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REGULATORY ISSUES IN SECTORS AND MODES OF SUPPLY

Note by the Secretariat[1]

1. At the request of the Working Party on Domestic Regulation, this Secretariat Note draws and builds upon the discussion of regulatory issues contained in the Background Notes on services sectors and modes of supply prepared for the Council for Trade in Services, and should be read in conjunction with them.[2] The basic purpose of the Note is to provide background information on regulatory practices and issues in various sectors and modes. It is thus envisaged that Members will use this Note to bring their own specific experiences, or contribute additional regulatory issues, to the discussions, as appropriate.

2. The issues discussed in this Note include, but are not restricted to, those under consideration in the negotiations on domestic regulation disciplines under Article VI:4. Consideration is also given to matters that may be the subject of scheduling under Article XVIII (Additional Commitments). By the same token, it should be noted that the following sections do not address regulations falling under Article XVI or XVII, or that may be incompatible with Article II of the GATS. In some cases, nevertheless, descriptions of the regulatory framework may include measures that could be addressed as market access limitations. These have been added for the purpose of completeness and do not suggest that they are under the scope of Article VI:4 or that they may be treated under Article XVIII.

3. It is not the intent of this Note to address in detail all regulatory issues that may arise in individual sectors and modes of supply. Rather, in keeping with the request from Members, the aim is to generally discuss the regulatory environment and trends affecting sectors and modes, and to highlight, where relevant, issues that may have a particular bearing on trade in services. Given that the focus, purpose and extent of regulation may differ between sectors, treatment of issues is specific to the sectors concerned.

4. The Note is divided into four sections. The first, by way of introduction, recalls the role of regulation in services and the importance of the domestic regulatory environment for trade in services. It also provides some general questions for consideration by Members. This is followed in the second section by a discussion of regulatory issues by sector. The third section on modes of supply deals with horizontal issues which are not specific to any particular sector. Where relevant, prominent examples or initiatives of regulatory co-operation in sectors or modes, which can help minimize the impact on trade in services, are highlighted. The fourth section provides some concluding observations.

5. It should be noted that no judgement is intended on what might constitute restrictions, problems or barriers that are incompatible with the provisions of the GATS. Nor does the discussion in this Note imply any judgement, direct or indirect, on the need for, or content of, any particular regulation, rule, procedure or administrative action.

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[1] This document has been prepared under the Secretariat's own responsibility and without prejudice to the positions of Members and to their rights and obligations under the WTO.

[2] The Background Notes are listed in Annex I of this Note.

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I. ROLE OF REGULATION IN SERVICES

6. The Preamble to the GATS, while affirming the role of progressive liberalization as a means of promoting the economic growth of all trading partners and the development of developing countries, at the same time recognises the right of Members to regulate the supply of services within their territories in order to meet national policy objectives. Specific characteristics of services markets make the use of regulation particularly important. Services are generally considered to be intangible and non-storable, and their supply often requires an interaction between the supplier and consumer. This implies that users frequently cannot easily assess the quality of the service until they have consumed it. Through regulation, governments seek to avoid that service suppliers exploit such information asymmetries. For instance, regulation may impose information requirements to inform consumers in advance, or impose qualification requirements for professionals, or licensing requirements that seek to ensure the competence of the service supplier and, thus, the quality of the services provided.

7. A government may want to ensure that certain services, even if provided by private commercial entities, like in the case of education or health, are available to all citizens at equitable conditions, no matter their location or income. Regulation may, in some cases, also be used to further certain policy objectives such as job creation in particular regions or to promote the access of disadvantaged persons to the labour market. In other cases, governments adopt regulation to tackle fraud and tax evasion or prevent service suppliers from indulging in anti-competitive practices in order, for example, to exploit a dominant market position.

8. The provision of certain services may create negative externalities the costs of which are insufficiently borne by the parties themselves. For instance, heavy road transport or intensive tourism could strongly affect the environment. Furthermore, as abundantly shown by the recent financial crisis, excessive risk-taking by financial institutions can undermine the financial stability of countries and create macroeconomic tensions around the world.

9. Effective regulation – or re-regulation – is often needed for liberalization to produce the expected efficiency gains without compromising on quality and other policy objectives. Often, addressing regulatory capacity constraints and weak institutional frameworks is part of the process of liberalization. The opening of a hitherto restricted market may also need to be accompanied by the introduction of licensing mechanisms and public service obligations for social policy reasons. Since many services contracts involve customized products (medical intervention, legal advice, financial products etc.), the need for regulatory protection is particularly evident.

10. Many developed and developing countries have undergone broad reform programs to open their services markets. These reforms have involved updating their legal frameworks, in particular through administrative regulatory instruments to increase transparency, implementing best practices to improve efficiency and reducing administrative burdens by streamlining procedures. Box 1 provides examples of situations where specific regulations are used to achieve certain policy objectives. It should be noted that these examples are given solely to illustrate the range of measures that are typically found in service sectors. They have not been listed with the intent of suggesting or recommending any particular policy or measure, nor in terms of their compatibility with the GATS or otherwise.

Box 1: Examples of services-specific regulation to pursue public policy objectives

Equitable access
Sectors: In the transport or telecommunication sectors, governments often want remote regions to be served regardless of profitability. Basic equity objectives may prompt governments to ensure that all citizens have access to education and essential health care at low or zero costs.

Measures: Cross-subsidization schemes to ensure that revenues in profitable areas are reinvested in favor of underdeveloped regions or persons in financial need; licensing conditions which include 'universal service obligations' (for example, commercial hospitals are required to treat a certain percentage patients free of charge, or postal, telecommunication services must be provided at equal conditions across the country, regardless of profitability considerations).

Consumer protection
Sectors: With regard to professional, financial or health services, the complexity of the service that is provided makes it very difficult for consumers to appreciate quality or safety prior to consumption. Service suppliers may exploit such information asymmetries.

Measures: Prudential and other technical standards to be complied with by service suppliers; transparency-related publication requirements on costs, risks, side-effects, etc, so as to enable the consumer to make informed decisions; education and training requirements to ensure competence; mandatory professional liability insurance.

Reduction of environmental impacts and other negative externalities
Sectors: Road and air transport cause pollution and noise; tourism could put the environment under stress and disturb natural habitats.

Measures: Traffic restrictions over weekends, during night hours or in sensitive areas; zoning laws and building codes; tax/subsidy-schemes to mobilize funds for preservation of cultural heritage.

Macroeconomic stability
Sectors: Financial institutions may engage in imprudent lending or design complex financial instruments that are insufficiently understood. As a consequence, depositors may lose confidence and withdraw their money, inter-bank lending may suffer, credit supply to the real economy be hampered, and so forth.

Measures: To ensure stability, financial institutions must comply with measures such as minimum capital requirements; higher capital reserves when new financial instruments are provided; diversify assets to limit exposure to individual clients; and report regularly on their activities.

Avoidance of market dominance and anti-competitive conduct
Sectors: Concerns about anti-competitive conduct arise in sectors prone to market concentration including services with network effects and interconnection needs (e.g. transport, telecom), and liberalized former monopolies (e.g. postal and courier, education and energy).

Measures: Limitations on market shares, introduction of price surveillance or mandatory price caps, interconnection guarantees, government-mandated technical standards to replace company-specific requirements.

11. It is thus widely understood that regulatory measures are necessary to increase welfare by correcting market distortions, minimising externalities, ensuring appropriate supply and access to services, or addressing income-related inequalities. National differences in regulation and procedural complexities in their implementation can, however, hamper trade. Irrespective of the substantive requirements, national and foreign service suppliers often need to follow administrative procedures to obtain authorizations and permits to enter and operate in the market. Domestic regulations in the form of cumbersome, and/or opaque licensing and qualification procedures, non-transparent criteria,

excessively burdensome and redundant requirements, and administrative "red-tape" can obstruct trade in services, even if this was not their intention. Administrative efficiency improvements, through the reduction of administrative barriers, simplification and coordination of procedures, can help improve the domestic business environment and, in turn, promote trade in services.

12. The sheer diversity of regulatory systems and standards in markets internationally can also significantly raise the costs of compliance for the service supplier and hamper trade, even in situations where there are no market access restrictions or discriminatory measures in force. Long and complex procedures for assessing an application for authorization to supply a service may also discourage suppliers from seeking access to a host member. Procedural complexity might also serve to hide protectionist intentions and give rise to good governance issues. Questions may also arise as to whether a regulation serves to protect public or private interest, or whether there may be more effective and efficient means of achieving a particular policy objective.

A. THE GATS CONTEXT

13. Apart from recognizing that measures affecting trade in services can take the form of a law, regulation, rule, procedure, decision, administrative action, or any other form, the GATS does not prescribe any particular regulatory approaches or standards. The Agreement is concerned with regulations only to the extent that they might have an impact on trade. Thus, due to the importance of the domestic regulatory environment as a context for trade, Members have a particular negotiating mandate in Article VI:4 of the GATS and the Decision on Domestic Regulation (S/L/70). According to this mandate, the Working Party shall develop generally applicable disciplines, including for professional services, and consider disciplines for individual sectors or groups thereof. It is important to note that disciplines on domestic regulation would not apply to all possible regulations affecting trade in services, but to a subset of particular measures. These are identified in Article VI:4 of the GATS and the subsequent Decision on Domestic Regulation as five types of measures, namely those relating to: licensing requirements; licensing procedures; qualification requirements; qualification procedures; and technical standards.

14. Article VI:4 states that the disciplines are intended to ensure that domestic regulations are, *inter alia*:

(a) based on objective and transparent criteria, such as competence and the ability to supply the service;

(b) not more burdensome than necessary to ensure the quality of the service;

(c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

15. Pending the entry into force of such disciplines, pursuant to Article VI:5, Members are required not to apply their domestic regulation in a way that would: nullify or impair specific commitments; be incompatible with the three above criteria; and could not have reasonably been expected at the time when the relevant commitments were made.

16. As a general obligation under Article VI:2, Members are required to maintain or institute judicial, arbitral or administrative tribunals or procedures where affected services supplies may seek review of administrative decisions and where justified, appropriate remedies. Where such procedures are not independent of the agency entrusted with the administrative decision concerned, the Member shall ensure that the procedures provide for an objective and impartial review.

17. Members also have to observe a number of existing disciplines on sectors where specific commitments are undertaken. Article VI:1 requires all measures of general application affecting trade in services to be administered in a reasonable, objective and impartial manner. Article VI:3 requires that information be provided without delay on the status of applications for the authorization to supply a service upon request by the applicant. It also requires the competent authority to, within a reasonable period of time, inform the applicant of the decision concerning the application. Under Article VI:6 adequate procedures to verify the competence of professionals of another Member must be provided in sectors where specific commitments regarding professional services have been undertaken.

18. In addition to Article VI obligations, the GATS already has certain rules on transparency. Under Article III, each Member is required to publish promptly all relevant measures of general application that affect the operation of the Agreement. Members must also notify the Council for Trade in Services of new or changed laws, regulations or administrative guidelines that significantly affect trade in sectors subject to specific commitments. Members also have a general obligation to establish an enquiry point to respond to requests from other Members. Moreover, pursuant to Article IV:2, developed countries (and other Members to the extent possible) are to establish contact points to which developing country service suppliers can turn for relevant information.

19. It should be kept in mind that Members may also undertake Article XVIII (Additional Commitments) with respect to measures affecting trade in services not subject scheduling under Articles XVI or XVII, including those regarding qualifications, standards or licensing. Article XVIII has a larger scope than Article VI:4 as it provides the possibility for undertaking commitments on matters other than those listed. Since Article XVIII does not contain any legal obligation in itself, commitments inscribed in the additional commitments column of schedules, must take the form of undertakings, with a full description of the obligations assumed. These obligations are to be applied on an MFN basis. The Reference Paper for telecommunication services is the most prominent example of how additional commitments have been used to secure adherence to certain regulatory principles. These principles concern issues such as competitive safeguards, interconnection, public availability of licensing criteria, universal service, independent regulator, and allocation and use of scarce resources.

B. GENERAL QUESTIONS

20. In reviewing the information provided in this Note, Members may wish to keep the following general questions, which apply to all sectors and modes, in mind:

(a) Are there any other regulatory issues in sectors and modes of supply, apart from those discussed, which may also have impact on trade in services?

(b) To what extent might trade-related regulatory concerns in sectors and modes of supply fall under the scope of domestic regulation disciplines and be addressed through the envisaged Article VI:4 disciplines?

(c) Would the scheduling of Article XVIII additional commitments be an effective complementary or alternative way to address any of these concerns? In this context, would a "Reference Paper" approach be useful?

21. In addition to these general questions, for certain sectors and modes, a number of specific questions have also been identified. These are listed at the end of the relevant sections. Both general and specific questions should not be considered to be exhaustive, nor are they intended to limit the consideration to just these issues. Rather, they have been provided to help stimulate any further discussion which Members may wish to pursue.

II. SECTORS

A. LEGAL SERVICES

22. Over the last two decades, the legal services sector has experienced rapid growth. This has been linked to the rise of international trade, and the consequent demand by exporters for legal advice on foreign markets. Abetting this growth has been the lowering of barriers by Members in various markets to services offered by foreign lawyers and law firms. In turn, this trend has drawn attention to the implications of domestic regulations on trade in legal services.

1. Regulatory Context

23. The nature of legal services gives rise to several regulatory objectives. First, and common to other professional services, is the need to ensure that the consumer receives a service of high *technical quality*. Because a client is usually not in a position to assess the quality of a legal service before (or even after) it has been delivered, regulations typically seek to protect a client by ensuring that the lawyer possesses the requisite skills and training. In order to meet qualification requirements imposed by the regulatory body, lawyers must have completed courses of study in the relevant law, passed pertinent examinations, and accumulated sufficient practical legal experience.

24. A second common regulatory objective is the need to ensure a high level of *ethical conduct* of the lawyer with respect to the client. Legal services deal with the creation, modification and interpretation of rights and obligations, and their enforcement against individuals, firms and governments. Often these services are contentious – asserting a client's right amounts to invoking the obligation of another person, often leading to disagreement or litigation. Given these opposing interests, clients require from their lawyers, who advise and represent them, not only technical expertise in the law, but also a very high degree of trust and integrity. Regulations aim therefore to ensure that lawyers maintain high ethical standards by respecting client confidentiality, avoiding conflicts of interest, and remain fully independent from any outside influence, whether professional, political or economic.[3] This type of regulation is typically enshrined in binding codes of ethics or 'deontology', which also serve to enhance the overall functioning of the justice system.

25. The importance of a certain independence of the lawyer and the legal profession from government influence has been cited as an important element that underpins the rule of law. It has led in many cases to the granting of regulatory powers to professional associations of lawyers. More broadly, the independence of lawyers has been invoked to justify rules requiring lawyers not to share fees with non-lawyers, or that the firm be established as a partnership or other type of legal entity. It should be noted that certain requirements such as those on a particular legal form are already subject to the obligations contained in Article XVI (Market Access) of the GATS.

26. A third regulatory objective, which is commonly found in legal services, is the need to ensure that the *public interest* is served through the effective administration of justice and the rule of law.[4] Detailed codes of ethics protecting the client, including the client's right to access the judicial system at reasonable cost, derive in part from this concern.[5] The public interest in legal services can, however, be broader than this and can also justify the need for laws and practices in a particular

[3] International Bar Association (1998), Resolution on Deregulating the Legal Profession.

[4] Basic Principles on Roles of Lawyers, adopted by the UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 1990. See also the views expressed by the International Bar Association in its Resolution on Deregulating the Legal Profession, 1998; and Standards and Criteria for Recognition of the Professional Qualifications of Lawyers, 2001.

[5] See for example: Council of Bars and Law Societies of Europe (CCBE), Charter of Core Principles of the European Legal Profession (2006) and Code of Conduct for European Lawyers (1988). For a national example, see American Bar Association (ABA) Model Rules of Professional Conduct (2002).

jurisdiction – which range widely from family law to contracts, property and basic civil liberties – to take into account local customs and values. This 'localism' arises since legal services, unlike some other professional services such as medicine or engineering, are not primarily based on a technology or science that transfers easily across national boundaries. This jurisdictional focus can lead to many different sets of laws, regulations and practices, which, in turn can complicate trade in legal services.

2. Regulatory developments and issues

27. Over the past few years, barriers to trade in legal services have been lowered in a number of countries. In many instances, blanket prohibitions on the practice of law by foreign lawyers have given way to new or better access. However, the removal of explicit barriers has served to highlight the trade generating, or impeding, role of domestic regulations. A key issue has become whether the objectives underlying these regulations can be achieved in a less burdensome manner. Some domestic approaches to regulatory reform in legal services are considered below, before turning to international approaches that can help reinforce reform.

(a) Domestic approaches to regulatory reform in legal services

28. Whether reform of regulations affecting trade in legal services is spurred by international co-operation or through an international agreement, it ultimately needs to be reflected in a Member's own regulatory framework. Several domestic approaches can be envisaged.

29. First, once some, or all, legal services are opened to foreign lawyers, qualification requirements might need to be examined and adapted to the regulatory objectives pursued. For example, a new set of qualification requirements may more closely *focus on the quality* of the service in order to serve the client better, and to contribute to the wider public interest of the efficient administration of justice. Thus prohibitions on the supply of legal services have increasingly given way to access based on an objective, non-discriminatory assessment of the legal qualifications of the foreign lawyer.

30. In establishing these requirements, authorities have increasingly distinguished between *different types of law* underlying legal services, recognizing that some may need more or different regulation than others. In particular, many jurisdictions accept that they have a greater interest in regulating the practice of their own (host country) law than they do the practice of foreign (home or third country) law, or international law. This idea underlies proposals for redefining the classification of legal services.[6] Thus in some jurisdictions a category of 'foreign legal consultant' has been established, under which foreign lawyers may advise on or practice non-home country law under less onerous conditions.[7] Even in the case where the foreign lawyer seeks to practice host-country law, re-qualification requirements can be refocused to take into account any relevant training and practical experience already acquired.

31. Proposals have also been made to adjust the level of regulation of legal services to the *degree of expertise of the client*. Where the client can be assumed to have special legal knowledge and skills (e.g. a large firm with in-house counsel), the possibility of information asymmetry between lawyer and client would be diminished. In such cases, the expert client would be better able to assess and assume responsibility for the quality of the service, and the credentials of the lawyer. The regulations governing the practice of law in such situation could therefore be somewhat less onerous.

[6] Communication from Australia, Negotiating Proposal: Legal Services Classification (S/CSS/W/67Suppl.2); see also International Bar Association Council Resolution, 2003.

[7] ABA Model Rule, 1993.

32. Although well qualified in technical knowledge and skills, a foreign lawyer will often need to satisfy the client and public interest by adhering to local codes of ethics. Since codes differ or even conflict between jurisdictions, reformed regulations may attempt to resolve the issues arising from a lawyer's requirement to adhere to both home and host country codes. Serious differences between codes can arise with respect to the right to advertise, approved forms of business structure, and fees. Although adherence to the local code will normally take precedence, account can be taken of the home country code.

33. Domestic regulatory reform of legal services have sometimes attempted to use *competition principles*. This approach looks at the economic function of legal services, particularly as an important input to other businesses, and its role in improving the overall competitiveness of the economy.[8] Areas of concern from this perspective include price-fixing, recommended prices, advertising regulations, entry requirements and reserved rights, name restrictions, regulations on business structure, and multi-disciplinary practices. Under this approach, it has been proposed that the restrictive effect of the regulation be assessed in relation to its public interest objective.[9] In the context of the GATS, some of the measures underpinned by competition principles, if they set quantitative limits or are discriminatory, would already be subject to market access (Article XVI) and national treatment (Article XVII) obligations.

34. Finally, greater *transparency* for licensing and qualification requirements and procedures is an elementary, but effective, way to improve the domestic regulation of legal services. A first but important step in the supply of a legal service is to clearly know what are the applicable rules and procedures.

(b) International approaches supporting or requiring domestic regulatory reform

35. Reform of regulations on legal services can be stimulated by international regulatory co-operation, or eventually be required under an international agreement. As mentioned in section 1 of this Note, the GATS provides basic rules on certain aspects of domestic regulation, such as transparency (Article III), and the reasonable, objective and impartial administration of measures (Article VI). The GATS also provides, for purposes of authorizing service suppliers, for the recognition of education or experiences obtained, requirements met, or licenses or certifications granted in a particular country. Importantly, this can take the form of a mutual recognition agreement (MRA), which allows Members to accord recognition to suppliers from certain jurisdictions without necessarily excluding those from a third country (Article VII).[10] This reciprocal element can provide an incentive to recognize legal education, training or other credentials obtained in another jurisdiction. Many countries do have recognition agreements on legal services, but the coverage of these agreements is very patchy and applied on a reciprocal basis.[11] On the other hand, the European Union provides an example of a fully-developed system of mutual recognition in legal services between its constituent States.[12]

36. Regional trade agreements can also provide for rules governing trade in legal services. For example, in the North American Free Trade Agreement (NAFTA) the parties are required to allow

[8] See for example the EC "Report on Competition in Professional Services", COM(2004) 83 final.

[9] Ibid. See also Terry, L (2008), "The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as 'Service Providers'", Journal of the Professional Lawyer, p 209.

[10] For views of what suitable recognition criteria might be, see International Bar Association, Standards and Critieria for the Recognition of the Professional Qualifications of Lawyers (adopted 2001).

[11] OECD (2007a), "Sectoral Study on the Impact of Domestic Regulation on Trade in Legal Services" Paris.

[12] OECD (2003), "Managing Request-Offer Negotiations under the GATS: The Case of Legal Services" (TD/TC/WP(2003)40/FINAL).

foreign legal consultations (FLCs) to practice or advise on their home country law.[13] The agreement also provides for mandatory consultations between professional bodies on matters affecting the practice of law.

37. International professional associations have also been active in suggesting new approaches to regulation in legal services. The International Bar Association (IBA), for example, has adopted a Statement on General Principles for the Establishment and Regulation of Foreign Lawyers, which sets out principles for the admission of foreign lawyers, based on whether they wish to practice home law (as an FLC under a limited licence), or host-country law (under a full licence, subject to local qualification requirements).[14]

B. ACCOUNTANCY

38. Accountancy is an essential professional service input in the production of both physical goods and other services. Accountancy regulations often have as their main objective the protection of the public and the promotion of the quality of the service. Perhaps most important is accountancy's contribution to the implementation and enforcement of prudential requirements and other financial regulatory measures. Despite the extensive international networks of the biggest firms, geographic markets for accountancy are still considered to be national, or even sub-national, due to pervasive entry and conduct regulation that varies significantly between jurisdictions.

1. Regulatory context

39. Regulation of accountancy involves certain restrictions on entry and professional conduct. While some restrictions may remedy market failures, others may be based on distributional or paternalistic motives, which may serve private rather than public interests. With respect to correcting information asymmetries between accountants and their clients, and preventing negative externalities to investors, banks and creditors, regulation of auditor entry and educational requirements is needed, together with more general prohibitions, e.g. on false and misleading advertising.[15]

40. Overall, the regulatory spectrum for accountancy services ranges from virtually no oversight to self-regulation to multiple regulators. Although self-regulation can be a useful tool, together with public regulation, there is a risk of rent-seeking behaviour. Regulations differ from country to country and even within a country (due to sub-federal jurisdictions). Consequently, the structure of the remaining "Big 4" accountancy firms, unlike most of their multinational clients, more closely resembles those of franchising networks. In addition, clients are regulated according to the types of services they are required to have or can select. Significant differences between countries may hinder the tradability of services and the mobility of professionals across borders. Solutions for cross-border inconsistencies often include the adoption of international standards to improve mobility, as well as mutual recognition (and co-operation) between regulatory bodies.

41. The most common forms of accountancy regulation include quality standards and exclusive rights, quantitative restrictions, advertising restrictions, price regulation, and rules on inter-professional co-operation and business structure. In the context of the GATS, some of these measures, if they set quantitative limits or are discriminatory, would already be subject to market access (Article XVI) and national treatment (Article XVII) obligations.

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[13] NAFTA, Annex 1210 (Chapter 12).

[14] International Bar Association (1998), op.cit.

[15] Competition law may be necessary to control cartel-like behaviour and abuse of market dominance. Nonetheless, the OECD advises that regulation should not extend beyond what is necessary to address the prevailing market failures. OECD (2009a), "Policy Roundtables: Competition and Regulation in Auditing and Related Professions", Paris, is the main source for this and the following three paragraphs.

42. In all EU Member States, for example, statutory audit is an exclusive right of one or more professional groups, but market entry regulation for other types of accounting services differ from country to country. In several EU Members, exclusive rights of accountants are much wider than in others. In the US, all jurisdictions have laws governing the licensing of certified public accountants, including requirements for education, examination and experience. However, while the use of the title "certified public accountant" in each jurisdiction is restricted to individuals registered with the State regulatory authority, other licensure requirements are not uniform. In addition, under all States' laws, certified public accountants must be the majority owners of accounting firms, and other owners must be active participants in the firms. The goal of these rules is to limit the potential for conflicts of interest. However, prohibiting certain types of business structures by making entry into the accounting market more difficult, benefits the incumbent firms, including the "Big 4" accounting networks.

43. Although often necessary to ensure quality, regulations may have the unintended effects of restricting economic competition and trade. A balance may need to be struck between the interests served by regulation and competition. Quantitative restrictions to entry, advertising bans and price regulation (including recommended fee scales), exclusive rights for tax advice and representation are examples of regulatory issues, which may, restrict competition more than necessary. The complexity of accounting standards; the need for additional guidance on practical implementation (e.g. valuation of financial instruments); suitability of international accounting standards for small and medium-sized enterprises; and technical matters such as fair value measurement are other regulatory issues that could also impact on trade.

44. Nonetheless, as stated by the OECD, "the need for ethical standards or codes of behaviour, and the desirability of high standards of professional competence to ensure integrity and public confidence, is unquestionable. But the twin objectives of promoting competition and maintaining professional standards are not necessarily contradictory".[16]

2. Regulatory developments and issues

45. WTO Members in 1997 adopted the Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector, followed by the Disciplines on Domestic Regulation in the Accountancy Sector in 1998.[17] The Accountancy Disciplines seek to ensure that measures relating to licensing, which are not subject to scheduling under Articles XVI or XVII, are not prepared, adopted or applied with a view to or with the effect of creating unnecessary barriers to trade in services. It also contain a requirement that such measures shall not be more trade restrictive than necessary to fulfil a legitimate objective. These Disciplines are, however, not yet legally in effect and are to be integrated into the GATS no later than the conclusion of the current round of services negotiations.

46. Since the adoption of both GATS instruments, the regulatory framework for accountancy has continued to evolve worldwide. The financial crises since the year 2000, in particular, have further highlighted the need for strengthening the institutional framework and governance of global accounting standard-setting, and improving the quality of international financial reporting. In addition, there has been a further shift in the governance of international accounting standard-setting, including the emergence of independent external oversight bodies. The international audit firm networks have also further evolved their business models and structures. Some of the main developments that have affected the regulatory environment for accountancy services are summarised in Box 2.

