Disciplines on Domestic Regulation Pursuant to GATS Article VI:4:
The WPDR Chair's Consolidated Working Paper
Canada's Guide to Domestic Consultations (Overview section)

Introduction

For many years, since the establishment of the GATS Working Party on Domestic Regulation (WPDR) in 1999, Members have engaged in extensive discussions on the development of disciplines on domestic regulation, pursuant to Article VI:4 of the General Agreement on Trade in Services (GATS). Discussions started on various concepts relating to the disciplines. These were eventually followed by the tabling and discussion of specific proposals on disciplines by various Members. The WPDR focused its efforts on developing disciplines pursuant to GATS Article VI:4 before the end of the Doha Round of negotiations, as mandated in Annex C of the Hong Kong Ministerial Declaration.

Based on the outcome of extensive discussions to date, the Chair of the WPDR issued in July 2006 a consolidated working paper that reflected his views on areas of convergence, areas where alternative approaches exist, and areas where differences remain to be resolved. He intended his document to facilitate further discussion in the WPDR and domestic consultations by individual WTO Members.

As past discussions have shown, there are many elements of proposed domestic regulation disciplines that raise concerns and questions for many Members, including Canada. In this regard, further analysis and consultation of regulators and service suppliers are required before Canada's position can be determined in some areas.

While the Chair's working paper does not constitute draft negotiating text, Canada views this working paper as providing a good starting point for our domestic consultations. To facilitate these consultations, the Department of Foreign Affairs and International Trade has developed the following Guide, which builds upon the Chair's document. This Guide provides a brief overview of the work of the WPDR, the rationale behind the development of disciplines on domestic regulation, and the key elements of concern and discussion among the Members. It describes Canada's objectives and interests in the development of disciplines. It conveys Canada's position and the basis of that position to date on some of the proposed provisions. Finally, the Guide asks pointed questions within the text to elicit views on what can or cannot be supported and the reasons why.

Background: Why develop Article VI:4 disciplines on domestic regulation?

Trade in goods generally faces barriers at the border, largely in the form of tariffs. On the other hand, trade in services is principally affected by barriers inside the border, such as domestic regulation. While such regulations may be non-discriminatory in intent, their application may have the effect of restricting trade.

To facilitate international trade and investment in services, the WTO General Agreement on Trade in Services includes several provisions that deal specifically with regulatory measures that may have restrictive effect on trade in services. Of particular interest to the WPDR and these current consultations is GATS Article VI:4, which mandates the development of any necessary disciplines to ensure that measures relating to qualification requirements,

qualification procedures, licensing requirements, licensing procedures, and technical standards do not become unnecessary barriers to trade. Article VI:4 requires that disciplines aim to ensure that such requirements are, *inter alia*:

(a) based on objective and transparent criteria, such as competence and the ability to supply the service;
(b) no more burdensome than necessary to ensure the quality of the service; and
(c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.

Until such time these disciplines are developed, however, Article VI:5 remains operational. It requires that in sectors in which a Member has undertaken specific commitments, pending the entry into force of Article VI:4 disciplines, the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair specific commitments in a manner that does not comply with the criteria outlined in VI:4 (a), (b), or (c), and could not reasonably have been expected at the time specific commitments in those sectors were made.

The work program on the development of disciplines on domestic regulation was initially implemented in March 1995 with a decision by the Services Council to have Members begin work in professional services. Priority was accorded to the accountancy sector and work was undertaken by the Working Party on Professional Services (WPPS).

The WPPS completed its work in April 1999 following the elaboration of two documents: *Guidelines for Mutual Recognition Agreements for the Accountancy Sector* (May 1997) and *Disciplines on Domestic Regulation in the Accountancy Sector* (December 1998). The *Guidelines* have no legal status but may be used to assist in the negotiation of mutual recognition agreements. The *Accountancy Disciplines* currently have no legal status but are to be integrated into the GATS no later than the conclusion of the Doha Round GATS negotiations.

With the completion of the WPPS work, the WPDR was established in April 1999 to continue the work of the WPPS to develop generally applicable disciplines. The WPDR also retained the option of developing disciplines for individual service sectors as required. Members have widely recognized that the *Accountancy Disciplines* serve as a good starting point or baseline for the development of horizontal Article VI:4 disciplines. As such they have incorporated some of the provisions of these disciplines in their own proposals.

State of Play[1]

In the early work of the WPDR, Members discussed concepts relating to the development of horizontal disciplines and the development of disciplines for professional services. The latter covered the sharing of national experiences, including regulatory regimes governing the sector, as well as the reporting of the outcome of consultations of professional service sectors on the relevance and applicability of the *Accountancy Disciplines* developed in 1998.

