

## Working Party on Domestic Regulation

### REPORT ON THE MEETING HELD ON 3 JULY 2001

#### Note by the Secretariat

The Working Party on Domestic Regulation (WPDR) held its twelfth meeting on 3 July. The agenda for the meeting is contained in Airgram WTO/AIR/1575. Based primarily on the revised version of the *Checklist of Issues for WPDR*, and a new Chairperson's Note, discussion focussed on the issue of the distinction between measures falling under GATS Article VI:4 and those under Articles XVI and XVII, as well as on the question of examples of actual regulatory issues. Some exchanges occurred on the issues of necessity, transparency, equivalence and international standards. There was also a tentative proposal to "jump start" the work on professional services.

#### (a) Organization of Work

The Chairperson observed that Members had had an excellent discussion on the organization of work at the previous meeting of the Working Party, on 11 May. As a result of the discussion, he circulated a new Chairman's Note, distributed as Job No. 01/93, dated 21 June 2001, and the Secretariat circulated a revised version of the *Checklist of Issues for WPDR*, distributed as Job No. 01/92, dated 19 June 2001. These documents would be discussed in more detail under the next agenda item, but he was conscious that there might be some Members who would like to add further thoughts on the organization of work.

The representative of the United States noted that Members were struggling with the challenge of striking a balance in the discussions regarding the development of disciplines, and there had perhaps been some unintentional focus on the development of horizontal disciplines. Meetings of the Working Party should be structured so as not to preclude any particular approach, he stated. The U.S. had given some thought to the complementarity between the development of horizontal disciplines and the work on professional services, and suggested that the Working Party might first wish to focus on a smaller grouping of architects, engineers, and land surveyors.

The representative of Chile asked if the U.S. could explain the reasons behind their choice of professions. The Chairperson agreed that the work was not mutually exclusive, but complementary. He suggested that Members could discuss this issue in detail under the next agenda item.

The representative of the United States said he agreed with the Chairman's Note that the work on professional services could help with the development of horizontal disciplines. The U.S. 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. He emphasized that the U.S. suggestion was an initial idea, and not a formal proposal.

The Chairperson noted that, in his Chairman's Note, he had been particularly conscious of exploring ways in which the work on professional services and on the development of horizontal disciplines could be brought together more effectively.

The representative of Hong Kong, China said their views on professional services were well known, but that they had an open mind on the issue of examining individual sectors. She said that the work of the International Union of Architects had already gone beyond the WTO's work, and urged that the Working Party move forward in professional services, but without compromising the development of general disciplines.

The representative of the European Communities said the U.S. idea appeared to help promote synergy between the two main activities of the Working Party. She stated that elements in the negotiating proposals also gave insight on issues and could help the Working Party in developing core principles of general application. The representative of Canada, regarding the U.S. idea, agreed that the two elements were not mutually exclusive, but reinforcing.

The representative of Brazil reserved his delegation's position on the U.S. idea. He concurred with Canada that the two tracks were not mutually exclusive. Without putting emphasis on either, the main questions to be addressed remained the same for both tracks, he noted. The representative of the United States said his idea was not a formal proposal, and that the U.S. was open to further suggestions. His delegation was not seeking to put priority on either track, but was concerned that there had been an imbalance in the priority, focusing on horizontal disciplines. He said that adequate attention also needed to be focused on professional services.

The Chairperson concluded by stating that Members had a useful exchange of views with respect to the organization of work. The discussions highlighted the fact that the organization of the Working Party was an evolving process. He emphasized that both professional services and the development of horizontal disciplines would remain on the Working Party's agenda, and that it was up to Members to provide the necessary inputs to ensure that both tracks were given equal priority.

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

The Chairperson noted that the second item on the agenda was the development of regulatory disciplines under GATS Article VI:4, with the discussion of concepts relating to the development of regulatory disciplines, and the development of disciplines for professional services, as sub-topics. He noted that the changes to the agenda were intended to reflect the previous meeting's discussions, but could be further revised at the request of Members.

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

Before turning to the various issues contained in the revised *Checklist*, the Chairperson briefly

introduced his recent Note, stating that it was an attempt to recap some of the themes that emerged from discussions at the last meeting, and then set out a number of observations and questions he had with regard to the issues that are addressed in the *Checklist*. These observations and questions were meant to encourage discussions on these issues, he noted, and should in no way be seen as the Chair trying to advocate any particular agenda.