[16] OECD (1999a), "Policy Roundtables: Competition in Professional Services", Paris, p. 17; and OECD (2007b), "Policy Roundtable: Trade Associations", Paris.

[17] WTO documents S/L/38 and S/L/64.

Box 2: Some key developments affecting the regulatory environment for the accountancy sector

Reports on the Observance of Standards and Codes (ROSC) initiative

The World Bank and the International Monetary Fund (IMF) in 1999 initiated the joint ROSC initiative, covering data dissemination, fiscal transparency, transparency in monetary and financial policies, banking supervision, securities market regulation, insurance supervision, payments and settlements, anti-money laundering and the combating of financing of terrorism, corporate governance, accounting and auditing, and insolvency and creditor rights. Objectives of the ROSC programme include: analysing the comparability of national accounting and auditing standards with international standards; determining the degree to which applicable accounting and auditing standards are followed; and assessing the strengths and weaknesses of the institutional framework in supporting high-quality financial reporting. Another major aspect of the ROSC initiative is to assist countries in developing and implementing an action plan for improving institutional capacity, with the aim of strengthening the corporate financial reporting regime.

Sarbanes-Oxley Act (SOX)

SOX, enacted in the US in July 2002, significantly revised the oversight and regulation of the US accounting profession, most notably by strengthening corporate governance requirements and improving transparency and accountability. SOX required the US Securities and Exchange Commission (SEC) to implement a number of new rules, including on independence, to address areas such as prohibited non-audit services, audit partner rotation, and conflicts of interest. SOX also established the Public Company Accounting Oversight Board (PCAOB) to oversee the audit of public companies. Although SOX rules are considered necessary and important, they might limit the number of accounting firm choices in case a large public company wants to switch auditors. With respect to multi-disciplinary practices (MDPs), SOX to some extent limited possibilities for conflicts of interest, as did the 2006 Directive on Statutory Audits in the EU. In some countries there are prohibitions on MDPs which are composed of accountants and other professionals such as lawyers. Among the potential conflicts of interests could be the obligation of lawyers to protect client interests, which may conflict with the transparency requirements for accountancy.

Group of Twenty

The G-20, in its declaration of April 2009, stated that accounting standard-setters should take action by the end of 2009 to: (a) reduce the complexity of accounting standards for financial instruments; (b) strengthen accounting recognition of loan-loss provisions by incorporating a broader range of credit information; (c) improve accounting standards for provisioning, off-balance sheet exposures and valuation uncertainty; (d) achieve clarity and consistency in the application of valuation standards, internationally, working with supervisors; (e) make significant progress towards a single set of high quality global accounting standards; and (f) within the framework of the independent accounting standard-setting process, improve the involvement of stakeholders, including prudential regulators and emerging markets, through the International Accounting Standards Board's constitutional review.

International Financial Reporting Standards (IFRS)

Since 2001, almost 120 countries have required or permitted the use of IFRS. They are firmly established in Australasia, and, Europe as well as in Canada, South Africa, South Korea, Russia and Turkey, and are set to be adopted soon in Japan and other jurisdictions. The US is reducing the differences between the US Generally Accepted Accounting Principles (GAAP) and IFRS, with the expectation of reaching convergence in the near future. The current economic and financial crisis added additional issues to the already wide-ranging debates on the implementation of IFRS, especially those related to financial reporting in a distressed economic situation. They include such challenges as measurement in illiquid markets, the pro-cyclicality of IFRS, provisioning aspects, and risk management and related disclosures and audit considerations. One of most important new issues is how to ensure that the financial reporting system not only provides a fair and objective reflection of company's financial status and performance, but also provides early warning signals which can help to avert major financial disasters. The new issues are particularly challenging for those countries with less developed financial markets and accountancy infrastructure.

International Standards on Auditing (ISA)

Over 100 countries are either using ISA, or are in the process of adopting or incorporating them into national auditing standards, or using them as a basis for preparing national auditing standards. ISA are intended for use in all audits - publicly traded companies, private business of all sizes and government entities at all levels. ISA are issued by the International Auditing and Assurance Standards Board (IAASB), which is a standard-setting

body operating independently under the auspices of IFAC. The IAASB's goals include the setting of high quality auditing, assurance, quality control and related services standards, and to facilitate the convergence of international and national standards, thereby enhancing the quality and uniformity of practice throughout the world and strengthening public confidence in the global auditing and assurance profession.

Sources: Information compiled from Hegarty, J and Gielen, F. et. al (2004), "Implementation of International Accounting and Auditing Standards: Lessons Learned from the World Bank's Accounting and Auditing ROSC Program; IFRS website available at www.ifrs.org (accessed 7 March 2012); and OECD (2009a), "Policy Roundtables: Competition and Regulation in Auditing and Related Professions", Paris.

47. Whilst the regulatory environment for the accountancy sector has evolved since the Accountancy Disciplines were negotiated back in 1998, the sector is still primarily regulated at the national level with the professional bodies playing an important role. With the global integration of financial markets, there is a tendency to converge more on ethical, technical and professional standards and practices, so as to ensure efficiency and international consistency. Greater convergence has also required greater collaborative effort between professional bodies and government regulators across jurisdictions.

C. ARCHITECTURE

48. Architectural services belong to the group of "accredited" professional services, as opposed to non-accredited business services such as marketing, advertising and consultancy.[18] Compared to other accredited professional services, such as accountancy and legal services, architectural services appear to be subject to fewer restrictive regulations.

1. Regulatory context

49. As with other professional services, regulations on architectural services are typically intended to ensure and maintain the quality of the service, and hence to protect consumers. Since 1998, the Collegi d'Arquitectes de Catalunya (COAC), publisher of Architectural Practice around the World, has been conducting research into architectural regulation, under the auspices of the Professional Practice Commission of the International Union of Architects (UIA).[19] The information is organized according to the main sections of a questionnaire sent out to all UIA member sections. The issues addressed in the questionnaire include: admittance to the profession, dealing with training and internships; professional practice, including details about various aspects of the profession in each country; and transnational practice, regarding exercise of the profession in other countries.

50. With respect to architectural regulation, it appears that practice of the profession is regulated in most countries, barring certain exceptions.[20] Reportedly most countries do allow foreign architects to practise independently, provided certain pre-requisites are met, such as proof of professional qualifications. For countries not allowing foreign architects to practise independently, collaboration with a local architect is often stipulated. In approximately one-third of the countries where this requirement exists, the association between the local and the foreign architect is established by mutual agreement between the parties, with no further conditions; for the rest, there are established

[18] The distinction between accredited and non-accredited professional services was discussed in the Uruguay Round Working Group on Professional Services. See WTO document MTN.GNS/PROF/ W/1.

[19] The UIA, created in 1948, is the worldwide professional body for architecture. It encompasses architectural organisations in 124 countries and territories and represents more than 1.3 million architects worldwide.

[20] According to COAC, these include Belgium, Finland, Ireland, Macedonia, Netherlands, Sweden, Switzerland and the United Kingdom. Belgian law, for example, regulates admittance to the profession (i.e. who may or may not practise), but not the profession as such; in the United Kingdom, the use of the title of architect is protected, but not its function.

requirements that must be met. In jurisdictions where architecture is not regulated, there are often no specific requisites for practice on the part of foreign architects.

51. It has been stated that the "[o]ver-riding restrictiveness issue for architects is the ability to secure a license to practice architecture in a foreign country".[21] The most important related issues include the increasing significance of having a degree in architecture granted by an accredited school of architecture, and the proper documentation of post-degree internship experience in order to qualify for licensing examinations.

52. It is common practice for a foreign architectural firm to contractually affiliate with a domestic registered firm to complete a commission in another country. This avoids the need for the foreign architect to become licensed in the country in which a project is located. The process is intended to provide the foreign architect with a partner who is experienced and well versed in the broad scope of the country's building codes, regulations, bidding practices and construction supervision. However, there may be situations where the professional and regulatory bodies in the host country have a legitimate concern whether the domestic architect is fully engaged in the process, and not merely serving as a "plan-stamper" on behalf of the foreign architect in order to get the project accepted and approved by local governing authorities.[22]

53. While solutions, such as collaboration with a local architect, may help to overcome certain regulatory constraints, time-consuming procedures and difficulties associated with the recognition of foreign qualifications continue to impede international trade in this sector. The expansion of mutual recognition agreements (MRAs) might seem the appropriate solution; however, these can prove onerous, time-consuming and resource-intensive to negotiate. Hence, the profession is increasingly requiring greater cooperation between regulators and academic institutions, as well as greater reliance on international standards.

2. Regulatory developments and issues

54. Increased environmental concerns have resulted in greater focus on architectural designs incorporating energy conservation, sustainability and green building technologies. In the process of expanding architectural practices into foreign markets, architects are responding to a rapidly changing set of building codes and standards related to environment, sustainability, and disability access that are often much different from what exists in their home countries. In a number of countries, national (and where relevant, State-level) regulatory bodies have come under pressure from architects and professional associations within their jurisdictions to revise laws and regulations and to accommodate changing global practices in order to remain internationally competitive.[23]

55. Among the most significant changes in the rules and regulations of a number of domestic professional bodies has been the elimination of mandatory fee schedules, prohibitions on advertising, and prohibitions on offering alternative types of professional services, e.g. design-build.[24] On the other hand, there are new regulatory requirements providing for continuing professional education to retain membership in a professional body and, increasingly, to maintain a professional licence to practice. Some regional examples of regulatory co-operation to facilitate the recognition and registration of architects are provided in Box 3.

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[21] Presentation by Russell Keune at the OECD-STRI meeting, July 2009. Available online at http://www.oecd.org/dataoecd/57/54/43231867.ppt (accessed 5 March 2012).

[22] Russell Keune (2009), op. cit., pp. 6-11.

[23] Russell Keune (2009), op. cit., p.14.

[24] Design-build is a project delivery system in which a party other than the architect signs a contract for a comprehensive service to both design and construct a building for a fixed fee.

Box 3: Some examples of regional initiatives to facilitate the recognition and registration of architects

European Union

Within the context of regional economic integration, the European Union and the European Economic Area introduced the principle of free movement of professionals and the mutual recognition of diplomas. Under Directive 85/384/EC of 10 June 1985, the "Architects Directive", as subsequently amended, each EU Member State recognised the diplomas, certificates and other evidence of formal qualifications awarded in the field of architecture by other Member States to nationals of Member States. The "Architects Directive" was repealed and replaced by Directive 2005/36/EC, as of 20 October 2007. The new Directive is a response to the 2001 Stockholm European Council's recommendations calling on the Commission to design a more uniform, transparent and flexible system with the aim of achieving the Lisbon strategy objectives. The Directive brought together in a single text the three Directives on the general system for the recognition of professional qualifications (recognition of diplomas, certificates and other evidence of higher education of long duration; recognition of other diplomas, certificates and other evidence of other professional education and training; and the mechanism for the recognition of qualifications for crafts, trades and certain services).

NAFTA

The North American Free Trade Agreement (NAFTA) contains certain disciplines, such as objectivity and transparency, pertaining to the licensing and certification of professionals, and a commitment to eliminate any citizenship or permanent residency requirement that a party maintains for the licensing or certification of professional service providers of another party. If a party does not comply with this obligation, any other party may maintain an equivalent requirement. The NAFTA also encourages the relevant bodies in their respective countries to develop mutually acceptable standards and criteria for licensing and certification of professional service providers. Back in 1994, based on the United States – Canada Free Trade Agreement, the US architectural profession had already concluded an agreement with their Canadian counterparts on a series of requirements for certification applicable to US and Canadian architects. It was an agreement between the National Council of Architectural Registration Boards (NCARB – a non-governmental, national federation of the official registration boards in 55 US jurisdictions) and the Committee of Canadian Architectural Councils (CCAC – a committee comprising all of the Canadian Provincial Architectural Associations). It is implemented by those States and Provinces that ratified the agreement, and this has meanwhile been achieved by a majority of them.

APEC

Work in the Asia Pacific Economic Cooperation (APEC) context has advanced in the preparation of directories on the requirements for provision of professional services, with priority on accountancy, engineering, and architecture. Within the APEC Architect Framework, participating economies are able to negotiate bilateral arrangements which fast track registration of "APEC Architects" wishing to be registered in other APEC economies. An example of this is the recently concluded agreement between New Zealand and Japan, which entitles New Zealand's APEC-registered architects to registration in Japan, subject only to a test that examines their knowledge of aspects of the architectural process that are exclusive to that economy. The same situation applies to Japanese APEC-registered architects wishing to be registered in New Zealand. As stated in the APEC architect's manual, candidates for registration as an APEC Architect must be currently registered/licensed or otherwise professionally recognized as an architect in the economy that maintains the section of the APEC Architect Register to which application for admission is made. Architects must submit documents to the appropriate Monitoring Committee that show that they have completed an accredited programme of architectural education, fulfilled pre-registration experience requirements, have practiced for at least seven years as a registered/licensed architect and satisfied any additional requirements, all in accordance with criteria determined by the Central Council. Architects may only be enrolled in the section of the APEC Architect Register in their home economy. APEC Architect Registration applies only to individual persons, not to architectural practices or firms.

Source: Websites of NAFTA; APEC; EU and the New Zealand Registered Architects Board

56. In light of the above, the following are some specific questions that Members might like to consider:

(a) How might co-operation between regulatory authorities in architecture, both at the inter- and intra- national levels, including with regard to time-consuming procedures and difficulties associated with the recognition of foreign qualifications, be improved?

(b) To what extent would issues such as mandatory fee schedules, prohibitions on advertising, and prohibitions on offering alternative types of professional services, e.g. design-build, fall under the scope of Article VI:4?

D. ENGINEERING SERVICES

57. Asymmetric information between service suppliers and service consumers provides an important rationale for the economic regulation of professional services, and hence of engineering. Engineering services, as professional services in general, are considered by the economic literature as "credence" products, the quality of which can be ascertained only at some cost after purchase and consumption, and eventually might never be fully assessed. They basically feature high pre and post-buying costs of quality assessment. Ultimately, consumers must have confidence in the professionals that provide the service, or the process regulating the profession.

1. Regulatory context

58. Two aspects of information asymmetry are considered as being potentially deleterious: adverse selection and moral hazard.[25] On the one hand, adverse selection in engineering services may result in a declining quality of services. Lack of information on product quality (which can be revealed only after purchase, if at all) could result in customers being prepared to pay only an average price for an unknown (hence presumed average) quality, prompting producers of higher-quality services to abandon the market, thus reducing the average quality supplied by those remaining. On the other hand, professionals may be faced with moral hazard, in cases where their own income goals run counter to the objectives of the clients, and where the asymmetry of information on the price-quality relationship stands in the way of fair bargaining. In such a situation there is a risk that the professional over-prices the service to the client, or supplies a higher quality than necessary to satisfy the client's needs.

59. Regulatory action is thus often motivated by the information-related problems. To ensure that engineering services are of a certain quality, qualification and licensing requirements are used as ex-ante quality control mechanisms. In most countries, engineering is considered an "accredited" profession. Suppliers are required by law or regulation to have minimum qualification and be licensed before they can provide engineering services or indeed use the title of "engineer". Qualification requirements usually include a university or another higher educational degree, additional practical training, and a professional examination. In a number of countries, all three requirements are a precondition for obtaining a licence to practise. In addition, licensing requirements typically include other conditions such as knowledge of the local language, good reputation, and residency or nationality. Membership in professional associations is frequently voluntary in the case of engineering services.

[25] Paterson, I., M. Fink, A. Ogus, et al. (2003), "Economic Impact of Regulation in the Field of Liberal Professions in Different Member States" (report commissioned by the European Commission – DG Competition), Institute for Advanced Studies, Vienna .

2. Regulatory developments and issues

60. The problem of information asymmetry has traditionally been used in engineering services as a justification for fee setting or price controls (fixed or recommended), restrictions on advertising, indemnity insurance, and the requirement of specific forms of business establishment. Some of these regulations, e.g., relating to specific types of legal entities, would be disciplined in the GATS by Article XVI. Some additional regulations usually apply to engineering firms, not just the professionals. These include local presence requirements to supply specific engineering work; limitations on foreign ownership; minimum number of local directors and/or staff; partnership, association or joint-venture requirements; and restrictions on hiring local professionals. Again, some of these requirements, if discriminatory, may be subject to scheduling under the GATS. However, other regulations, though hampering trade, might be beyond the scope of scheduling.

61. As mentioned, regulations on engineering services are frequently intended to ensure the quality of the service, the integrity of service providers, and the protection of consumers. For example, residency requirements may help ensure familiarity with local rules, and facilitate consumers' redress in case of professional malpractice. They may also promote suppliers' adherence to professional disciplines and codes. Restrictions on incorporation may limit the use of company type structures for the purpose of reducing the personal liability of professionals. Licensing and qualification requirements may be designed to ensure standards of competence, performance and accountability. Fee and advertising restrictions, for instance, are sometimes justified on the basis that competition on costs may lead to reduced service quality.[26] That being said, excessive regulation can also stifle markets and eventually have an adverse effect on the price and quality of services.[27]

62. Replies to surveys conducted by the OECD reveal interesting information on actual regulatory practices.[28] Price, advertising and marketing regulation seems to be rarely applied. Qualification requirements vary. Licensed engineers are generally required to have a minimum period of university or higher education (mostly four to five years, but not exceeding eight or ten years), often coupled with additional years of compulsory professional experience (from half a year to a maximum of five) and/or a professional examination. Some countries complement the initial education requirement (e.g. university degree) with compulsory professional practice, some also make it mandatory for individuals to take a professional exam after obtaining the university or higher education degree, while other jurisdictions apply the three requirements – initial education, practice, and exam – in conjunction.

63. Various studies that seek to quantify the impact of regulations affecting engineering services tend to confirm that the sector is subject to a generally lower level of regulation, than other professions.[29]

64. In light of the above, the following are some specific questions that Members might like to consider:

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[26] OECD (1996), "International trade in professional services: Assessing Barriers and Encouraging Reform", Paris.

[27] OECD (2000), "Competition in Professional Services", Directorate for Financial, Fiscal and Enterprise Affairs, Committee on Competition Law and Policy, DAFFE/CLP(2000)2, Paris.

[28] Paterson et al (2003), op.cit.; and Conway and Nicoletti (2006) "Product Market Regulation in the Non-Manufacturing Sectors of OECD Countries: Measurement and Highlights", *OECD Economics Department Working Papers*, No. 530.

[29] Golub, S.S. (2003), "Measures of Restrictions on Inward Foreign Direct Investment for OECD Countries", *OECD Economics Department Working Paper,* No. 357; Koyama, T., and S. S. Golub (1996), "OECD's FDI Regulatory Restrictiveness Index: Revision and Extension to More Economies", *OECD Economics Department Working Paper,* No. 525.

(a) Could cooperation between regulatory authorities (including non-governmental bodies) complement the development of VI:4 disciplines? If so, should disciplines take account of industry initiatives, particularly with regard to the development of education and professional standards?

(b) Do Members share the view that, compared to other professions, engineering is subject to a generally lower level of regulation? In any case, where are the most significant problems from a trade perspective and how might disciplines under VI:4 address them?

E. COMPUTER AND RELATED SERVICES

65. A variety of government regulatory measures have an effect on the growth and development of computer and related services (CRS). Key areas include labour policies (work permits/visas, education, training), research and development support, protection of intellectual property rights, technical standards, tariffs on computer equipment, and government procurement.

1. Regulatory context

66. Many governments are designing policies and initiatives to encourage the spread of new and high-bandwidth telecommunication services. The implications for businesses and the computer services industry are substantial. As a result, the industry is more sensitive today to a variety of regulations affecting telecommunications, cited in the telecommunications section of this Note. Like other ICT-enabled business services, growth of trade in computer and related services relies on increased transnational investment, ease of globalized sourcing, labour skills and productivity, as well as the availability of modern and affordable communications infrastructure. Other key regulatory areas that have an effect on the sector include not only those cited earlier, but increasingly also those related to intellectual property, privacy, censorship, national security and cyber-crime. In a sector that in most countries has been subject to little direct regulation in the past, the perceived need for adopting regulation in these areas has posed a challenge for governments and companies alike.

2. Regulatory developments and issues

67. Regulations promoting competition in broadband, leased lines, mobile and satellite services, i.e. the means of delivery for computer and related services, will be a key factor determining the competitiveness of economies with interests in the sector. The trend in on-line capabilities to deliver computer services and software will continue to expand as penetration of broadband technologies rises. The trend also contributes to greater potential for the offshoring of computer and related services, a topic raised in the section of this Note on cross-border supply. Therefore, emerging trends in Internet regulation and attempts by governments to improve oversight of cross-border activity may have an unavoidable impact on trade in CRS.

68. Other areas of regulation have gained in relevance to the supply of computer services and software as they move to an on-line environment. These include intellectual property rules, regulatory intervention to enhance infrastructure investment, particularly in broadband and on-line security and privacy. Greater bandwidth availability has the potential, for example, to support an emerging commercial model referred to as "cloud computing", whereby a service supplier may host not only data but also software applications and servers.[30] By supporting a trend in which consumers and companies no longer need to own and operate their own software and computing infrastructure, the provision of cloud-based software and computer services increases the importance of regulations

[30] Weber, Jonathan (5 May 2008), "Cloud Computing", *Times Online*.

related to data security and privacy. At the same time, the trend towards greater regulation of Internet and Internet services may have important implications for the supply of computer and related services.

69. Regarding intellectual property, and as also discussed in the audio-visual section of this Note, Internet and other forms of on-line supply of services have made it more difficult than in the past to police the copyrights and patents that have helped promote an innovative culture in the computer services and software industries. Such concerns have prompted industry associations to focus increasingly on cyber security, Internet governance and the enforcement of intellectual property rights.[31] Also of note, as cited in the audio-visual section, are the difficulties confronting companies supplying global cross-border services, when copyrights and patents remain the domain of individual national jurisdictions.

70. It is worth noting that regulations related to some broader areas have a bearing on trade and competitiveness in computer and related services. These include equipment trade and tariffs, education (both generally and particularly in relation to IT skills), competition policy, and the liberalization of markets for IT-enabled services and major IT user industries. Regulations with respect to mergers and acquisitions, for example, and other elements of competition law have increasing relevance as the industry and many of its key players emerge and mature from their early days as small, start-up companies. Policies and regulations affecting research and development also remain important for the sector as employment in R&D-related computer services and software development activities is significant.

71. Many of the newer regulatory trends in the CRS industry concern issues such as security, privacy and intellectual property rights. Such issues are not directly related to work under WPDR and, in some instances, may be related to broader policy concerns covered by exemptions under Article XIV. To some extent such issues have arisen from time to time over the life of the electronic commerce Work Program of the WTO, but without conclusions.

72. In light of the above, the following are some specific questions that Members might like to consider:

(a) What may be an appropriate forum to discuss the trade effects on CRS of emerging regulations in these areas?

(b) Are possible guidelines on the application of Article XIV to CRS and other affected service industries, such as telecommunications, audiovisual or other cross-border services, an avenue worth exploring?

F. POSTAL AND COURIER SERVICES

73. Postal and courier services form a key part of the global communications infrastructure, with high economic and social importance.[32] In recent decades, postal services have undergone radical changes — from a regulatory, operational and technological perspective — throughout the world. Traditionally, the postal sector has been characterized by state-owned monopolies providing basic mail services and privately-owned courier companies supplying expedited delivery services.

74. Today, such a distinction is put into question by the radical changes that the sector has undergone and is still experiencing. Traditional postal operators and private delivery companies, including global express delivery firms, are competing in a new business environment, using new

[31] See, for example, a White Paper of the Business Software Alliance (2008), "Necessary Elements for Technology Growth".

[32] For the purpose of this Note, postal and courier services include express delivery services.

technologies and expanding into new business segments. While many liberalization initiatives have succeeded, they have also highlighted the importance of properly addressing certain basic regulatory issues.

1. Regulatory context

75. Market-oriented postal reforms have been undertaken in most countries, to different degrees: public postal operators have been corporatized and/or privatized, and the scope of postal monopolies has been reduced or even abolished in some cases. As a result, the traditional dividing line between private and public operators has become much less clear. Key facets of market-oriented postal reform relate, on the one hand, to the corporatization and privatisation of postal operators and, on the other hand, to the liberalization of postal markets and related regulatory developments.

76. While more and more countries have chosen to open postal and courier services, the key issue facing these countries is how to regulate this sector in the context of liberalization. In fact, this is also the main concern of those countries that are hesitant to pursue liberalization in this sector, especially given the fact that the experience of some countries did not always lead to better performance.

2. Regulatory developments and issues

77. In this regard, several specific, sometimes interrelated issues affecting trade in this sector, need to be addressed.

(a) Universal Postal Service

78. The first key regulatory issue to be addressed in this sector is related to the provision of a universal postal service. This is a generally recognized concept as postal services are essential to a country's economic and social development. It is also an obligation in international law for most countries, which requires governments to ensure that quality basic postal services are provided to all areas in their territory at affordable prices.[33] In a liberalized environment where competition exists, the way universal service is administered matters because it may have an impact on market access and competition. In principle, each country needs to clearly define the universal service it wishes to maintain, calculate the costs of the provision of universal service and secure the financing of these costs in a transparent, non-discriminatory and competitively neutral manner. However, it is not always easy to do so in practice. To determine the actual costs of providing universal service is considered to be one of the biggest and most problematic issues in postal regulation. More specifically, the challenge is to determine the difference between the costs of providing a universal service and the income generated from it.[34]

79. While monopoly is no longer regarded as the only way to support universal service provision, most countries, particularly developing countries, still choose to grant universal service providers, usually state-owned postal operators, certain exclusive rights, called the reserved area. Perhaps this is because many governments find it difficult to otherwise finance universal services[35] or because incumbent postal operators are unwilling to give up the exclusive rights and related privileges they enjoy.

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[33] See Article 1 of the Universal Postal Union (UPU) Convention. The UPU now has 191 member countries.

[34] UPU (2004), "Postal Regulation: Principles and Orientation", Bern, p.18.

[35] Some studies show that the provision of universal service in a liberalized postal markets cannot be taken for granted under all circumstances, even in developed countries. See Vincenzo Visco Comandini (2002), "The Provision and Funding of Universal Service Obligation in a Liberalized Environment", in Damien Geradin (ed.), *The Liberalization of Postal Services in the European Union,* Kluwer Law International, Great Britain, pp. 221-234.