[1] Documents related to the work of the Working Party on Domestic Regulation are available on the WTO website. See http://www.wto.org/english/tratop_e/serv_e/s_coun_e.htm.

Members also engaged in a discussion of a WTO Secretariat compilation of a list of examples of the kinds of measures that would be addressed by disciplines under GATS Article VI:4, based largely on contributions by Members. Among the examples cited by Members included the following: There are too many steps for business registration and such registration must be renewed relatively frequently at considerable time and expense. Regulators require in-country experience before sitting examinations. It is difficult to operate a business in the face of too many license requirements. Some licensing requirements are not relevant to the license being obtained. The regulatory environment lacks transparency, with laws and regulations being unclear in respect of criteria and conditions.

By 2003, Members started to propose specific disciplines on domestic regulation. Between 2005 up to June 2006 more proposals were tabled and extensively discussed. They addressed the key elements of scope and application, definitions, transparency, licensing and qualification requirements and procedures, technical standards, and special and differential treatment.

Submissions came from both developed and developing countries. Proposals from the latter reflected a strong development focus. One proposal sought to ensure that the situation faced by small, vulnerable economies be taken into account in the drafting of disciplines. Another pushed for pro-development principles to promote appropriate domestic regulatory reform and institution building efforts that will help their exporters address regulatory barriers in the markets they operate in. One other proposal outlined a list of specific areas where technical assistance and capacity building are sought.

Negotiating Dynamics

In the course of proposal-by-proposal deliberations and thematic discussions, the concerns and differences among the Members coalesced around several issues, the most prominent being the necessity test, and special and differential treatment.

A. Necessity Test

One of the key issues that engendered debate in the membership was the *Necessity Test*. This is a test used in some WTO agreements to ensure that measures, which are implemented to achieve a Member's policy objective, do not constitute unnecessary barriers to trade. A necessity test is built into GATS Article VI:4 (b) in stipulating that the disciplines to be developed ensure a measure may not be "more burdensome than necessary to ensure the quality of a service." Article VI:5 references the language of Article VI:4 for existing commitments, thus effectively incorporating that article's necessity test.

Nevertheless, there remains a great sensitivity to the use of a necessity test based on the possible implications on the rights of governments to regulate in the public interest. Many oppose the inclusion of the test in the disciplines even with the recognition in the GATS of the rights of Members to regulate in order to meet national policy objectives. On the other hand, there are those who actively support a necessity test as a means of ensuring that countries do not use their licensing and qualification procedures and requirements, and

technical standards in services as disguised trade barriers to negate commitments they have undertaken in the GATS.

Our assessment is that any negotiating text developed will have to reflect an approach that bridges the gap between the two extremes. As such Canada will seek to ensure that any discipline that incorporates a test must give unquestionable recognition of a Member's right to regulate in order to meet all its national policy objectives and ensure that, should a dispute ever arise, a panel will only have the jurisdiction to assess the burdensome nature of a measure to meet a specific objective, but will not have jurisdiction to question the legitimacy of a policy objective.

B. Special and Differential Treatment and LDCs

Developing countries support the development of domestic regulation disciplines and, given that the Doha Round is a development round, they seek development-friendly provisions. Given the asymmetries existing in respect of the development of services regulation in different countries, there is broad recognition that flexibility is necessary to accommodate the differences among Members. One issue that has been the subject of discussion is whether or not least developed countries (LDCs) should be exempted from the scope of the disciplines. Those who argue against such an exemption propose instead the provision of longer transition periods and technical assistance to facilitate implementation.

Members also differed on the issue of how special and differential treatment is to be granted to developing countries and LDCs in particular. There are views on whether technical assistance should be given on demand or provided on mutually agreed terms and conditions. Some developing countries seek technical assistance directed at strengthening their services export capacity and their participation in standards development in international bodies. The question of just what kind of assistance falls within the ambit of Article VI:4 needs further review.

C. Scope of Application of Disciplines

Overall, Members seek disciplines that are horizontal in nature. Proposed disciplines are intended to apply to all levels of government and non-governmental bodies in the exercise of delegated authority. These disciplines would only apply to measures that relate to licensing and qualification requirements and procedures, as well as technical standards. Finally, the disciplines would only apply to sectors, sub-sectors and modes of supply where Members have taken specific commitments. For example, in Canada's case, these would not apply to services such as health, public education, and social services. Prospective Article VI:4 disciplines shall cover both the Uruguay Round and new Doha Round commitments that Members will undertake. Article VI:4 disciplines are intended to help ensure that any market access commitments made by other WTO Members are not negated by the application of their services regulations.