#### *Examples of actual regulatory issues*

With respect to the General Issues section of the *Checklist*, the Chairperson noted there were a number of topics that fell into this area. The first topic was the question of examples of actual regulatory issues that related to Article VI:4. At the last meeting, the Secretariat presented the informal paper, *Examples of Measures to be Addressed by Disciplines under GATS Article VI:4*, circulated as Job. No. (01)/62, dated 10 May 2001. There were also the recent contributions from Japan (Job 1954, dated 20 March 2001) and Australia (Job (01)/69, dated 10 May 2001). He asked whether Members wished to comment on these papers.

The delegate from Canada commented on the Secretariat *Examples* paper, saying she questioned the inclusion in Annex I of “Restrictive regulations relating to zoning and operating hours”. The example “Unduly burdensome requirements” did not seem clear, she stated. Regarding the inclusion of “It is necessary to obtain/renew the same license in every regional government”, she commented that multiple jurisdictions were often a reflection of Member’s constitutions. For “A large number of documents is required (application procedures)”, it was not clear what was intended. The inclusion of “Residency/citizenship requirements” was questioned as a VI:4 measure. For the item, “Non-recognition of foreign qualifications”, she asked whether it should be read as the absence of procedures to consider foreign qualifications. The Secretariat replied that the items in Annex I were contributed by Members and that, as noted in paragraph 4, the level of detail provided was often not sufficient.

The delegation of Japan supported the revised *Checklist*, but was concerned about the Working Party’s discussions becoming too diffused with the additional issues. The informal *Summary* of discussions was a good way of recording Members’ comments, they stated. The delegation supported the *Examples* paper, and said it needed to be expanded and made more precise. They suggested that “Lack of consistency in implementing regulations” be added to the *Examples* paper.

The representative of the United States stated that the *Examples* paper was very useful, and he hoped it could be expanded over time. He noted that the categorization of particular measures under the five VI:4 categories was sometimes difficult. Additional measures which the U.S. believed could be included were: “Inadequate information available, or information not readily available, to non-governmental market participants about new or proposed regulations affecting their interests”; “Where government approval is required but denied, no reasons are given for denial, and no information is given on what must be done to gain approval in the future”; “Lack of opportunity for interested non-governmental market participants to meet with government officials to discuss the impact of new or proposed regulations”; “Absence of pre-determined, clear criteria for licensing requirements”; “Required examinations scheduled infrequently”; “Fees charged in connection with licenses or authorizations can be unreasonably high”; and “Inability of applicants to file complaints regarding review of their applications”.

The Chairperson noted that Members were having a useful discussion, and suggested that

Members first consider the issues somewhat further before having the Secretariat undertake any revisions of the *Examples* paper.

The representative of the European Communities said there was much food for thought in the *Examples* paper, but that it would be helpful if the Members who had submitted the examples could provide further clarification. In this way Members could also consider solutions to provide inputs for the development of disciplines. The delegation of India said that, in order fully to understand the examples given, Members needed to relate them to the supply of a particular service. The Chairperson said these comments were appropriate, and he hoped Members would bear them in mind.

The delegation of Brazil, regarding the *Examples* paper, said this kind of input was needed for Members to make further progress. He noted that the examples to be considered should comply with certain criteria: i.e. they must be non-discriminatory, non-quantitative and, therefore, not subject to scheduling under Article XVI and XVII. He shared Canada's doubts on the inclusion residency/citizenship requirements. The inclusion of zoning and operating hours, however, seemed to fit. He agreed on the need to clarify some examples, e.g. unduly burdensome requirements.

The Chairperson thought that Brazil's observations were also useful, and noted that the Secretariat had made the point in paragraph 4 of the *Examples* paper regarding the need for greater detail. He encouraged Members to provide focused, more precise examples.

#### *Linkage between transparency and necessity*

The Chairperson noted that Members had already had very detailed discussions of this item, then opened the floor for additional comments. He recalled that the question under this item was "To what extent can greater transparency play a role in determining whether a measure is necessary?".

The representative of the European Communities agreed there was already much discussion, but said the test should be whether a measure is "more burdensome than necessary", rather than simply "necessary".