80. A World Bank study points out that postal sector policymakers in both developed and developing countries are continuously attempting to compromise between the objectives of introducing competition and dismantling barriers to entry, and ensuring the financial stability of traditional monopolies entrusted with the universal service mandate.[36] It should be noted that even if a reserved area is maintained, the regulator still needs to clearly define its scope so that a clear line could be drawn between competitive and non-competitive activities. Lack of clarity in the reserved area leaves room for discretion. For example, some countries define the reserved area simply in terms of the activities of the public provider. While in other cases there is a general reference to letters and/or parcels, but without indication of the weight, price or level of service contemplated (e.g., whether the monopoly relates to basic delivery or express services), with monopoly rights defined very broadly in relation to universal service objectives. Since the purpose of the monopoly is to generate funds needed to cover additional costs of providing universal service, it is desirable to define the reserved area based on such costs so as to increase competition in postal markets. Obviously, the narrower the reserved area, the more market access possibilities for other operators, especially new entrants. Nevertheless, in clarifying the scope of the reserved area as part of their postal reform, some countries have actually reduced the scope of *de facto* competition.[37]

81. In the light of the experience in telecommunications, some countries are considering a universal service fund as an alternative or complement to the reserved area to support such services in liberalized markets. However, it appears more difficult to define the tax base and the tax rate in postal services than in telecommunications. Most postal operators have engaged in non-postal businesses (e.g. banking, insurance, retail, etc.), and big postal and delivery operators, called "integrators", have combined delivery services with transport, freight forwarding, customs brokerage and logistics services. This raises several questions such as the eligibility of companies for contributing to the fund and parameters for tax (e.g. mail volume or total revenue). The concern is that the universal service fund may increase transaction costs of operators in delivery and other services and distort competition.[38]

(b) Competition

82. Another key regulatory issue in this sector is how to prevent anti-competitive practices in liberalized markets. This becomes an issue because incumbent postal operators, particularly those still holding a monopoly, may abuse their dominant position when competing with other operators. Cross-subsidization is one of the main anti-competitive practices in this sector. Often linked to a postal monopoly, it refers to financing competitive services with resources gained in non-competitive services by incumbent postal operators. Practices in this regard have already led to several litigations in the European Union and in the NAFTA.[39]

83. For instance, many countries in Europe (following the EU Postal Directive) require accounting separation of the competitive and non-competitive activities of the incumbent's postal business as a mechanism for detecting cross-subsidization. Some countries require that competitive

[36] Boutheina Guermazi and Isabelle Segni (2005), "Postal Policy and Regulatory Reform in Developing Countries", in *World Bank, The Postal Sector in Developing and Transition Countries,* p. 47.

[37] WTO (2010a), "Postal and Courier Services", Background Note by Secretariat, document S/C/W/319, p. 69 and footnote 76.

[38] Vincenzo Visco Comandini (2002), op. cit., pp. 229-230. One of the main concerns that China's draft Postal Law has generated is its provision on universal service fund. See WTO (2007), "Communication from the United States – Transitional Review Mechanism Pursuant to Paragraph 18 of the Protocol of Accession of the People's Republic of China ("China") – Questions from the United States to China", document S/C/W/289, 5 November 2007.

[39] For example, UPS filed a complaint with the European Commission against Deustche Post in 1994, and a complaint against the Canadian Government in 2000 under the NAFTA with regard to the anti-competitive practices of Canada Post.

services be provided by a financially independent subsidiary of the incumbent postal operator. Privatization of state-owned postal operators or elimination of the reserved area is suggested as a structural approach to preventing anti-competitive cross-subsidization.[40] The third EU Postal Directive requires the majority of Member States (95 per cent of EU postal markets in terms of volume) to abolish exclusive rights by 1 January 2011 and by 1 January 2013 for the rest. Germany (2008), Finland (1991), Sweden (1992), the United Kingdom (2006), Estonia (2009) and the Netherlands (2009) have already abolished the reserved areas before the date foreseen in the Directive. EU candidate countries are at different stages in the transposition of the postal *acquis.*

(c) Licensing requirements and independent regulator

84. There are concerns that licensing may be used to restrict market entry after liberalization, particularly in some countries where, to date or not long ago, no sectoral license has been needed for providing some services, notably express delivery services. According to a World Bank study, some countries have engaged in regulating the market through levying high license fees on competitors as a contribution against universal service costs borne by the universal service provider; in most cases the fees are calculated without detailed studies of the actual costs of the perceived universal service obligation.[41] Governments need to balance the necessary regulatory role a licensing system may play and the burden that it may impose on business.

85. Lack of an independent regulator is raised as a concern in liberalized postal markets. In many countries, public postal operators used to be entrusted with administrative functions, including issuing licenses, setting prices, monitoring the market, etc. Even when transformed into commercial corporations and deprived of administrative functions, they remain publicly owned and thus maintain a close relationship with governments. To avoid conflicts of interest and guarantee neutrality *vis-à-vis* all operators in the market, independence of the regulator must be ensured. There is no single model for postal regulators. Some countries have established a separate postal regulatory body. In some other countries, the regulatory authority is located within the Ministry of Communication or the telecommunication regulatory body.

(d) Border procedures and shipment requirements

86. Cumbersome and opaque border procedures for customs clearance and inspection may lead to undue delay at customs and, thus, have a negative impact particularly on express delivery operators as they need to guarantee timely delivery. In some countries express operators are also affected by weight or value restrictions on their shipments, e.g. limiting express items to those weighing less than a certain quantity, and barring them from expedited processing at customs. In response to these problems, some preferential trade agreements (PTAs) contain a specific provision on express shipment in the chapter on customs administration, which is aimed at facilitating customs clearance for express delivery services. This provision usually requires parties to provide for pre-arrival processing of information, permit the submission of a single document, minimise required release documentation, and allow for an express shipment to be released within six hours of the submission of necessary customs documentation. In some PTAs, parties are additionally required to provide a separate and expedited customs procedure for express shipment, without regard to weight or customs value, and assess no customs duties or taxes and require no formal entry documents for express shipments of low value.

87. As many countries undertake further postal reform to liberalize further and increase competition in their markets, more emphasis may need to be put on regulatory issues, both domestically and internationally. At the international level, some PTAs contain additional disciplines

[40] OECD (1999b), "Promoting Competition in the Postal Sector", Paris.
[41] Boutheina Guermazi and Isabelle Segni (2005), op.cit.

or regulatory commitments, particularly related to express delivery services; in the DDA negotiations, negotiating proposals as well as some Members' offers with respect to postal and courier services suggest that scheduling additional comments under the GATS could be an instrument to deal with these issues.

G. TELECOMMUNICATIONS

88. The global environment in which telecommunication services are traded today is predominantly a competitive one, characterized by more open cross-border trade and foreign direct investment. Cross-border trade increasingly encompass not only the traditional cross-border supply of services via termination, but also the uptake of new customers within foreign markets far from where the supplier is physically located. The combination of rapidly growing and liberalized telecommunication markets has presented both challenges and opportunities for regulators.

1. Regulatory context

89. The Reference Paper on regulatory principles in telecommunications has helped shape the regulatory environment in this sector over the past decade (see Box 4). It has served as a blueprint for sector reform in WTO Members and in countries wishing to accede. Even WTO Member governments who have not yet committed to its provisions have adopted similar principles, either by directly borrowing from it, or by adopting best practices consistent with the Reference Paper.

Box 4: Reference Paper on Regulatory Principles for Telecommunications

The Reference Paper is a set of regulatory principles for trade in telecommunication services. It is legally binding for those WTO governments which have committed to it by appending the document, in whole or in part, to their schedules of commitments as an additional commitment under the provisions of GATS Article XVIII.

The Paper contains a series of definitions and principles for the prevention of anti-competitive practices. It also provides principles for interconnection, universal service, transparency, licensing criteria, independence of regulators, allocation and use of scarce resources.

More than 82 Member governments have attached the Reference Paper to their schedule of specific commitments.[42] About seven Members have made commitments to some, but not all, of the provisions, or have appended their own versions. Every government that has acceded to the WTO since the basic telecommunications negotiations has also taken on these disciplines. In the Doha Development Agenda negotiations, some governments have made offers that would commit for the first time telecommunications services and that include the disciplines in the Reference Paper.

Source: WTO (2009a), "Telecommunication Services", Background Note by the Secretariat, S/C/W/299.

90. Regulators nevertheless continue to face many new challenges as the transition to competition, new technologies and the convergence of different services and industries with traditional telecommunications take hold. Often, regulators find themselves in relatively uncharted territory, particularly for developing economies where regulatory solutions employed in industrialized country governments may be difficult to adapt or less well suited to their circumstances. In some cases, however, new regulators with a relatively blank slate can now pick and choose from a wide variety of best practice options that others have developed, and avoid adopting outdated regulatory practices from the start.

[42] Counts EC Member States individually.

2. Regulatory developments and issues

91. Over the past decade regulatory practices have evolved, mostly in a positive direction as regards the facilitation of trade in telecommunications, as governments have reconsidered historic practices in favor of more flexible frameworks. The regulation of traditional telecommunication services is experiencing a trend toward more light-handed approaches. However, despite a dramatic opening of markets over the past decade, incumbent operators (i.e. the former monopolies) still retain a dominant position in most economies. For this reason, the maintenance of competition safeguards such as those dealt with by the Annex on Telecommunications and the Reference Paper has continued to be an important feature of telecom reforms. At the same time, Internet services appear to be passing from a state of little or no regulation into the realm of greater regulatory intervention, often due to perceived needs to address a number of broader policy concerns.

92. As regards convergence, it is increasingly clear that a fine distinction between telecom and computer services, and, in some respects, audio-visual services provided over telecommunication networks, is difficult to make. Services across these sectors can now more frequently be provided over the same network platforms and by a single supplier. Problems can arise, however, due to the often very different regulatory traditions to which the services now converging were subject in the past. Moreover, this means that the telecommunications, computer services and audio-visual sectors increasingly face some common regulatory concerns. Some of the areas where cross-cutting regulatory issues may arise are briefly noted, below.

(a) Licensing practices

93. Licensing practices have evolved in recent years to include more flexible regimes as well as the reduction or elimination of licensing requirements for some services. Some Members have introduced unified licenses which are service-neutral, allowing suppliers to provide different services (e.g. fix and mobile) under a single license. Examples of governments offering unified licenses include Hong Kong, China; India; China; Botswana; Nigeria; and Saudi Arabia. Other Members have introduced technology-neutral licenses which allow companies to choose the technology they will use to provide services or to transition to newer technologies without needing an additional or new license. Some of the governments now issuing technology-neutral licenses for certain services, typically wireless, include Chinese Taipei, Estonia, Niger, Nigeria, Sweden, the United Kingdom, and the United States. All licenses are technology-neutral in Bahrain, and Pakistan has announced plans to offer technology-neutral mobile licenses during 2012. Such licenses have involved a complementary shift to more flexible spectrum policies (see below), such as the award of frequencies on a technology neutral basis. It is also becoming somewhat more common not to require licenses for many forms of value-added and non-facilities based telecommunication services.

(b) Spectrum management

94. Compared with other sector reforms, spectrum policies have been slower to change, perhaps due to the complexity of the area. More recently, however, there are signs of a rethinking of practices so as to better adapt technical, allocation and assignment decisions to competitive environments.[43] Spectrum auctioning is already common in many markets and, in a few cases, experiments in spectrum trading have been initiated or are being contemplated.[44] In another form of enhanced flexibility, some governments now encourage spectrum sharing among operators and technology-neutral frequency awards are becoming more common. However, the challenges can be considerable.

[43] See, for example, Wellenius, B and I. Neto (2008), "Managing the Radio Spectrum: Framework for Reform in Developing Countries", *World Bank Policy Research Working Paper*, No. 4549.

[44] See, for example, Ibarguen, Giancarlo (2003), "Liberating the Radio Spectrum in Guatemala", *Telecommunications Policy*, Vol. 27, pp 543-664.

In some cases, existing holders must be migrated out of certain frequency slots and technical harm or interference issues must be resolved. Nevertheless, increasing demand on spectrum resources, as mobile technologies become a predominant form of delivery and satellite services more affordable, requires innovative solutions. Increased demands on spectrum are also brought to the fore as the audio-visual sector continues to expand and as high-bandwidth telecommunications technologies move into the delivery of video, Internet and television services. In an era of global trade in telecommunications, there is also a need to ensure that the solutions are competition-friendly.

(c) Access pricing: Interconnection, mobile termination and mobile roaming

95. Certainly, regulation of traditional interconnection involving links to incumbent fixed networks remains critically important to competitive markets. However, new issues are arising as technologies change and other operators take on larger roles. In some markets, operators of fixed telecommunications are transforming their facilities into IP-based, so-called next-generation networks (NGNs). This prospect is attracting renewed regulatory debate. Some observers argue that neither interconnection regimes developed for the Internet (e.g. peering) nor those used for traditional telephony networks are most suitable in the NGN context. In addition, as it becomes more common for audio-visual content to be delivered over telecommunication facilities, questions of access or interconnection rights for the last mile to the customer premises can arise for audio-visual suppliers who find themselves in competition with operators for the same services. However, as regards reasonable and non-discriminatory access obligations, audio-visual services are not covered by the Annex on Telecommunications.

96. Questions about mobile interconnection or call termination rates in the domestic market have arisen over the past decade with the rise in popularity of mobile phones. Experts have questioned, and continue to explore, why presumably competitive markets have been insufficient to lower mobile pricing. During 2010-2011, governments striving to reduce mobile termination rates included Bahrain, Egypt, France, Italy, Kenya (for SMS), Mexico, Poland, Portugal, South Africa, Sweden and the United Kingdom. In some cases, (e.g. Bahrain and Turkey), regulators have made determinations of dominance regarding mobile termination markets.

97. International mobile roaming charges have also become an issue due to the exceedingly high prices charged to customers who use their phones abroad. As with mobile interconnection, regulators are questioning why a presumably competitive market is able to sustain such high price levels. Most regulatory tools for dealing with market imperfections, if this phenomenon can be considered as such, rely on control or dominance. Some regulators feel the problem is associated with the lack of transparent regulations, while others see it more as a failure of competitive conditions.

98. Finally, so-called network neutrality debates that have taken hold in the United States, and to some extent Europe, involve fairness of access concerns. Although often seen primarily as a consumer issue, the debate also has implications for businesses using or delivering their services over the Internet. Most importantly, the debate contributes to shifting the perspective on how Internet service providers might be more actively regulated in the future.

(d) Universal service in a new environment

99. According to one observer, as mobile substitution occurs, the traditional paradigm of fixed line as the universal service obligation is no longer valid and the rules must be changed.[45] Already, some governments are supplementing universal service obligations with additional criteria, such as extending access to the Internet, in general, or broadband services, in particular. Many experts see

[45] Chun-Mei, C., Hsiang-Chih, T and Chi-Kuo, M. (2008), "Income, affordable and threshold effects on FMS in the developed and developing economies", *Telecommunications Policy,* Vol. 32, No. 9-10.

this as the best incentive for ensuring that competition flourishes in new technology environments. Affordable access for certain under-served or less well-off population groups is now seen by governments as not only a way to close the so-called digital divide, but also as a means to provide for the livelihoods of these people and the sustainability of communities. In efforts to seek additional revenue for network build out and raising penetration levels, in some markets a variety of new fees or taxes are being imposed on service suppliers, including, for example, fees on international incoming traffic. Where specific obligations or contributions placed on operators appear necessary to meet universal service goals, governments need to bear in mind Reference Paper principles such as "transparent, non-discriminatory and competitively neutral". These principles remain as important for the implementation mechanisms in new environments as they were to universal service schemes linked to fixed telephony.

(e) Subsidies and other incentives to broadband

100. In what has become a race to adopt and spread the use of broadband technologies, a number of governments have experienced frustration with the slow introduction by companies and limited uptake by customers. Since broadband technologies can deliver more and better telecommunication services as well as a wide variety of other information services, they are central to many e-government and economic stimulus initiatives. Broadband services are also thought to be critical to the ability of an economy to remain competitive in global markets for international trade in goods and services. Some governments, as mentioned above, have folded broadband into universal service policies, while others have developed dedicated funds to spur its growth and development. Yet others have taken a hands-off, market driven approach.[46] Some schemes recently instituted or under consideration hint more at outright subsidies to operators selected to undertake commercial deployment of broadband offerings. If not undertaken with prudence, such policies could risk upsetting the competitive balance between market players.

(f) Security, privacy and piracy regulation vs. free flows of information and trade

101. Increasing concerns about cybercrime, cybersecurity, individual privacy, copyright infringement and inappropriate content have come to the fore as the Internet has matured as a ubiquitous global service. While considered legitimate and important, tensions have arisen regarding the manner in which different governments are moving to address these issues. Of particular concern is the possible impact of regulations on the free flow of information. It is not only telecommunications, but also computer and audio-visual services, which are potentially affected. One of the key concerns of the telecommunications industry has been the liability of Internet access suppliers, who must usually take the brunt of responsibility for implementing and enforcing new regulatory initiatives. Some in the industry argue that certain emerging regulations may not achieve a desirable balance but overreach their objectives with onerous trade-inhibiting regulations on service suppliers.

(g) Other regulatory issues

102. Other regulatory issues that have emerged in recent years include local loop unbundling, co-location of facilities, number portability and dialling parity. Looking at the telecommunications provisions of PTAs, there has also been a trend toward the expansion of some of the benefits included in the WTO Reference Paper to value-added service suppliers. Finally, with the growth and expansion of mobile companies, vigilance over mergers and acquisitions in this sub-sector that might have anti-competitive effects has become increasingly important.

[46] See, for example, Huigen, J. and Cave, M. (2008), "Regulation and the promotion of investment in next generation networks—A European dilemma". *Telecommunications Policy*, Vol. 32, No. 11. Among other things, the authors suggest that the incentives to invest are weaker in markets with only one fixed network.

103. To a considerable extent, the existing provisions of the Annex on Telecommunications and the Reference Paper on telecom regulatory principles go a long way to addressing regulatory issues in the sector, both as regards Article VI:4-type measures as well as competition policy. Concerns related to interconnection, and mobile termination and international roaming are examples of issues that may be adequately addressed by these disciplines.

104. Two areas where new regulatory trends are taking hold are spectrum management and Internet – areas which are dealt with only marginally in the existing disciplines. New universal service policies and mechanisms are also evolving as communication services are ever more important to achieving economic and social objectives. However, in some instances, this has led to additional fees or charges on certain services or suppliers, but not on others. Also, in some cases subsidy programmes beyond the existing universal services mechanisms have been instituted, e.g. to promote broadband development.

105. In light of the above, the following are some specific questions that Members might like to consider:

(a) Is there a need to take a closer look at emerging Internet regulation or to take initiatives to help ensure that new spectrum policies will be both competition friendly and GATS consistent?

(b) Could it be advantageous to exchange information on some of the new and emerging practices in this regard and review some of the possible GATS implications?

H. AUDIOVISUAL SERVICES

106. The audiovisual sector's importance stems from the fact that it has economic as well as social and cultural components. The sector is skill-intensive. It is also a leading user of new technologies and therefore a driver of investments in network infrastructure. Government policies often play a significant role in the sector, whether to promote domestic cultural content or ensure diversity and pluralism, protect intellectual property rights, regulate advertising practices, or to proscribe illicit content.

1. Regulatory context

107. Audiovisual services are typically subject to a wide array of government regulations, due to the sector's social, cultural and economic importance. Regulations may relate, for example, to the protection of intellectual property, competition, protection against illicit or offensive content, advertising, or language requirements as regards subtitling and dubbing. A number of issues discussed under the above section on telecommunication services (e.g. interconnection, spectrum management) can be of relevance for audiovisual services, though they are not mentioned here to avoid duplication.[47]

2. Regulatory developments and issues

108. The sector has undergone - and will continue to experience - significant change as a result of technological advances. Among other things, these make it easier, in terms of cost, quality and time, to transmit greater amount of content within and across borders; allow content to be distributed on a variety of platforms and devices by diverse operators; and give greater control to consumers over

[47] Audiovisual services in the Services Sectoral Classification List (MTN.GNS/W/120) includes broadcasting as defined in CPC Prov. 7524. A number of issues mentioned in this section may also be of relevance for telecommunications services.

what they want to watch or listen, when, where, and how. This naturally has consequences for economic operators as well as regulators.

(a) Convergence-related regulatory issues

109. Convergence confronts governments with the challenge of reconciling previously distinct regulatory frameworks. In the past, each type of content had a dedicated network. Television content was delivered over one technology, but now, in addition to traditional broadcasters, the same content can be transmitted by cable, mobile and fixed-line phone companies, or Internet access providers. While broadcasters have traditionally been subject to more regulation, including with respect to content, telecommunication companies tended to be regulated to a lesser extent, with a greater focus on carriage regulation and competition rather than content. Convergence and the arrival of such new systems as Internet Protocol Television (IPTV) or mobile television challenge regulatory frameworks based on traditional distinctions. As a result, in recent years, many countries have adopted, or have plans to adopt, new policies to address the convergence of telecommunications, information technology and broadcasting.[48]

110. Emerging regulatory approaches tend to provide an enabling policy environment that aims to facilitate convergence. Recent research suggests that failing to do so can create barriers to competition, and slow down the development of information communications technologies (ICT) to the detriment of users (e.g. expanded reach and variety of services, lower prices) and service suppliers (e.g. capacity to leverage existing infrastructure to provide a wider range of services at lower cost).[49]

111. One area where regulatory frameworks may need to be revisited relates to authorizations and licensing. For one, licensing regimes may have to be adapted to reflect the fact that licensees can offer similar services using different networks. Countries used to only permit the delivery of specific services over a given network − and many still have regulatory regimes based on such an approach. Such traditional regulatory frameworks may prevent network owners from providing services that they are now capable of supplying (e.g. television programming over the phone line or, from a telecom point of view, cable companies being allowed to provide telephony services). Various countries are now moving to an approach focusing on the services being supplied, and are less concerned with the technology used to supply them. Still, if unclear or too complex, licensing procedures for such 'converged' services would raise suppliers' entry costs.[50]

112. Another important regulatory objective in the emerging environment is to ensure a level playing field. Broadcasting, telecom and Internet service suppliers have in the past been subject to different regulatory frameworks, and hence different rules and requirements. Nowadays, to promote competition and avoid creating distortions, it will be necessary to reduce asymmetry in the rules that apply to similar services. For example, governments may need to evaluate whether differences between telecom operators and broadcasters as regards rules on content requirements, concentration limits, or mergers and acquisitions should remain. At the same time, distinctions in the regulatory regime can be important, such as when stricter rules are applied to dominant firms to ensure they do not abuse their market power.

[48] World Bank (2007a), "Regulatory Trends in Service Convergence", *World Bank Working Paper*, Washington; OECD (2007c), "Policy Considerations for Audio-Visual Content Distribution in a Multiplatform Environment", Paris.

[49] Singh, Rajendra and Siddhartha Raja (2010), "Convergence in Information and Communication Technology", World Bank, Washington D.C.

[50] Ibid; OECD (2004a), "The Implications of Convergence for Regulation of Electronic Communications", Paris.

113. Convergence has had an impact not only on regulations, but on regulatory agencies. Typically, different regulators or bodies oversaw different areas, for example one for broadcasting and another for telecommunications. While converged regulators have emerged in some cases, what arguably matters to a greater extent is the coordination between different agencies − or within a converged agency − to reflect and implement a regulatory framework better adapted to convergence. Indeed, conflicts between regulators over competencies can delay important decisions (e.g. the introduction of IPTV services in Korea).[51]

114. In a related manner, technological advances, in particular the growth of video on-demand, have led to modifications in regulatory approaches. As noted in S/C/W/310, in the European Union, the recent Audiovisual Media Services Directive covers all audiovisual media services, not only traditional broadcasting, but also online and on-demand audiovisual content. It draws a distinction between linear (with a programme schedule such as conventional television) and non-linear services (video on-demand). The latter are subject to a number of rules (e.g. advertising, protection of minors, prohibition of illicit content) on the same footing as traditional linear services so as to ensure similar treatment. Sometimes, though, the non-linear services are subject to less strict rules, recognizing that consumers have greater control and choice in that context.

(b) Competition and other regulatory issues

115. As with other sectors, a well-functioning audiovisual market requires appropriate regulation of cartels and anti-competitive practices, for example to monitor the extent and effects of vertical integration. While it may yield economic efficiencies that benefit consumers, vertical integration can also raise competition concerns. For example, an entity's control of television programming rights and distributor platform(s) may enable discrimination against competitors in the downstream market, unduly reducing their access to content. Discrimination can also occur when anti-competitive conditions in the downstream market unduly deny access of content producers to distribution platforms.[52]

116. A number of countries have measures in place to ensure the plurality of voices, or of sources of information, in the media. These objectives have often been implemented through cross-ownership limits. In light of technological changes permitting consumers to access content through different means, governments may need to consider whether existing limits on ownership across different media have not become too burdensome in a modified business context. Indeed, many regulations still in place ignore new media. Traditionally, when terrestrial broadcasting was dominant, it could be assumed that there would only be a few broadcasters and that their influence had to be limited.[53]

117. Must-carry (or must-list in the case of electronic program guides) obligations are a common area of regulation in the sector. Typically, this involves requiring broadcasters to offer certain local, regional or public service channels, or, traditionally, imposing on networks that they carry those TV channels that, in an age of distribution scarcity, were considered by the general public as the main ones. Given the greater abundance of networks and content, adequate regulation on must-carry obligations are important to ensure a level playing field, e.g. ensuring that the number of must-carry or must-offer channels is not too high, that the criteria for selecting the channels are clear and public, and that any compensation rules are transparent and fair. As mentioned above for other regulatory areas, the emergence of new ways of delivering television programming (e.g. mobile TV) raises the issue as to whether pre-existing must-carry rules should be imposed on new players (e.g. mobile TV),

[51] Singh, Rajendra and Siddhartha Raja (2010), op.cit. pp. 94-95; OECD (2007c), op.cit., p. 21.

[52] ITU (2008), "IPTV and Mobile TV: New Regulatory Challenges for Regulators", Chapter 9 in *Trends in Telecommunication Reform: Six Degrees of Sharing*, Geneva, available at "http://www.itu.int/ITU-D/treg/publications/trends08.html" (accessed on 12 February 2012).

[53] OECD (2004a), op.cit.

or whether they should be equally relaxed for all. Some research has also suggested that, to ensure a level playing field, all broadcasters with must-carry status should be subject to a must-offer obligation, whereby they would provide their programmes to all platform providers under non-discriminatory terms and conditions.[54]

118. An obstacle that reduces the online cross-border supply of audiovisual content relates to the territoriality of intellectual property rights and obstacles to multi-territory licensing or clearing of rights. With respect to the music industry, the European Commission concluded that the online supply of music services across the EU required improving pan-European licensing for music services, which in turn required the creation of new structures for collective management societies.[55] Governments may facilitate the adaptation of the collective management of rights in the digital environment by encouraging collecting societies to set up new or improved schemes to address the licensing of new media exploitation and/or by streamlining their methods to facilitate multi-territory licensing of digital rights.