Chair's Consolidated Working Paper

On the basis of the various proposals tabled and the outcome of discussions at the WPDR, the Chair prepared his consolidated working paper. Many Members expressed varying degrees of

support for the document, with many welcoming it as a good basis for further consultations. However, others criticized the paper for incorporating elements, such as the necessity test, which they did not accept. Therefore, they were not willing to consult on the basis of the paper and sought a negotiating text to be developed by the Chair.

As the Chair explains in his introductory note below, the paper is not a draft negotiating text. This is a working document that will be subject to modification when Members resume their discussions. We hope that a draft negotiating text will be developed shortly after negotiations resume and are, therefore, using the Chair's working paper to facilitate domestic consultations.

The current working paper covers the following elements: Objectives; Scope of Application ; General Provisions; Definitions; Transparency; Licensing Requirements; Licensing Procedures; Qualification Requirements; Qualification Procedures; Technical Standards; Development; and Institutional Provisions.

Canada's Objectives and Interests in Article VI:4 Disciplines

GATS Article VI on Domestic regulation fully reflects Canadian laws, policies and practices. No changes were required to implement it at the end of the Uruguay Round. As we elaborate on these provisions, as in the case of Article VI:4 disciplines, we will need to ensure that they reflect Canadian laws, regulations, procedures, and practices already in place. At the same time, we must recognize that these disciplines may also incorporate non-binding best practice guidelines from which we all can benefit from as we seek to improve good regulatory practices across the membership.

In terms of the proposed disciplines, many elements are consistent with Canada's own regulatory approach. These include proposed disciplines on transparency, including the provision of the opportunity to comment. Under the *Government Directive on Regulating*[2] (will replace the 1999 *Government of Canada Regulatory Policy*), the federal government is committed to create accessible, understandable, responsive regulation through greater inclusiveness, transparency, accountability, and public scrutiny. It requires federal departments and agencies to identify interested and affected parties and provide opportunities to engage in open, transparent, and balanced consultations on the development, implementation, evaluation, and review of regulation. This would mean providing timely feedback, as well as advising on the outcome of consultations and priorities considered in decision-making.

Proposed disciplines on regulatory transparency are expected to deliver many benefits to investors and exporters of services. The disciplines are envisioned to secure greater transparency of, and predictability in, the environment in which they operate. Regulatory transparency constitutes a key priority for Canadian service sectors as had been conveyed in past consultations. As a result, Canada has consistently argued for it and will continue to push for disciplines in this area.

[2] See http://www.regulation.gc.ca/default.asp@language=e&page=thegovernmentdirectiveon.htm

Another Canadian objective is to ensure that the language of the existing necessity test in Article VI:5 is clarified such that the scope is clear (i.e., any test will relate only to the five types of measures covered by Article VI:4); that any discipline which incorporates a test gives unquestionable recognition of a Member's right to regulate in order to meet all its domestic policy objectives; and that panel jurisdictions are clear.

The necessity test is not a new concept to Canada. It has been used in other WTO agreements, such as the Agreement on Technical Barriers to Trade (TBTA), the Agreement on Sanitary and PhytoSanitary Measures (SPS), and the Annex on Telecommunications.

Moreover, this concept is recognized in Canada's regulatory policy. In the 1999 *Government of Canada Regulatory Policy*, regulatory authorities are required "to ensure that information and administrative requirements are limited to what is absolutely necessary and that they impose the least possible cost". This is also reflected in the draft *Government Directive on Regulating*. It would further require that in selecting the appropriate mix of government instruments for action that departments and agencies demonstrate that the regulatory response is designed to address policy objectives and advance public interest, and that the regulatory response is proportional to the degree and type of risk to Canadians and Canada's natural environment.

To date, Canada's approach on the necessity test in the WPDR has been two pronged. As a first step, a key objective has been to ensure that the language of the existing necessity test is clarified. Moreover, in terms of policy objectives, we support the general reference to national policy objectives without solely focusing on quality of service. This recognizes the fact that objectives of relevance to other service sectors go beyond quality of service to encompass also security, consumer safety, or environmental protection. Should a dispute ever arise, we want to ensure a panel will only have the jurisdiction to assess the burdensome nature of a measure to meet a specific objective and will not have jurisdiction to question the legitimacy of a policy objective for which the measure has been developed. There appears to be no opposition to Canada's position in this regard.

As a second step, Canada is assessing through these consultations whether each specific proposed discipline that includes a necessity test element can be accepted in their entirety or in parts, and on what basis.

In conclusion, it is in Canada's interest to participate in the negotiation of these disciplines to ensure that the interests and priorities of both Canadian regulators and service suppliers are advanced.