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

The Chairperson observed that a closely related topic was the degree of linkage between actual regulatory examples and measures covered under GATS Articles VI:4 and XVI/XVII. In his view, and as highlighted in paragraph 6 of his Note, the linkages between measures falling under Article VI:4 and those under Articles XVI/XVII should probably be more fully explored given the potential for confusion in terms of the respective parameters of each of these provisions. In so doing, Members might want to consider whether Article VI:4 was intended to capture only non-discriminatory, non-quantitative restrictive measures not captured by Articles XVI and XVII, and whether there could therefore be any overlap between Articles VI:4 and XVI/XVII measures.

The Chairperson suggested that, in the discussions, Members address the question of the Informal Note that was prepared by the Chairman of the Working Party on Professional Services which indicates that, in the course of work to develop disciplines on domestic regulation in the accountancy sector, "[i]t was observed that the new disciplines developed

under Article VI:4 must not overlap with other provisions already existing in the GATS, including Articles XVI and XVII, as this would create legal uncertainty.” Paragraph 7 of his Note referred to that previous Informal Note.

The delegation of Australia said their capital was not convinced there was a conflict between Article VI:4 and Articles XVI and XVII, nor that Article VI:4 disciplines would create legal uncertainty. Australia believed it was essential to apply Article VI:4 to measures scheduled under Articles XVI and XVII. The delegation stated that scheduled reservations must have legitimate objectives, i.e. any protectionist intent must be made transparent.

The representative of Brazil thanked the Chairperson for his insightful Note, particularly with regard to the current topic. His delegation fully agreed in this respect with paragraph 9 of the EC paper (W/14). The distinction between measures within the scope of Article VI:4 and measures subject to scheduling was not questionable, he stated, and any overlap would seriously affect the objectives of the WPDR’s work to create disciplines on regulation.

The delegation of Canada also thanked the Chairperson for his Note, and said they did not see how Article VI:4 could cover scheduled measures. The need for legal certainty ensured there could be no overlap. They supported the EC view in this regard. Previous WTO documents, including S/C/W/96 and S/WPPS/122, had also discussed this issue, the delegation noted. The delegation of Mexico agreed with the views expressed by the EC, Brazil and Canada, and said they thought the issue had already been decided in the WPPS.

The delegation of the United States said the U.S. believed there was a significant overlap. 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 delegation stated. For example, the transparency and administrative aspects of scheduled measures could also be considered under Article VI:4. Further discussion was required, and the *Examples* paper provided this opportunity. The question, the delegation stated, was whether a single measure could have diverse effects.

The Chairperson said that his Note was an attempt to help Members achieve greater clarity on this issue, and that further discussion was necessary. Members needed to remember they were talking specifically about Article VI:4, and not Article VI:1, VI:3 or other Article VI measures, he stated.

The delegation of Chile basically agreed with the U.S., but in theory agreed with other delegations as well. They believed that a single measure could have diverse effects. These different effects should be dealt with in different fora, the delegate stated, with Article VI:4 effects dealt with in the WPDR while the market access and national treatment effects were dealt with in the schedules.

The representative of India said he was trying to understand how a measure could justify both Article VI:4 and Articles XVI and XVII, and asked how a scheduled measure could also be covered under Article VI:4. If a measure was scheduled, that was the end of the matter, he would have thought. He enquired as to how Article VI:4 disciplines could over-rule scheduled measures, a position which his delegation would find untenable. He requested examples from Members of the types of measures being discussed.

The delegate from Brazil said the discussion was very instructive, even though he failed to

grasp the justifications given. He asked how a measure could be judged by its effects, given that the GATS categorized what were market access and national treatment measures. The objective of disciplines was to ensure that non-discriminatory measures were not more trade restrictive or burdensome than necessary, he stated. Otherwise, they could upset the balance of rights and obligations. He noted that, if Members so wished, administrative procedures and other Article VI:4 measures could be scheduled under Article XVIII.

The representative of Hong Kong, China supported the statements in S/WPPS/4, and associated herself with the views of the EC, Brazil and Canada. Article VI:4 was designed to capture non-discriminatory measures not subject to scheduling, she stated. The question of whether a licensing requirement was subject to scheduling should be considered in the context of whether it limited market access or national treatment, she stated. There should not be any overlap, as the areas addressed by Article VI:4 and Articles XVI and XVII were quite different.

