Working Party of the Trade Committee

TRADE IN SERVICES

TRANSPARENCY IN DOMESTIC REGULATION: PRIOR CONSULTATION
This report was prepared by Keiya Iida and Julia Nielson of the Trade Directorate and is released as a general distribution document under the responsibility of the Secretary-General.

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Introduction

1. This paper has been prepared in response to a request from the Working Party of the Trade Committee, following discussion at the Second Services Experts Meeting held on 18-19 June 2000, for further work on issues related to transparency in domestic regulation. While previous studies on regulatory transparency have covered a wide range of practices and options for improving regulatory transparency, this paper focuses on prior consultation. It is primarily based on the market openness chapters of the regulatory reform country reviews examined by the Trade Committee Working Party; the government capacity chapters reviewed by the Public Management Committee Working Party; and other resources accumulated through the OECD Regulatory Reform exercise, including the 11 sectoral and thematic studies conducted in 1997.

2. This paper has five sections. Section I outlines the potential benefits of prior consultation, and raises some issues regarding how it might operate in practice. Section II outlines the existing framework of multilateral trade rules and disciplines related to prior consultation or prior notification. Section III presents a survey of current practices related to prior consultation amongst OECD members. Section IV provides a cross-country analysis of the lessons that can be drawn from those studies. Finally, Section V considers the possible implications for enhanced GATS disciplines on transparency.

I. Benefits of prior consultation

3. Transparency is an essential component in the openness of decision-making related to the introduction, administration and enforcement of new or amended regulations. Regulatory transparency is an important tool in preventing arbitrary and unnecessary barriers to trade in goods and services. While disciplines for regulatory transparency are more developed for goods than for services, the cost and complexity of delivering services across borders or of establishing commercial presence in a market underscores the importance of regulatory transparency for trade in services.

4. Transparency in regulation is not static, but rather is part of the dynamic process of regulatory policy-making. In both social and economic terms, it plays an important role in revealing the basis for, and


the full range of possible costs and benefits of, policy decisions and their implementation. Regulatory transparency is conducive both to fairer and more effective governance, improving public confidence in governmental and regulatory performance, and to economic efficiency, helping to remove distortions which might otherwise undermine domestic policy objectives. For trade policy, transparency in domestic regulation is a crucial tool in making policy-makers, business and civil society aware of the need for, and the full range of social and economic costs and benefits of, regulatory reform and trade liberalisation. Transparency can also bring particular benefits to developing countries, as the greater predictability and stability brought about through increased transparency in the introduction and implementation of regulatory measures facilitates trade and investment.

5. By contrast, last-minute disclosure of new or modified regulations can pose difficulties for economic stakeholders in taking necessary actions and adjusting to changes in regulations. Late disclosure also makes constructive input from civil society more difficult to achieve. Prior consultation, which provides opportunities for interested parties to make comments and for due consideration to be given to those comments, prior to finalisation of a regulation, could be one way to address these problems.

6. Prior consultation could facilitate trade in services in four ways.

   (i) Firstly, prior consultation in trade-related domestic regulatory processes would provide firms with more predictable conditions in foreign markets. When trade-related regulatory decision-making is open and transparent, foreign firms are able to obtain information on:
       – the conditions and constraints they will encounter in a market;
       – the measures they could take to comply with regulatory requirements;
       – a more accurate picture of costs and returns on their investment or commercial presence; and
       – time and flexibility to adjust to potential changes in regulation.

   (ii) Secondly, prior consultation would also help to reveal hidden discrimination that can potentially arise from subordinate measures. Transparency enables foreign firms to find out whether subordinate measures deviate from the founding, or enabling, legislation. As transparency permits business and other parts of civil society to be better informed about such discretion, and permits greater scrutiny of decision-making processes, it creates additional incentives for bureaucrats to apply regulation in a non-discretionary and thus non-discriminatory way.

   (iii) Thirdly, by allowing for feedback from interested parties before implementation, prior consultation would lead regulatory authorities to reflect carefully before introducing or modifying regulations. Prior consultation could play an educative role in making policy makers aware of other approaches, including those taken by other countries, to address similar policy objectives. It could thus help to disseminate international best practices, resulting in better regulation. Prior consultation could also provide an opportunity for regulatory authorities to gather and consider information on whether measures were unnecessarily trade restrictive and whether other, less trade restrictive, means were available to achieve the same legitimate policy objectives. Comments received could be helpful in estimating the trade impact of proposed measures and illuminating the relative trade restrictiveness of different alternatives. They may thus constitute an early warning system for trade disputes that may arise with respect to new or modified regulations and play a role in avoiding unnecessary trade restrictiveness.
(iv) Fourthly, prior consultation assists all stakeholders in understanding the basis for regulation. Greater comprehension of the rationale for a regulation helps to build support for it and to ensure its effective implementation.