119. Other regulatory measures that can negatively affect trade in this sector include insufficient protection of intellectual property rights, lack of transparency regarding licensing procedures and requirements, inadequate procedures for appeal, lack of an independent regulator, preferential treatment of public companies (e.g. television), restrictive limits on advertising, excessive withholding taxes, and excessively onerous or unclear rules with respect to censorship or content review.

I. CONSTRUCTION AND RELATED ENGINEERING SERVICES

120. Governments – including regional and local authorities – have an important role in regulating the construction industry and overseeing the quality and safety of structures, civil engineering works and residential houses. For instance, land use and building regulations aim to protect public health, safety and general welfare relating to the construction and occupancy of buildings and structures, as well as to promote a socially functional, environmentally sustainable and aesthetically harmonious living environment.

121. Firms attempting to participate in construction service markets are subject to many different aspects of domestic regulation. They must obtain building permits, conform to local land use/zoning requirements,[56] urban planning and environmental regulations, as well as to other rules and technical requirements inscribed in local, national or international building codes. Contractors and all the professionals allocated to any given project must often also be registered. If considered belonging to a "regulated profession", skilled construction workers and craft persons must often be registered with, or accredited in, professional bodies or national registers of artisans in the country in which the service is supplied. Their individual competences must be verified or, alternatively, their qualifications, education or skills formally recognised. In some countries, construction firms are required to make a prior declaration if they want to post staff on a cross-border basis (mode 4), even for very short duration postings. Companies frequently have to undergo systematic on-site checks in case of temporary movement of natural persons. They also have to comply with social security regulations including fees and remunerations, health and safety regulations, and liability and

[54] Cullen International (2006), "Study on the Regulation of Broadcasting Issues under the New Regulatory Framework", prepared for the European Commission (Information Society and Media Directorate-General), 22 December 2006, pp. 77-89; OECD (2007c), op. cit.; European Audiovisual Observatory (2005), "To Have or Not to Have: Must-Carry Rules", Iris Special, Strasbourg.

[55] European Commission (2005), "Study on a Community Initiative on the Cross-Border Collective Management of Copyright", Commission Staff Document, Brussels.

[56] Zoning laws, enforced by local government entities (municipalities) in most developed and developing countries, deal with land use, lot sizes, building heights, density, setbacks, and other aspects of property use. Typically a zoning permit must first be obtained, which authorizes the building or alteration of a structure within the zoning ordinances specified for a given area.

professional indemnity insurance regimes in the host country. Finally, they sometimes face complex and unclear procedures for the award of public contracts or concessions, as well as restrictions on the use of construction-site equipment and material.

122. These regulatory measures may affect one or several modes of supply. Furthermore, a barrier hampering the service supply at any *one* of the different stages of the construction process – ranging from sending a crew just for the time span of a particular project to a more permanent, 'duly constituted' commercial presence; and from the use of inputs necessary for the provision of the service to the after-sales/maintenance and repair phase – may undermine the entire transnational service supply.

1. Regulatory context

123. The construction sector is relatively predisposed to national/local regulation on at least four accounts. Firstly, given that the construction process involves a large mix of labour[57], materials, machinery and equipment, a wide range of regulatory measures by Members are implicated. Barriers to the movement of any factor of production can significantly affect trade in construction services. Labour for instance (i.e., the movement of foreign natural persons supplying a service) is sometimes subject to prior authorisation, registration and/or declaration requirements, even for project-related work of short duration. In some cases, short-term contracts for construction workers are not permitted at all. Many of these issues are similar to those discussed in the mode 4 section of this Note. The non-recognition of professional qualifications and overly burdensome/costly qualification requirements and procedures to achieve such recognition may constitute a problem. Firms that wish to bring their own materials, machinery and equipment often have to comply with a variety of different national technical specifications and standards in the host country. In some cases, they face outright import restrictions; or goods imported on a temporary basis, such as construction-site machinery and specialty equipment, are not released from the payment of import duties and taxes.[58]

124. Secondly, construction is an activity which is relatively localised and unlike many other service industries its output is physical in nature. It is the production process that is exported; the final output is located in the host country. It is thus usually the *lex rei sitae*[59] that applies: i.e., the activity is regulated under the national legislation where the construction site is located. As a result, a service supplier that wishes to be active in several countries is obliged to conform to different regulatory regimes in parallel. This is especially problematic for small and medium-sized enterprises (SMEs) that are prominent in the construction industry. They are potentially hit harder than their larger rivals by fixed regulatory costs which are not proportionate to project size. As a result, SMEs might be at a competitive disadvantage or even be dissuaded from international activities altogether.[60]

125. Thirdly, as a supplier of physical infrastructure, the sector has linkages to many different markets and activities: mining, petroleum and petrochemicals, power generation including renewable energy, manufacturing, water and utility distributions systems, sewer/waste, transportation,

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[57] Notably low-to-medium skilled labour in the project implementation (i.e., the physical construction) phase.

[58] Note, however, that there is no requirement in the GATS to schedule a limitation to the effect that the cross-border movement of goods associated with the provision of a service may be subject to customs duties or other administrative charges. Such measures are subject to the disciplines of the GATT (see WTO (2001) "Guidelines for the Scheduling of Specific Commitments under the General Agreement on Trade in Services (GATS), document S/L/92, 28 March 2001, paragraph 7).

[59] Latin for "the law where the property is situated".

[60] European Commission (2002), "Report from the Commission to the Council and the European Parliament on the state of the Internal Market for services – presented under the first stage of the Internal Market Strategy for Services", COM(2002) 441 final, p. 8.

telecommunications, and public health are just a few.[61] Some of these key infrastructural, capital-intensive sectors are themselves subject to considerable government regulation. Depending on the type of structure (commercial building, hospital, etc.) or civil engineering work/facility (e.g., power plant, port) that a contractor builds, he will face different sector-specific norms and regulations.

126. Fourthly, being in a highly competitive and rather low-margin sector (except in niche segments), construction firms seek to add more value to their services. This implies more partnering with the client, assuming responsibility not only for the 'brick and mortar' part but for an entire project, and looking at the whole-life costs of a built asset. As a result, a growing emphasis is being placed by private as well as public sector contracts on 'design-build', a project delivery system whereby the design and construction aspects are contracted for with a *single* supplier known as the design-builder.[62] For instance, a property developer who intends to have an office building constructed will be looking for a contractor that can take charge of the full range of tasks involved to have the building constructed including design, preparing and applying for building permits, ensuring compliance with environmental rules, site preparation work, supervising and carrying out construction and follow-up works. Site preparation work may involve the excavation and safe disposal of contaminated soil, necessitating additional licensing and qualification requirements. As contractors are increasingly supplying integrated solutions, they potentially have to comply with a wide range of regulations.

2. Regulatory developments and issues

127. Difficulties for foreign construction service suppliers may be created not only by the nature of the regulation, but also by the fact that the required permits and licenses may be granted by various government authorities at different levels (national, regional and often local), or even by industry associations. The latter may not always welcome foreign competition in the market or may not be sensitive to the trade effects of regulation. The lack of transparency concerning the rules that apply, as well as certain informal business practices and, possibly, collusion of established suppliers with local authorities, could hamper market access. Competition policy is also relevant, as the sector has often given rise to anti-competitive behaviour and practices.

(a) Licences, authorizations, registrations, prior declarations

128. Licensing is prevalent and, especially for more complex projects, construction firms have to comply with pre-qualification standards, also referred to as qualification rating systems. The latter restrict the eligibility to bid – usually for capital-intensive or technically highly complex contracts – to companies with a given financial and/or technical capacity and track record. Rating systems normally entail minimum capital outlay requirements and apply in a non-discriminatory manner, based on objective criteria – as they aim to ensure the technical and financial capacity of the contractor and quality of the service. However, it cannot be excluded that some of these systems are used to *de facto* limit foreign entrants.

129. In certain countries, service suppliers are obliged to register with an administrative authority, a professional body, a chamber of craft trades or a trade association. For example, construction companies may have to register with a professional body or with their profession's national association. Craft persons (such as carpenters, electricians, tilers, etc.) have to be listed in the national register of artisans even if the intended service supply is of limited duration; and regulated professions may be subject to a requirement to register with a professional body or trade association. This could prove expensive for suppliers who wish to supply services in several countries, particularly on

[61] WTO (2009b), "Construction and related engineering services", Background Note by the Secretariat, document S/C/W/302 , paragraph 4.

[62] Ibid., paragraph 22.

account of the annual contributions to be paid. Often requirements already met by a service supplier in his/her country of origin are not recognized and thus not taken into account, leading to a potentially costly duplication of administrative formalities.

130. Construction firms wishing to send their own staff to perform works abroad ("contractual service suppliers" in standard mode-4 terminology) are sometimes required to make a prior declaration for each individual site and worker. A service supplier who wishes to regularly send contractual service suppliers for short periods often cannot obtain an authorisation valid, for example, for one year. For example, as the European Commission described the situation for construction services in the EU internal market in its 2002 report: "The burden and complexity of administrative formalities, the stringent and quasi-systematic checks which some posted workers may have to undergo, excessive paperwork and the associated delays (stoppage of work), could result in difficulties in the case of regular and short-term posting".[63] Finally, the application of the host country's labour-law provisions to foreign contractual service suppliers, without account being taken of obligations and charges already met by the employer in his country of origin, also can make it challenging to supply services in other countries, particularly for SMEs.

(b) Requirements in respect of professional qualifications and experience

131. Differences between countries regarding 'regulated activities' and disparities in national requirements concerning the necessary professional qualifications often make it difficult for service suppliers to provide services abroad using their original professional title. Certain construction-related activities – such as engineers, consulting engineers, surveyors and crafts persons (carpenters, electricians, etc.) – are considered to be 'regulated professions' in some countries, while they are not regulated in others. A service supplier of a Member with no requirements for a professional diploma, who wishes to set up a commercial presence in, or supply services on a cross-border basis into, another Member that has such a requirement, may not always find it easy to have his/her professional qualifications, education or skills recognized.

(c) Technical, health and safety standards

132. As an activity with great impact on public health and safety (of workers and later occupants) and on the environment, the construction sector is frequently subject to minimum health and safety standards. These are usually included in building codes, which apply to construction products as well as to the design of buildings and other civil engineering structures.

133. The practice of developing, approving, and enforcing building codes varies considerably from Member to Member. In some jurisdictions, building codes are developed by government agencies or quasi-governmental standards organizations and then enforced across the territory by the central government. In others, where the power of regulating construction and fire safety is vested in local authorities, a system of model building codes is used.[64]

134. The Eurocodes (European technical standards for structural design), for instance, constitute a pan-European building code that is mandatory for public works and the *de-facto* standard for the private sector in the European Union. The Eurocodes replaced national building codes published by national standard bodies, although many countries had a period of co-existence. Additionally, each EU Member is expected to issue a National Annex to the Eurocodes, which will need referencing for a particular country (e.g., the UK National Annex).

[63] European Commission (2002), op. cit., final, pp. 23 (footnote omitted).

[64] For instance, many municipalities in the US have model codes which are adapted to their own needs. See for instance the New York Ordinance on Land Usage or the Municipal Code of Chicago, Illinois (available at http://www.amlegal.com/library – accessed on 5 March 2012).

135. Another example is the National Building Code of India (NBC), which provides guidelines for regulating the building construction activities across the country. It serves as a model code for adoption by all agencies involved in building construction works, be they Public Works Departments, other government construction departments, municipalities or private construction agencies. India's National Building Code contains administrative regulations, development control rules and general building requirements; fire safety requirements; as well as stipulations regarding materials, structural design and construction, and safety.

136. Construction *products* also are subject to a range of national (and regional, for instance at the EU level) approvals and other technical performance specifications. Although pertaining to the goods sector, they may impact the cross-border provision of construction services.

(d) Other Regulatory Measures

137. In addition to the above-mentioned sector-specific measures, the suppliers of construction and related engineering services are also likely to be affected by a range of other regulatory measures in the host country, including labour market regulations; environmental and energy efficiency regulations; and liability and professional indemnity regulations. Public procurement policies might also be used in support of particular regulatory objectives.

138. In light of the above, the following are some specific questions that Members might like to consider:

(a) Construction firms have to comply with a great variety of national and sub-national (local) regulatory requirements, which may result in lack of transparency, and even uncertainty, concerning the applicable rules and the requirements/procedures to be fulfilled. To what extent might Article VI:4 disciplines and/or Article XVIII additional commitments deal with these transparency issues? Would Members that have set up electronic platforms ('single windows') where domestic and foreign suppliers can gather all available information on applicable legislation, mandatory approvals, etc. be willing to share their experience?[65]

(b) Would it be useful for Members to examine common principles and procedures for the recognition of professional qualifications of skilled construction workers and craft persons (including the recognition of professional experience as a substitute for a formal diploma)? Could guiding principles be elaborated to deal with situations where the construction workers/craft persons come from jurisdictions where these professions are unregulated (i.e., where obtaining a professional diploma is not mandatory)? How is that issue dealt with, if at all, in bilateral and regional free trade agreements/mutual recognition agreements? Could the GATS facilitate such regulatory co-operation through Article XVIII additional commitments?

(c) Could registration requirements (obliging service suppliers to register with an administrative authority, a professional body, a chamber of craft trades or a trade association) be eased, or even waived, if the service supply is of a limited duration? Could the contribution fee to be paid to these bodies be made proportionate to the duration of the stay (e.g., a service supplier providing a service for two months would not have to pay the full annual contribution)?

[65] For instance, the Finnish Ministry of the Environment has set up a webpage on 'regulating construction' and plans to introduce eServices for housing and building; see http://www.ymparisto.fi/default.asp?node=4076&lan=en (accessed 25 April 2012).

(d) Could it be advantageous to exchange information on Members' practices in regard to pre-qualification standards/qualification rating systems (usually *minimum* requirements on contractors' financial and/or technical capacity and track record that restrict the possibility to bid) and to review some of the possible GATS implications?

(e) Would it be useful for Members to examine which regulatory simplification/facilitation measures could be taken, including specifically for small and medium-sized construction firms?

J. DISTRIBUTION SERVICES

139. The distribution services industry is highly dynamic. While distributors had in the past been perceived as mere dispensers of goods adding little value, modernisation of the sector has boosted its contribution to consumer satisfaction by offering a broader range of products and value-added services (e.g. delivery, after-sales services). The performance of the sector is crucial to efficient resource allocation and contributes to consumer welfare by providing access to a wide variety of goods at competitive prices. Inefficient distribution services limit the extent to which gains from the liberalization of trade in goods benefit consumers in terms of lower prices and greater choice. Exposure to competition stimulates local suppliers to improve their production methods and standards, the organization of their supply chains, and their use of technology.

1. Regulatory context

140. Distribution services are quite diverse, in terms of forms (e.g. fixed location stores, electronic commerce, door-to-door sales, open markets), formats (hypermarkets, supermarkets, department stores, convenience stores, traditional small shops), product offerings (food vs. non-food, multi-product vs. specialized goods, etc.), and legal structures (e.g. independent, integrated groups, franchises). Distributors also interact upstream with producers, including across borders, and with various other economic actors, e.g. providers of logistics and transport services, payment systems, commercial property managers, or advertising agencies. Often, regulation of the sector is directed at consumer and environmental protection, ensuring that health and safety requirements are met, and at preventing abuse of market power by dominant players.

2. Regulatory developments and issues

141. Since distribution services play a fundamental role in the movement of goods from producers to consumers, a wide variety of regulatory issues are of relevance to trade in this sector. This section seeks to highlight some of the key issues but does not aim to be exhaustive. For example, the section does not address barriers to the movement of goods (e.g. customs clearance processes) that, naturally, also affect distributors. Neither does it focus on regulatory barriers in other service sectors, on which retailers and wholesalers rely, such as transport, logistics or financial services.

(a) Zoning and urban planning

142. Since a preponderant proportion of trade in distribution services takes place through commercial presence, distributors can be negatively affected by certain practices relating to zoning and urban planning. Typically, at the local or regional level, zoning or urban planning regulations aim to attain such general objectives as facilitating orderly urban development, making best use of existing facilities and land, promoting the economic development of local communities or regions, assessing the impacts of new developments on the environment and on traffic congestion, or facilitating citizens' access to a range of shopping services. The relative priority given to any such objective varies across different regions and countries. Further, in a number of countries, additional

authorizations and special regulations are applied in relation to the opening of large distribution outlets.

143. Notwithstanding the regulatory objectives being pursued, zoning and urban planning systems can sometimes operate in an inconsistent, slow, insufficiently transparent, or seemingly inconsistent manner. In such situations, costs increase for actors involved, and investors and developers may see market opportunities frustrated. An ineffective system may reduce the capacity of new entrants to introduce greater competition, affecting, in turn the benefits for consumers. In some cases, established distributors participate in the planning decision process, which may tilt the balance against new entrants.[66]

144. Clear and transparent procedures, objective evaluation of applications, limited overlaps and duplications across levels of governments, application of the general principles of proportionality and reasonableness between planning obligations imposed and objectives pursued, the provision of reasoned information justifying decisions taken, and the right to quick and efficient appeals of decisions taken, could help limit negative impacts, as well as strike an appropriate balance between the pursuit of relevant regulatory objectives and freedom of establishment of distributors. As noted in the case of the EU, zoning plans are sometimes not in place and authorities take case-by-case planning decisions on the basis of procedures lacking transparency.[67]

145. Land use permits are often subsumed into the more general zoning and urban planning process, though in some cases they are subject to specific regulations. The OECD, on the basis of a review of national experiences, noted that some projects underwent substantial qualitative evaluation and that refusals often did not require a well-reasoned basis. It noted that such situations did not need to involve corruption, but that corruption was more likely to occur when no clear criteria were required to reject an application.[68]

146. While some zoning and urban planning systems include the impact on existing distributors as a criteria for obtaining permits or licences, this would be akin to a schedulable "economic needs test". Such entries can be found in a number of Member's scheduled commitments on distribution services, especially as regards large wholesale or retail outlets. The OECD recommends that adverse impact tests, where effects on competing firms or the presence of sufficient demand for new facilities are examined, should not be used by planning authorities because they are likely to hinder competition and harm consumers.[69]

147. Duplication and complexity of licences required for opening new retail outlets can also increase costs. Aside from zoning and planning permits, specific licences are often needed to operate

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[66] WTO (2010b), "Distribution Services", Background Note by the Secretariat, document S/C/W/326, 29 October 2010, pp. 20-25; European Commission (2010a), "Commission Staff Working Document on Retail Services in the Internal Market", Accompanying document to the Report on Retail Market Monitoring, SEC(2010) 807, 5 July 2010; European Commission (2010b), "Towards More Efficient and Fairer Retail Services in the Internal Market for 2020", Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2010)355, 5 July 2010; Boylaud, Olivier and Giuseppe Nicoletti (2001), "Regulatory Reform in Retail Distribution", OECD Economic Studies No. 32; See also UNCTAD (2005), "Report of the Experts Meeting on Distribution Services", 15 December 2005, pp. 8-9.

[67] European Commission (2010a), op.cit., pp. 24-26 and 61-62.

[68] OECD (2008a), "Land Use Restrictions as Barriers to Entry", Directorate for Financial and Enterprise Affairs, Competition Committee, Paris. See also: Autorité de la concurrence (France) (2010), "Réponse à la consultation publique européenne relative au fonctionnement du secteur du commerce et de la distribution", available at: http://www.autoritedelaconcurrence.fr/doc/contribution_ce_distrib_sept10.pdf (accessed on 6 June 2012).

[69] OECD (2008a), op.cit., p. 9.

a retail business. In addition, further authorizations or permits may be required from the retailer to be able to sell certain types of products. The greater the number of permits that have to be obtained (sometimes by different regulatory bodies or levels of government), the greater the costs and possible barriers for new entrants, and hence limits to competition.[70]

(b) Competition

148. Several competition-related concerns arise in the distribution sector as governments may seek to prevent the abuse of power by major distributors, as well as similar practices by major suppliers, which may affect distributors.[71] One important issue relates to possible anti-competitive consequences of vertical relations between distributors and suppliers (manufacturers, food processors). While integration can improve efficiency and be generally welfare-enhancing, some practices may also have anti-competitive effects. Different views have been expressed on how these should be regulated. Practices that have attracted concerns include selective distribution, exclusive dealing arrangements, exclusive territories[72], and resale price maintenance.[73] While resale price maintenance is prohibited under various countries' competition laws, others do not have outright bans but restrict it in some manner (e.g. when it involves companies with significant market power).[74]

(c) Other regulatory issues

149. In addition to zoning and planning laws, which are likely to impact more on large outlets, there are also the general conditions for establishing new retail businesses to consider. These will have a substantial impact on small and medium sized enterprises (SMEs) which, in terms of number of establishments, are predominant in the distribution sector. Complex and costly administrative procedures to open new businesses are particularly constraining for SMEs, a great share of which operate in the distribution sector.

150. Although this affects all distributors, SMEs also suffer significantly from certain practices that make cross-border e-retailing more difficult. A number of factors contribute to this, many of which relate to consumers' or suppliers' perceptions (e.g. language problems, doubts about after-sale support, concerns about capacity to seek redress if something goes wrong), or to other services sectors (e.g. high delivery costs or barriers to goods trade). Perceptions aside, limits to cross-border e-retailing can also be linked to regulatory differences faced by traders. Within the EU, for instance, apart from value added taxes, differences in consumer laws reduce interest for cross-border on-line

[70] Boylaud, Olivier and Giuseppe Nicoletti (2001), op.cit., p. 261.

[71] WTO (1998), "Distribution Services", Background Note by the Secretariat, document S/C/W/37, 10 June 1998; WTO (2010b), "Distribution Services", Background Note by the Secretariat, document S/C/W/326, 29 October 2010; Arkell, Julian (2010), "Market Structure, Liberalization, and Trade: The Case of Distribution Services", in Cattaneo, Engman, Sáez, and Stern (eds.), *International Trade in Services; New Trends and Opportunities for Developing Countries*, World Bank, Washington DC, p. 161.

[72] For example, EC (2010a), op. cit., p. 41 and 50-51, notes that in certain instances wholesalers and subsidiaries of manufacturers are refusing to sell the products to retailers established abroad that sought to engage in licit parallel trade.

[73] Resale price maintenance generally refers to an agreement between the distributor and the supplier that specifies the minimum or fixed price that the retailer charges consumers for the product.

[74] In order to facilitate retailer-supplier relations, a number of countries have developed codes of good practice – often non-binding or a mix of self-regulatory and legal-regulatory approaches – to govern buyer-supplier relationships and help prevent and resolve conflicts. See WTO (2010b), document S/C/W/326,op.cit., p. 25.

sales of goods. Strengthening on-line and cross-border enforcement and establishing efficient mechanisms for dispute resolution would help foster trust for such transactions.[75]

151. Other important regulations affecting the operation of the sector relate to shop opening hours, the freedom to set prices (including measures restricting the capacity to offer discounts), and restrictions relating to advertising (e.g. regulation of telephone and electronic media marketing, prohibitions on the offering by service providers of incentives, rewards, and other promotional programmes). While these regulations are intended to pursue general non-trade objectives (e.g. consumer protection in the case of regulations relating to promotions or advertising), they can significantly limit competition, when too restrictive or burdensome.[76] For example, certain restrictions on advertising can make it more difficult for newcomers to expand their market share.

152. Finally, regulatory approaches with respect to franchising can also facilitate, or hamper, the development of this fast growing distribution segment. In particular, the adoption of franchise-related laws – e.g. dealing with mandatory disclosure of information – as well as trademark/copyright law is important so as to effectively protect rights of franchisors and franchisees.[77] Since franchising is based on contractual relationships, the degree of clarity and stability of laws and regulations governing such contracts (e.g. procedures applying in case of dispute) can constitute important obstacles or incentives for these types of business arrangements.[78] More generally, whilst not pertaining directly to the regulatory framework for distribution, increased protection of intellectual property rights would tend to benefit retailers and franchisers who rely on trademarks or brand names.

K. EDUCATION SERVICES

153. Due to its social and economic importance, regulatory measures in the education sector cover a vast array of issues including the promotion of ethical and social values; national language and culture; as well as universal access to basic education. It is not the intent here to address all these issues in detail but rather to highlight certain regulatory areas that could be said to be more directly related to trade in education services. In particular, the focus is on the private higher education as this is the segment of the sector where trade in education services has been the most dynamic. Historically, public provision of education on a non-commercial basis has been the norm for the most of the world. However, as a result of significant changes in the structure, governance and financing of public sector institutions, private education has been growing strongly, particularly in the segment of higher education. An important feature of that growth has been the emergence of private-for-profit education providers in the form of sole proprietorships, franchises or national/international chains.[79]

[75] European Commission (2009), "Report on Cross-Border E-Commerce in the EU", Commission Staff Working Document, Brussels, SEC(2009)283 final; Bureau Européen des Unions de Consommateurs (BEUC) (2010), "BEUC Response to the Retail Market Monitoring Report", 10 September 2010, https://circabc.europa.eu/d/d/workspace/SpacesStore/6e4dc0aa-006b-413b-8acb-5c8da4fa2392/BEUC-en.pdf (accessed on 11 February 2012).

[76] OECD (2009b), "Reform of Product Market Regulation in OECD countries: 1998-2009", Chapter 7 of *Economic Policy Reforms 2009: Going for Growth*, Paris, pp. 179-192.

[77] UNCTAD notes that franchising is often under-regulated in developing countries. For example, in some cases, franchisees are often unaware of their rights and obligations and the regulation of franchisors is weak. See UNCTAD (2011a), "World Investment Report 2011: Non-Equity Modes of International Production and Development", Geneva, pp . 8-9.

[78] UNCTAD (2011a), op.cit. pp. 169-170.

[79] See Lim, Aik Hoe and Saner, Raymond (2011), "Rethinking Trade in Education Services: A wake-up call for trade negotiators", *Journal of World Trade*, Volume 45, No 5. October 2011, pp. 993–1034.

1. Regulatory context

154. The expansion and broadening of the private sector's role in the delivery of education and the large increase in the numbers of international students, programmes and institutions have made the regulation of the sector a key challenge. With increased trade, particularly through modes 1 and 3, national authorities face the challenge of either applying existing regulatory regimes on private education to foreign services and suppliers or creating wholly new regulations and quality assurance frameworks.

155. Regulatory frameworks in education typically seek *inter alia* to: ensure the quality of the service (including the protection of consumers/students and measures to ensure international equivalence of degrees and diplomas); maintain the particular character of the education sector (such as the state-funded status of educational institutions); promote ethical and social values, cross-cultural understanding, national language and history; ensure gender equality; promote cultural identity and the use of the national language; and universal access to education. These are objectives which would have implications not only to foreign but also to domestic providers of education services. At the same time, foreign providers, given their unfamiliarity with the domestic regime may need to be assured that quality, accreditation and recognition systems are based on objective criteria, and that adequate verification procedures exist.

