

**Working Party on Professional Services**

THE RELEVANCE OF THE DISCIPLINES OF THE AGREEMENTS ON  
TECHNICAL BARRIERS TO TRADE (TBT) AND ON  
IMPORT LICENSING PROCEDURES TO ARTICLE VI.4  
OF THE GENERAL AGREEMENT ON TRADE IN SERVICES

Note by the Secretariat

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1. This note has been prepared upon the request of the Working Party on Professional Services at its informal meeting on 22 May 1996. It raises what appear to be the main issues concerning the relevance of the Agreements on Technical Barriers to Trade (TBT) and Import Licensing Procedures to the development of disciplines relating to qualifications, technical standards and licensing pursuant to paragraph 4 of Article VI of the GATS. The note focuses on the applicability of the normative approaches of the two Agreements to the categories of measures covered by Article VI:4 with particular reference to the accountancy sector. It builds on an earlier introductory paper by the Secretariat<sup>1</sup> which outlines how a number of basic concepts and principles are made operational in the two agreements. The note does not represent an exhaustive account of the issues that need to be addressed in this context, nor is it meant to be an authoritative interpretation of the provisions of the GATS.

2. The note consists of four sections. The first provides a brief description of the scope of GATS Article VI:4 and of the TBT and Import Licensing Agreements. The second is a description of the key elements of the TBT Agreement and an analysis of their applicability to the measures referred to in Article VI. The third section examines the relevance of the disciplines of the Import Licensing Agreement to the GATS requirement that licensing procedures should not in themselves constitute a trade restriction. The fourth and final section attempts to summarize the main issues which emerge from the paper and which may require further consideration and discussion by Members.

## **I. SCOPE OF ARTICLE VI.4 AND THE TBT AND IMPORT LICENSING AGREEMENTS**

3. Paragraph 4 of Article VI of the GATS calls upon the Council for Trade in Services to develop any disciplines necessary to ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements and procedures do not constitute unnecessary barriers to trade in services. Measures falling within the scope of Article VI.4. are intended to serve regulatory or other public policy objectives. Their purpose is not to restrict trade, and if they have incidental restrictive effects on trade, Article VI requires that these effects should be the minimum compatible with achievement of the desired policy objective. Nor should Article VI.4 measures have discriminatory effects, as between foreign and domestic services and service suppliers.<sup>2</sup> Measures are legitimate under Article VI so long as they meet the requirements of Paragraph 4.<sup>3</sup> By contrast, measures intended to restrict trade and/or to discriminate between national and foreign suppliers are dealt with under Article XVI, Article XVII and the Annex on Article II Exemptions.

4. It is useful to distinguish between the different categories and sub-categories of measures covered by Article VI:4:

- Qualification requirements: these comprise substantive requirements which a professional service supplier is required to fulfil in order to obtain certification or a

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<sup>1</sup>See document S/WPPS/W/6 *Background Information on the Agreement on Technical Barriers to Trade and the Agreement on Import Licensing Procedures*.

<sup>2</sup>Of course it is possible that a domestic regulation which is not intended to discriminate against foreign suppliers could do so in practice. In such cases, where there is a relevant scheduled commitment the national treatment obligation could be invoked in dispute settlement to secure reform of the measure.

<sup>3</sup>Three requirements are stated in Article VI:4, which are not intended to be exhaustive, and must be: (i) based on objective and transparent criteria; (ii) no more burdensome than necessary to ensure the quality of the service; and (iii) in the case of licensing procedures, not in themselves a restriction or the supply of the service.

licence. They normally relate to matters such as education, examination requirements, practical training, experience or language requirements.

- Qualification procedures: these are administrative or procedural rules relating to the administration of qualification requirements. They include procedures to be followed by candidates to acquire a qualification, including the administrative requirements to be met. This covers *inter alia* where to register for education programmes, conditions to be respected to register, documents to be filed, fees, mandatory physical presence conditions, alternative ways to follow an educational programme (e.g. distance learning), alternative routes to gain a qualification (e.g. through equivalences) and organizing of qualifying examinations, etc.
- Licensing requirements: these are substantive requirements, other than qualification requirements, with which a service supplier is required to comply in order to obtain formal permission to supply a service. They include measures such as residency requirements, fees, establishment requirements, registration requirements, etc.
- Licensing procedures: these are administrative procedures relating to the submission and processing of an application for a licence, covering such matters as time frames for the processing of a licence, and the number of documents and the amount of information required in the application for a licence.
- Technical standards: these are requirements which may apply both to the characteristics or definition of the service itself and to the manner in which it is performed. For example, a standard may stipulate the content of an audit, which is akin to definition of the service; another standard may lay down rules of ethics or conduct to be observed by the auditor.