7. In addition to facilitating trade, prior consultation would also enhance both the legitimacy and the effectiveness of regulatory measures through increased dialogue with industries and civil society at the domestic level. While regulatory measures are already "democratic", having been authorised by the legislative branch or issued by regulatory authorities acting under appropriate mandates, increased prior consultation at all levels would help regulatory authorities to enhance the perceived legitimacy of, and lessen the scope for a challenge to, any measures. Firmer support for regulatory measures from key stakeholders would also result in improved compliance. Additionally, feedback from stakeholders will assist regulators to gain a clear picture of the market and policy environment in which a particular regulation will operate and thus help to identify in advance any potential technical or practical difficulties with implementation.

8. Prior consultation can thus both facilitate trade and deliver significant domestic benefits in terms of the efficiency, effectiveness and legitimacy of regulation. However, the extent to which these benefits will be attained depends upon both the existence of supporting frameworks (see Box 1) and how prior consultation is conducted. A number of specific issues arise regarding the implementation of prior consultation at the national level, including:

− What sorts of regulations should be subject to prior consultation? Should this include regulations at all levels of government (including sub-federal levels)? Does it include all types of laws or only regulations developed by subordinate authorities? How would the limits of any category of measures to be subject to prior consultation be defined given differences amongst members' political and administrative systems?

− Who should be consulted (e.g., foreign and domestic firms)? Should consultation processes be open to any interested party (i.e., participants self-select) or should participants be selected by relevant regulatory authorities, including on the basis of the extent to which their interests may be affected by the proposed measure? Can both these models be used at different stages of the process of developing regulations -- i.e., can ideas be floated amongst a small group of key stakeholders at an early stage, to be followed by wider consultation with (self-selected) affected parties later in the process?

− What form should prior consultation take? Should it involve notification to the WTO Secretariat or simply notification in government gazettes or websites?

− What sort of follow up, if any, to consultation should be required? Should prior consultation include a commitment to respond to any comments received, to discuss comments received on request, or simply to take them into account? Should any comments received also be made publicly available in the interests of transparency?

9. The case studies in Section III indicate a range of national approaches to the conduct of prior consultation, but with some similarities in the approaches taken to addressing the above issues. Other insights on how these issues might be addressed may also be gained from examining the existing framework of WTO rules and disciplines pertaining to prior consultation or prior notification.
Box 1: Other important factors relating to prior consultation

Several factors can impact upon the effectiveness of the prior consultation.

*Independence of regulatory authorities*: in both rule making and implementation, the independence of regulatory authorities is critical to ensure transparency in trade-related domestic regulation. Although legislative powers shape the basic regulatory framework, the implementation of certain measures is often delegated to the competent regulatory authorities. In addition, these authorities can also make subordinate rules. Independence of these regulatory authorities is important in ensuring transparency in their own activities and in ensuring that all stakeholders (e.g., industry, consumers) are treated in a balanced way.

*Use of international standards*: The extent to which prior consultation may be necessary, and the efficiency with which it can be conducted, is strongly influenced by the existence of international standards. For example, neither the SPS nor the TBT Agreement requires provision of the opportunity for prior comment for regulations based upon international standards. However, there are currently very few international standards for most services sectors. Nonetheless, the additional information gained by regulators via prior consultation including on international best practices may contribute to increased convergence in regulatory approaches, and to the development of international standards, over the longer term.

*Implementation*: Trade-friendly regulation requires transparency not just in the development of regulations, but also in their implementation. The benefits of regulatory reform will materialise only when regulations are implemented and enforced in a consistent, open and predictable way.

II. Existing Multilateral Disciplines

10. This section examines the various WTO agreements and seeks to identify existing rules related to transparency, including those related to prior notice and comment procedures for domestic regulation.

*GATT 1947*

11. The disciplines related to transparency in GATT 1947 (Article X) require the prompt publication of all laws and regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, in such a manner as to enable governments and traders to become acquainted with them. However, Article X only ensures transparency of regulation at the time of entry into force; it does not require prior consultation procedures.

12. WTO agreements related to goods which deal with "behind the border" issues of domestic regulation such as standards have introduced enhanced disciplines on transparency.

*Agreement on Sanitary and Phytosanitary Measures (SPS Agreement)*

13. The SPS Agreement includes procedures for the prior notification of proposed measures, along with an opportunity for comment by other WTO Members. Information is not provided directly between regulators and stakeholders, but via Members’ notifications to the WTO Secretariat. While WTO member governments use this procedure to raise concerns both within the relevant WTO bodies and in bilateral consultations, there is no actual requirement for consultations between regulatory authorities and service providers or civil societies at the domestic level.

