JOB(06)/223 11 July 2006

Working Party on Domestic Regulation

COMMUNICATION FROM THE UNITED STATES

Outline of US Position on a Draft Consolidated Text in the WPDR[1]

The following communication, dated 10 July 2006, from the delegation of the United States is being circulated to the Members of the Working Party on Domestic Regulation.

A. GENERAL CONSIDERATIONS

1. In general, we are looking for the clearest, most precise language for any new binding disciplines. While we acknowledge the value of familiar text drawn from other trade agreements, we do not feel that it is necessary or desirable to draw exclusively from such sources. In many ways, these proposed disciplines are quite different from other WTO agreements, and we should remain open to language tailored to the specific context of services regulation and the nature of the specific disciplines proposed.

B. PRINCIPLES AND OBJECTIVES

2. The US supports a clear statement recognizing all Members' right to regulate and introduce new regulations to achieve domestic policy objectives, and also recognizing the specific needs of developing countries in that regard (capacity constraints, under-developed regulatory regimes, etc.). However, we do not support language in this regard that could be construed to establish a greater or lesser right to regulate for any Member or group of Members.

3. We do not support any type of operational necessity test or standard in any new disciplines for domestic regulation. However, we share the concerns raised by many Members that the right to regulate should not be used in practice to avoid trade obligations. In that regard, we are open to discussing non-operational language in the preamble, expressing that Members' objective in developing any new disciplines is to establish that principle.

4. We support a clear statement that any new disciplines for domestic regulation are in addition to, and do not derogate from existing obligations and exceptions in the GATS, including the Annex on Movement of Natural Persons.

C. SCOPE AND APPLICATION

5. We support application of new disciplines where Members have undertaken specific commitments in their schedules.

6. We have consistently taken the position that domestic regulation in services is extremely complicated and that developing disciplines that applied to all services sectors posed particular problems. Our consistent position has been that horizontal application would depend on the nature of the disciplines, and that strong disciplines in all areas would not be feasible on a horizontal basis.

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[1] This communication represents the US position on the contours of a first draft consolidated Chair's text for Article VI:4 disciplines. It is without prejudice to the US position on the final outcome of the negotiations in the Working Party on Domestic Regulation, and the US reserves the right to revise its position on any of these issues, or any other issues raised during the course of the negotiations.

7. We do not support application of any new disciplines to visa issuance and related measures, by which Members regulate the movement of natural persons into, or their temporary stay in their territories.

D. DEFINITIONS:

8. We have significant concerns about defining the elements of any new disciplines, and this is an area that we feel will require a great deal of work in future weeks. In particular, we have strong concerns about a single definition of qualifications requirements for both natural persons (engaging in the professions) and juridical persons. The nature of the definition in this area will also affect the type of discipline that we can support.

9. We are also concerned about clarity in the definitions of licensing requirements and qualifications requirements. We are not convinced that the definitions proposed so far, which link the two, provide the necessary clarity to implement new disciplines effectively.

10. We are also concerned that terms are not defined so broadly as to create legal uncertainty about coverage. With respect to qualifications requirements, for example, we would not want any confusion about application to academic or other qualifications that we feel should clearly be excluded from any disciplines. We have similar concerns about the definition of technical standards.

11. With regard to licensing requirements, we do not want to see a definition that would encompass forms of permission that might be termed "license," but should clearly be excluded from our work in the WPDR. As an example, we would not want to see a definition that could be interpreted as covering certification or permits relating to the construction, operation or use of facilities, use of natural resources, or that serve to implement and enforce certain laws, e.g. food safety inspections, vehicle safety and emissions inspection, environmental protection, etc.

E. LICENSING AND QUALIFICATIONS REQUIREMENTS

12. Given the strong preference of Members for horizontal disciplines, we support a very cautious approach in the area of requirements. This is an area that very quickly touches on the content of regulations and can impinge on Members' right to set appropriate standards to ensure the quality of services, public health and safety, environmental protection, prudential financial practices, and other important policy objectives. Our ability to support disciplines in this area will depend greatly on the nature of the proposed disciplines, the clarity of their scope of application and flexibility in the level of compliance.

F. LICENSING AND QUALIFICATIONS PROCEDURES

13. This is an area where, in principle, we believe it is feasible to have more developed disciplines, since over time best practices have developed and adopted on a regional or international basis.

G. TECHNICAL STANDARDS

14. We take a very cautious approach in this area. The concept of technical standards is not well-developed in the services sector, few countries have regulations in this area, and so far the proposed definitions for technical standards are very vague. In this area we can support general provisions related to transparency and public availability.

II. TRANSPARENCY:

15. Transparency is the highest priority for the US in these negotiations, and is the area that we feel is best suited to horizontal application. Our priorities in this area are set out in the US' proposed text on horizontal transparency disciplines (JOB(06)/182).

16. We are looking for disciplines that adopt realistic and flexible standards of compliance, covering publication of regulations so that they are available to interested persons; operation of points of inquiry available to interested persons; provision, on a best endeavour basis, for prior publication of new regulations and a reasonable opportunity for interested persons to comment, as well as the expectation that substantive comments received will be taken into consideration by the regulator.

17. We believe that transparency is fundamental to good governance and creating the environment of certainty and predictability that benefits domestic service suppliers.

I. DEVELOPMENT:

18. We support a realistic and practical approach to recognizing the different levels of development among Members, and one that is consistent with the mandate of Article VI:4.

19. In this regard we think the provisions suggested in the draft text from China and Pakistan, setting out phase-in periods for compliance with any new disciplines, is very interesting.

J. REVIEW MECHANISM:

20. We see the value in some sort of mechanism to review the implementation of any new disciplines, and are open to discussing the possibility of some sort of new committee or other institution.

21. We do not support the creation of a new negotiating mandate at this time.