2. Regulatory developments and issues

156. Some of the key regulatory issues with implications for trade in education services are discussed below.

(a) Licensing and registration

157. Education sector regulation is typically concerned with ensuring that students receive a good quality service from competent providers. This usually means that regulatory measures are taken to monitor and control the teaching staff, facilities, equipment, curriculum, materials and methods for evaluating students. The ultimate goal being to protect the interests of the student and the integrity of the education system.

158. Regulatory regimes tend to be most developed for commercial establishment in the form of branch campuses.[80] Foreign education institutions are often treated as local private providers and have to undergo the same registration and/or licensing procedures. Typically, this would involve an assessment of whether the provider has the substantive competence to supply the service and the financial capacity to implement the project. There is a great variety of licensing practices and it would be beyond the scope of this section to describe them all.[81] Very generally, some regimes grant an initial licence to operate with final authorization only after a second assessment has been undertaken following several years of operation. Others only have a single stage for licensing and once authorization has been granted, there is no supplementary approval required. In both cases, there could be on-going monitoring of the programmes offered, staff qualifications and student numbers.

159. Registration with a national authority is often compulsory for an education provider and may be the only way to obtain recognition for its programmes. Although the regulations might not be discriminatory, ineffective and/or highly cumbersome registration procedures could still have an

[80] UNESCO (2007), "Cross-border higher education: regulation, quality assurance and impact - Chile, Oman, Philippines, South Africa." Available at http://www.iiep.unesco.org/ (accessed 5 March 2012).

[81] See Verbik, L and Jokivirta, L.(2005), "National regulatory frameworks for transnational higher education: Models and trends", Part 1. Briefing Note 22, February 2005, Observatory on Borderless Higher Education (OBHE) for a discussion of various models of national regulatory frameworks.

impact on trade. These could include multiple or duplicative procedures and administrative requirements that are not fully transparent, which may leave the provider uncertain of what documentation is required or to which authority it should be submitted. In addition to procedural issues, imposition of opaque and subjective criteria or outdated standards could give rise to uncertainty and arbitrary decision making.[82]

160. In some situations, the difficulty of obtaining authorization to supply education services, might be exacerbated by unclear national policies concerning the role of the private sector in the education system or insufficient administrative capacity to implement appropriate and up-to-date standards and quality criteria. Education providers might find it difficult to obtain authorization to operate in another country simply because information on applicable laws and regulations are absent or incomplete. Other issues related to registration include special rules on the use of specific titles such as 'university', and associated restrictions on their ability to set fees at market rates and operate as for-profit entities, programme/curriculum content and the type of qualifications that can be offered.[83]

(b) Quality assurance and accreditation

161. A central feature of virtually all education systems are quality assurance mechanisms to ensure that education standards are being met. Quality assessment varies considerably between countries in terms of approach and degree of stringency. Nevertheless, it typically involves an assessment of: inputs, such as the qualifications of the teaching faculty; and of processes, for example the conduct of research and student assessments. It can also include an assessment of outputs, for instance the numbers of graduates, publications and research findings. Accreditation is a related concept, where the provider is accredited by an appropriate body as having met a particular quality standard and is thus authorised to offer educational programmes in that area.

162. From the perspective of trade in education services, it is important that quality assessment regimes are transparent and relevant to the goals sought, and that standards are based on certain objective criteria.[84] Closely linked to the issue of quality assurance and accreditation is the recognition of academic and professional qualifications. National systems for granting qualifications as well as the nature of qualifications vary significantly across countries. This means that when students or employees move to a foreign country they often have to repeat the same qualification requirements already completed in the home country. Enhanced trade in education services and growing professional mobility have significantly increased the importance of academic and professional recognition of qualifications.[85] Yet, the sheer diversity of quality assurance and accreditation systems, and the lack of comprehensive networks for coordinating various initiatives at the international level can impede trade.

(c) Regulation of cross-border exchanges

163. Cumbersome and time consuming registration and licensing procedures for commercial establishment have in a way given rise to a large variety of working arrangements between foreign and existing local education providers. The most prominent model has been franchise and twinning arrangements. Such arrangements are typically regulated less intensively than the establishment of branch campuses. Since franchising and twinning arrangements usually involve all modes of supply,

[82] See Fielding, J. and LaRocque, N (2008), "The Evolving Regulatory Context for Private Education in Emerging Countries, Education" Working Paper Series No.14, IFC, The World Bank, Washington.

[83] See APEC (2009), "Measures affecting cross-border exchange and investment in higher education in the APEC region" APEC Human Resources Development Working Group.

[84] See OECD (2004b), "Quality and Recognition in Higher Education: The Cross-Border Challenge", Paris.

[85] Ibid.

the responsibility for regulating the activity will lie with both the provider and receiver country. The 'provider country' is the source country of the programme, qualification or other intellectual property (e.g. component of a course of study).[86] While the 'receiver country' is the host country where students receive the programme, qualification or other intellectual property sourced overseas.

164. A particular concern is that such forms of trade in education services could challenge countries where administrative capacity is weak and where there are no functioning quality assurance systems in place. There may be problems associated with non-recognized, unregulated higher education institutions that are not subject to quality control systems in either the sending or receiving country. Education authorities have an incentive to co-operate in order to protect consumers by, for instance, identifying and monitoring unscrupulous providers. There would also be scope for technical assistance to be provided to authorities who lack the capacity to review and assess the quality of particular education programmes or providers.

(d) Regulatory co-operation and recognition

165. Various initiatives have been taken at the national and international level in response to these challenges. Examples include the International Network for Quality Assurance Agencies in Higher Education (INQAAHE) which has published guidelines on good practice based on 10 general principles.[87] In 2005, UNESCO and OECD, after consultation with their respective sets of members, prepared a set of "Guidelines for Quality Provision in Cross-Border Higher Education". The Guidelines published by the OECD recommend good practices for a range of stakeholders and call on governments, both sending and receiving, to establish mechanisms for the accreditation and quality assurance of all institutions in their territory.

166. UNESCO and the Asia-Pacific Quality Network (APQN), a regional association of quality assurance professionals, have prepared a toolkit on regulatory considerations, including examples of approaches taken at the national level.[88] Regulatory approaches vary from licensing or registration systems, where academic standards are not set, to accreditation systems which specify academic as well as other requirements and standards. Quality assurance may also be of concern to the home government of the foreign service supplier which is interested in upholding the reputation of its education and qualification system, especially since it could have a bearing on the status and recognition of qualifications awarded to domestic students.

167. The UNESCO Regional Conventions on recognition of qualifications have been the main international instruments addressing the recognition of academic qualifications for academic purposes and sometimes play a role in recognising diplomas for professional purposes.[89] At present there are six regional conventions on the recognition of qualifications (Africa, Arab States, Asia and Pacific, Latin America and the Caribbean, and two European conventions) as well as one interregional convention (Mediterranean Convention). The Bologna Process, although originally only focused on Europe, is also a leading international instrument on the issue of harmonisation and comparability of programmes and degrees. The process, with the goal of permitting students, faculty and graduates to

[86] The definitions of 'provider' and 'receiver' are based upon the "UNESCO-Asia Pacific Quality Network Toolkit: Regulating the Quality of Cross-Border Education", available at http://www2.unescobkk.org/elib/publications/087/APQN_Toolkit.pdf (accessed 5 March 2012).

[87] INQAAHE was established in 1991 as a professional association in support of quality assurance agencies. See http://www.inqaahe.org (accessed on 7 March 2012).

[88] UNESCO (2006), "Global Education Digest 2006", Paris.

[89] These Conventions are available at: "http://portal.unesco.org/education/en/ev.php-URL_ID=13880&URL_DO=DO_TOPIC&URL_SECTION=201.html" (accessed 5 March 2012).

move freely across national borders, started with 29 economies and now includes over 40, with the inclusion of many developing countries.[90]

168. Other processes that can have a positive impact on trade in education services include the conclusion of mutual recognition agreements, which are relatively easier to achieve than harmonisation. Overall, greater cooperation between national quality assurance agencies, and the development of common standards will be an important factor in the future internationalization of education services.

169. In light of the above, the following are some specific questions that Members might like to consider:

(a) Could additional commitments under Article XVIII have a role to play in supporting/complementing regulatory cooperation on internationally accepted principles for quality assurance and accreditation?

(b) In what other ways could the GATS facilitate arrangements for the recognition of foreign qualifications, including schemes for the transfer of credits of completed studies, between receiver and host countries?

L. ENERGY SERVICES

170. While there has been a long tradition of private sector involvement in oil markets, public monopolies have been predominant in gas and electricity markets. Until the end of the 1980s, electricity and gas were supplied principally by state-owned, vertically integrated monopolies. Given the high-capital costs involved in building and maintaining infrastructure, and the monopoly situation characterizing the transportation segment in these sectors, direct state involvement was seen as the best option for meeting public service obligations. Drivers for liberalization of gas and electricity markets included increased energy demand due to economic development and demographic growth, coinciding with strained public budgets. Technological developments, which led to the competitiveness of smaller power generation units and greater performance of power grids, as well as public concerns about monopoly-related efficiency have also contributed to the liberalization of the sector. On the other hand, a different trend has emerged in the oil sector, with the increasing role of state-owned national oil companies (NOCs), in particular in the upstream segment.

1. Regulatory context

171. The energy supply chain is subject to a wide array of government regulations which pursue various policy objectives, among them: ensuring reliable and affordable access to energy goods and services, mitigating the negative effects of energy production and consumption on public health and the environment, and promoting the diversification of energy sources in order to guarantee long-term security of supply. Subsidies are widespread in the energy sector and concern all energy sources. Relevant programmes pursue different objectives, such as ensuring access for the poor, encouraging the development of alternative energy sources, or facilitating more sustainable energy consumption. They may target consumers and/or producers, and take many different forms (grants, low-interest or preferential loans, tax rebates, tax credits, feed-in tariffs, support for research and development, etc.).

172. An important concern for governments is to ensure reliable and affordable access to energy goods and services. Regulatory measures include universal service obligations which typically exist in relation to distribution of gas and electricity. Moreover, when private companies provide such

[90] Hopper, R (2007), "Building the Capacity in Quality Assurance: The Challenge of Context", in OECD, *Cross-Border Tertiary Education: A way towards capacity development*, Paris.

services to the public, various measures can be put in place to protect consumers, especially low-income groups, from market risks. Regulatory instruments used by governments include price caps, minimum customer service standards, price subsidies and other bill assistance programmes.

2. Regulatory developments and issues

173. Government regulation also aims at mitigating the negative effects on public health and the environment stemming from energy production and consumption. Such effects may be very different depending on the energy source and the type of activity involved, hence, a variety of measures exist, targeting both suppliers and consumers. These measures include mandatory environmental impact assessments as a prerequisite for starting energy projects, technical standards, labelling requirements and economic instruments, such as tax schemes or financial incentives. Mandatory licensing requirements may exist at various points of the energy supply chain (construction and operation of energy plants, trading of energy, etc.). Licensing systems allow *inter alia* governmental authorities to ensure that licensees comply with relevant legislation regarding technical standards, consumer and environmental protection requirements.

174. The lack of adequate regulatory frameworks is also an issue in the energy sector. A recurrent concern expressed by energy firms, especially those providing oil and gas field services, relates to opaque frameworks and administrative systems. Poor regulatory transparency reportedly provides scope for corruption, arbitrary business and licensing practices and unpredictable policy changes, e.g., in tax regimes. Energy service suppliers view the ability to comment on new regulations, procedures and other measures potentially affecting their interests as a key transparency element in the implementation of policies.

175. Competition policy is an important aspect of government regulation in restructured markets. Anti-competitive practices by recently-merged utilities represent barriers to trade in energy services, especially for network-based activities, e.g., transmission and distribution segments of gas and electricity. After unbundling and privatization, former monopoly suppliers may retain a dominant position on the market, impede or discriminate among new entrants and skew competition. Hence, market reforms need to be supported by a regulatory framework aiming, *inter alia*, at (i) promoting transparency in the adoption and implementation of rules, regulations and technical standards; (ii) guaranteeing non-discriminatory third-party access (TPA) to, and interconnection with, networks, grids and other essential infrastructure; (iii) establishing an independent regulator; (iv) ensuring non-discriminatory and timely information on data relevant for transportation and transmission of energy, such as prices, transmission capacity, etc.; and (v) more generally, preventing anti-competitive practices.

M. ENVIRONMENTAL SERVICES

176. The environmental services sector has undergone significant changes over the last 20 years. Industrialization, urbanization and demographic growth, but also consumer pressures for cleaner products, have contributed to increasing the demand for environmental goods and services. Many new products have appeared, beyond the traditional infrastructure services. Global environmental challenges, like climate change, and increasing needs in developing countries are fostering demand for new services.

1. Regulatory context

177. Environmental services can be divided into two broad categories. The first – and, for a long time, most common – use of the term refers to services such as waste water treatment, refuse collection and disposal, or street cleaning, which are typically provided by public authorities to local communities. The provision of these services, also dubbed infrastructure environmental services,

normally entails important capital costs (construction and maintenance of a pipe network for waste water treatment, for instance), which may give rise to natural monopolies. Services like street cleaning have the characteristics of public goods[91], which mean that private suppliers do not have sufficient incentive to provide them. Moreover, these services entail important social, public health and environmental policy dimensions. These features explain why public authorities tend to be the main suppliers and private companies operate mainly through delegation of tasks or following divestiture of assets. Given their social and political dimensions, structural reform programmes are not without controversy. Liberalization of monopolistic-type industries normally requires a strong regulatory framework and on-going surveillance in order to protect consumers and ensure the quality of the service.

178. The second category of environmental services emerged in the wake of the environmental policy initiatives implemented in developed countries in the 1960s and 70s, and responded to new requirements regarding air pollution prevention and mitigation, noise abatement and remediation of polluted sites, amongst others. These services – also referred to as "non-infrastructure" environmental services – are supplied primarily on a business-to-business basis as the main clients are private firms needing to comply with environmental regulation. Non-infrastructure environmental services do not raise the same level of concerns as infrastructure environmental services when it comes to liberalization and are, in fact, already provided mostly on a competitive basis.

2. Regulatory developments and issues

179. Thus, when examining regulatory issues, a distinction should be made between infrastructure and non-infrastructure environmental services. Infrastructure environmental services, such as waste water treatment or refuse collection and disposal, serve important public policy objectives related *inter alia* to health and environmental protection. When governments decide to involve private firms, they often put in place various regulatory measures to ensure that these objectives are fulfilled. These include regulations to ensure universal access, and to set tariffs and enforce various standards (e.g. relating to service quality, environmental impacts, relations with customers, etc.).

180. As infrastructure environmental services are prone to monopolies, there is limited – or no – competition in the market, although competition may be possible. When delegating the supply of infrastructure environmental services (such as the operation of a waste water treatment plant, or the collection and treatment of solid waste), governments can elect among various contractual forms depending on the type of task to be outsourced and degree of responsibility to be delegated (e.g., concessions, service contracts, management contracts, build-operate-transfer (BOT) contracts, etc.). Adequate legislation could help ensure a fair and transparent tendering and selection process.

181. Non-infrastructure environmental services, such as remediation services, are supplied mainly on a business-to-business basis and the main clients are firms needing to comply with environmental regulation. Since polluters are not always willing to engage voluntarily in cleaning-up the contamination caused by their activities, the demand for non-infrastructure services is correlated with the development of environmental legislation, with more stringent standards increasing demand. For instance, the implementation of legislation requiring the clean-up of industrial sites will trigger demand for remediation services.

182. Regulatory regimes in related sectors (in particular architecture services, engineering and integrated engineering services, technical testing and analysis services, construction services) have a

[91] A public good can be defined as an "[i]tem whose consumption is not decided by the individual consumer but by the society as a whole, and which is financed by taxation. A public good (or service) may be consumed without reducing the amount available for others, and cannot be withheld from who do not pay for it." See http://www.businessdictionary.com/ (accessed on 12 July 2010).

direct relevance for suppliers of environmental services, in particular non-infrastructure environmental services.

183. Suppliers of environmental services are not only affected by the lack of appropriate regulatory frameworks but also by inefficient administrative processes. Typical problems include insufficient information regarding licensing and certification procedures, and tendering processes; unnecessary delays in processing applications and informing applicants; and weak or inconsistent enforcement of environmental regulation.

184. In light of the above, the following are some specific questions that Members might like to consider:

(a) Would domestic regulation disciplines on qualification and licensing requirements and procedures also be relevant in this sector, in particular for non-infrastructure environmental services?

(b) Would regulatory concerns related to infrastructure environmental services, such as those arising in relation to bidding processes and award of concession contracts, require a more specific approach?

N. FINANCIAL SERVICES

185. The financial services sector has unique characteristics that have motivated special treatment in regulation and trade agreements.[92] Understanding these features is crucial to comprehending the objectives and rationale of domestic regulation in this sector. First, financial services provide functions essential to the modern economy, such as facilitating transactions, mobilizing savings, allocating capital, monitoring borrowers and managers, mitigating risk, allowing payments, and providing liquidity.[93] Second, financial services are ubiquitous, in the sense that all economic agents (companies, governments and individuals) need them.[94] Third, financial services underpin the operation of the monetary and payments systems of any modern economy, which makes it crucially important for the functioning of all other economic sectors.

1. Regulatory context

186. Financial services are extremely varied and include many different types of products and services such as insurance, deposit taking, financial leasing, payment and money transmission, securities trading, elaboration of credit ratings, and provision and transfer of financial information. The sector is characterised by a multiplicity of service suppliers, with special features, such as banks, trust and loan companies, credit unions, life and health insurance companies, property and casualty insurance companies, securities traders and exchanges, investment fund companies, pension funds, finance companies, insurance agents and brokers, and a myriad of auxiliary service providers (e.g. independent financial advisors, actuaries, financial information companies, credit rating agencies). This variety of services and service suppliers implies that the rationale for - and therefore the focus of - regulation will also depend on the specific nature of such products, services and service suppliers.

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[92] As in the GATS, it is very common to find in preferential trade agreements specific annexes - or indeed separate chapters - on financial services, containing additional provisions or safeguards catering for the special nature of the sector (e.g. provisions clarifying the scope of the sector, the so-called "prudential carve-out").

[93] World Bank (2001), "Finance for growth: policy choices in a volatile world", Washington.

[94] White, Lawrence (2010), contribution to the OECD Policy Roundtable on "Competition, Concentration and Stability in the Banking Sector".

187. A distinction is usually drawn between the reasons for regulation (why regulation is necessary at all) and the objectives pursued (what outcome regulation is trying to secure). As discussed in Section I of this Note, regulation is often needed to prevent or minimize various market failures. [95] Left unregulated, the financial sector could produce sub-optimal results and reduce market failure. Regulation is also sometimes used with non-economic objectives in mind, such as improving access to financial services for segments of the population that would otherwise be underserved.

188. In terms of market failures in financial services, the most prominent results from asymmetric information, e.g., one party to a transaction having information about itself or its actions that is not available to the other party. Asymmetric information is pervasive in all areas of finance.[96] If the borrower knows more about its potential to repay than does the lender, the latter is at a disadvantage; if an insured person knows more about the risks than does the insurer, the latter is at a disadvantage; if a company's manager knows more about its ability and real commitment to the firm than the shareholder or potential investor, the latter are at a disadvantage. Asymmetric information can adopt basically two forms: adverse selection and moral hazard. Adverse selection arises because one party has relevant information that the other party lacks, which may lead to undesirable decisions, such as choosing an investment project, company manager or insurance client which is riskier and less profitable than otherwise. Moral hazard refers to situations where the well informed party to a transaction (e.g. the borrower, the company's manager, the insured) takes undue risks because, since that risk is under-priced, the costs of such actions will be borne by the other party to the transaction. In situations where asymmetric information prevails, the costs of detecting whether one party is taking advantage of their better information is extremely high. The existence of these asymmetries can lead to partial or complete breakdowns of markets.[97]

189. Negative externalities are also pervasive in financial services. These occur when an individual or firm making a decision does not have to bear the full cost of his or her actions. Since decisions taken by economic agents are based on the equalization of private marginal cost and marginal benefit, thus ignoring the cost to third parties or the society at large, negative externalities result in market inefficiencies unless proper regulatory action is taken. In the case of financial services, such negative externalities could be deleterious to the financial system and the economy. Bank runs constitute the typical example of a negative externality in finance. The failure of one bank could cause poorly informed depositors at other banks to become nervous and to run on their own banks to withdraw their deposits, potentially causing the failure of other banks, with yet further contagion effects.

190. Contrary to other sectors of the economy, where the failure of one firm tends to benefit other firms as it can take over the failed firm's market share, the failure of one bank could in fact be detrimental not only to its competitors, but to the rest of the economy.[98] When one bank fails, consumers might lose confidence in the system as a whole, and because of the interconnection among financial institutions and markets, this may spark - as witnessed in 2007 and 2008 - a crisis of unpredictable proportions. In other non-financial sectors, firms typically face problems of insufficient demand during a crisis. While in a banking crisis, banks face the converse problem of being unable or

[95] Llewellyn, David (1999) "The Economic Rationale for Financial Regulation", *FSA Occasional Paper # 1* (April).

[96] Ibid; Stiglitz, Joseph E., Jaime Jaramillo-Vallejo, and Yung Chal Park (1993), "The role of the state in financial markets", in *World Bank Research Observer*, Annual Conference on Development Economics Supplement: 19-61.

[97] An extended version of the asymmetric information problem might be termed the "widows and orphans" situation, in which some market participants (e.g., depositors, borrowers, investors) may be incapable of looking after their own best interests and will not learn from their own mistakes. White, Lawrence (2010), op.cit.

[98] OECD (2010a) "Policy Roundtable on Competition, Concentration and Stability in the Banking Sector", Paris.

unwilling to supply credit to businesses, consumers or each other. If banks lose the confidence to lend to one another, this ultimately undermines confidence and stability in the system as a whole. During the recent financial crisis, losses on sub-prime mortgages led banks to radically re-assess the risks that they were willing to take, leading to the drastic reduction of available credit, something known as a "credit crunch". Banks stopped lending not only to individuals and companies, but also to each other, leading to the breakdown of the interbank market and pushing the economy into recession. This, in turn, undermined confidence in the banking system and the economy as a whole, further deteriorating the situation and the prospects of recovery.[99]

191. While a more detailed framework might be set by particular regulators, in the final analysis, the three core objectives of financial regulation are: (1) to sustain the integrity and stability of the financial system; (2) to maintain the safety and soundness of financial institutions; and (3) to protect the consumer.[100] The impact of the failure of financial institutions on systemic stability and the interests of consumers means that regulators are almost inevitably bound to have a prudential concern for the liquidity, solvency and riskiness of financial institutions. The first two objectives mentioned earlier will necessarily focus on individual institutions and also on the system itself. The recent financial crisis has brought about an emphasis on micro- and macro-prudential regulation. Micro-approaches are aimed at preventing the costly failure of individual financial institutions, whilst macro-approaches are focused on the aggregate risk arising from the collective behaviour of financial institutions.[101] The goal is to safeguard the financial system as a whole and to create a more disciplined, and less pro-cyclical financial system, which better supports balanced and sustainable growth.[102] The third objective on consumer protection issues is usually focused on safeguarding customers from unsatisfactory business conduct.

2. Regulatory developments and issues

192. The modalities and scope of financial regulation tend to change over time in light of developments. For example, financial innovation, and the emergence of new financial products and markets, has made the risk characteristics of financial institutions and the financial system generally more complex.[103] In particular, as shown by the recent financial crisis, the systemic dimension to regulation and supervision should no longer be exclusively focused on banking, given the close interconnection of banks and other types of financial institutions, which imply that banks may not be the only source of financial contagion. The "regulatory perimeter" has expanded to formerly unregulated or lightly regulated areas (e.g., hedge funds and hedge fund managers, and credit rating agencies), with a view to ensuring that all systemically important activity is subjected to appropriate oversight and regulation.[104]

193. As indicated in the preceding section, in many cases regulators erect barriers to entry in financial services. For example, rules preventing the establishment and operation of banks that are

[99] For a discussion on the origins and development of the recent financial crisis, see WTO (2010c), "Financial Services", Background Note by the Secretariat, document S/FIN/W/73 and Corr.1, 3 and10 February 2010.

[100] Llewellyn (1999), op.cit.

[101] Borio, Claudio (2009), "The macroprudential approach to regulation and supervision", VoxEu.org, 14 April; Financial Stability Board, IMF, and Bank for International Settlements (2011) "Macroprudential policy tools and frameworks - Update to G-20 Finance Ministers and Central Bank Governors" (14 February 2011).

[102] Financial Stability Forum (2009a), "Addressing Procyclicality in the Financial System" (April).

[103] WTO (2010c) document S/FIN/W/73 and Corr.1, op.cit.; and WTO document S/FIN/W/74, "Impact of Technological Developments on Regulatory and Compliance Aspects of Banking and Other Financial Services under the GATS", Background Note by the Secretariat, 21 September.

[104] Financial Stability Board (2009b), "Improving Financial Regulation - Report of the Financial Stability Board to G-20 Leaders" (25 September); and WTO (2010c) document S/FIN/W/73, op.cit.

inadequately capitalised, insufficiently liquid, or run by unfit individuals seek to protect depositors and maintaining confidence in the banking system. Similarly, rules preventing the establishment and operation of inadequately capitalized insurance companies are aimed at protecting policy holders. Disclosure requirements are necessary in capital markets to safeguard the interests of investors. Rules on leverage are to ensure that banks do not undertake excessive risks.

194. While prudential regulations are required to promote financial stability, it is important to ensure that they do not undermine competition excessively, and contribute to a stable and sound financial system. At times licensing and qualification requirements and procedures, as well as standards, may distort competition by being excessively burdensome. The appropriate combination of regulations and their administration depends on country circumstances, including the development and complexity of the country's financial sector and the quality of supervision.

195. The literature on financial services liberalization suggests that the following situations/measures may be particularly burdensome and could hamper trade:

(a) Lack of transparency of regulations. Relevant regulations, existing and new, are not made publicly available at all times. Notification periods are insufficient.

(b) Lack of public prior comment on draft regulations or inadequate follow-up of comments made by financial service suppliers. Forthcoming regulations are not submitted for public comment with a reasonable amount of time prior to their enactment. Suppliers that provide comments and recommendations do not receive a reply from the supervisory authority.

(c) Inadequate time to implement new regulations. Financial service suppliers are not afforded sufficient time to become familiar with and be prepared to implement new and revised regulations before these become effective.

(d) No written information on the status of licence applications.

(e) Burdensome requirements for new products, forms, rates and services (e.g. insurance). For example, it may take between 6 and 12 months for new products to be approved. No provision that allows new products to be deemed approved after a set period (e.g. between 30 and 90 days) if the supervisor has not taken action otherwise. In addition, where filing and approval of a product is required, the policy reasons for such requirements are not made publicly available by the regulatory authority.

(f) No internationally recognized accounting, auditing and actuarial standards in use by the regulatory authority.