14. Obligations regarding prior notification and opportunity to comment are triggered in cases where an international standard, guideline or recommendation does not exist or the content of the proposed sanitary or phytosanitary (SPS) regulation is not substantially the same as an international standard,
guideline or recommendation and where the regulation may have a significant effect on trade of other Members. In those circumstances, according to Annex B, paragraph 5 of the SPS Agreement, Members shall

- Publish a notice at an early stage in such a manner as to enable interested Members to become acquainted with the proposal to introduce a particular regulation;
- Notify other Members through the WTO Secretariat of the products to be covered together with a brief indication of the objective and rationale for the proposed regulations. Such notification shall take place at an early stage when amendments can still be introduced and comments taken into account;
- Provide upon request to other Members copies of the proposed regulation and, whenever possible, to identify the parts which in substance deviate from international standards, guidelines or recommendations;
- Without discrimination, to allow reasonable time for other Members to make comments in writing, discuss these comments upon request and take the comments and the results of the discussions into account.

15. A standard format has been agreed by WTO Members for SPS notifications. The items in this format are: agency responsible; products covered; regions or countries likely to be affected (to the extent relevant or practicable); title and number of pages of the notified document; description of content; objective and rationale (i.e., food safety, animal health, plant protection, protect humans from animal/plant pest or disease, protect territory from other damage from pests); whether a relevant international standard, guideline or recommendation exists (and, if so, deviations from it); relevant documents and language(s) in which they are available; proposed date of adoption; proposed date of entry into force; final date for comments; agency or authority designated to handle comments (national notification authority, national enquiry point, other); and the location where texts available (address, fax number and e-mail address).

16. However, where urgent problems of health protection arise or threaten to arise for a Member (Annex B paragraph 6), that Member may omit such of the steps provided for above as it finds necessary, provided that the Member:

- Immediately notifies other Members, through the Secretariat, of the particular regulation and the products covered, with a brief indication of the objective and the rationale of the regulation, including the nature of the urgent problem(s);
- Provides upon request, copies of the regulation to other Members;
- Allows other Members to make comments in writing, discusses these comments upon request, and take the comments and the results of these discussions into account.

17. Obligations related to implementation of the Agreement are set out in Article 13. Members are fully responsible for the observance of all obligations under the Agreement and are required to formulate and implement positive measures and mechanisms in support of observance of the Agreement by other than central government bodies. Members are also required to take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories, as well as regional bodies in which relevant entities within their territories are members, comply with the Agreement. Members are also required not to take measures which have the effect of, directly or indirectly, of requiring or encouraging such regional or non-governmental entities, or local governmental bodies, to act in a manner inconsistent with the Agreement. Members are also obliged to ensure that they rely on the services of non-governmental entities for implementing SPS measures only if these entities comply with the Agreement.
18. Annex A of the SPS Agreement defines SPS measures as all relevant laws, decrees, regulations, requirements and procedures. WTO Members implement virtually all SPS measures as regulations, rather than legislative measures.

Agreement on Technical Barriers to Trade (TBT Agreement)

19. Similar procedures for prior notification, along with opportunity for comment are found in the TBT Agreement. Again, information is not provided directly between regulators and stakeholders, but via Members’ notifications to the WTO Secretariat.

20. Obligations regarding prior notification and opportunity for comment are triggered where a proposed technical regulation is not in accordance with an international standard, or where no relevant international standard exists, and where the technical regulation may have a significant effect on trade of other Members. In these circumstances, the Agreement (Article 2.9) requires Members:

− To publish a notice in a publication at an early appropriate stage, in such a manner as to enable interested parties in other Members to become acquainted with it, that they propose to introduce a particular technical regulation.

− To notify other Members through the WTO Secretariat of the products to be covered by the proposed technical regulation, together with a brief indication of its objective and rationale. Such notifications shall take place at an early appropriate stage, when amendments can still be introduced and comments taken into account.

− Upon request, to provide to other Members particulars or copies of the proposed technical regulation and, whenever possible, to identify the parts which in substance deviate from relevant international standards.

− Without discrimination, to allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.

21. A standard format has been agreed by WTO members for notification of proposed technical regulations. The items in this format are: agency responsible (plus the agency handling comments, if different); article of the TBT Agreement under which notification is made; products covered; title, number of pages and language(s) of the notified document; description of content; objective and rationale (including the nature of urgent problems where applicable); relevant documents; proposed date of adoption; proposed date of entry into force; final date for comments; the agency from which texts are available (national enquiry point or address, e-mail and fax number of other body).

