally recognized Members right to regulate, was overriding. At the same time, there were also the mandates given in Articles VI:4 and XIX, for ensuring that regulations were not unnecessarily trade restrictive and promoting trade liberalization, respectively. Regulatory autonomy was nonetheless preserved, as Members were free to pursue the policy objectives suitable for their domestic environments. While pursuing this right to regulate, regulators needed to be mindful of their GATS commitments, as well as the international trade implications of their regulatory options.

The Secretariat was asked whether it had previously compiled information on the jurisprudence relating to the application of necessity in the WTO. The Secretariat noted there was an existing paper on this issue from the Committee on Trade and the Environment (document WT/CTE/W/53/Rev.1, dated 26 October 1998), and suggested that, after examining this paper, Members could decide whether wished to have additional work done. The Chairperson said there was the question of updating, after Members had read the document. Several Members asked for information on EC jurisprudence regarding proportionality, and were told all jurisprudence was available on the CELEX database.

A question was raised concerning whether there was a difference between restrictiveness and burdensomeness in the context of Article VI:4. The Secretariat replied that there was a difference, and that a measure could be more burdensome than necessary, but not to the point of being trade restrictive and vice-versa.

10. "Third aspect" of the necessity test:

One delegation said that consideration must be give to the criteria to be used in applying the "third aspect" (i.e. the idea that a measure that has the effect of restricting trade can be considered "necessary" only if there is no alternative measure less restrictive of trade which may be reasonably available to a Member to achieve the same policy objective); another delegation said that the "third aspect" could be excessively burdensome considering the vast scale of services sectors. The reply was made that the "third aspect" was in fact a means for examining alternatives to particular regulations.

Transparency

11. Transparency objectives:

Several delegations urged caution in regard to further transparency obligations, and asked Members to consider costs as well as benefits. They noted this item was related to item 12 of the Checklist concerning administrative burden. One delegation stated that dual standards of notification, e.g. between different levels of government, could not be permitted in regard to transparency provisions.

Responding to a question on the costs and benefits of transparency, one delegate said that transparency benefited consumers and companies most, as it would assist in creating a more predictable trading environment, and more transparent ways of doing business, but that there would also be benefits for governments in terms of promoting foreign market access. The delegate noted that while transparency had costs, particularly at the sub-national levels, the use of the Internet and other technologies could help reduce those costs.

One delegation said that not enough discussion had taken place on transparency disciplines, including building on the variety of transparency provisions contained within the accountancy disciplines. Other delegations noted that the importance of transparency was explicitly recognized in Article VI:4 (a), and that the VI:4 mandate implied a need for additional transparency provisions. Several delegations agreed that the most important aspect of transparency was to increase predictability; therefore, transparency disciplines needed to be directed towards services providers, not towards governments, and there should be no new notification requirements. Some delegations, however, said that Article III requirements were sufficient, and there should be no new measures.

12. Prior comment provisions:

Many Members opposed the creation of any prior comment provisions, saying they were unnecessarily burdensome, especially for sub-national entities. One Member noted that the OECD was preparing a paper on this issue. One Member expressed the view that prior comment provisions could have similar effects to necessity provisions, and said that Members could examine and compare the administrative burden of these two alternatives. Another Member asked towards whom prior comment provisions should be targeted, and how such provisions could be made workable at the multilateral level.

Some delegations stated that prior comment provisions as part of the law-making process were not permitted under their domestic legislation. Many governments, however, did publish new measures well in advance of their entry into force. One delegation noted that all WTO Members had already agreed on prior comment on goods standards. Another Member observed that the accountancy disciplines had a "best endeavours" clause, and said this could be repeated. Other Members said caution was required, and that the definitional and prior comment issues needed to be examined in greater detail.

13. Notifications related to prior comment provisions:

One delegation said that notifications in government gazettes should be the minimum requirement, with Internet listings also encouraged, but that notifications to the WTO were not required. Others, as noted above, opposed the creation of any prior comment provisions.

14. Compliance with existing notification requirements:

Several delegations stated that the notification requirements under GATS Article III were not being observed, and needed strengthening. Other delegations were opposed, stating that Members already had difficulty meeting existing requirements. One delegation said there seemed to be some confusion among Members concerning the differences in the transparency criteria of Article VI and of Article III.

15. Appropriate levels of transparency

One delegation asked whether the OECD had conducted work on cost-benefit analyses in respect to transparency provisions. The Chairperson asked the Secretariat to make an enquiry. The response to the Secretariat enquiry was that, although no specific cost-benefit analyses had been conducted, some information might be available in the individual country studies.

16. Role of equivalence

The Chairperson said he believed that much of the information regarding professional services could inform and help the work on the development of generally applicable disciplines.

One delegation noted the existing requirements of Article VII and said, if used appropriately, they could lead toward some convergence with respect to the recognition of qualification requirements, etc. New requirements should not be imposed, the delegation stated. In addition, it would be interesting to hear if any Member had used the MRA Guidelines developed earlier for professional services. One delegation stated that disciplines would not be useful unless they tackled Article VII- related issues, and that the MRA guidelines for accountancy were a helpful precedent.

One Member raised the issue of the additional requirements to demonstrate equivalence imposed by Members on professionals holding foreign qualifications, and said that the issue which needed to be further discussed was whether these additional equivalency requirements were more burdensome than necessary. Another Member noted that the concept of equivalency was already reflected in the accountancy disciplines.

17. Role of international standards

The Chairperson stated that a lot of the information that had been discussed under professional services could inform and help the work on the development of generally applicable disciplines. It was noticeable that several Member's papers referred to the same international body – the International Union of Architects - when discussing the question of international standards. Some delegations noted the problem that services standards “were not yet standardized”. One delegation stated that some of their domestic professional associations felt that developing countries were not able to participate fully in the creation of international services standards.