5. The basic requirement in Article VI:4 is that domestic regulatory measures in services should not be formulated or applied in such a way as to create unnecessary trade barriers resembles the core disciplines of the TBT Agreement, which has established, for the first time, internationally accepted rules governing the drafting, adoption and certification of product standards. The Agreement's objective is to ensure that technical regulations, voluntary standards and conformity assessment procedures adopted for reasons of safety, health, consumer and environmental protection, or for other purposes, do not constitute unnecessary obstacles to trade.

6. Under the TBT Agreement technical regulations lay down product characteristics and their production methods; compliance with them is mandatory. Voluntary standards also specify product characteristics, but compliance with them is not mandatory. Conformity assessment procedures are measures applied to determine whether relevant requirements pertaining to technical regulations or standards are fulfilled. There are clear similarities between these three types of measures and those covered by Article VI:4 of the GATS. Technical standards in the sense of Article VI:4 would presumably cover both technical regulations and voluntary standards in the sense of the TBT Agreement. Qualification requirements in the GATS are also analogous to technical regulations in that they set mandatory standards for the qualifications demanded of service suppliers. Similarities can also be seen between conformity assessment procedures under the TBT Agreement and certain qualification procedures under Article VI:4 in that both embody administrative and procedural rules which aim at verifying compliance with substantive mandatory regulations.

7. The Agreement on Import Licensing Procedures covers administrative procedures used in import licensing regimes which require a licence as a prior condition of importation. The Agreement is concerned only with procedural requirements and not at all with the objectives or criteria of the licensing regime. The disciplines of the Agreement which address non-automatic import licensing require that import licensing procedures do not constitute restrictions in addition to those which they administer (e.g. quantitative restrictions). Similarly, the aim of developing any more detailed GATS rules on licensing would be to ensure that licensing procedures in services, like import licensing procedures for goods, are transparent, predictable, impartially administered and not more burdensome than strictly necessary.

## **II. IMPLICATIONS FOR SERVICES OF THE MAIN ELEMENTS OF THE TBT AGREEMENT**

8. The disciplines of the TBT Agreement aim at striking a balance between the freedom of Member countries to adopt and implement regulations which are deemed necessary to achieve legitimate policy objectives and ensuring that such measures do not constitute unnecessary barriers to trade. Article VI:4 of the GATS is based on the same normative approach, requiring that domestic regulatory measures do not constitute unnecessary barriers to trade in services. This part of the note describes five key elements of the TBT Agreement and explores their applicability in the Article VI context.

### **(i) Legitimate policy objectives**

9. The Agreement lays down that technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking into account the risks non-fulfilment would create. In assessing such risks, a number of criteria are cited as relevant, including available scientific and technical information, related processing technology and intended end-uses of products. This is not intended to be an exhaustive list. In addition, technical regulations shall not be maintained if the circumstances or objectives giving rise to their adoption no longer exist, or if changed circumstances or objectives can be addressed in a less trade-restrictive manner.

10. Article 2:2 of the Agreement contains an indicative list of what are considered legitimate policy objectives. These include: national security requirements, the prevention of deceptive practices and the protection of human health or safety, animal or plant life or health, or the environment. This approach implies that other policy objectives may be considered legitimate, but what they are and the procedure by which they may be identified as such is left open in the drafting of the provision.<sup>4</sup>

11. An important question facing the Working Party is whether the same approach of avoiding an exhaustive delineation of public policy objectives would be appropriate in GATS. At present, little in Article VI directly addresses the objectives of regulatory interventions. Article VI:4(b), however, states that domestic regulatory requirements must be not more burdensome than necessary "to ensure the quality of the service". Members of the Working Party might wish to consider whether it is desirable to identify any further "legitimate policy objectives". Of particular relevance in the Article VI:4 context is the question whether any such objectives would be defined at a general level applicable to all services sectors, or would be identified at a sector specific level. For example, ensuring the quality of services is surely a valid general objective, while in the case of accountancy more specific objectives might also be elaborated.

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<sup>4</sup>If the Agreement were to provide an exhaustive listing of policy objectives, it would implicitly determine the legitimacy of all interventions defended on public policy grounds. The tradition of GATT has been to avoid questioning the non-trade objectives of governments, except in Article XX where an exhaustive list of grounds for departing from GATT obligations is provided.

**(ii) Assessment of whether a regulation is more trade-restrictive than necessary**

12. Article 2:2 of the TBT Agreement requires that technical regulations shall not be more trade restrictive than necessary to fulfil a legitimate objective. A measure that has the effect of restricting trade can be considered "necessary" only if there is no alternative measure less disruptive of trade which a Member may reasonably be expected to employ to achieve the same policy objective. As noted above, Article VI:4 is also framed in terms of an obligation to avoid creating unnecessary obstacles to trade. The Working Party might wish to consider whether it would be desirable to elaborate further upon this notion, either in a general or a sector-specific context. Some considerations that might be relevant in each of the regulatory domains covered by Article VI:4 are set out below as they apply to the accountancy sector.