22. As with the SPS Agreement, where urgent problems of safety, health, environmental protection or national security arise or threaten to arise (Article 2.10), a Member may omit such steps as it finds necessary, provided that the Member, upon adoption of a technical regulation, shall:

− Notify immediately other Members through the Secretariat of the particular technical regulation and the products covered, with a brief indication of the objective and the rationale of the technical regulation, including the nature of the urgent problems;

− Upon request, provide other Members with copies of the technical regulation;

− Without discrimination, allow other Members to present their comments in writing, discuss these comments upon request, and take these written comments and the results of these discussions into account.
23. The TBT Agreement (Article 3) states that Members are fully responsible for the observance of all the provisions of Article 2 and requires Members to formulate and implement positive measures and mechanisms in support of observance of Article 2 by other than central government bodies. Members are also obliged not to take measures which require or encourage local government bodies or non-governmental bodies within their territories to act in a manner inconsistent with Article 2. Members must also take such reasonable steps as may be available to them to ensure compliance by local government and non-governmental bodies within their territories with Article 2 (with the exception of the notification provisions in 2.9.2 and 2.10.1). The Agreement also requires Members to ensure that technical regulations of local government, on the level directly below that of the central government, are notified in accordance with paragraphs 9.2 and 10.1,3 except for technical regulations the technical content of which is substantially the same as that of previously notified technical regulations of central government bodies of the Member concerned. (The lack of parallel specific provisions in the SPS Agreement for notification of measures by local governments reflects the fact that there are almost no specific regulations on SPS measures at local levels.)

24. The TBT Agreement refers simply to "documents", but distinguishes between technical regulations (which are mandatory) and standards (which are not). In general, many of the standards and requirements with which the Agreement deals are developed in subordinate measures, rather than legislative instruments (as governments wish to avoid having to change the law every time a technical modification to a standard is necessary). While it is possible that some relevant measures could be enacted via legislative means, in practice, they are enacted via subordinate measures such as regulations.

TBT Code of Good Practice

25. While the above disciplines apply to technical regulations, the Code of Good Practice in the TBT Agreement requires domestic standards bodies to undertake prior consultation on prospective standards. The Code requires that its adherents, inter alia, grant national treatment and MFN in terms of standards and use international standards where possible. Adherents are required to allow at least 60 days for submission of comments on draft standards prior to their adoption (this period can be shortened where urgent problems of safety, health or environment arise or threaten to arise). They must provide, upon request, a copy of the draft standard and take any comments received into account. If so requested, they shall reply to any comments received as promptly as possible, including an explanation why deviation from international standards is necessary. While Members must ensure that central government standardising bodies accept and comply with the Code of Good Practice, they need only take such reasonable measures as may be available to them to ensure that local government and non-governmental bodies do so. They must also not take measures which would have the effect, directly or indirectly, of requiring or encouraging such standardising bodies to act in a manner inconsistent with the Code.

GATS

26. While the GATS has a number of general transparency requirements, as well as disciplines relating to domestic regulations, it does not have any specific provisions with regard to prior consultation.

27. Article III requires members to publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application which pertain to or affect

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3. These paragraphs refer to the obligation to notify other members through the Secretariat of the products to be covered by a proposed regulation as well as its rationale and objective at an early appropriate stage when amendments can still be introduced and comments taken into account.
the operation of the GATS. Members must promptly and at least annually inform the Council for Trade in Services of the introduction of any new, or any changes to existing, laws, regulations or administrative guidelines which significantly affect trade in services covered by its specific commitments. Members are also obliged to establish one or more enquiry points to provide specific information to other Members, upon request. This procedure focuses on notification to the Council for Trade in Services or the provision of information through enquiry points, rather than direct exchanges between regulators and business or civil society.

28. Article VI requires that each Member have procedures for prompt, objective and impartial review upon request of, and appropriate remedies for, administrative decisions affecting trade in services (although this does not require any member to institute tribunals or procedures which would be inconsistent with its constitutional structure or legal system). Where authorisation is required to supply a service subject to a specific commitment, the competent authorities are obliged to inform the applicant of the decision within a reasonable period of time, and to provide, on request and without undue delay, information concerning the status of an application. It is noteworthy in Article VI that the right of service suppliers to information on regulatory and administrative decisions, and to judicial and administrative review and appeals processes, is explicitly recognised.

29. Additionally, Article VI.4 mandates the development of any necessary disciplines for measures relating to qualification requirements and procedures, technical standards and licensing requirements to ensure that any requirements are, inter alia, based on objective and transparent criteria, not more burdensome than necessary to ensure the quality of the service and not in themselves a restriction on the supply of the service. Some discussion of prior consultation has taken place in the WTO Working Party on Domestic Regulation in the context of development of these disciplines.