(g) Obligation for insurance companies to employ a locally qualified actuary in order to be able to introduce new products. Foreign-qualified actuaries working in insurance groups are not acceptable, hindering company's development in the host market.

(h) Undue limits on the supply of product lines. For example, in some markets, the supply of personal accident and medical insurance is sometimes allowed only to life insurance companies, while in most markets general insurance companies may write these lines of business.

(i) Tight rules on distribution of insurance products (i.e. restrictions on the ability of other financial services institutions to sell insurance products over the counter). For

example, it is sometimes required that all the administrative procedures linked to an insurance policy are conducted in the office of the insurer and signed proposal forms used in every case. This restricts distribution arrangements such as bancassurance (i.e. sale of insurance and other related products through a bank).

(j) Restrictions on advertising of financial products, which may make it particularly difficult for the business to be conducted over the Internet.

(k) Unreasonably high (by international standards) levels of minimum registered capital, for example to open a bank.

(l) Cumbersome and lengthy approval processes. For example, sometimes financial service suppliers have to go through a lengthy preparatory approval process, followed by a formal approval process, and even by an additional business licence granted by the regional regulator.

(m) Existence of multiple regulatory authorities, making authorization lengthy and cumbersome.

(n) Need to have all parent bank documents "notarized" in the home country and authenticated at the host Member's embassy or consulate.

(o) Need to have all personnel approved by the regulatory authority. Sometimes regulators must approve the appointment of all persons of responsibility in a bank, going beyond a traditional "fit and proper" test of main shareholders and directors.

O. TOURISM

196. Tourism's multi-sectoral linkages are both a strength and potential source of weakness. These linkages offer extensive opportunities for poverty alleviation and economic diversification, but inefficient or inappropriate regulation in particular sectors can reduce overall competitiveness. Immigration and entry/exit control regulations, for instance, have a direct influence on international tourism, and the industry is vulnerable to temporary shocks, such as terrorism or health crises, as well as related regulatory responses. Regulations, or the lack of them, on other environmental issues, and social/cultural concerns can also have a significant impact on the sector.

1. Regulatory context

197. Under the WTO's Services Sectoral Classification List (WTO document MTN.GNS/W/120), the scope of "Tourism and Travel Related Services" is distinctly limited, comprising only hotels and restaurants, travel agencies and tour operators, and tourist guide services (complemented by a residual "Other" category). Numerous other tourism services - such as computer reservation systems; cruise ships and many other transport services; hotel construction; car rentals; certain distribution, business, and financial services; as well as most recreational, cultural and sporting services - have been placed within other W/120 sectoral categories.[105] While this complicates the task of negotiating tourism-related GATS commitments, it often makes sense from a regulatory perspective (e.g. having the transport ministry establish and administer safety standards for tourism buses). It also means that the way the various segments of the tourism supply chain are regulated can have an impact on the overall competitiveness of the sector.

[105] See, for example, WTO (2000), "Communication from the Dominican Republic, El Salvador, Honduras, and Panama – *The Cluster of Tourism Industries*", document S/CSS/W/19, 5 December 2000.

2. Regulatory developments and issues

(a) Travel warnings

198. Typically issued in response to natural disasters, health crises or terrorism, travel warnings can be devastating for tourism. Consequently, the World Tourism Organization (UNWTO) in 2005 adopted the Guidelines on Travel Advisories, which address the procedures used when formulating and administering travel warnings, emphasising the need for transparency, accuracy, etc.[106] Growth of the tourism sector, including the increased movement of natural persons, has also led to increased demand for the development of international standards. The UNWTO has worked to develop a range of quality standards, commencing with those to be applied to tourism destinations. The International Organization for Standardization (ISO) has also formed a Technical Committee to examine standards on terminology for tourism and related services.[107]

199. Travel warnings can cause serious disruption to both employment and revenue in the short-term. At the same time, governments obviously do have the right – and arguably the obligation – to help protect the well-being of their citizens travelling abroad. Consequently, the issue at stake is evidently to ensure that travel warnings are objective, impartial, and do not cause unnecessary negative effects.

200. In addition to natural disasters, health crises or terrorism, travel warnings, advisories and travel alerts often include warnings about high crime levels or other relevant tourism issues.[108] While most governments do evidently exercise caution and restraint in issuing travel warnings, there are apparently no commonly agreed definitions of the terms used, which means they can indicate different degrees of risk. In the United States, for example, travel warnings are issued when the State Department decides, based on all relevant information, to recommend that Americans avoid travel to a certain country.[109] Countries where avoidance of travel is recommended will have travel warnings, complemented by country specific information. By contrast, travel alerts constitute a means to disseminate information about terrorist threats and other relatively short-term and/or trans-national conditions posing significant risks to the security of American travellers. Travel alerts are issued when there is a specific threat that cannot be countered, and have to date been issued to deal with short-term coups, violence by terrorists, anniversary dates of specific terrorist events, etc. There is also a "worldwide caution" to update information on the continuing threat of terrorist actions and violence against American citizens and interests throughout the world.[110]

201. In other countries, such as the United Kingdom, travel warnings/advisories indicate specific categories of risk, for example, countries where all travel, or in certain parts within the territory, is advised against; countries where all but essential travel is advised against; and countries where all but essential travel is advised against in parts of those countries.[111] Some other countries are more descriptive as to the dangers encountered and do not specify clear categories of risk. Instead, the

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[106] Adopted by resolution A/RES/508(XVI) at the sixteenth session of the General Assembly of the World Tourism Organization, Dakar, Senegal, 28 November – 2 December 2005. See also the UNWTO Global code of Ethics for Tourism, available at UNWTO website http://www.unwto.org (accessed 8 March 2012). The Secretariat is not aware of sources listing all travel warnings currently in effect.

[107] See ISO website, available at http://www.iso.org/iso/iso_technical_committee?commid=375396 (accessed 8 March 2012).

[108] With regard to the strongly negative impact of criminality on tourism, see UNWTO (1996), "Tourist Safety and Security: Practical Measures for Destinations", Madrid.

[109] See http://travel.state.gov/travel/cis_pa_tw/cis_pa_tw_1168.html (accessed 5 March 2012).

[110] Available at http://travel.state.gov/travel/cis_pa_tw/pa/pa_4787.html (accessed 5 March 2012).

[111] For further details, see http://www.fco.gov.uk/en/travel-and-living-abroad/travel-advice-by-country/ (accessed 5 March 2012), as well as "http://www.fco.gov.uk/en/travel-and-living-abroad/travel-advice-by-country/how-we-advise/" (accessed 5 March 2012).

strength of the language used to describe the security/safety issues gives an indication as to the degree of danger. Regarding health and environmental risks, the categorisation is somewhat easier and less controversial, as the evaluation of risk is monitored at the international level.[112] Hence, travel advisories often report the information issued by international organisations such as the World Health Organization.

202. The UNWTO Guidelines on Travel Advisories address the procedures used when formulating and administering travel warnings. Nonetheless, wide variations in terms of application evidently remain, and few government websites for travel warnings refer to the UNWTO Guidelines. It must be noted that some of the differences in the application of travel warnings, e.g. their duration and degree of severity, might be accounted for by higher levels of perceived risk in a given situation for citizens of some countries than for others.

203. The predecessor of the UNWTO Guidelines is the Global Code of Ethics for Tourism, which was adopted in 1999.[113] Both the UNWTO Global Code of Ethics for Tourism and the Guidelines on Travel Advisories are non-binding under international law. The UNWTO conducted three surveys among its member States (2000, 2004 and 2008/2009) in order to monitor implementation of the Code by governments, and its incorporation into domestic law. Institutional and legal commitment towards implementation of the Code has been expressed by a large group of countries, in fact, 49 responding States have indicated that they had incorporated its principles into their legislative texts, while 48 countries had used them as a basis for establishing national laws and regulations or for designing policies and master plans assuring the sustainable and responsible development of tourism.[114] A newer UNWTO initiative, the UNWTO Declaration on the Facilitation of Tourist Travel, was approved at the UNWTO General Assembly in October 2009.[115] With regard to travel warnings, the declaration calls upon UNWTO Member States issuing travel advisories in respect of third countries to commit to consult as widely as possible with the governments of these countries and destinations, especially on the safety and security aspects of each tourist region in the country, and to update the relevant information at regular intervals (i.e. at least every six months).

(b) Anti-competitive practices

204. While not frequently documented, especially with respect to developing country destinations, anti-competitive practices, such as by airlines or tour operators, can also have significant bearing on tourism.[116] Such practices can arise at different stages of the tourism value chain, according to the type of service supplied, and may need to be addressed through market-oriented regulation.

205. Preliminary research has identified some key anticompetitive measures affecting trade in tourism, including cartels, abuse of dominant position and of buying power, and attempts to monopolise. The vertical relationship between holiday package providers, retailers and tourism service suppliers can be an important source of anticompetitive behaviour. International tour

[112] New Zealand uses a system of: Extreme risk – advising against all travel (within all or parts of a destination); high risk – i.e. non-essential travel, including tourist travel, should be deferred; and some risk – signifying a level of risk that warrants caution; see http://www.safetravel.govt.nz/advisories/aboutadvisories.shtml (accessed 5 March 2012). Canada uses a four-step system, see http://www.voyage.gc.ca/faq/tip_prv-eng (accessed 5 March 2012).

[113] Resolution A/RES/406(XIII), adopted at the UNWTO General Assembly (1999), Santiago de Chile, Chile, 27 September - 1 October 1999.

[114] UN General Assembly (2010) "Implementation of the Global Code of Ethics for Tourism", document A/65/275, New York, 10 August 2010, paras. 11 and 13.

[115] Resolution A/RES/578(XVIII), adopted at the UNWWTO General Assembly (2009), Astana, Kazakhstan, 5 - 8 October 2009.

[116] Geloso Grosso, M. Lesher,M. and Pinali.E (2007), "Services Trade Liberalization and Tourism Development", *OECD Trade Policy Working Paper,* No. 57, pp. 25-27.

operators act as the wholesalers of tourism products, such as transport, accommodation or organised excursions, provided in destination countries by local suppliers, while travel agents in origin markets act as the retailers. The tour operators segment of the industry is dominated by a few large international firms and has featured increasing vertical integration in recent years. Other segments of the industry, especially local suppliers such as independent hotels, restaurants and tourist guides, are characterised by a large number of SMEs. Scope for anticompetitive practices may also arise in related industries. For example, large airlines have in some cases been accused of abusing their market power to the detriment of local suppliers.

206. Documented case studies of anti-competitive practices affecting tourism, especially with respect to developing country destinations, appear to be quite rare, thereby hindering the development of appropriate policy responses.[117] Anti-competitive practices can also occur both between and within countries, and can involve abuses by both developed and developing-country suppliers.[118] For example, an OECD study notes that large Western airlines have in some cases been accused of abusing their market power to the detriment of local suppliers[119], while another publication provides evidence of similar practices on the part of certain developing country airlines.[120]

207. Examples also exist of anti-competitive practices in other sectors that directly affect tourism. These sectors include cement (essential for building hotels), jet fuel, freight transport, cable TV, telecoms, banking services, computer software, shipping, and air freight.[121] With regard to Computer Reservation Systems (CRS) and Global Distribution Systems (GDS), by contrast, technological and ownership changes have apparently reduced the potential for anti-competitive practices.[122]

(c) Movement of tourism professionals

208. The movement of tourism professionals are also affected by a wide range of measures on mode 4 such as quantitative restrictions and related qualification requirements. Eligibility criteria tend to be strict, with a preference for categories of persons who are highly skilled and well-educated, while application procedures often tend to be cumbersome, costly, and administratively complex. Quantitative restrictions are frequently placed on visas and work permits, expressed as numerical quotas and/or economic needs tests (ENTs). These measures are already subject to scheduling by virtue of Article XVI of the GATS. There are, however, other regulatory measures outside the scope of schedules such as that the assessment of an applicant's credentials may take into account only

[117] The most complete information on the actual extent and types of anti-competitive practices involving tourism would, of course, be national-level information. Unfortunately, no such submissions have been made by WTO Members to date in the context of the services negotiations.

[118] A, E, Rodriguez and James Murdy (2006), "Anti-Competitive Practices in the Tourism Industry: The case of small economies", in *Journal of Business & Economics Research*, October 2006.

[119] Geloso Grosso, M. Lesher,M. and Pinali.E (2007), op. cit., p. 26. See also OECD (2008b), "Tourism in OECD Countries 2008: Trends and Policies,", p.73, for an example of anti-competitive practices regarding destination management in the Caribbean.

[120] World Bank (2007b), "Services Trade and Development: The Experience of Zambia", A. Mattoo and L. Payton, Washington D.C., p. 197.

[121] PowerPoint presentation by Simon Evenett and Frédéric Jenny, *Anticompetitive Practices in Sub-saharan Africa: Myth, Reality and Perspectives*, CRC 3rd International Conference: Pro-Poor Regulation and Competition: Issues, Policies and Practices, Capetown, 7-9 September 2004.

[122] See WTO (2006), "Second Review of the Air Transport Annex, *Developments in the Air Transport Sector* (Part One)", Note by the Secretariat, document S/C/W/270, 18 July 2006, pp. 20-42.

formal qualifications, rather than also considering skills and experience.[123] A number of these issues, which are not specific to tourism, are also discussed in the mode 4 section of this Note.

209. Article 9 of the UNWTO Global Code of Ethics for Tourism concerns workers and entrepreneurs in the tourism industry. With respect to visa procedures, the UNWTO Declaration on the Facilitation of Tourist Travel noted that tourist travel could be greatly facilitated by measures that can be implemented easily and without detriment to this discretionary authority. The UNWTO General Assembly thus called upon Member States, whenever possible and taking consideration of the respective legislation, to adopt measures to simplify visa application and processing formalities and to improve the timeliness of visa issuance.

210. In light of the above, the following are some specific questions that Members might like to consider:

(a) Would it be useful for Members to specifically examine procedures for the recognition of professional tourism-related qualifications, e.g. hotel managers and restaurant chefs, including recognition of professional experience as a substitute for formal qualifications?

(b) To what extent can domestic regulation disciplines address anticompetitive practices in the tourism value chain?

(c) Should Members discuss procedures for the establishment and removal of travel warnings, especially regarding consultations with affected parties?

P. MARITIME TRANSPORT

1. Regulatory context

211. The maritime transport sector is closely linked to international trade: it derives its growth from trade, and also contributes to its expansion. The sector includes various distinct segments, from liner and bulk cargo transport, to different forms of passenger transport (e.g., ferries, cruise ships), to port operation services. At both the national and international levels, various regulations are applied in the sector, reflecting each segment's specificities. Regulations aim, among other things, to ensure maritime safety, protect the environment, prevent anti-competitive practices, promote security, or meet certain labour standards.

2. Regulatory developments and issues

212. This section focuses on regulatory issues relating to port services, competition policy, and security. It was beyond the scope of this Note to cover in depth environmental, safety and social regulatory concerns affecting the sector.[124]

[123] An earlier informal paper regarding administrative procedures for obtaining visas and work permits was circulated by Colombia to the Working Party on Domestic Regulation (WPDR) as WTO document JOB(04)/84, 1 July 2004.

[124] This section largely relies on the comprehensive discussion of regulatory issues in WTO (2010d) "Maritime Transport Services", Background Note by the Secretariat, document S/C/W/315, 7 June 2010, as well as Members' comments on that Note (JOB/SERV/119). Like the Background Note, this section does not focus on passenger transport services.

(a) Regulatory issues relating to port services

213. Major steps have been taken over the past ten years towards privatization and opening up to foreign participation in the port sector.[125] This has given rise to considerable regulatory action. Since a growing number of ports are managed/owned to different degrees by private actors, achieving access to and use of port services in a non-discriminatory manner and on the basis of reasonable terms and conditions has been of high importance for maritime transport suppliers and also a key objective of various governments.[126]

214. Regulatory activity in the port sector has been closely related to the transformation of service ports into landlord ports, that is, moving from a situation where ports provided all port services, in particular cargo handling, to a situation where they merely supply and manage heavy infrastructure. Light infrastructure (e.g. cranes, forklifts) are left in the hands of concessionaires or private operators.

215. Port reforms have taken various forms, but all involve important institutional changes that shift the role and responsibilities between the public and private sectors. When reforms are undertaken, governments have to select among options for private sector participation, and develop legislation, contracts and institutions to regulate private sector participation. The number of countries with experience in port reforms is significant and has been increasing rapidly.[127]

216. The World Bank's inventory of best practices in that regard suggests that port regulations should spell out clearly the requirements for handling and storage of hazardous cargoes, as well as the technical regulation of operations to ensure compliance with security, safety, labour and environmental protection standards. Economic regulation is also necessary when competition is weak or non-existent. Relevant initiatives in that regard include requirements to publish tariffs, prohibitions of undue discrimination against similar port users, and the establishment of mechanisms though which the government can monitor competitiveness of the market and investigate any anti-competitive practices. Ports faced with greater competition (inter-port or intra-port) require less economic regulation than others.[128] The main objective of an independent regulator would be to ensure effective competition among the various operators in the port, control monopolies and mergers, and prevent such practices as abuse of dominant position, price fixing, or cross-subsidization from monopoly services to services in competition.

217. In initiating and carrying out port reforms, institutional arrangements may require important changes. While reforms can take many forms and have different objectives, a sound and clear legal framework defining public-private partnerships is crucial to ensure success (e.g. attract commitments from investors). For example, BOT (build-operate-transfer) arrangements should be accompanied with rules spelling out the responsibilities of the parties, and by regulations describing how the concession law would be applied in practice (e.g. clear and transparent process for awarding contracts). The entity responsible for monitoring relevant private participation in port activities should be specified, and the basis for any licensing process should be made clear in the law.[129] Another sound regulatory practice may include the use of competitive bidding processes to select the investor providing the best commitments, port services or price levels. An efficient bidding process

[125] Port services include such services as pilotage, towage, vessel traffic management, garbage collection, provisioning, fuelling, and watering services, etc.

[126] The principles are reflected in the additional commitments foreseen in the maritime model schedule. Certain economic integration agreements also incorporate similar disciplines.

[127] UNCTAD (2011b), "Review of Maritime Transport 2011", Geneva; International Bank for Reconstruction and Development/World Bank (2007), "Port Reform Toolkit", 2nd edition, Washington DC, available at: http://siteresources.worldbank.org/INTPRAL/Resources/338897-1117197012403/mod1.pdf (accessed 12 June 2012).

[128] IBRD/World Bank (2007), op.cit.

[129] Ibid.

supposes that barriers that could restrict the number of bidders (e.g. costly administrative requirements and procedures) be limited and that transparency prevails through the different phases of the process.[130]

218. Concession contracts will contain economic conditions. Importantly, the port authority may require the operator/concessioner to meet certain public service requirements as regards, for example, service continuity, and equal access and treatment of users, including non-discrimination regarding pricing, priorities, level of service. As noted by the IBDR/World Bank (2007), the principle of non-discrimination among users does not prevent prudent commercial management of activities, including differentiated tariffs, priorities or service levels, if these are based on such objective criteria as annual traffic or vessel characteristics that are applied uniformly to all similar users.

219. The difficulties encountered in some countries by foreign port operators (no pre-qualification for tendering, compulsory resale of assets acquired following a merger/acquisition) point to continued political and economic sensitivities.[131]

(b) Competition policy

220. Competition policy is another important regulatory issue in maritime transport. The practice of carriers to commonly fix prices and regulate capacity (i.e., control supply) has been debated for many decades. Historically, shipping conferences, where groups of ship-owners fix departure frequencies and common prices for a given geographical area, are the oldest form of cooperation between ship-owners. When competition laws were first developed, conferences benefited from anti-trust immunities, typically on the grounds that they ensured price stability and reduced uncertainty with respect to available tonnage.[132]

221. The end of the 1990s marks the gradual loss of influence of liner conferences, at least in the largest markets. The United States introduced a system of confidential "services contracts", freely negotiated between individual ship-owners and shippers (Ocean Shipping Reform Act (OSRA) of 1998). The Act continued to grant immunity to liner conferences, but introduced a number of conditions to avoid effective collusion, e.g. it eliminated tariff filing requirements; allowed shippers and carriers to negotiate confidential agreements and not reveal the terms of the contract to other operators; and permitted independent rate action (IRA) (the right to fix tariffs independently of conferences) to cover multiple trade lanes. Reducing transparency of freight rates and giving conference members independent contracting rights rendered cartel enforcement more difficult.[133]

222. In the meantime, in the European Union, a series of prosecutions for abuse of dominant position, gradually reduced the ability of conferences to fix tariffs and regulate capacity, thus forcing European ship-owners also to resort to individual services contracts. In 2003, the European Commission started to re-examine its existing policies, in particular the block exemption. The examination found no causal link between price fixing and reliable liner services, and estimated that a repeal of the exemption would improve service quality, and lead to a moderate drop in prices and considerable reductions in charges and surcharges.[134] In 2006, the Council of the European Union

[130] UNCTAD (2011c), "How to Utilize FDI to Improve Transport Infrastructure - Ports: Lessons from Nigeria", *Best Practices in Investment for Development: Case Studies in FDI*, Geneva.

[131] WTO (2010d), document S/C/W/315, op.cit.

[132] These immunities were very broad in "ship-owning countries" (e.g. Japan, European Union) and of a more conditional nature in "shipper countries" (e.g. Australia, Canada, United States), with obligations in respect of agreement filing, the opening of conferences to any ship-owner wishing to participate, and equal treatment for shippers, and the right to fix tariffs independently of conferences (Independent Rate Action).

[133] Phang, Sock-Yong (2009), "Competition Law and the International Transport Sectors", *Competition Law Review 5 (2)*, pp. 193-213.

[134] Ibid.

abolished, through Regulation No. 1419/2006, the block exemption and the shipping conference system as of 31 October 2008. All joint price fixing activity for services from or to the European Union and the European Economic Area is now illegal.

223. Elsewhere, conferences are authorized, but under various, increasingly strict, conditions which are typically aimed at protecting the rights of shippers (exporters and importers).[135] Notwithstanding immunity for shipping conferences or similar arrangements, regulations may help limit anti-competitive effects. First, governments may provide individual conference members with the right to offer rates or services that are different from those set by the conference; shippers and carriers should have the option of freely negotiated rates, surcharges and terms of carriage, and freedom to negotiate not constrained by outside parties. Second, confidentiality of these negotiations and agreements, including regarding rates, should be strongly protected. Finally, governments may provide a mechanism for hearing complaints from affected shippers.[136]

224. In the US, conferences are treated like any other group of ship-owners though they have in practice disappeared on routes to and from the country.[137] In Australia, the two most recently revised versions of Part X of the Trade Practices Act (1999 and 2005) have maintained anti-trust immunity for conferences. However, in line with the recommendations issued by the Productivity Commission, the Government has prohibited all ship-owner groups (including, therefore, conferences) from inhibiting in any way their members' capacity to conclude services contracts. Penalties and provisions concerning the lodging of complaints by shippers have been reinforced and a net public benefit requirement has been introduced.

225. In September 2007, the Competition Commission of India ordered shipping companies to desist from anti-competitive behaviour. Legislation is envisaged to reinforce the powers of this commission. In China, maritime competition legislation requires that conference agreements or any other agreements between ship-owners be filed with the Shanghai Shipping Exchange, which has been designated as the delegated authority for this purpose. The Exchange prohibits undeclared shipper discounts, sanctions abuses of dominant position, obliges shipping companies to have a local representative in China and sets forth requirements concerning shipper consultations.[138]

226. In Singapore, the Competition Commission granted in 2006 a five year block exemption (subsequently extended to 31 December 2015) to all liner shipping agreements, subject to a list of conditions.[139] For some countries, there may have been concerns that non-exemption decisions would

[135] In 2002, an OECD study recommended that limited anti-trust exemptions not be permitted to cover price-fixing and rate discussions. It called for capacity agreements to be carefully scrutinized to ensure they did not distort markets in which they were present. The study found no convincing evidence that discussing/fixing rates offered carriers more benefits than imposed costs to shippers and consumers. It recommended that countries seriously consider removing anti-trust exemptions for price-fixing and rate discussions; exemptions for other operational arrangements could be retained as long as they did not result in excessive market power. See OECD (2002), "Competition Policy in Liner Shipping", Final Report, Paris.

[136] OECD (2002), op.cit.

[137] The last one, the Trans-Atlantic Conference Agreement (TACA) covering traffic with Europe, was dissolved on 1 October 2008 upon the entry into force of Council Regulation (EC) No 1419/2006. In 1998, the EC Commission had fined the "Trans-Atlantic Conference Agreement" US$314 million for setting prices not only for the ocean leg, but also for inland transportation by truck or train. See Fink, Carsten, Aaditya Mattoo, and Ileana Cristina Neagu (2002), "Trade in International Maritime Services: How Much Does Policy Matter?" *World Bank Economic Review 16 (1)*, pp. 81-108.

[138] See Containerisation International, November 2009, p. 21.

[139] See http://www.ccs.gov.sg/content/ccs/en/Legislation/Block-Exemption-Order.html (accessed 5 March 2012).

risk diversion of cargo to ports in neighbouring countries without a competition law regime or with antitrust exemptions.[140]

227. Distinct from shipping conferences, "stabilization", or "discussion", agreements vary greatly in status from one jurisdiction to another.[141] In particular, capacity stabilization agreements have always been banned for traffic to and from the European Union, and now also in Australia. Elsewhere, they are tolerated under terms which, overall, are becoming increasingly stringent.

(c) Security

228. Security measures have increased at both national and international level since the tragic events of 11 September 2001. As most measures have been unilateral, international cooperation has had to increase in view of the need to prevent conflict of laws, the accumulation of operationally incompatible standards, and the costs associated therewith. To this end, both the International Maritime Organization (IMO) and the World Customs Organization (WCO) further developed key multilateral standards. Meanwhile, regulations are revised so as to take more effective account of the needs of operators and the risks of conflict of laws.

229. In terms of content, security-related measures can be grouped into four categories. The first category seeks to ensure, in the port of arrival, that neither the vessel nor its cargo is being used for terrorist purposes and that no terrorists are hiding among the vessel's crew. Such measures include the posting of guards in ports, security audits, lighting and fencing requirements, the installation of detection systems − including radiological and nuclear detection systems, and procedures for the screening and identification of port workers. At the multilateral level, the IMO International Ship and Port Facility Security Code (ISPS) of December 2002, which came into force on 1 July 2004, represents the main international regime.

230. The second category of measures covers the vessel and its equipment: pilot projects concerning electronic seals and geo-localized container tracking;[142] introduction of a "black box" identification system (IMO Automatic Identification System (AIS)); vessel audits and security plans, including the appointment and training of security officers, administrative authority approval, introduction of an alert system, and overall monitoring by the State in which the vessel puts in to port (IMO ISPS Code), and obligation to provide full details of the content of the vessel's before its arrival at the port of destination (Japan) or its departure from the port of origin.[143]

231. The third category of measures involves "exporting" security obligations to the port of origin: targeted or general pre-shipment inspection programme conducted by customs officials from the destination country in collaboration with customs officials from the country of origin.[144]

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[140] See Phang, Sock-Yong (2009), op.cit., pp. 203-4 in reference to discussions in Canada with respect to the review of the Shipping Conferences Exemption Act.