The delegation of Switzerland welcomed additional real-case examples. 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 representative of the United States appreciated Switzerland's point on complementarity. Perhaps it was a question of how to define a measure, he stated. He asked if, for scheduled restrictions, the process of applying for a license or the fees applied, were covered by Article VI:4 disciplines. It was not an issue of Article VI:4 "trumping" scheduled measures, e.g. a limit on the number of suppliers. Regarding the question of legal certainty, he noted that the lack of information on Article VI:4-related aspects, e.g. how to apply for a license, etc., undermined the legal certainty of scheduled measures.

The Chairperson said the discussions were a necessary process, and useful to ensure clarity.

The representative of Chile agreed with Switzerland that complementarity was the issue. She agreed with Canada and others that these issues should not be allowed to overlap. If a measure included both issues, it needed to be tackled in different fora.

The delegate from Korea said he had understood that Article VI:4 was only for non-discriminatory, non-quantitative measures, but always had doubts. There might be some overlap, he stated. However, he basically agreed with Canada and others. He asked whether there was an overlap if, for example, licensing requirements specified the type of legal entity, and suggested that further discussion was required.

The delegation of Canada said that, if there was a question of overlap, there was also a question of paramountcy. Otherwise, there would be a vacuum, and this was not allowed under the architecture of the GATS. Canada's view was that Article VI:4 covered those non-discriminatory, non-quantitative measures not already captured by Articles XVI and XVII, i.e. a sub-set of the range of measures covered by the GATS.

The delegation of Chile, regarding the issue of overlap, asked whether scheduled limits on the number of licenses meant there would be no limitations on matters such as the fees charged. The delegation of India replied that, in this regard, Members could refer to Article VI:1.

The representative of the European Communities said it was clear that Article VI:4 applied to

non-discriminatory, non-quantitative measures, and there could not be an overlap. She noted that other GATS provisions could help deal with the difficulties which arise, e.g. the consultation rights under Article III:4. The delegation of Brazil noted that market entry commitments applied only to qualified entrants, and that the legitimate objectives under Article VI:4 were applicable.

The delegation of Japan said that, from the viewpoint of legal certainty, disciplines under Article VI:4 shouldn't overlap those in Articles XVI and XVII. The key element may be the distinction between disciplines and measures. A measure may have several effects, but the disciplines should not overlap, the delegation stated.

The delegation of Chile asked whether a scheduled commitment had to satisfy the requirements of Article VI:4. The representative of the United States said that perhaps the issue was the definition of "measure", and noted that a system could have multiple measures. He acknowledged that, in terms of disciplining, there would be no overlap. Discriminatory effects would be a question for Articles XVI and XVII, he stated, while transparency and other non-discriminatory effects would be a question for Article VI:4.

The Secretariat observed that the issues were being clarified as the discussion continued. "Measures" were defined very broadly under the GATS, 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, the Secretariat noted. 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. Regarding Chile's question, the Secretariat stated that Article VI:4 was not designed to handle measures scheduled under Articles XVI and XVII.

The delegation of the United States stated that, in their view, systems for the administration of market access restrictions would be subject to Article VI:4. The Secretariat agreed, but said that it should always be kept in mind that the system itself was a different measure from the restrictions that it administered.

The Chairperson said he would not attempt to sum up the discussions, but that the clarification provided by the Secretariat helped point Members in the right direction, and provided them with some ideas to further consider in advance of the next meeting.

#### *Administrative burden*

The Chairperson introduced this topic by noting that previous discussions on this issue appeared to indicate that Members were assessing this issue from the perspective of the administrative burden placed on the regulators, as opposed to on Members *per se*. The Chairman's Note asked whether regulators were the only entities that the Working Party should focus upon regarding the question of administrative burden, and whether there were any other entities that needed to be considered.

The representative of the United States 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, he stated.

The representative of the European Communities, as noted earlier, 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.

The delegate from Australia, regarding the issue of balance, referred to the earlier Australian paper on regulatory impact analysis (S/WPDR/W/15, dated 3 May 2001) with respect to cost-benefit analyses, saying they led to better regulation and less burden in the longer-term, especially for small and medium-sized enterprises.