- Qualification requirements

13. Qualification requirements are often considered to consist of three main components: education, examinations and experience. In the accountancy sector, for example, education refers to the body of knowledge acquired by accountants covering subjects such as audit, general accounting, cost and management accounting, analysis of financial statements, tax law, law of insolvency, etc. Accountants also need to demonstrate that they have passed an examination of professional competence covering both theoretical knowledge and evidence of the ability to apply that knowledge in practice. In most countries there are also requirements that in order to be authorized to practice accountants must have completed a certain period of approved and supervised practical experience in an appropriate professional context.

14. There can be significant differences between countries in the level of qualification requirements pertaining to the above three areas. Such differences, which may make it difficult for foreigners to meet the requirements, are often non-discriminatory and simply reflect the complexity of the economy in question or the nature of the functions required of accountants under national law. In cases where qualification requirements may be considered to have a discriminatory effect (for example, those which specify that in order to be certified, studies must be undertaken at specific educational institutions or that prior residency must have been undertaken within the country concerned for defined periods), it should be borne in mind that the GATS national treatment provision (in sectors where scheduled commitments have been made) in principle provides recourse for assessing whether requirements which may not have been drawn up with the intention of excluding foreign practitioners do discriminate in practice.

15. In the light of the potentially broad application of Article XVII of the GATS, Members of the Working Party might wish to consider what is entailed by ensuring that non-discriminatory qualification requirements should not be unnecessarily burdensome. In doing so, it should be borne in mind that qualifications may necessarily and properly vary from country to country - in terms of the content, length and rigour of educational and examination systems as well as of the nature and extent of required experience - and that it is unlikely to be possible to reach a common, detailed definition of what is overly burdensome for all countries with respect to a particular service. Nevertheless, Members might find it useful to examine a few obvious examples what could be considered to be more burdensome than necessary. In this regard, Members might wish to consider whether it would be useful to make provision for a consultation process in which they would be able to meet and discuss differences over issues for which specialised, technical information may be necessary, analogous to the procedures for technical expert groups in Article 14 and Annex 2 of the TBT Agreement.

- Licensing requirements

16. Licensing requirements are widely used in regulating services activities. Accountancy services are no exception. Apart from the requirement that a foreign accountant possesses the necessary qualifications, a number of other licensing requirements may be imposed by the competent authorities. These may include a nationality condition, an establishment or residency requirement, membership of a local professional association, subscription to a professional indemnity insurance, and evidence of sound moral and financial standing. It will be noticed that in this illustrative list, reference is made to a nationality requirement which imposes a precondition on the foreign supplier that is not related to the ability to supply the service. Such a requirement, which amounts to discrimination against foreign suppliers, is subject to the market access and national treatment provisions of Articles XVI and XVII respectively. Article VI:4, on the other hand, is concerned with those requirements which do not discriminate between service suppliers of other Members nor in favour of service suppliers of national origin.

17. For the purpose of developing any necessary disciplines on licensing requirements under Article VI:4, the essential question seems to be how the Working Party could make use of the TBT approach whereby legitimate public policy objectives are identified and a general rule laid down that domestic measures shall not be more trade-restrictive than necessary to fulfil the objective. In relation to the accountancy sector, Members have identified a number of broad policy objectives - including safeguarding the public interest, protecting the consumer and ensuring the quality of the service - which apply to most and perhaps all of the licensing requirements which have been mentioned. In the light of these objectives, it would seem reasonable to suggest that Members examine the possibility of developing a multilateral consultation process (referred to in paragraph 15) through which licensing requirements felt to be unnecessarily onerous may be examined.

- Technical standards

18. There is no definition of technical standards in the GATS but the work carried out in the accountancy sector would suggest that standards in the area of trade in services apply not only to the technical characteristics of the service itself (e.g. specifying methods of financial reporting) but also to the rules according to which the service must be performed (e.g. defining the way a competent auditor should perform an audit including the type of checks he must perform, the way the work should be documented and so on). This distinction is akin to that made in the TBT between product standards and standards relating to production and process methods. In principle, all technical standards are meant to serve legitimate policy objectives, a concept that has already been codified in the TBT Agreement and is also inherent in the underlying logic of Article VI:4. Also, the potentially restrictive effect of such standards is well recognized in both trade in goods and trade in services. Consequently, the main objective of any disciplines on the use of such measures is bound to be the same in both cases, namely to ensure that such measures do not constitute unnecessary trade barriers.