[141] They seek to establish a *modus vivendi* between conference members, on the one hand, and independent ship-owners, on the other, through capacity and price coordination.

[142] US programmes "Smart and Secure Trade Lanes" and "Operation Safe Commerce"; APEC electronic container tracking project; ASEAN shipping movements database; and ISO standards on electronic seals (2008).

[143] US "24-Hour Rule" and "10+2 Rule"; European Commission Regulation No. 312/2009 of 16 April 2009. Since 1 January 2011, the advance declaration is an obligation for traders and is no longer optional, which means that relevant security information must be sent in advance of goods' arrival to the EU. See: UNCTAD (2011b), op.cit., p. 122.

[144] The targeted US Container Security Initiative (CSI) programme; the five US pilot projects conducted in the United Kingdom; Pakistan; Oman; Honduras and Hong Kong, China, under the 2006 Safe Port Act; and the US "100 per cent scanning" law of July 2007, due to enter into force on 1 July 2012.

232. The fourth category seeks to ensure the security of the entire transport chain, from the production facility in the country of origin through to the port exit point in the destination country, and to place responsibility on the chain's private actors. In return, these actors will benefit from "fast lane" cargo clearance. At the multilateral level, the WCO Safe Framework provides a set of minimum standards and principles that must be applied by national customs administrations. The four core principles relate to: advance electronic information; risk management; outbound inspections; and business partnerships. These are furthered by customs-to-customs network arrangements, and customs-to-business partnerships.

(d) Other regulatory issues

233. Various other regulatory issues are particularly relevant for maritime transport, though a detailed presentation would go beyond the scope of this Note. These include regulations in relation to the environment, maritime safety, and maritime social legislation.[145]

234. On environmental protection, the IMO adopted in July 2011 a new package of technical and operational measures to reduce greenhouse gas (GHG) emissions from international shipping. The package aims at improving the energy efficiency of ships through improved design and propulsion techniques, as well as through operational practices. The IMO has also discussed the introduction of market-based instruments to reduce emissions, but there has so far been no agreement on such instruments.[146]

Q. ROAD TRANSPORT SERVICES

235. Suppliers of road freight transport compete not only with each other for traffic, but also with operators of other transport modes.[147] This inter-modal competition, particularly in land-based transport, has strongly influenced the regulatory regime governing the road freight industry. Compared with maritime shipping, road and rail are currently transporting relatively small quantities of freight traded internationally, particularly between different continents. Just under one quarter of global trade (measured in value) takes place between countries sharing a land border, where surface modes are assumed to be dominant. As land-based transport has a relative advantage in terms of cost per transit-time compared to water and air transport, this is expected to result in increased demand for international movements via this mode.

1. Regulatory context

236. The road freight transport sector is heavily regulated with measures ranging from security to road safety, the taxation of vehicles, fuel and infrastructure, social legislation (driving hours and rest periods, wage norms and social insurance cover), road traffic (prohibitions and restrictions), environmental standards, and technical standards (in particular, weights and dimensions).

237. While road transport is mainly regulated at the national level, in States with a federal structure, some regulations may also be operated at the sub-federal level. At the international (mostly regional) level, regulation tends to focus on the harmonization of the operating conditions, such as weight and dimensions, environmental standards, driving hours and rest periods, and fiscal harmonization.

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[145] On these issues, see WTO (2010d) document S/C/W/315, op.cit., pp. 27-30.

[146] See International Maritime Organization (2011), "Main events in IMO's work on limitation and reduction of greenhouse gas emissions from international shipping", available at: "http://www.imo.org/MediaCentre/resources/Documents/Main%20events%20IMO%20GHG%20work%20-%20October%202011%20final_1.pdf" (accessed 5 March 2012).

[147] See also OECD (2010b), "Globalisation, Transport and the Environment", Paris.

2. Regulatory developments and issues

238. In discussing regulatory issues, it is useful to distinguish between regulations that apply at the border, and thus, affect only international traffic, and regulations that apply behind the border, and hence affect traffic irrespective of its origin.

(a) Regulations at the border

239. Regulatory issues pertinent to border crossing are perceived by operators in the sector as amongst the most significant. These revolve essentially around two main matters.

240. First, harmonisation and facilitation initiatives aimed at facilitating border crossings. The road transport industry follows with keen interest the WTO trade facilitation negotiations, in particular where transit issues are concerned. A leading role has already being played by the United Nations Economic Commission for Europe's (UNECE) harmonization and facilitation conventions, the scope of which extends far beyond the European continent. Out of 57 conventions, at least five are of major importance. These are summarised in Box 5.

Box 5 : Examples of main UNECE harmonization and facilitation conventions

The European Agreement on Main International Traffic Arteries (AGR) of 15 November 1975 (37 contracting parties in January 2012) defines a uniform legal framework for the construction and development of a coherent international road network in all member countries and territories of UNECE, in particular for main arteries (so-called "E-road" network). It defines such main arteries and the construction parameters to which they must conform. The Agreement, which is regularly updated, underwent a major revision with the integration of the road network of the countries of the Caucasus and Central Asia. It has served as a model for several similar initiatives in Asia (by ASEAN and by the United Nations Economic Commission for Asia and the Pacific) and in the Middle East (by the United Nations Commission for Western Asia). The Agreement was consolidated in 2006.

The European Agreement Concerning the Work of Crews of Vehicles Engaged in International Road Transport (AETR) of 1 July 1970 (51 Contracting Parties in January 2012) establishes uniform working conditions for the drivers of vehicles used in international road transport in accordance with relevant provisions of the International Labour Organization. These concern driving and rest periods, rules on the composition of crews and uniform conditions applicable to drivers. The AETR is regularly aligned with the corresponding European Union Directives. The consolidated version of the AETR currently in force dates from 2006.

The Customs Convention on the International Transport of Goods under Cover of TIR Carnets (TIR Convention) of 14 November 1975 (68 Contracting Parties in January 2012, including 15 Contracting Parties outside the area covered by the UNECE) allows for international transports of goods via as many transit countries as may be necessary without intermediate customs inspection. The affixing of seals and an international guarantee chain to ensure the payment of duties and taxes owed and to prevent fraud complete the system. The IRU is responsible for issuing TIR carnets and administering the guarantee. The application of the TIR Convention now extends beyond Europe to the Middle East (Lebanon, Kuwait, United Arab Emirates, Syria, Iran), North Africa (Algeria, Morocco, Tunisia), West Africa (Liberia), Asia (Indonesia, Mongolia, Republic of Korea), North America (United States) and Latin America (Chile, Uruguay).

The Agreement concerning the Adoption of Uniform Conditions for Periodical Technical Inspections of Wheeled Vehicles and the Reciprocal Recognition of Such Inspections of 13 November 1997 defines the legal framework and procedures for the adoption of uniform rules for technical inspections and the mutual recognition of the resulting certificates. This Agreement had 12 Contracting Parties in January 2012.

The International Convention on the Harmonization of Frontier Controls of Goods of 21 October 1982 (56 Contracting Parties in January 2012) aims to reduce the formalities and the number and duration of all types of controls (medico-sanitary, veterinary, phytosanitary, etc.) relating to compliance with technical standards or quality control. This Convention applies to imports, exports and goods in transit.

241. Apart from the Conventions listed in Box 4, numerous other specialised and general regional organizations have developed conventions and other instruments intended to promote harmonization of the conditions of competition in the international road transport industry and the facilitation of trade in the sector.[148]

242. Second, problems arise from the way in which border-crossing regulations are implemented. According to the IRU and the World Bank, border crossing difficulties are particularly acute in certain geographical areas such as West Africa or the eastern borders of the European Union.[149] There is a substantial amount of information from the World Bank, the various United Nations Regional Economic Commissions, the regional Development Banks and UNCTAD concerning, for example, the costs and delays generated by these problems. For its part, the IRU has set up a 'border waiting times observatory'.

243. These difficulties are generally linked to infrastructural, human resource or governance issues, rather than regulatory measures per se. Efforts to alleviate or eliminate such problems are being made in connection with numerous bilateral and multilateral technical assistance projects, which often include regulatory reforms. Amongst recent initiatives is the Chirundu One Stop Border Post (OSBP) between Zambia and Zimbabwe. The OSBP was launched in December 2009 under the North South Corridor Pilot Aid for Trade Programme initiated by COMESA-EAC-SADC, to address the challenges of one of the busiest border crossings in the region where transporters experienced significant delays. As a result of the establishment of the OSBP, freight operators stop only once to complete border formalities for both countries, and waiting times have been reduced from about four to five days to a maximum of two days and often to a few hours.[150]

(b) Regulations behind the border

244. Many regulations governing domestic traffic apply also to "visiting" foreign trucks through the principle of territoriality. A foreign-registered vehicle is subject to its host country's legislation in terms of weights and dimensions, rules of the road, payment of tolls, etc. Main exceptions are the taxation of the transport company (in the absence of a double taxation agreement), the taxation of the vehicle in relation to its registration, and the driver's wage and social insurance contributions, which remain those of vehicle's country of origin.

245. National regimes tend to be fairly similar in content, at least between countries at the same level of development, with a few exceptions. International and regional conventions often seek to establish the lowest common denominator of the national regimes within their sphere of application. Such conventions may have been developed by international organizations with very broad geographical coverage (typically, the above-mentioned UNECE conventions) or by regional organizations with specific or general mandates (for example, ASEAN).

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[148] For an overview of these activities, see the IRU (2004), "TRANSLex -IRU Handbook on Road Transport Facilitation, Legislation and Practices", pages 12-20 for Europe, 21-38 for Africa, 40-70 for Asia and the Pacific, 71-81 for the Middle East and 82-102 for Latin America. This work also contains the Internet addresses to obtain updated information.

[149] See, for instance, ILO (2006), "Labour and social issues arising from problems of cross-border mobility of international drivers in the road transport sector – Report for discussion at the Tripartite Meeting on Labour and Social Issues arising from Problems of Cross-border Mobility of International Drivers in the Road Transport Sector", Geneva; Arvis, J.F, G. Raballand and J.F Marteau (2007), "The cost of being landlocked : logistics costs and supply chain reliability", *World Bank Policy Research Working Paper,* No. 4258.

[150] See World Bank (2012), "De-Fragmenting Africa: Deepening Regional Trade Integration in Goods and Services", Washington.

246. A full description of the regulatory regime for road transport lies beyond the scope of this Note and would also run into insurmountable data problems, particularly with respect to taxation and social policy.[151] Thus, only environmental standards and regulations regarding weights and dimensions will be considered.

(c) Environmental regulations

247. Unlike in maritime and air transport, there is no universal standard for emissions in the road freight transport sector. This multiplicity of standards is attributable not only to the regional, or at most continental, nature of road freight transport, but also to the physical and fiscal characteristics of each market. Thus, in the United States, the preference is for vehicles with powerful engines delivering high torque and, hence, displaying a particular emission profile, whereas in Europe, mainly for fiscal reasons, the range of vehicles is more varied in terms of engine capacity. Vehicles produced and used in emerging countries are often geared to more difficult road conditions, requiring mechanical characteristics that may generate proportionally more emissions. However, there are ultimately only very few competing emission standards: three altogether, of which two are often accepted simultaneously.

248. According to the data of the Intergovernmental Panel on Climate Change (IPCC), the transport sector as a whole (including the transport of persons by sea, air, bus and private car and freight transport) accounts for 23 per cent of CO2 emissions.[152] Freight transport by road accounts for 25 per cent of the transport sector's energy consumption (16 per cent for heavy lorries, 9 per cent medium-sized lorries), a figure directly proportional to the emission of carbon dioxide.[153]

249. The volume of carbon dioxide emitted by the sector is clearly destined to increase in the coming decades. However, there is no consensus amongst forecasters. Historically, the demand for road transport runs more or less parallel to growth in GDP, but its energy intensity (energy consumption per tonne-km) is expected to decrease by about one-third by 2030 thanks to technical progress (notion of "environmental decoupling"). Nevertheless, technological improvements will probably not suffice to stabilise the overall volume of emissions at its present level, but will merely help to slow down its growth.

250. Road transport operators are generally in favour of the regulation of CO2 emission standards because a reduction in these emissions would lead, *ipso facto*, to a reduction in the consumption of fuel, which is one of their main running costs.[154] Technical innovations, the training of drivers in economical driving, and innovative logistical concepts, such as Intelligent Transport Systems (ITS) and "optimized" (i.e. increased) weights and dimensions would also contribute to reducing emissions. The suggestion that weights and dimensions be increased has been opposed by environmental groups because of the additional damage that heavier lorries could inflict on road networks and the infrastructure in general.

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[151] The IRU Information Centre (http://www.iru.org/index/en_services_infocentre) collects a large amount of regulatory information concerning road transport. However, it is designed to provide professionals with specific operational information and, as its authors themselves acknowledge, is far from being exhaustive, particularly in terms of geographical coverage.

[152] IPCC (2007), Working Group III Fourth Assessment Report "Mitigation of Climate Change" B. Metz, O.R. Davidson, P.R. Bosch, R. Dave, L.A. Meyer (eds) Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA; See also International Transport Forum (2008), "Forum highlights, transport and energy, the challenge of climate change".

[153] These figures are however disputed by road transport professionals.

[154] On the other hand, the latest toxic emissions standards led to a slight increase in fuel consumption per ton-kilometre.

251. The greenhouse gas emissions generated by road transport (a notion which encompasses both polluting and carbon dioxide emissions) are included in the reduction targets of the Kyoto Convention. So far, however, the sector is not subject to emission trading rights programmes. Notwithstanding, at least in the northern hemisphere, there has been a proliferation of environmental taxes levied on heavy goods vehicle traffic, including those aimed at reducing congestion and the general deterioration of road networks and infrastructure.

(d) Regulation of weights and dimensions

252. Standards governing weights and dimensions tend to differ significantly, even between countries that are neighbours and/or at comparable levels of development. Such differences can have major adverse consequences for actual market access which, in some cases, may go so far as to eliminate or seriously restrict competition from neighbouring countries. The World Bank's freight corridor studies contain several pertinent examples.[155] The ensuing (protective) effects may be one of the reasons why sector representatives, at least at national level, do not seem to be calling for harmonization.

253. The debate over weights and dimensions seems to have shifted, at least in developed countries, towards the domestic front. It pits the providers and users of road transport, who favour heavier and longer rigs which are more economically efficient and proportionally less polluting, in terms of greenhouse gas emissions, against environmentalists who are concerned about road congestion and its infrastructural implications (construction and maintenance).

R. LOGISTICS SERVICES

254. Emergence of global supply chains, expansion of world trade in goods and services, and application of new technologies allowed logistics services to flourish as an industry. It also has become an increasing tendency for manufacturers and suppliers of goods and services to outsource logistics-related activities to specialists so that they can focus on core businesses and at the same time ensure efficient management of supply chains.

1. Regulatory context

255. Driven by clients' increasingly sophisticated demands as well as by competition in the market, companies that used to deal with one or two components of the logistics chain have increasingly transformed into integrated operators. Such companies typically engage in services activities across the logistics chain from pre-production to end consumption, including *inter alia* supply-chain consulting, warehousing and distribution, air and ocean freight forwarding, customs brokerage, transportation management, cargo handling, home delivery, etc.

256. Today, traditional freight forwarders and international transport companies all claim to be logistics operators capable of providing customized services to the needs of their clients. The organizational and economic advantages of integrating and controlling the entire logistics chain have been widely recognized. The availability of efficient logistics services is critical to overall competitiveness as it facilitates participation in global supply chains and economic globalization. The efficiency of the sector depends on accessibility to quality and reliable logistics infrastructure as well as a regulatory environment that is conducive to competition and to the smooth movement of goods and services along the logistics chain.

[155] Arvis, J.F., G. Raballand and J.F. Jean-Francois (2007), op.cit.

2. Regulatory developments and issues

257. Regulatory issues that may have important implications for logistics services often relate to access to logistics infrastructure, licensing requirements and procedures, competition policy, technical standards, and customs and inspection procedures, etc. As transportation is a component of the logistics chain, regulatory issues related to freight transport through various modes (air, maritime, rail and road) are relevant for logistics services.[156] A number of these sectors have already been discussed in this Note. Thus, the observations below focus on regulatory issues that are more relevant for contract logistics, i.e. third party logistics (3PL).[157]

(a) Access to logistics infrastructure

258. Easy access to quality and reliable logistics infrastructure (e.g. ports, rail terminals, roads, ICT networks, etc.) contributes to logistics services providers' performance and competitiveness. Such access does not simply mean availability of physical infrastructure, it also means the possibility to access infrastructure on non-discriminatory and reasonable terms. In addition, as logistics services often involve multimodal transportation, easy access to infrastructure requires that the connectivity between different modes of transport be ensured as well. Today, logistics services cannot function without the support of advanced ICT technologies at each stage from planning, inventory management, tracking and tracing to transport and timely delivery. Therefore, it is also important to ensure that logistics operators gain access to existing ICT networks and are allowed to introduce new systems applications. Restrictions on access to infrastructure affect the efficiency of logistics services and may lead to delay, low service quality or even interruption of the logistics chain. For example, in some countries, logistics service providers are required to use designated companies for cargo-handling at airports or ports and are prohibited from self-handling cargos; access to storage and warehousing facilities at airports/ports is limited or conditional on financial investment in infrastructure.

(b) Competition

259. Competition-related concerns are often raised in terms of access to logistics infrastructure. In many countries, logistics infrastructure owners (e.g. railways, ports, etc.) have directly or indirectly engaged in logistics services in order to diversify or expand their businesses. This may lead to competitive distortions that are not easy to address. For example, with only accounting separation between the rail infrastructure business and train operations, it is difficult to guarantee absence of discrimination between the rail owner and competitors in the allocation and pricing of track access

[156] For example, regulations on the allocation of take-off and landing slots for airlines, environmental restrictions on airlines' hours of operation, cabotage regulations in air and maritime transport, regulations on fleet size and hours of operation in road transport, etc.

[157] WTO (2010e), "Logistics Services", Secretariat Background Note, document S/C/W/317, 10 June 2010; examined three major subsectors in the logistics chain: storage and warehousing, freight forwarding, and contract logistics. It is pointed out that it is not always easy to separate the activities provided. There is no distinct category in the current GATS classification. During the DDA negotiations, a group of Members proposed a checklist for scheduling substantial and meaningful specific commitments in sectors (TN/S/W/20). While services inscribed in the checklist are all considered being involved one way or another in the logistics chain, they are divided into three tiers: (1) core freight logistics services; (2) related freight logistics services; and (3) Non-core freight logistics services. In the definition by the United States International Trade Commission (USITC) in its 2005 survey on logistics services, supply-chain consulting and transport management services are the core services offered by the majority of logistics services providers. Supply-chain consulting services involve global network design and distribution strategies while transport management services include storage and warehousing, cargo handling, transport agency services and customs brokerage.

and ancillary services.[158] Full separation would be a way of ensuring neutrality and avoid that public funding of infrastructure be used to indirectly support other activities.[159] In some countries, as incumbent postal operators have expanded their businesses into logistics services, competition issues have also been raised in view of possible cross-subsidization by incumbent postal operators through its businesses in the reserved area. As integration has become a way to enhance competitiveness (e.g. a shipping line integrates into its business the functions of shipping agents, cargo handling companies, freight forwarders and inland transport providers), abuse of market power could arise. Excessive market concentration could be to the detriment of smaller competitors or new entrants. For example, when rail and port operations are commonly owned, the port operator has a clear incentive to favour rail access over trucks.

(c) Licensing requirements

260. As logistics services are increasingly provided in an integrated manner, an operator may have to obtain several licences from many different authorities in charge of various parts of the logistics chain (e.g. authorities in charge of customs, inspection, port, airport, rail, road, postal, etc.). Licences for the provision of transportation services are required in virtually every country. Many countries also require separate licences for warehousing, freight forwarding, express delivery, or shipping agency, etc. In some cases, provincial or local governments maintain inconsistent licensing requirements and procedures. The need for multiple licences raises transaction costs, in particular for integrated operators, which have to either choose between the time-consuming process applying for all needed licences or subcontract domestic suppliers. As logistics services are increasingly customized to meet the needs of the client, integrated operators often need to directly engage in a wide range of services or control the entire logistics chain in order to ensure high service quality. In the case of subcontracting, domestic suppliers may not always possess expertise to deliver goods "at the right place, at the right time, right price and right quality". Burdensome licensing requirements are often compounded by lack of transparency. In this context, it has been suggested that service suppliers be allowed to supply in combination the services that make up the logistics chain, from cargo handling, warehousing, freight forwarding, to transport, distribution and delivery.[160]

(d) Border procedures

261. According to a United States International Trade Commission (USITC) survey on logistics services in 2005, border clearance procedures, including customs and inspection, constitute the greatest impediment to the supply of global logistics services. In a survey undertaken by the World Bank, efficiency of the customs clearance process is one of the six indicators to assess the logistics performance of an economy.[161] As the main objective of logistics services is to move goods expeditiously, reliably, and at low cost, time-consuming and cumbersome border procedures have significant adverse impacts on the efficiency of the sector. Excessive paper documentation for the customs clearance, limited hours of operation at customs facilities, preferred treatment of domestic carriers, and security-related delays in inspection are cited as factors that make it more difficult for logistics suppliers to deliver on time. In addition, customs laws and regulations are sometimes applied inconsistently at different customs stations in certain countries.[162] This raises uncertainty and

[158] OECD and International Transport Forum (2010), "Integration and Competition Between Transport and Logistics Businesses" p. 23.

[159] Ibid.

[160] WTO (2004), "Communication from Australia; Hong Kong, China; Liechtenstein; Mauritius; New Zealand; Nicaragua; Switzerland and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu - *Logistics Services*", document TN/S/W/20, 25 June 2004.

[161] World Bank (2010), "Connecting to Compete 2010 - Trade Logistics in the Global Economy: The Logistics Performance Index and Its Indicators", Washington.

[162] USITC (2005), "Logistics Services: An Overview of the Global Market and Potential Effects of Removing Trade Impediments" Investigation No. 332-4623, USITC Publication 3770.

unpredictability of business operations and may result in extra costs for logistics providers. It has been proposed in the DDA negotiations and PTA negotiations to develop regulatory disciplines that extend to procedures and formalities such as documentation requirements, customs clearance, customs inspection, and electronic processing. One specific suggestion is for Members to accept electronic trade administration documents.[163] In some PTAs, parties have undertaken certain regulatory commitments to facilitate customs clearance and inspection procedures.

III. MODES OF SUPPLY

A. CROSS-BORDER SUPPLY (MODES 1 & 2)

1. Regulatory context

262. Cross-border trade can occur in all but a very few services today, due to advances in information and communications technologies (ICT). However, certain sectors such as computer and related services, certain business support services, and many auxiliary services to other sectors have become most closely associated with the recent rise in potential for cross border trade. This trend is often referred to as offshoring. These and an increasing number of services considered to be ICT enabled are therefore subject, in principle, to any relevant regulations affecting the sectors concerned. Some of the key factors in fostering cross-border trade, particularly in back office support services, include not only cheaper labour costs for both workers and managers, but also a blend of factors involving available skills and education levels, cost and quality of infrastructure (e.g. telecommunications, internet, electricity), and complementary language abilities. Of particular relevance, given the degree of IT outsourcing and the reliance of cross-border trade on ICT services, are the regulatory issues cited in the sections of this Note on computer and related services and telecommunications. Nevertheless, some unique regulatory considerations exist due to the fact that the suppliers do not have or do not need a commercial presence in the legal jurisdiction to which they export. As a result, the application of regulatory measures to cross-border trade raises a number of questions.

2. Regulatory developments and issues

263. First is the feasibility for the importing country of applying some regulations to a supplier outside its jurisdiction. These might include technical or quality standards, certification requirements, and consumer protection. Also, there is the question of whether some aspects of regulation impact differently on services supplied cross-border, on-line as opposed to those supplied by suppliers who are present within the territory of the Member (modes 3 and 4). In the case of licensing, where it exists for a service, is it possible that electronic supply may call for new or different approaches to licensing regimes? How are qualification or technical requirements to be implemented with respect to suppliers situated outside the territory of the importing country? In some cases, such concern may be in part the reason for the persistence that some governments retain commercial presence requirements for cross-border supply. In some cases, also, an inbuilt presumption of licensing requirements is that the supplier has a presence in the territory of the Member granting authorization.

264. Governments have relatively limited experience with regulating cross-border transactions, although some sectors such as financial services have a significant history in this regard. In the financial sector, cooperation between regulatory authorities has been common and some other sectors are exploring ways to do so. However, since such cooperation is not always in place or is impractical, it is not uncommon for regulations or other controls considered a priority to be implemented by means of measures directed at the consumer's right or ability to purchase certain services from abroad.

[163] WTO document TN/S/W/20, op.cit.

265. National regulatory regimes, in many cases, have not kept pace with the technologies that are transforming the ease with which many services can now be traded across borders. So-called e-commerce laws often address only targeted issues such as electronic signatures and the admissibility of electronic documents in legal proceedings. The difficulty in keeping pace applies to many forms of regulation, not only potential trade restrictions. To deal effectively with cross-border supply, governments might feel that they need to have some regulatory reach beyond their borders, to increase coordination with the authorities in the national jurisdiction of the suppliers concerned. Another approach is to rely to a considerable extent on an expectation that suppliers outside their borders will abide by the laws in the client's jurisdiction, however, developing effective sanctions and enforcement to ensure that this will be likely is a consideration.

266. As with IT services in general, other areas of governmental regulatory activity relevant to cross-border supply include research and development (R&D) policy, rules governing the privacy and security of information, the protection of intellectual property rights and government procurement. Research and development is not only a service that itself can be increasingly supplied cross-border, it also underpins many of the technologies and applications used to engage in cross-border supply. Since much of cross-border supply deals with the transfer of information, and with outsourced corporate back office support, financial auxiliary services, personnel services, and health services, this information can be sensitive and confidential. Therefore, regulations protecting the privacy and confidentiality of information are also relevant to cross-border trade.

267. In light of the above, the following are some specific questions that Members might like to consider:

(a) Points made above in relation to computer and telecommunication services may often have relevance to cross-border supply of services in general. However, additional issues particular to cross-border supply of services may arise as concerns domestic regulation (i.e. jurisdictional question, extra-territorial application of regulations). Some such concerns have arisen in the past in the context of the e-commerce work program. Should these continue to be pursued either in that context or in regular GATS bodies?