### Necessity

The Chairperson said that the next topic was the issue of necessity. Items 6 to 8 of the revised *Checklist* contained a range of issues relating to necessity that the Working Party would need to work through. In so doing, he stated, Members should probably bear in mind the necessity test developed for the *Disciplines on Domestic Regulation in the Accountancy Sector*, as this would seem to provide the basis for anything that the Working Party might be able to develop on a more horizontal basis.

The representative of the European Communities 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. Concerning criteria for the necessity test (item 7), the EC believed the terms listed would not necessarily be defined the same way, and that “least trade restrictive” was probably the strictest interpretation. On proportionality, the representative reiterated that they were not seeking an EC-type of proportionality test for the GATS. She noted that the term “not more burdensome than necessary” was itself a form of proportionality test.

The delegate from Thailand agreed it was not necessary to develop a list of legitimate objectives. The delegate from Brazil noted that items 6 and 7 of the *Checklist* were closely linked. His delegation still sought clarification on proportionality, especially with respect to defining when a measure was disproportionate to the objectives it aimed to achieve.

The representative of the European Communities said that many Members had proportionality provisions in the way that they applied their domestic legislation, and that the Working Party needed to give “flesh” to the term “not more burdensome than necessary”. The effort by the WPDR to define “user friendly” parameters for this term was a major element in the development of disciplines on domestic regulation, she stated.

The delegate from Brazil, on paragraph 17 of the EC paper, asked how the specific objective pursued would be distinguished from the rationale for the objective. The representative of the European Communities replied that the rationale, which related to the right to regulate, was not questioned. The question was the way in which Members regulated, i.e. how the objective was being pursued.

## Transparency

The Chairperson stated that the next topic was the issue of transparency. He noted that items 9 to 14 of the revised *Checklist* contained a range of issues relating to transparency that the Working Party would need to work through. In so doing, he stated, Members should probably bear in mind the “transparency tests” that were developed for the *Disciplines on Domestic Regulation in the Accountancy Sector* as they would also seem to provide the basis for whatever that the Working Party might be able to develop on a more horizontal basis. Additionally, the most recent contributions from the EC (W/14) and Japan (Job (01)/77, dated 28 May 2001) contained some ideas that would probably benefit from a more thorough discussion in the Working Party.

The delegate from Canada, regarding paragraphs 1 and 4 of Japan’s paper, asked the meaning of the term “adverse disposition”. She also observed that the processes described in Japan’s paper already existed under the federal regulatory regime in Canada. The delegate from Australia, also regarding Japan’s paper, asked how Japan intended that stricter notification requirements should be imposed. Regarding transparency in general, she suggested that perhaps the Working Party could explore an agreed set of minimum standards, which would be subject to an annual review process.

The representative of the United States said his delegation generally agreed with the approach of Japan’s paper, and was encouraged by the proposed list of elements for transparency disciplines. The paper would help Members develop a complete list of best practices. The U.S. was not convinced, however, that stricter notification requirements were needed. Instead, the U.S. focus was on providing domestic regulatory transparency, to ensure that all interested parties, as opposed to Members, should have access to, and the ability to comment on, regulatory measures. On paragraph 3 of the paper, the U.S. felt that access to enquiry points, as well as information on the rationale behind a measure, should be available to all interested parties. The U.S. supported Japan on comment procedures. On Australia’s idea for a review process, he asked if it was intended that the minimum standards not be subject to dispute settlement.

The representative of Australia said she was not sure of the intentions of her capital. In response to the U.S. questions on Australia’s earlier paper (S/WPDR/W/8) asked at the previous meeting, she said the paper did not intend to prescribe what were legitimate objectives. Instead, Members should decide. Regarding the question on the meaning of the term “domestic regulation”, she stated that the measures to which the transparency provisions in the first three elements of paragraph 8 of that paper would apply were those referred to under Article VI:4, while for the last two elements it was the measures under the broader transparency provisions of Article III.

The representative of Japan said “adverse disposition” was a concept in Japanese administrative law meaning actions which created adverse conditions for suppliers, e.g. the imposition of new taxes. On paragraph 2 regarding notification, Japan wanted to have a mechanism to ensure that the notifications required under GATS Article III, especially Article III:3, actually occurred. On paragraph 3, second tiret of the paper, Japan used the term Member in order to avoid excess administrative burden.