19. As in the TBT agreement, Article VI of GATS does not attempt to develop or formulate technical standards. Standards are formulated and developed in response to changing legal, social and economic environments and, reflecting sometimes widely differing circumstances around the world, quite properly vary from country to country. In the accountancy sector, for example, countries with extensive technical standards are generally reluctant to recognise the work done in countries with markedly different standards. The financial statement of a company audited in a country of the latter category will generally have to be re-audited by local professionals in a country of the former category in order to comply with the local legal requirements. One of the purposes of the work in the Working Party is to ensure that the preparation and application of such standards do not unnecessarily restrict trade in fulfilling their objectives. Useful guidance is offered by the TBT agreement, which has established rules governing all stages of standards-related activities - drafting, adoption and certification - and it would seem

reasonable to assume that the core principles of the TBT agreement, including the necessity or least-trade-restrictiveness test, would be relevant for developing disciplines designed to prevent the use of technical standards in services becoming more burdensome than necessary. Members may wish to consider whether the main objective of the work of the Working Party with respect to technical standards should be limited to the creation of rules to govern intergovernmental consultations over technical barriers in services trade, or whether it should aim at developing disciplines which would cover all stages of the standards process. At any rate, a first step might be to consider what a technical standard is in services, and what a working definition should cover.

**(iii) Use of international standards**

20. The TBT Agreement uses international standards as a benchmark for determining whether a measure is more trade restrictive than necessary. It states in Article 2:4 that where relevant international standards exist or their completion is imminent, Members must use them, or the relevant parts of them, as a basis for their technical regulations except when they would be an ineffective or inappropriate means of fulfilling legitimate objectives. Factors that might justify national departures from international standards include fundamental climatic or geographical factors or technological problems.

21. The TBT Agreement establishes a rebuttable presumption that national technical regulations do not create unnecessary trade barriers if their purpose is the fulfilment of a legitimate objective and they are drafted in conformity with relevant international standards. In order to reduce unnecessary obstacles to trade, Members are encouraged to use relevant international standards with a view to harmonizing their technical regulations, standards and conformity assessment procedures on as wide a basis as possible. International standards are defined broadly under the TBT Agreement and cover both standards prepared by the international standardization community which are based on consensus, as well as documents that are not based on consensus. In addition, Members are obliged to participate actively "within the limits of their resources" in the work of appropriate international standardizing bodies.

22. Article VI:5 of the GATS provides that in determining whether a Member's domestic regulations are in conformity with the Article VI:4 criteria, account shall be taken of international standards of relevant international organizations applied by that Member. Furthermore, according to GATS Article VII:5, wherever appropriate, Members shall work in cooperation with relevant intergovernmental and non-governmental organizations towards the establishment and adoption of common international standards for the practice of relevant services trades and professions. The current provisions in the GATS do not go as far as the TBT agreement in laying down a general obligation on Members to use international standards when they are available, thereby establishing a rebuttable presumption that any measure which is consistent with international standards would be considered not to create an unnecessary obstacle to trade. Nevertheless, the GATS obligations in this area do seem to point in a similar direction.

23. In the course of its deliberations on accountancy, a sector in which a number of international standards for practice and qualification have been established, the Working Party has received briefings and documentation on the development and promotion of international standards in accounting, auditing, education and ethics. Taking the example of international accounting standards, Members have been made aware that the International Accounting Standards Committee, in cooperation with other professional and regulatory bodies, has developed international accounting standards and is at the same time improving existing standards and issuing new ones. The general impact of the work so far has been to foster a greater awareness among Members of the use of international standards as a basis for financial disclosure and reporting requirements as well as for other regulatory purposes.

24. The Working Party's focus is, of course, on how to avoid any unnecessary trade-distorting effects of standards, for example through disparities in different national standards or insufficient information on technical requirements relating to standards. Given the information that has been generated in the Working Party, would Members feel that they have a sufficient basis to draw preliminary conclusions regarding the applicability of the TBT approach on using international accounting standards as a benchmark for determining whether national standards may be more burdensome than necessary to achieve a legitimate policy objective? If such an approach were to be considered appropriate in the context of possible disciplines on technical standards in accountancy, there would be other related questions to address. These include whether the use of international standards should be mandatory, and whether such use would establish a rebuttable presumption that the measure in question does not constitute an unnecessary obstacle to trade in services. A TBT type approach in the sector could mean, for example, laying down a general obligation on Members to use International Accountancy Standards as such, or as a basis for their own standards on financial reporting, or even to require companies to reconcile their financial statement with international accountancy standards whenever the standards used are different.

25. On-going work by the accountancy profession in the area of international qualifications and educational guidelines could have implications for the work on qualification requirements. IFAC is involved in the preparation of ethical standards as well as international education guidelines which cover continuing professional education; education and training requirements for accounting technicians; pre-qualification education, test of professional competence and practical experience of professional accountants; and professional ethics. Members might wish to consider whether these guidelines could be used as international standards for the purposes of assessing whether and to what extent qualification requirements might be considered to be unnecessary obstacles to trade in terms of Article VI:4.