30. Both Article III and Article VI refer to "measures". "Measure" is defined very broadly in the GATS as any measure by a member, whether in the form of a law, regulation, rule, procedure, decision, administrative action or any other form. However, GATS Article III.3, which deals with annual notifications to the WTO Council for Trade in Services, uses a narrower definition, referring to "laws, regulations or administrative guidelines". GATS Article VI contains a number of different terms: VI.1 refers to "measures of general application"; VI.2(a) refers to "administrative decisions affecting trade in services"; VI.3 refers to "domestic laws and regulations" and VI.4 refers to "measures relating to qualification requirements and procedures, technical standards and licensing requirements". Under the GATS, "measures taken by members" also explicitly includes those taken by regional or local governments and authorities. Members are also obliged to take such reasonable steps as may be available to them to ensure the observance of obligations under the agreement by regional and local governments and authorities.

Disciplines for the accountancy sector

31. The Disciplines for the Accountancy Sector reached under the GATS in 1998 include provision for domestic regulatory authorities to endeavour to conduct prior consultation as a domestic procedure. However this is limited to measures significantly affecting trade in accountancy services. According to the Disciplines (paragraph 6), when introducing measures significantly affecting trade in accountancy services, Members shall endeavour to provide opportunity for comment, and give consideration to such comments.

4. In areas where members have undertaken specific commitments, they must not apply licensing and qualification requirements and standards that nullify or impair such commitments in a manner which does not comply with these criteria and which could not have been reasonably expected of them at the time the specific commitments were made.
before adoption. Members shall inform another member, upon request, of the rationale behind domestic regulatory measures in the accountancy sector, in relation to legitimate objectives. Preliminary consideration is underway in the WTO Working Party on Domestic Regulation of the possibility of extending the Disciplines to cover other services, in particular other professional services.

Summary

32. Existing disciplines for transparency, including prior notification and opportunity for comment, are more developed for trade in goods than for trade in services. While both involve consideration of how to incorporate the trade dimension into the hitherto domestic procedure of setting technical standards, there are some differences between goods and services.

33. Current disciplines related to prior notification and opportunity for comment in both the TBT and SPS Agreements are mandatory. The only provisions for services, those in the Accountancy Disciplines, take the form of “best endeavours” and have yet to enter into force. The TBT and SPS Agreements both treat sub-national regulations separately (members are obliged to encourage, and to avoid discouraging, compliance by sub-national entities; in the TBT Agreement technical regulations at the level directly below national government are also subject to notification and prior consultation). Under the GATS, members are obliged to take reasonable steps to ensure observance of the Agreement by sub-national entities and the GATS definition of measures includes all types of measures taken by both central and regional/local governments.

34. Prior notification and/or notice and comment procedures under both the SPS and TBT Agreements and the Accountancy Disciplines are only required for measures significantly affecting trade. Exceptions also exist under the TBT and SPS Agreements for emergency situations (although these retain the core consultation requirements, but change the timing). Additionally, in the SPS and TBT Agreements, prior notification and opportunity for comment requirements are triggered when a regulation is not based upon an international standard or where no such standard exists. This is likely to be the case most of the time with regard to regulations concerning services as there are few international standards (work to develop international standards has thus far been concentrated in professional services such as architecture).

35. The nature of trade in services means that there may be a significant number of regulations to be notified or included under any prior consultation procedure. This, plus the sector-specific nature of many regulations in services trade (requiring the involvement of many different government and private sector organisations), and the changing nature of many services sectors (through privatisation and liberalisation), may amplify the scale of prior consultation activities when applied to services. In the context of discussions on possible disciplines under Art VI.4 in the WTO Working Party on Domestic Regulation, some WTO members have expressed concern about the additional administrative burden of prior comment obligations and have suggested that any WTO obligations should be on a “best endeavours” basis only. A

5. According to the 1998 Decision adopting the Disciplines, they are to be applicable to Members who have entered specific commitments on accountancy in their schedules. Additionally, no later than the conclusion of the current round of services negotiations, these disciplines, plus any new or revised disciplines developed by the Working Party on Domestic Regulation, are intended to be integrated into the GATS. See S/L/63, dated 15 December 1998.

6. These moves have largely been industry led. See, for example, draft recommended international standards of professionalism in architectural practice prepared under the auspices of the Union Internationale des Architectes (www.uia-architectes.org). It should also be noted that differing regulatory needs and preferences may limit the extent to which international standards may be developed in services.
number of members have called for any prior comment procedures to exclude legislative processes, and be limited to regulations, although questions arise about how these might be defined given differences between members’ legal and administrative systems.