The delegate from Canada thanked Japan for their responses, and said that they, like Japan,

believed that further consideration of transparency would be most useful. The representative of the European Communities also thanked Japan for their clarifications. She agreed with Japan that transparency should be among Members, not interested parties, and noted that Members could act on the behalf of interested parties if they so wished. The delegate from Korea noted that Korea had asked Japan the same question as Canada at the last meeting, and he wished to know whether Japan intended to introduce any new obligations.

The delegate from Chile agreed with Japan on greater transparency, but felt that in some elements Japan was going beyond the Article III requirements. The idea, however, was a good one. The delegate wished to discuss further this issue at the next meeting. Japan's proposal focused on government measures, he noted, but the private sector also played an important role. The representative of the United States noted, regarding enquiry points, that the TBT rules for goods allowed for comments by interested parties. The Chairperson agreed that there would be a further exchange of views at the next meeting.

The delegate from Brazil, regarding item 9 of the revised *Checklist*, said this was a crucial element, and asked if it included sub-federal measures. Brazil believed that disciplines should cover measures at all levels of administration. The delegate enquired whether item 9 should be moved to the General Issues section of the *Checklist*. Brazil could not agree with any additional notification requirements, he stated. He noted, however, that Members could make counter notifications under Article III.5. He broadly supported paragraphs 28 and 29 of the EC paper, including the need for differences in regulatory systems to be respected.

The Chairperson agreed that item 9 and the point on federal/sub-federal measures might be better considered under General Issues. Members' discussions on transparency, together with the papers from the EC and Japan, had been useful, he stated, adding context to the issues under consideration.

### *Equivalence*

The Chairperson observed that this was one of two "new" topics introduced in the *Checklist*, and said that the revised *Checklist* posed a very short question for the Working Party to consider in relation to equivalence - namely, did Members think that the concept of equivalence was relevant to the Working Party's work on Article VI:4 disciplines. It would be up to the Members to develop further this particular aspect of the *Checklist*, he stated. In so doing, he believed that much of the information regarding professional services could inform and help the work on the development of generally applicable disciplines, as stated in paragraph 13 of his previous Chairperson's Note (Job(01)/59, dated 27 April 2001). In this regard, he noted that the contributions from Canada (S/WPDR/W/13, dated 16 March 2001) and Mexico (S/WPDR/W/12, dated 9 March 2001) contained some commentary on the notion of equivalence. In his view, Members should feel free to introduce, or draw upon, the contributions on professional services in their continuing discussions on more horizontal disciplines, not only in relation to equivalence, but all other areas of the Working Party's work.

The representative of the European Communities noted the existing requirements of Article VII. If used appropriately, she stated, they could lead toward some convergence with respect to the recognition of qualification requirements, etc. New requirements should not be imposed, she stated, but Members could examine suggestions in the light of some of the negotiating proposals made by Members. In addition, it would be interesting to hear if any Member had used the MRA *Guidelines* developed earlier for professional services, she said.

The delegate from Chile raised the issue of the additional requirements to demonstrate equivalence imposed by Members on professionals holding foreign qualifications, and stated this was an important aspect of Chile's negotiating proposal. The issue which needed to be further discussed, she stated, was whether these additional equivalency requirements were more burdensome than necessary.

The delegate from Korea said that the EC's point on Article VII was probably correct, and emphasized that he fully agreed with the points made in the Secretariat background paper (S/C/W/96) regarding equivalency. He noted that the concept of equivalency was already reflected in the accountancy disciplines, and said this issue should be further explored.

#### *International standards*

The Chairperson noted that the final *Checklist* topic was international standards. As was the case for equivalence, the revised *Checklist* asked whether Members thought that international standards were relevant to the Working Party's work on Article VI:4 disciplines. The Chairperson believed that much of the information that had been discussed under professional services could inform and help the work on the development of generally applicable disciplines.

In this regard, as highlighted in his Chairperson's Note, he noted that the contributions from Australia (Job No 3262, dated 25 May 2000), Canada (S/WPDR/W/13), Japan (S/WPDR/W/6, dated 19 May 2000) and Korea (S/WPDR/W/10, dated 29 September 2000) contained some commentary on international standards. Indeed, it was noticeable that each of these papers referred to the same international body - the International Union of Architects - when discussing the question of international standards.