26. The Working Party has, in conformity with its mandate, focused its work on better understanding the use of international standards in the accountancy sector. Members might wish at some point to examine the implications of other global standards. The best known international standards are the ISO 9000 series, which are generic guidelines for quality management and quality assurance in both manufacturing and services industries. An examination of such widely recognized international quality assurance standards may be helpful in assessing, among other things, the trade restrictiveness of licensing processes for service suppliers.

#### **(iv) Notification requirements**

27. The TBT Agreement stipulates that if Members do not avail themselves of relevant international standards, or if such standards do not exist, certain procedural requirements must be met in those cases where the intended technical regulation may be expected to have a significant effect on trade. These include the requirement that prospective standards must be notified to other Members through the WTO Secretariat at a sufficiently early stage in their drafting (generally at least sixty days prior to their formal adoption) so as to allow reasonable time for other Members to make comments. Such comments must be taken into account before the adoption of the regulations or conformity assessment procedures.

28. Article III of the GATS (Transparency) contains a number of obligations such as publishing or making publicly available information on measures of general application and the establishment of enquiry points to provide specific information on services regulations to other Members upon request. However, the only notification requirement Article III contains is in paragraph 3, where Members are required to notify new, or changes to existing, regulations which significantly affect trade in sectors covered by their specific commitments. A relevant question to consider for the purpose of developing disciplines under Article VI:4 is whether more substantial transparency requirements should be elaborated in relation to certain types of services regulations, particularly by way of notification. For example, should all regulations relating to qualification requirements, technical standards and licensing requirements



be notified to the WTO? Or should such a requirement cover only certain sub-categories of those regulations? Also, should such a requirement cover all services sectors, or should it cover only sectors and sub-sectors where specific commitments are undertaken? Should certain regulations (e.g. qualification requirements and/or technical standards) be notified prior to their adoption so that other Members of the WTO would have the opportunity to comment? And if so, to what extent would the notifying Member be expected to take such comments into account in the drafting of the regulation in question? Needless to say, the answers to these questions might not be the same for all categories of measures covered by Article VI:4, nor for all services sectors.

**(v) Application of conformity assessment procedures and their mutual recognition**

29. Under the TBT agreement, conformity assessment refers to any direct or indirect procedure to determine that technical regulations or standards are met. Such procedures may relate to sampling, testing and inspection; evaluation, verification and assurance of conformity; registration, accreditation and approval; or any combination of the above.

30. In view of the fact that multiple testing, inspection and certification of products exported to different countries increases business costs and uncertainty, and creates unnecessary barriers to trade, the TBT Agreement lays down detailed rules with respect to conformity assessment procedures. In essence, the rules require that central government bodies accord access to the relevant procedures to third country suppliers on a non-discriminatory basis. Furthermore, the procedures themselves should not become unnecessary trade obstacles, meaning that they shall not be more strict or be applied more strictly than is necessary to give the importing Member adequate confidence that products conform with technical regulations or standards. Members are required to ensure that conformity assessment procedures are undertaken and completed as expeditiously as possible, that information requirements are limited to what is necessary to assess conformity, and that the siting of facilities used to assess conformity is not such as to cause unnecessary inconvenience to applicants.

31. Article 6 of the TBT Agreement encourages Members to enter into negotiations on mutual recognition agreements for conformity assessment and on acceptance of the results, of conformity assessment procedures in other Members whenever possible, provided such procedures are considered adequate and offer an assurance of conformity equivalent to their own procedures. The Agreement recognises that prior consultations may be necessary in order to arrive at a mutually satisfactory understanding regarding the competence of the relevant conformity assessment bodies. In that connection, relevant guidelines or recommendations issued by international standardizing bodies are to be taken into account.

32. The TBT rules governing certification of conformity with standards were drafted in part as a response to the growing complexity of conformity assessment systems in many countries, which increasingly imposed duplicative or discriminatory requirements for product certification and quality assurance. Similar duplication discrimination or redundancy in the field of services would presumably prove just as inhibiting of trade. Much work would appear to be needed to develop a basic understanding of the various procedures being used by Members in different service sectors to assess conformity with particular standards. In the case of accountancy services, the assessment of the conformity of the service or of the services supplier with established standards is generally not performed on an *a priori* basis by any authority. It is the accountant himself who declares that he has behaved according to ethical rules and that the service complies with the requisite technical standards. Whenever checks are implemented, they occur *a posteriori* and are conducted by the relevant professional bodies which, as part of their remit, often monitor the quality with which their members perform their work, including adherence to standards. It seems that the trend in this sector is towards closer supervision of professionals, as schemes like peer review and quality control programmes become more widespread. As a result, conformity assessment procedures will need to be adapted to this particular context to be

of any relevance. In the case of *a posteriori* checks, for example, the issue is not the provision of fair access to such checks by foreign professionals but the prevention of the avoidance of such controls.

