

COMMUNICATION FROM AUSTRALIA

The following communication has been received from the delegation of Australia with the request that it be circulated to Members of the Working Party on Domestic Regulation.

1. In Australia's judgement, Members should intensify substantive work on domestic regulation this year. Development of disciplines on domestic regulation, as foreshadowed in Article VI:4, would complement market access negotiations by ensuring that market access commitments are not undermined by trade-restrictive regulations. The disciplines should be designed to minimise trade restrictions, while preserving Member's capacities to regulate their economies appropriately.

Scope: Types of Regulation

2. Article VI:4 lists three types of domestic regulation, namely qualification requirements and procedures, technical standards and licencing requirements and procedures. Members maintain systems of domestic regulation, however, which fall outside the reasonable definitions of any of those three types. Rather than seek to expand the list to ensure that its coverage is comprehensive, Australia suggests that the Working Party treat the three items as indicative only. Other types of regulation could possibly include: warranties/guarantees and participation in professional indemnity funds or insurance; continuing education (which might fall under licensing arrangements); business advertising and marketing; and community service obligations.

Scope: Application

3. Australia believes disciplines developed in accordance with Article VI should apply to all sectors, with the effect of those disciplines built up as Members expand the scope of their scheduled commitments. Making these disciplines strictly and immediately conditional on the scheduling of sectors would add another layer of unnecessary complexity to the architecture of the GATS.

Necessity Test

4. The Secretariat paper (S/C/W/96) focuses on four issues to be addressed under Article VI: necessity, transparency; equivalence; and international standards. Members have accorded greater priority to the first two in recent discussions in the Working Party on Domestic Regulation. Work on the necessity test is, in many respects, a prerequisite to successful work on the other three items. An effective, practical necessity test is central to developing the strong disciplines that are required in the forthcoming negotiations.

5. The necessity test will be used to determine whether measures to implement a policy objective are the least trade-restrictive available. In Australia's judgement, Members should draft a necessity test which, while drawing on the concepts of Article VI:4 (a-c), is tighter and more

consistent with other WTO Agreements. Members need to establish what would constitute a necessary barrier to trade in services. For example, the following definition of the necessity test in the SPS Agreement could be revised so that it applied to services: "a measure is not more trade-restrictive than required unless there is another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade" (SPS Article 5, footnote). For "the appropriate level of sanitary or phytosanitary protection", Members could consider substituting "a legitimate policy objective". Although the SPS language is similar to that in TBT Article 2.2, the former is more concise and the concepts are more relevant to services.

Transparency

6. Article III is the standing guideline for work on transparency, and its requirements should apply to the appraisal of regulations, specifically in:

- the need for up-to-date information on enquiry points;
- notification of new and revised measures.

The disciplines on domestic regulation could, however, be strengthened by additional requirements:

- a prior consultation obligation, such as the one envisaged in the accountancy disciplines;
- an obligation to explain the policy rationale of a measure – especially of a new measure – on request.

Legitimate Objectives

7. Article VI:4 does not define legitimate objectives, apart from the reference to "not more burdensome than necessary to ensure the quality of the service". The accountancy disciplines (in Section II, paragraph 2) specify four legitimate objectives: protection of consumers; the quality of the service; professional competence; and the integrity of the profession. Further work on legitimate objectives in domestic regulation should build on those definitions. "Quality" could be interpreted broadly enough to cover reliability, efficiency, comprehensiveness and like concepts.

8. Other concepts could be added as the Working Party develops its thinking on the subject. The Working Party could, for instance, review the continued use of nationality or permanent residency requirements as a condition for meeting qualification and licensing requirements for services providers. In addition, the Working Party might seek to examine a framework of good administrative practice, possibly by trying to give more specific and practical application to the scope of legitimate public policy objectives in regulatory fields.