Members did not comment on this agenda item.

#### *Summary*

The Chairperson said he would not attempt to summarize the overall *Checklist* discussions, but noted they would be reflected in the informal Summary to be updated by the Secretariat.

#### *Development of Disciplines for Professional Services*

The Chairperson noted that the other sub-topic under this agenda item was the development of disciplines for professional services. At the previous meeting, Members commented on two revised Secretariat papers, the second draft of the *Synthesis of Results to Date of the Domestic Consultations in Professional Services* (Job No. 7667/Rev.1, dated 16 March 2001), and the fourth draft of *International Organizations in Professional Services* (Job No. 2139/Rev.4, dated 16 March 2001). These comments had been incorporated in the third and fifth revisions, respectively of these papers, circulated as Job No. (01)/99 and Job No. (01)/98, respectively, both dated 28 June 2001. He then opened the floor for comments by Members.

The representative of Thailand noted that her delegation had made a verbal report on their domestic consultations with professional associations at an earlier meeting, and said that Thailand intended soon to submit a paper as well. The Chairperson observed that it was ultimately up to the Members themselves to ensure that all items on the agenda were appropriately addressed. He urged Members to make contributions under this item at the next

meeting.

The representative of the United States stated that his delegation would seek to refine the initial idea on professional services that he had suggested earlier in the meeting. The representative of Australia supported the inclusion of architects and engineers in the group for negotiations suggested by the U.S., and said she would like legal services also to be included.

The representative of Hong Kong, China thanked the Secretariat for producing the revised *Synthesis*, and noted that a large number of sectors supported the accountancy disciplines. This provided an indicator of the appropriateness of the accountancy disciplines, she stated. The representative urged other Members to complete their consultation processes. She also found the U.S. suggestion interesting.

The representative of Switzerland said they were still working to collect information from their consultations, but expected that it would be provided soon. The delegation of Thailand noted they had completed their consultations. She urged other Members to report on their consultations. Members should proceed slowly on sectoral disciplines, she stated, but Thailand would consider any proposals from the U.S. or other delegations on this topic.

The representative of Chile said the U.S. suggestion was interesting, and could help in making progress. He awaited further information from the U.S. Members, however, should be discussing criteria first, he stated, that is the specific nature of a particular sectors and the justification for including it in this context. The representative of Brazil again noted that they reserved their position with respect to the sectors to be selected.

The representative of the European Communities noted that several professional services sectors were already covered under the existing negotiating proposals to be discussed in the Special Session of the Council for Trade in Services. The range of responses from the domestic consultations would seem to favour a fairly broad approach, she stated. The representative of the United States emphasized that his delegation's proposal was very informal, and that there was no suggestion that the existing broad-based approach be set aside. He agreed with Chile that Members might start by considering criteria for the inclusion of sectors.

The Chairperson concluded by stating that the exchange of views had been quite useful. He looked forward to further ideas on "jump-starting" the work on professional services, and said that Members needed to think about criteria. He noted that only 12 reports had been received on domestic consultations, and urged Members to submit reports in advance of the next meeting. He suggested that Members might take another look at the *Synthesis* paper for the next meeting.

#### Date of Next Meeting

Members agreed to hold the next formal meeting on 2 October, in connection with the meetings of the Council and other subsidiary bodies.

## 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. No. 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.

#### 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.

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. 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. Another delegation said there was no evidence in GATS for this interpretation, and that they believed scheduled measures should also be subject to VI:4 disciplines. The delegation stated that scheduled reservations must have legitimate objectives, and that any protectionist intent must be made transparent.

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. One Member stated that the issue of the applicability of disciplines 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.

Necessity

**6. 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

**7. 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.

"Third aspect" of the necessity test:

One delegation said that consideration must be given 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

#### 9. 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 delegation stated that their only legislative mechanism for prior comment was for standards under the TBT and SPS agreements. 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 Member stated that disciplines should cover measures at all levels of administration, including sub-federal measures.

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.

#### 10. 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.**

#### **11. 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.**

#### **12. 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.**

#### **13. 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.

**14. 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.

**15. 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 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.

**16. 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.

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