33. The Working Party may wish to consider what further work is required in order to determine the appropriateness of the approach of the TBT Agreement to conformity assessment, both at the general and sector level. More specifically, it could be argued that certain qualification procedures bear similarities to conformity assessment procedures as defined by the TBT Agreement. Both relate to administrative and procedural requirements which aim to ensure conformity with other rules of a substantive nature. Article VI:4 requires that such procedures shall not be more burdensome than necessary to ensure the quality of the service and that they should be based on objective and transparent criteria. A question the Working Party might wish to consider is whether future disciplines under Article VI:4 should require that qualification procedures be no more strict or be applied no more strictly than is necessary to give assurance of the fulfilment of qualification requirements. Might there also be a requirement that qualification procedures be undertaken and completed as expeditiously as possible, and that the information and documentation requirements imposed on professionals of other Members be limited to what is necessary to assess their fulfilment of the qualification requirements? Also, might there be a requirement that the practical and logistical arrangements (e.g. place and time of examination) do not cause unnecessary inconvenience to applicants?

### III. MAIN ELEMENTS OF THE AGREEMENT ON IMPORT LICENSING PROCEDURES

34. The Agreement on Import Licensing Procedures defines import licences in Article 1:1 as "*administrative procedures used for the operation of import licensing regimes requiring the submission of an application or other document (other than that required for customs purposes) to the relevant administrative body as a prior condition for importation into the customs territory of the importing Member*". The Agreement contains general provisions on import licensing, as well as specific provisions applying to automatic and non-automatic licensing procedures. Under automatic licensing procedures, approval of an import licence application is "freely granted", the intention being that licensing is genuinely automatic, unrestrictive, non-discriminatory and prompt. Non-automatic licensing procedures are associated with measures of a restrictive character, or measures aimed at fulfilling a particular public policy goal.

35. The general provisions seek to reduce the scope for discrimination or administrative discretion with regard to the procedures for both types of licensing. They require that rules for import licensing procedures be neutral in application and administered in a fair and equitable manner. Regarding formalities and documentation, the Agreement requires that:

- Rules and all information concerning procedures must be published, whenever practicable, 21 days prior to the effective date of the requirement, but in any event not later than the effective date. Any exceptions, derogations or changes in the rules or the list of products subject to import licensing must be published, and copies of these publications must be made available to the Secretariat. Members may make written observations on licensing procedures and must be given the opportunity to discuss them with the Member concerned.
- Application forms and renewal forms must be simple, and only such documents and information considered strictly necessary for the proper functioning of the licensing regime must be required upon application for a licence.
- Application procedures and renewal procedures must be simple, with a reasonable period allowed for the submission of licence applications;

- The number of administrative bodies to be approached by an applicant in connection with an application must be limited to one, except in strictly indispensable cases, and in any event the number should not exceed three;
- Applications must not be refused for minor documentation errors and inadvertent errors or omissions of a minor nature must not be unduly penalized.

36. An automatic licence should be issued without delay and in any case within a maximum period of ten days after receipt of an application. The Agreement further stipulates the conditions that must be fulfilled for licensing procedures to be considered automatic. Regarding non-automatic import licensing, the Agreement seeks to ensure that licensing procedures do not themselves increase the restrictiveness of the measure being applied, and that there is transparency in measures adopted. The Agreement includes the following principal rules for the administration and the allocation of non-automatic licences:

- Transparency with respect to the allocation of licences and the administrative details of the licensing system: All information relevant to the administration allocation criteria and functioning of the licensing system shall be published. For example, Members using a licensing system to administer import quotas shall publish the overall amount of quotas (in quantities and/or values) and the time specificity of the quotas. Where quotas are allocated by country, the Member applying the restrictions shall promptly inform all interested supplying Members of the quota allocations. Overall, the Agreement requires Members to publish sufficient information for traders to know the basis on which licences are granted and it also contains rules for the notification of new or modified import licensing procedures.
- Eligibility for obtaining a licence: Eligibility for quota allocations via import licence should be non-discriminatory. Any potential importer refused a licence is entitled to an explanation of the refusal and to an appeal or a review of the decision in accordance with the national legislation.
- Time period for processing applications: Licence applications shall in principle be processed within 30 days if applications are considered on a first-come first-served basis, and within 60 days if all applications are considered simultaneously.

37. It can be seen from the above that for non-automatic licensing procedures, administrative burdens for importers must be limited to what is absolutely necessary to administer the measures to which they apply and should not restrict or distort imports any more than would be expected from the measures themselves.