36. While there are a number of issues to be addressed, analysis of the existing WTO disciplines suggests three possible approaches for incorporating prior consultation disciplines into the GATS:

- Develop a set of disciplines for the domestic regulatory authorities requiring prior consultation at the domestic level similar to the procedures for the Accountancy Sector or the Code of Good Practice in the TBT Agreement (“Domestic procedure approach”) (i.e., includes non-government stake-holders in other WTO member states. While the Accountancy Disciplines are "best endeavours" only, this approach could take the form of either mandatory or "best endeavours” disciplines);

- Develop disciplines similar to the TBT/SPS notification and opportunity for comment requirements. (“Notification approach”) (i.e., prior notification via the WTO Secretariat, with members able to comment on the proposed measures and to follow up specific issues bilaterally, with all processes operating between member governments);

- Require Members to provide, upon request, other Members with necessary information as to the rationale for regulatory measures, or other information regarding the proposed regulation (“Enquiry approach”) (i.e., government to government, but on an as requested basis).

37. Before analysing the potential use of these approaches, either separately or in combination, it is useful to consider the actual practices of Members to date.

III. Country Case Studies

38. This section analyses the domestic regulatory process in more detail, focusing on domestic practises on prior consultation in the OECD Member countries. It draws attention to a range of on the coverage, timing and contents of prior consultation, which could affect multilateral rule making.

39. European Union7 -- The European Commission consults with interested parties in various ways. Special interest groups are consulted through formal procedures such as advisory groups, or through structured procedures such as specific networks or associations, or on an ad hoc basis. With respect to trade policy, in particular, the Commission consults with representatives of civil society, business, and trade unions, both in horizontal meetings and sector-specific hearings. A "Green Paper" inviting comments from interested persons on policy options, including in public hearings, is another formal channel of consultation and it involves also seeking comments from foreign parties.

40. Another dimension of openness is public access to information on deliberations in the institutions of the Community. The European Parliament conducts its formal debates in public. The meetings of the Council are not public, and deliberations are covered by the obligation of professional secrecy, unless the Council decides otherwise by the appropriate voting rule. However, the Council periodically holds public debates, discloses votes when acting as a legislator and, in general, discloses the provisional agendas, minutes, and statements of its meetings when adopting legislative acts. The meetings of the Commission are not public and discussions are confidential.

41. Technical regulations of Member States regarding goods and rules on Information Society services are also notified to the Commission. This process enables the Commission: to inform companies of national regulatory initiatives; to assist in enhancing the national regulatory environment for companies; to identify the need for harmonisation in respect of the subsidiary principle in order to complete the Internal Market; to assist Member States in identifying the best regulatory practices followed by other states; and to prevent provisions in national regulations which might impede market entry of companies or adversely affect competitiveness. In 2000, Member States notified 751 draft technical regulations covering all fields of community law.

42. **Japan**\(^8\) -- The Public Advisory Boards (SINGIKAI), which often discuss regulatory policies for introduction or modification of regulation, are in principle required to be open to the public or at least to publish the record of the discussion. In cases where it is not disclosed to the public, the reason must be explained to the public. The recent survey of 167 advisory councils found that all advisory councils reviewed at least opened the meeting to the public or made a report of the substance of the meeting publicly available.\(^9\)

43. Public Comment Procedures are also applied to statements of an administrative organ of the national government which are of general applicability and related to formulating, amending and repealing a regulation. These procedures are not carried out for the draft bills proposed by the cabinet to the Parliament. At the time of notification, regulatory authorities shall specify the period of time for comment that shall be determined with about one month as a guiding standard, taking account of the time span considered to be necessary for the public to submit comments and information. Regulatory authorities should give due consideration to comments received and make publicly available their views on those comments.

44. Such procedures can be omitted in the following cases according to the judgement of regulatory authorities; however, they are held accountable for their judgement on the omission and are obliged to explain its rationale:

- Urgent problems that arise or threaten to arise;
- International treaties and commitments which do not allow for any discretion of regulatory authorities;
- Measures are of a minor or mechanical nature and does not substantially alter existing arrangements;
- Measures of the local governments;
- The Public Advisory Board (SINGIKAI), to which members from all the interested parties including foreign ones are invited to give their comments, could be considered as equivalent to public comment procedures.

\(^8\) See “Kisei no Settei mataha Kaihai ni kakaru Iken Teishutu Tetsuduki (Public Comment Procedures for Introduction or Amendment of Regulations),” Decision of the Cabinet, Government of Japan, 1999.