(b) Also, even for economies that do not impose commercial presence requirements, licensing or certification requirements may nonetheless imply or inadvertently require a degree of commercial presence in order to supply services. Where some forms of authorization are required, certain agencies with respect to particular services have instituted on-line application procedures that can facilitate participation in the market by non-resident suppliers. Would there be advantages to exploring this and other possible regulatory mechanisms that could facilitate cross-border supply?

(c) Another problem for cross-border supply can be the lack of mechanisms to facilitate the cooperation of regulatory authorities across different national jurisdictions. At present, only the joint efforts of financial supervisory authorities are formally recognized, in the Annex on Financial Services. Are there improved means by which GATS bodies could serve to promote such cooperation among regulators, e.g. via information sharing, consultations, notifications or other means?

B. COMMERCIAL PRESENCE (MODE 3)

268. This section illustrates some of the regulatory issues that affect trade through the establishment of a commercial presence as defined in Article I:2(c) of GATS (mode 3). It focusses on elements that are pertinent horizontally, *i.e.*, to all or most of mode 3 trade, leaving the discussion of sector-specific issues to the relevant sectoral sections.

1. Regulatory context

269. Establishing a commercial presence in a foreign country or territory is the primary way in which many services are traded internationally. Mode 3 is believed to account for approximately 55-60 per cent of all services trade falling under the GATS. Likewise, foreign direct investment (FDI) in services accounts for about two-thirds of FDI inflows worldwide and about 55 per cent of FDI inflows into developing countries.[164] Establishing a presence in the host market, which allows for direct interaction with the customer (as well as with local regulatory and supervisory authorities) often is the preferred way of doing business, even when cross-border supply is technically feasible. It makes it easier to respond to consumer preferences, which are shaped by factors such as culture and language but also, not insignificantly, by the regulatory environment. Tax deductibility, health insurance portability, grants and subsidies in the education field, as well as tariff setting in relation to utilities like water or electricity are cases in point.

270. In many cases, regulatory requirements compel service suppliers to establish a commercial presence and incorporate as a particular type of legal entity. For instance, by requiring the establishment of a fully-capitalized, locally-registered subsidiary, host country authorities often wish to ensure that the foreign-controlled entity falls within their regulatory/supervisory purview and actual reach. Some of the reasons for insisting on commercial presence were discussed in the preceding section on cross-border supply. This can be the case in particular for sectors considered to be sensitive, such as infrastructural, financial, and certain social and cultural services.

271. The key rationales for regulation have already been discussed in section 1 of this Note. More specifically, other public policy goals or overriding public interest motivations to regulate mode 3 might include: national security considerations (e.g., national screening of foreign investments to assess the latters' impact on critical infrastructures or technologies);[165] public health considerations; safety; consumer protection against fraud or violation of privacy, or to ensure the quality of the service (regulation of many professional services through qualifications and licensing requirements); protection of depositors and investors (prudential regulation in the financial sector); development or other economic concerns; reliable and affordable access (e.g., in the health, education and energy sectors); as well as the protection of data integrity and online security (e-commerce, information and communications sector).

2. Regulatory developments and issues

272. In many countries, developed, developing and least-developed, there has been an increasing trend towards the introduction of competition in services activities. Countries have taken measures designed to eliminate public monopolies and to open up to private (including foreign) competition major infrastructural services such as financial, telecommunications, energy, rail and other transport services. All these examples show the close interrelations between mode 3/investment, domestic regulatory reform,[166] competition and trade policies. In this section, three mode-3 relevant regulatory issues are briefly described. They relate to transparency, licensing and qualification requirements and procedures, and regulatory co-operation.

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[164] UNCTAD (2006), "Measuring Restrictions on FDI in Services in Developing Countries and Transition Economies", United Nations, New York and Geneva, p. 1.

[165] See for instance, Clark, H. L. and Wang, L.W. (2008), "Foreign Investment and National Security – New Approaches to National Security Screening of Foreign Investments in the United States and China could subject Deals to Closer Scrutiny", *China Business Review*, January-February 2008, pp. 51 ff.

[166] Domestic regulatory reform may include, *inter alia*, the separation of regulatory responsibilities, increased accountability and effectiveness, increased competition and third-party access provisions.

(a) Transparency

273. Foreign service suppliers often experience considerable difficulty in obtaining precise information on the applicable national rules and their interpretation, the competent authorities at various federal and sub-federal levels and the procedures to be complied with in order to set up a commercial presence in the territory of another Member. The accumulation of formalities and procedures, combined with the lack of information (regarding necessary authorizations, qualification requirements and other conditions attached to them, employment law, technical regulations for equipment and material to be used by the service supplier, etc.) can have a dissuasive effect on service suppliers from other Members.

(b) Complexity of licensing (including authorization/prior declaration) and qualification requirements

274. The complexity of services regulation, coupled with the fact that the quality of a service is directly dependent on the characteristics and ability of its supplier, engenders a number of licensing, authorization and qualification requirements, which are not to be found in regulations governing goods. Beyond the quantitative and territorial restrictions, as well as the nationality and residence requirements imposed by some Members on services activities (which pertain to Articles XVI and XVII of GATS and thus do not fall within the scope of this Note), access to a large number of service activities is subject to licensing, authorization or prior declaration procedures. They are particularly widespread in areas such as professional services (especially the so-called "regulated professions"), technical testing and analysis services, services incidental to mining, placement and supply services of personnel, as well as private security, telecommunications, environmental, financial and transport services.

275. Furthermore, the failure to take into account requirements already met by a service supplier in his/her home country – for instance, securities or guarantees already deposited, liability and professional indemnity insurance policies already taken out – may lead to duplicating and compounding the constraints facing suppliers who wish to establish a commercial presence in several markets.

(c) Multiple procedures

276. Often, it is the sheer number of different local and national authorizations/licences required for some activities that is particularly burdensome for foreign service suppliers – as if it means having to contact more administrative authorities, fill in more forms and provide more certificates. For instance, suppliers of retail distribution services often need a building permit, an environmental impact as well as a socio-economic impact certification – in addition to having to comply with complex zoning regulations. This multiplicity of authorizations can be especially onerous for foreign service suppliers as they are less familiar with local authorities and modus operandi. The procedures and conditions associated with such permits and regulations may *de facto* have restrictive or even discriminatory effects on foreign service suppliers, particularly if the procedures involve bodies which include domestic competitors.

277. The bureaucratic complexities of certain authorization and registration procedures, the long time required for completion, the onus of proof, the certification of translations, the administrative fees to be paid, the less than constructive attitude taken by some authorities and the difficulties involved in lodging administrative appeals, all entail substantive compliance costs that may discourage foreign service suppliers from setting up a commercial presence, particularly small and medium-sized enterprises (SMEs) and start-ups.

278. To enhance trade opportunities, governments have taken a series of business facilitation measures, *inter alia*; e-government platforms and single windows for applications to guide national and foreign investors in fulfilling the myriad of administrative procedures needed to establish commercial presence. These government measures are not exclusive to service suppliers; however they offer good examples of trade enhancing initiatives available to service suppliers. For instance, examples include EU points of single contact,[167] Nigeria's One-Stop Investment Centre (OSIC),[168] Rwanda's E-Regulation Platform and El Salvador's National Investment Office.[169] Such services are increasingly common and can be found in many other countries.[170]

(d) Independence of decision making

279. In addition to regulatory obstacles arising from national, regional and local legislation and regulation, impediments may arise also from the behaviour of administrations, including the use of discretionary powers or heavy and non-transparent procedures, which favour domestic suppliers. Another difficulty often cited by business is the unpredictability resulting from unclear requirements which are applied on a case-by-case basis by national authorities.

280. In light of the above, the following are some specific questions that Members might like to consider:

(a) Are there any mode 3 specific regulatory issues which are not already addressed in the respective sectors?

(b) Would it be helpful to exchange information on what horizontal initiatives could help facilitate service suppliers to fulfil administrative procedures needed to establish commercial presence?

C. PRESENCE OF NATURAL PERSONS (MODE 4)

281. This section highlights the main regulatory issues that affect trade through the presence of natural persons (mode 4). It focuses on elements that are pertinent horizontally, to all or most trade under this mode.

1. Regulatory context

282. Mode 4 trade takes place in a heavily regulated context. This is largely because both a "trade" and a "migration" component are involved in the movement of natural persons to provide a service.

283. Supplying a service through mode 4 necessarily requires that the individual concerned enter and be physically present in another Member's territory. Hence, in addition to regulation stemming from the nature of the individual as a service provider, a whole set of mode 4-relevant measures

[167] EU Directive 2006/123/EC on Services in the Internal Market, 12 December 2006, Article 6.

[168] Nigeria's Investment Promotion Commission (NIPC) established a One-Stop Investment Centre (OSIC) to bring together officials from 16 different ministries and agencies with the intention of facilitating entry and establishment for investors. See Nigerian Investment Promotion Commission (NIPC) website available at http://www.nipc.gov.ng/onestop.html (accessed 6 March 2012).

[169] Ministry of Economy created the National Investment Office (Oficina Nacional de Inversiones – ONI-) to facilitate the establishment of national and foreign investments in the country. See El Salvador's Ministry of Economy website, available at http://servicios.minec.gob.sv/oni/main.html (accessed 6 March 2012)

[170] For general discussion on business facilitation measures See UNCTAD (2011a) op.cit and UNCTAD's smart solutions for business facilitation, available at http://businessfacilitation.org/ (accessed 9 March 2012).

originate from the fact that the person is simultaneously also a "migrant", albeit with a temporary, economic and service-providing profile.

2. Regulatory issues and cooperation

284. Mode 4 raises a number of regulatory challenges, mostly revolving around four main sets of issues. They are illustrative of the intersection of the trade and migration backdrops against which mode 4 occurs. While some issues pertain primarily to either the trade or the migration contexts, others may straddle across the two.

285. The main issues relate to: transparency; procedures concerning admission and stay; verification of competence; and mechanisms to ensure a person's return. The remainder of this section discusses each issue in turn, while also highlighting instances where governments have responded to the challenges involved by putting in place mechanisms of regulatory co-operation.

(a) Transparency

286. One particular challenge when it comes to mode 4 relates to the different requirements that may need to be satisfied before services can be supplied through this mode of supply. Depending on the category of persons concerned, mode 4 may imply the fulfilment of requirements and procedures related to admission, work authorisation, residence permit and/or verification of competence. Business visitors, for instance, will most likely be faced exclusively with entry requirements, whereas specialists working as intra-corporate transferees might need to fulfil all four.

287. In light of the non-permanent nature of mode 4 movements, moreover, these requisites may need to be met several times over in order to supply services to the same market. In addition, they are proportionately more costly to fulfil for an individual than for a commercial entity. They might prove particularly burdensome if the applicant is an independent professional[171], but would be of consequence also for contractual service suppliers.[172] Both of these categories of persons cannot rely on the support of a commercial entity established in the host market that would be more resourceful and better informed about local requirements and procedures.

288. Transparency-related concerns relevant to mode 4 include cases when: not all relevant regulatory measures are published, or are not easily accessible, for instance electronically; information on entry, work and residence authorisations are not available from a single source or measures pertaining to temporary and permanent presence are bundled together; the national authorities competent to receive applications for the different permits and authorisations are not clearly identified; information on material or evidence to be submitted and relevant process is lacking; indicative time-frames for processing of visas and applications are not specified; no information is available on the way in which Economic Needs Tests (ENTs) are administered; the reasons for the denial of an application are not provided; the possibility of redressing any procedural shortcomings is foreclosed; and new measures or modifications of existing ones are not promptly made available.

[171] "Independent professionals" are usually defined as self-employed persons who are present in a foreign market to supply a service to a local client pursuant to a service contract.

[172] "Contractual service suppliers" commonly refers to employees of a service supplier without commercial presence in the host country, who are present in that market to provide a service pursuant to a service contract concluded between their employer and a local client.

(b) Procedures relating to admission and stay

289. Procedures for visas, work and residence permits can act as significant impediments to mode 4 trade.[173] Application procedures may be cumbersome, excessively costly and administratively complex; processing times can be lengthy, rejection rates high and the costs of reapplying important. Applicants are often required to follow separate procedures for entry visas and work and residence permits. Permit extension and renewal processes may not always be more streamlined than those governing initial applications. Procedures, particularly work-permit related ones, rarely distinguish between temporary and permanent movement of labour, and are therefore particularly ill-suited for the temporary, and often time-sensitive, types of movement that mode 4 involves. Opaque and arbitrary procedures may compound these problems.

290. To try to deal with concerns of this nature, a number of initiatives have been taken at the regional level. Notable examples are the APEC Business Travel Card (ABTC) and, more recently, the EU Blue Card.

291. The ABTC scheme commenced permanent operations in March 1999. While it does not grant any right of entry, the system streamlines entry for business people within the Asia-Pacific region. The scheme allows accredited professionals to obtain, through a single application form, a travel card for multiple, short-term visits to other APEC economies over a period of three years. The holder of an ABTC is allowed repeated two-or three-month stays in an APEC economy that is a full member of the scheme without the need to apply for individual visas or entry permits.[174] Cardholders are also entitled access to fast-track immigration processing lanes at major airports of the region.[175]

292. The EU Blue Card is a much more recent scheme.[176] It entered into force on 19 June 2009 and was to be transposed by EU Member States by 19 June 2011. The scheme is aimed at facilitating conditions of entry and residence in the EU of third-country nationals for the purpose of highly qualified employment and includes the creation of a fast-track procedure for issuing the EU Blue Card, a special residence and work permit.

293. Applicants that fulfil a set of conditions will be issued with the Card, which is valid for a standard period of one to four years, with the possibility of renewal. A Blue Card may also be issued or renewed for shorter periods in order to cover the work contract period plus three months. A decision on the application will be provided within 90 days of filing and, if successful, the applicant is to be given every facility to obtain the requisite visas. Cardholders and their families are entitled to enter, re-enter and stay in the issuing Member State and pass through other Member States, work in the sector concerned and receive equal treatment with nationals as regards, for example, working conditions, social security, pensions, recognition of diplomas, education and vocational training.

(c) Verification of competence

294. Not all mode 4 trade requires that the competence of the individual concerned be verified or qualifications, education or skills be formally recognized. When it comes to non-regulated

[173] Problems in government handling of visas for foreign business travellers have been estimated to have cost US businesses more than US$30 billion in revenue and indirect costs between July 2002 and March 2004, for instance (The Santangelo Group (2004) "Do Visa Delays Hurt US Businesses?" Washington).

[174] Eighteen out of the 21 APEC economies participate fully in the ABTC scheme. The remaining three economies, i.e. Canada, the Russian Federation and the United States, are transitional members. As such, they only provide fast track immigration processing lanes.

[175] More information about the main features of the ABTC scheme can be obtained at http://www.businessmobility.org/key/ABTCArrangementsMarch2008.html.

[176] Council Directive 2009/50/EC of 25 May 2009.

professions, for instance, an entry visa, possibly complemented by a work permit, might be all that is needed to engage in the supply of a service.

295. However, particularly when it comes to professional services, mode 4 trade implies that the competence and credentials of the professional concerned be verified and recognized. In assessing an applicant's credentials, formal qualifications are generally the main, if not the sole, element taken into account. In certain sectors, however, skills and experience might prove equally or even more relevant. Even when expertise and on-the-job familiarity are considered, the assessment criteria may still be oriented towards local knowledge and norms.

296. Qualifications obtained abroad are rarely fully recognized in the host country.[177] The impact of non-recognition is likely to vary depending on the type of mode 4 movement involved (independent professionals probably being more affected than intra-corporate transferees), size of the supplier (smaller enterprises encountering more difficulties than larger corporations), sector (regulated services being significantly more concerned than unregulated ones), possibility of modal substitution (suppliers of services that may be provided through alternative modes being less impaired), and the country concerned (depending on the relative differences of the regulatory regimes involved).

297. Mutual Recognition Agreements (MRAs) are mostly concluded for licensed professions with established international standards and practices. They are not necessarily a viable option for occupations where skills and experience are judged mainly through a concrete demonstration of work or after a period of service. MRAs usually involve neighbouring (mainly developed) countries, partners of broader integration initiatives, or countries with former colonial or linguistic ties. These agreements rarely award 'pure' recognition. They mostly require a significant amount of regulatory cooperation and often some regulatory adaptation.[178] Since the process of negotiating MRAs is generally complex, time- and resource-intensive, these agreements tend to be concluded only when there are prospects of exploiting promising commercial opportunities abroad or in order to fill domestic skill gaps.

298. Article VII:4 of the GATS requires that, within 12 months from the date on which the WTO Agreement takes effect, each Member inform the Council for Trade in Services (CTS) of its existing recognition measures. As of February 2012, 49 such notifications have been submitted to the CTS. Though this is likely not the full extent of recognition measures currently in existence[179], it still provides a sense of how rarely qualifications and experience acquired abroad have been recognized.

299. In the absence of MRAs, mechanisms to assess and recognise competence may range from case-by-case evaluations of prior qualifications to the passing of examinations at licenced facilities to demonstrate equivalence with national qualifications. The processes involved may be discretionary, particularly when they are based on unspecified criteria, imply substantial delays and costs, and concern multiple government levels and entities. To remedy any verifiable deficiencies in education, training or experience, the applicant may be required to take specific courses and training, which may replicate, at least to some extent, prior education or coaching, or be made to acquire fresh experience, irrespective of past practice.[180]

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[177] See, for instance, Chanda, R, (1999), "Movement of natural persons and trade in services: Liberalising temporary movement under the GATS", *ICRIER Working Paper*, No. 51.

[178] As described, for example, in Chaitoo, R. (2008), "Services liberalisation and domestic regulation: Why is it important?" Paper prepared for CUTS/FICCI Conference on "Global Partnership for Development: Where do we stand and where to go?".

[179] Some recognition arrangements might have been negotiated as part of Economic Integration Agreements, for instance.

[180] See, for example, Ganguly, D. (2005), "Barriers to movement of natural persons. A study of federal, states and sector-specific restrictions to mode 4 in the United States of America", *ICRIER Working*

(d) Mechanisms to ensure return

300. Mode 4 movements are mostly of a non-permanent nature. In this regard, it might be argued that mode 4 poses substantially the same challenge as other kinds of temporary migration, i.e. the risk that entrants might overstay.

301. To address this risk, bilateral labour agreements in particular have put in place cooperative mechanisms between authorities in sending and receiving countries. Source countries have taken on obligations that include pre-movement screening and selection, education and training pre-departure, facilitation of the return and reintegration of their nationals, and measures to combat irregular emigration to the host country. On their part, destination countries have permitted re-entry of the same migrant on a priority basis, to facilitate circular movement, and offered assistance to sending country governments to help them implement such return schemes.

302. Such co-operation mechanisms have also been accompanied by unilateral measures. To prevent overstaying, destination countries have placed obligations on both employers and employees. Examples of the former include requiring firms or individuals to place a bond which is forfeited in the case of non-departure, or fining the domestic sponsoring company for workers who do not leave and withdrawing their right to sponsor future workers. In the latter case, measures have included withholding part of the compensation of the service providers until they or their employees leave the country. Many of these mechanisms are more easily applied to companies than to individuals. Unsurprisingly, enforcement difficulties have been fewer for intra-corporate transferees, where the local company can be sanctioned, than for self-employed suppliers.[181]

303. In light of the above, the following are some specific questions that Members might like to consider:

(a) Does the temporary nature of a significant portion of mode 4 movement call for specific solutions to transparency-related challenges?

(b) Do elements of the APEC Business Travel Card and the EU Blue Card mechanisms offer viable blueprints for similar co-operation initiatives, possibly including those at the multilateral level?

(c) Are the provisions of Article VII:4 sufficient to ensure adequate transparency with regard to the existing and prospective mutual recognition agreement and arrangements negotiated by Members?

(d) Could features of the cooperative mechanisms set up between origin and destination countries in some bilateral labour agreements be usefully transposed under the GATS in an MFN-consistent manner?

IV. CONCLUDING OBSERVATIONS

304. The purpose of this Note has been to provide background information on regulatory issues that might arise in various sectors and modes of supply. In keeping with the request from Members, the approach has been to discuss generally the regulatory environment and trends affecting sectors and modes, and to highlight, where relevant, issues that may have a particular bearing on trade in

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Paper, No. 169 or Mattoo, A. and D. Mishra (2009), "Foreign professionals in the United States: Regulatory impediments to trade", *Journal of International Economic Law*, Volume 12, Issue 2.

[181] See World Bank, OIM, OECD (2004), "Trade and migration. Building bridges for global labour mobility", Paris.

services. The issues raised in the Note are not exhaustive and Members may wish complement them with their own specific experiences, or contribute other regulatory matters, to the discussions, as appropriate. Thus, any conclusions that are to be drawn would depend on any further discussions by Members.

305. Nevertheless, in the interest of facilitating consideration of the Note in the Working Party on Domestic Regulation, some general points, appear to be pertinent:

(a) Whilst there are considerable differences between services sectors and modes of supply, the underlying rationale for regulation is often based upon addressing perceived *market failures* or to achieve particular *social equity objectives*. The extent of market failures (see Section I for further background) may arise to different extents depending on the sector/mode concerned. For instance, in network services (i.e. telecommunications, transportation, logistics, energy), regulation is often closely related to competition policies, as the regulator seeks to ensure that the dominant market player, often a former monopoly does not abuse its position through its control of essential infrastructure. In other sectors, such as professional services, regulation may be more directed at offsetting information asymmetries and protecting consumers from unqualified practitioners. Problems of asymmetric information can also arise in other sectors, such as financial services, and can lead to less than optimal financial choices and risks assessments, which lead to market imbalances. A market failure cited in virtually all sectors are negative externalities, such as environmental impacts. In fact, certain sectors, such as tourism, distribution and transport, have a predominance of externality-related regulation. In terms of social equity objectives, fulfilment of universal service obligations and access to essential services, is a theme which runs through a number of sectors, such as education, telecommunications, and postal and courier services.

(b) Actual regulatory practices vary, but here again there appear to be some common threads. Regulations are typically applied either upon entry or authorisation to supply the service, or during the conduct of the service. Thus, in the literature on regulation, a distinction is sometimes made between these two categories. *Entry regulations* may set conditions restricting the entry into the market to supply a particular service (e.g. licensing and qualification requirements, quantitative limits on the number of suppliers of professional services, forms of business, and exclusive rights granted to suppliers in certain areas). C*onduct regulation* govern how the service is to be provided, including restrictions on prices and fees, and advertising.[182] The categorizations of *entry and conduct* do not translate directly into the GATS provisions on market access (Article XVI), national treatment (Article XVII) and domestic regulation (Article VI), though certain of these measures are already subject to these disciplines. In the context of this Note, what is of interest is the distinction between those which are within the scope of Article VI:4 and those that go beyond. The latter include regulatory issues cited for certain sectors, such as intellectual property rules, competition policy, procurement, and protection of privacy and confidentiality.

(c) In the case of competition policy, depending on the sector and regulatory approach taken, many issues raised in this Note suggest a close link between competition and regulation. Competition-related interventions typically include measures such as

[182] Paterson et al (2003) op. cit.; and Conway and Nicoletti (2006) "Product Market Regulation in the Non-Manufacturing Sectors of OECD Countries: Measurement and Highlights", *OECD Economics Department Working Papers*, No. 530.

banning, or imposing constraints on, agreements between firms that seek to fix prices or market shares, as well as measures preventing abuses of a dominant position, anti-competitive mergers and acquisitions, and predatory pricing. Thus, where promoting competition is seen to be in the public interest, regulation is sometimes used to achieve or support the development of competitive structures. On the other hand, complex or excessively onerous licensing and qualification requirements or procedures, by raising entry and transaction costs can hamper market contestability. Competition policy also often gives rise to issues of appropriate institutional structures.

(d) Promoting good regulatory practice, in terms of reducing the administrative burden and enhancing transparency is yet another theme which, to greater or lesser extents, appears to be common to virtually all sectors. For certain sectors and modes, application procedures may be cumbersome, excessively costly and administratively complex; processing times can be lengthy, rejection rates high and the costs of reapplying important. Addressing such administrative burdens is a separate issue, independent from the substantive requirements that might be involved. In this context, it is useful to recall that there are a number of GATS provisions (Article III and certain provisions under Article IV and Article VI) to ensure and promote transparency of the regulatory process and the resulting rules. One particular facet is the requirement to establish contact points, pursuant to Article IV:2, where service suppliers from developing countries can seek information concerning commercial and technical aspects of supplying services, as well as registration, recognition and obtaining of professional qualifications.

(e) Recognition of foreign education, professional experience and technical skills is another cross-cutting issue. In order to ensure that foreign services suppliers meet the standards imposed on suppliers of national origin, regulators are often called upon to assess the equivalence of domestic and foreign qualifications. Recognition is an area which has possibly seen the most regulatory co-operation, particularly through the work of professional bodies, to either accept the equivalence of qualifications obtained under other jurisdictions or unilaterally recognise equivalence. Linked to recognition are the use of international standards which appear to be more prevalent in certain sectors, often as a result of market forces, as compared to others.

306. As mentioned in Section I of this Note, it might be helpful for Members to consider whether the regulatory issues reviewed would have an impact on trade in services and if so, to what extent any adverse effects might be addressed through disciplines to be negotiated under Article VI:4 and/or should other potentially relevant avenues such as Article XVIII additional commitments be pursued. With the diversity of issues, sectors and modes covered, the Note might also lend itself to use as a reference document for any future regulatory-related discussions on sectoral or cross-cutting themes.

ANNEX I: SECTORAL BACKGROUND NOTES BY THE WTO SECRETARIAT

2009-2011

Symbol	Title	Date
S/C/W/298 and S/C/W/298/Add.1	Tourism Services	08.06.09
S/C/W/299 and S/C//W/299/Corr.1	Telecommunication Services	10.06.09
S/C/W/300	Computer and Related Services	22.06.09
S/C/W/301	Presence of Natural Persons (Mode 4)	15.09.09
S/C/W/302	Construction and Related Engineering Services	18.09.09
S/C/W/303	Architectural Services	17.09.09
S/C/W/304	Cross-Border Supply (Modes 1 & 2)	18.09.09
S/C/W/310 and S/C/W/310/Corr.1	Audiovisual Services	12.01.10
S/C/W/311	Energy Services	12.01.10
S/C/W/312 and S/C/W/312/Corr.1	Financial Services	03.02.10
S/C/W/313	Education Services	01.04.10
S/C/W/314	Mode 3	07.04.10
S/C/W/315	Maritime Transport Services	07.06.10
S/C/W/316	Accountancy Services	07.06.10
S/C/W/317	Logistics Services	10.06.10
S/C/W/318	Legal Services	14.06.10
S/C/W/319	Postal and Courier Services	06.08.10
S/C/W/320	Environmental Services	20.08.10
S/C/W/324 and S/C/W/324/Corr.1	Road Freight Transport Services	29.10.10
S/C/W/326	Distribution Services	29.10.10
S/C/W/334	Engineering Services	22.02.11