38. As noted above, GATS Article VI:4 requires that licensing procedures do not in themselves constitute a restriction to trade in services. Moreover, Article VI:3 states that where authorization is required for the supply of a service in respect of which a commitment has been made, the licensing authorities must inform an applicant of the decision regarding the application within a reasonable period of time. There is also an obligation to inform an applicant without undue delay of the status of the application. Under GATS, licensing procedures may be designed to administer substantive regulatory requirements or trade restrictions such as those falling within the scope of Article XVI (e.g. a limitation on the number of service suppliers). Alternatively, the grant of a licence may be a formality. This distinction is akin to that made between non-automatic and automatic licensing in the Agreement on Import Licensing Procedures.

39. The parallel between what is contained or contemplated in GATS and the GATT approach is clear - above all in relation to the concern that licensing should not become an instrument of trade restriction in its own right. Both agreements also seek to ensure that the administration of licensing procedures is timely, transparent and impartial. Given these similarities, there would seem to be a case for examining whether the more detailed provisions of the Agreement might provide guidelines for the further development of Article VI disciplines. Members might wish to consider questions such as whether there should be an obligation to ensure that application forms should be as simple as possible, whether documentation and information requirements should be confined to what is considered strictly necessary for the proper functioning of the licensing system, whether the number of administrative bodies to be approached by an applicant in connection with an application be limited, and whether there should be a time frame for the processing of an application. It should be noted, however, that while all these questions might be relevant to disciplines on licensing procedures in services generally, in some cases the focus may need to be at the sectoral level. For example, the appropriate time limit for processing a licence application may well vary from sector to sector.

#### **IV. SUMMARY AND CONCLUSIONS**

40. This paper has examined key provisions of the TBT Agreement and the Agreement on Import Licensing Procedures with a view to considering how far these Agreements can provide guidance with respect to the work programme on domestic regulation in trade in services envisaged under Article VI:4 of GATS. Strong similarities exist between the basic approach to regulatory interventions in the two GATT 1994 Agreements and that adopted or contemplated in GATS. At a general level, the clearest similarity is in the attempt of the objectives of both GATT and GATS to ensure that regulatory interventions and procedures are transparent, predictable, and no more disruptive or limiting of trade than necessary to attain the desired policy objective. The rationale for this approach seems obvious, considering the overall aim of both GATT and GATS to preserve and promote an open multilateral trading system. But less obvious are the details of the requirements and procedures necessary to create an appropriate regulatory environment.

41. The two GATT 1994 Agreements have been honed into what they are today over many years, starting in the 1970s. Their detailed provisions have been developed and refined in the light of experience and changing needs. This paper does not start from the assumption that everything learned and instituted on the goods side can simply be transposed into a services context, but it does suggest that intrinsic similarities between GATT and GATS make it useful, as a starting point for the Article VI:4 work programme, to consider how far it is possible to draw on accumulated experience. Similarly, the Working Party on Professional Services has spent a considerable amount of time examining regulatory issues in the accountancy sector, and the insights accumulated through this exercise should also prove useful in the more general context of work on domestic regulation foreseen in Article VI:4.

42. A general point seems worth making about standards and licensing-related issues in the context of trade in services; because GATS deals with service suppliers as well as services, and because service sectors are often more intensively regulated than goods sectors, there may be considerable variation among sectors in the nature of regulatory interventions. There will be natural limits to the applicability of general rules and disciplines in the services area, beyond which sectoral specificity is inevitable. Perhaps the greatest policy challenge is to construct as detailed a regulatory framework as possible of general applicability, and then base sector-specific rules about regulatory regimes on principles enunciated at the general level. This would clearly be consistent with the focus adopted in Article VI:4. Among the issues emerging from the paper that are summarized below, a supplementary question in many cases has to do with identifying the appropriate degree of sectoral specificity. In order to avoid repetition, this particular question has not been posed in every case that it is applicable.

**(i) Agreement on Technical Barriers to Trade**

43. The foregoing discussion of the TBT Agreement focused on three distinct aspects of the agreement. These were, first, provisions dealing with technical regulations, standards and conformity assessment procedures, all of which must be designed and implemented with a view to avoiding unnecessary barriers to trade. Second, several aspects of the agreement designed to ensure transparency and accountability in standard-setting (in respect of both technical regulations and standards) and conformity assessment procedures were examined. These included notification requirements and the right of Members to comment on intended regulations and standards-related procedures at the formulation stage. Third, there was a discussion of the role of harmonization through the adoption of internationally established standards, as well as of conformity assessment procedures, as mechanisms for ensuring that standards and procedures relating to their implementation do not become unnecessary obstacles to trade.

*Possible questions for further consideration*

44. Some questions emerging from the foregoing discussion that would seem to warrant further reflection by Members are summarized below. These questions are not presented in any particular order, nor are they intended to prejudice the views of Members as to whether these or any other questions should be taken up in the context of a work programme on Article VI:4.