\(^9\) See “Singikai to no Kokai to no Suisshin Jyokyo ni Kansuru Follow up Chosa Kekka (Survey on the disclosure of the advisory councils to follow up the implementation of the cabinet decision),” The Management and Co-ordination Agency (MCA), Government of Japan, October 2000.
45. For about 70% of the 345 items posted for public comment regulatory authorities’ views on comments received are made publicly available. It is also noteworthy that about 96% of all items were conducted over the Internet.  

46. United States -- The Administrative Procedures Act (APA) requires that an agency publish a proposed measure only for Federal regulations and that any interested parties -- national or non-national -- must be given a reasonable period of time for comment (usually a minimum of 30 days). The comments received are made public via the establishment of a legal rule making “record,” which contains all factual materials received and potentially relied upon in the regulatory decision. Although agencies retain ultimate discretion in determining to what extent to consider and respond to a particular comment, they must explain the factual and logical basis for their decision. The formal record may be also used in subsequent court litigation.

47. The APA permits the use of the good cause exception when the agency finds that the notice and comment procedures are “impracticable, unnecessary or contrary to the public interest.” The agencies most frequently indicated that some kind of emergency would make prior consultation impracticable or contrary to the public. In other cases, agencies suggested that prior consultation was unnecessary because the action being taken was non-controversial and technical in nature. However, when agencies issue final rules without prior consultation, the APA requires the agencies to provide an explanation when the rule is published in the Federal Register. In addition, regulatory authorities’ use of the exceptions is subject to judicial reviews and the courts can and sometimes determine that regulatory authorities’ reliance on exceptions was not authorised under the APA.

48. Canada -- According to “Government of Canada regulatory policy” approved by the Cabinet, regulatory authorities in the central government proposing new regulatory requirements, or changes to existing regulatory requirements, must carry out timely and thorough consultations with interested parties.

49. However, the Statutory Instruments Act identifies, as a class, certain types of regulations that may be exempted from pre-publication. Regulations that may be exempted from pre-publication include:
   - Regulations that respond to emergencies where there are major risks to health, safety or security
   - Regulations that are economically or politically sensitive, where prior consultation would cause demonstrable adverse effects or undermine the intent of regulations, such as regulations affecting subsidy changes and interest rate changes
   - Other insignificant technical changes in regulations.

50. However, when exceptional cases affect a regulatory authority’s ability to fulfil a requirement, the regulatory authority must justify and document the exception. Notice of proposed regulations and amendments must be given so that there is time to make changes and to take comments from consultees.

10. See “Kisei no Settei mataha Kiahai nikakaru Iken Teishutsu Tetsuduki no Jisshi Jyoukyo ni tsuite (Survey on the implementation of the notice and comment procedure regarding introduction of or modification of regulation),” The Management and Co-ordination Agency (MCA), Government of Japan, July 2000.
13. The Act defines a regulation as a statutory instrument made in the exercise of a legislative power conferred by or under an Act of Parliament for the convention of which a penalty, fine or imprisonment is prescribed by or under an Act of Parliament. The Act is not applicable to regulations at the provincial level.
into account. Regulatory authorities must clearly set out the processes they use to allow interested parties to express their opinions and provide input. In particular, authorities must be able to identify and contact interested stakeholders, including, where appropriate, representatives from public interest, labour and consumer groups. If stakeholder groups indicate a preference for a particular consultation mechanism, they should be accommodated, time and resources permitting. Consultation efforts should be co-ordinated between authorities to avoid duplication and reduce the burden of burden on stakeholders. Regulatory authorities should consider using an iterative system to obtain feedback on the problem, on alternative solutions and, later, on the preferred solution. Consultations should begin as early as possible in order to get stakeholder input on the definition of the problem, as well as on proposed solutions.

51. **Australia**\(^{14}\) -- Regulation impact statements (RIS) are required for all cabinet proposals in the federal government affecting business. The RIS consists of several elements such as the problem or issues which give rise to the need for action, the desired objectives, a consultation statement (the process and results of consultation) and a recommended option.

52. In general, an RIS should be prepared for at least two stages in the regulation-making process. The initial draft RIS is prepared to inform the most critical and potentially influential, which is not generally made public at this stage. The second RIS may be the same as the one considered or a refinement. Its purpose is to make transparent to the public and Parliament, the basis for choosing a particular regulatory approach.

53. Preparation of the RIS is not mandatory for a regulation where:

- There is an urgent need for government actions due to public health and safety emergencies. (A RIS needs to be prepared after regulatory action has been taken.)
- It is a regulation of a local state or self-governing territory.
- It reflects a specific election commitment and there is no scope to consider alternatives ways to meet that commitment.
- It is not likely to have a direct, or a substantial indirect, effect on business and is not likely to restrict competition or of a minor or machinery nature and does not substantially alter existing regulatory requirements.
- It is required in the interests of national security or which merely meets an obligation under an international agreement.