- (i) Would it be useful to distinguish between mandatory and voluntary standards in the services context, in the same manner as the TBT Agreement?
- (ii) Neither the TBT Agreement nor the GATS attempts to provide an exhaustive list of legitimate policy objectives that would warrant the introduction of standards or licensing requirements. Would the further elaboration of illustrative public policy objectives under GATS serve any useful purpose?
- (iii) Both the TBT Agreement and GATS predicate the objective of avoiding trade restrictions on the notion of “necessity” -- that is, on the rule that standards and licensing requirements should not constitute unnecessary barriers to trade. Is there any need further to elaborate upon the content of the concept of necessity in GATS, either in a general or sector-specific context?
- (iv) Considerable variation is likely to be found in standards-related policies and procedures in the area of services, particularly in the seemingly numerous areas in which international standards have not been developed. Does this situation justify consideration of the establishment of a special consultative mechanism under which Members could discuss and explain aspects of their regulatory regimes upon request?
- (v) Neither the TBT Agreement nor GATS claims competence with respect to the substantive content of standards. The TBT Agreement does, however, set out detailed rules governing each stage of standards-related procedures, including drafting, adoption and certification procedures, and various aspects of implementation. Should similar disciplines be developed in GATS to deal with standards, including those relating to qualification requirements?
- (vi) The TBT Agreement requires that international standards (technical regulations) must be used unless such standards constitute an ineffective or inappropriate means of achieving a legitimate policy objective. Article VI:5 of the GATS requires that due account be taken of international standards in determining whether a Member is in

compliance with its obligations under Article VI:5(a). Article VII:5 (Recognition) states that wherever appropriate, recognition should be based on multilaterally agreed criteria and that Members should work with relevant bodies towards common standards. Do the GATS provisions need elaboration?

- (vii) Among its transparency provisions designed to ensure adequate accountability, the TBT Agreement requires that if international standards are not used, or do not exist, and a contemplated standard is likely to have significant trade effects, then it must be notified prior to its introduction, and consultations on such a standard must be held upon request. Article III of GATS contains publication requirements in respect of measures of general application affecting trade in services, and notification requirements in respect of policy changes affecting services in respect of which specific commitments have been undertaken. Would it be desirable to extend the transparency provisions of GATS in the area of standards, to cover such requirements as prior notification and consultation, and justification upon request of a particular standard? Additionally, should any such requirements be of general application, or restricted only to those instances in which specific commitments have been undertaken?
- (viii) The TBT Agreement seeks to establish procedures to ensure that conformity assessment does not become an unnecessary barrier to trade. Would a similar approach, involving the establishment of obligations in relation to conformity assessment procedures, including preventing the avoidance of such procedures be desirable in GATS?
- (ix) The TBT encourages mutual recognition of conformity assessment procedures, much as the GATS seeks to do in Article VII in relation to the authorization, licensing and certification of service suppliers. Are the GATS provisions in need of further elaboration?

**(ii) Agreement on Import Licensing Procedures**

45. The fundamental objective of the GATT 1994 rules on import licensing is to ensure that licensing procedures do not in themselves constitute a barrier to trade. The same policy objective is spelled out in GATS Article VI:4(c). The Agreement on Import Licensing gives force to this objective in a number of ways, including through minimizing the scope for discrimination and administrative discretion in licensing decisions and procedures, seeking to ensure that the administrative burden of licensing is no greater than what is essential to achieve the relevant underlying policy objective, and requiring that all licensing procedures are carried out in a timely, transparent and impartial manner.

*Possible questions for further consideration*

46. While the GATS approach is very similar to that of the Agreement on Import Licensing Procedures, it currently lacks the detailed provisions of the latter Agreement. In considering the desirability of developing such provisions in GATS, some of the questions that appear relevant for examination are listed below.

- (i) If there is a case for establishing eligibility criteria *ex ante* for the granting of licenses, is there a better way of doing this than through the distinction between automatic and non-automatic licensing? More generally, is this latter distinction useful in the context of Article VI:4?
- (ii) Should more detailed rules be developed in GATS to ensure the neutral application and equitable administration of licensing procedures?

- (iii) Should rules be developed in relation to advance publication of all information necessary for compliance with licensing requirements? Would any other transparency requirements be appropriate, such as general notification obligations additional to those contained in Article III?
- (iv) Should an obligation be established to ensure that the simplest possible licensing requirements are applied consistent with the underlying objectives of licensing, including those relating to documentary requirements and the number of entities involved in processing license applications?
- (v) Should the notion of “a reasonable period of time” used in Article VI:3 of GATS be elaborated to include specific time periods, and if so, at what level of sectoral specificity?