54. If there are any doubts as to whether or not a regulatory review or proposed regulation qualifies for an exemption, the matter should be referred to the Office of Regulation Review (ORR) that decides whether a RIS should be prepared.

55. According to the recent survey, the central government introduced 263 bills into Parliament in 1998-99. Of these 263 legislative proposals, 261 bills assessed included 360 policy proposals (regulatory and non-regulatory in nature). Of these, 140 proposals were exempt from the RIS process, having no impact on business and 103 proposals impacted on business, but proposed changes that satisfied one of the above exceptions to the RIS process. The remaining 117 proposals that triggered the RIS requirements, 115 were accompanied by an RIS when tabled in Parliament.

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56. On the other hand, delegated legislation is categorised into two forms in the survey: disallowable instruments, which are tabled in Parliament and are subject to review by the Senate Standing Committee on Regulations and Ordinances (SSCRO), and non-disallowable instruments, that are not subject to parliamentary scrutiny. In 1998-1999, of the 1590 disallowable instruments reported by departments and agencies, 683 were deemed to have no impact on business; and 797 impacted on business but were subjected to a RIS exception. This left only 110 that required an RIS, out of which RISs were prepared for 102 proposals and tabled publicly to Parliament. Out of the 143 non-disallowable instruments reported, 27 triggered the RIS requirement, out of which the RISs for 26 proposals were prepared. While there is no obligation to publicise the RISs for non-disallowable instruments, the ORR encourages them to do so. The ORR notes that some agencies now place RISs on their web-site.

57. **United Kingdom**\(^\text{15}\) -- The Better Regulation Task Force (BRTF), an independent body supported by the Regulatory Impact Unit in the UK Cabinet Office, reviews regulatory measures against Principles of Good Regulation, which include transparency as one of key disciplines. The Principles of Good Regulation states that policy objectives, including the need for regulation, should be clearly defined and communicated to all those concerned and also notes that proposals must be published and ample time for consultation be given before decisions are taken.

58. **Netherlands** -- The Dutch government is reducing the importance of advisory councils and tripartite consultation mechanisms whose rigid structure risks neglecting legitimate “outside” interests, including those of foreign countries. Prior consultation through different stages of preparation is discretionary and initiators can choose who will participate. However, consultations are said to be open to affected and interested parties, be they domestic or foreign parties, and they appear in practise to be administered to affected foreign affected parties in a non-discriminatory way. Public notice and comment procedure is increasingly, though not widely, used in the later stage. Some laws require pre-publication of regulatory proposals and invitation to comment from all members of the public.

59. **Mexico** -- The Federal Administrative Procedure Law leaves the use of public consultation to be decided in sector-specific laws. If a specific law establishes that proposals must be published for comment, the period of time allowed should be of at least 60 days, unless otherwise specified. The regulatory framework provides for no discrimination between nationals and non-nationals wishing to participate in public consultations. Comments from non-nationals are duly taken into account along with other comments.

60. **Spain** -- For subordinate measures regulatory authorities are required to provide a reasonable period for public consultation for subordinate regulations, which in general must not be less than 15 working days. In addition many sectoral laws have established advisory and consultative bodies with explicit mandates to review proposals of legislation and subordinate measures. While regulators have discretionary power in deciding who among domestic and foreign parties are to be consulted, regulators must answer all comments received.

61. **Denmark** -- There is no standardised procedure on consultation with the public and the choice of participants in the early process is at the direction of regulatory authorities. Development of major legislation is often conducted by a government-appointed preparatory committee, bringing together a wide range of groups with significant interests in the legislative proposal. The composition of committees is at the discretion of the government. There has been some decline in the extent of use of the committee's process over the last two decades.

62. However, foreign trade partners have not raised concerns about the system of consultation since it is rather conducted in a non-discriminatory manner. Some ministries post bills on the Internet at the time they are made available for comment prior to finalisation for submission to Parliament. The committee process for legislation is not generally used for subordinate measures. Public notice and comment procedures are widely used in the preparation of “substantially important” subordinate measures, although there is no formal and systemic requirement for this.

63. **Korea** -- The Basic Law on Administrative Regulations and Application recognises that prior consultation occurs at two stages; an initial consultation to determine general views prior to the development of a regulatory proposals, followed by consultations on a draft regulation. At the initial stage, ministries are expected to consult with strongly affected parties prior to the drafting of new regulation. The consultation also tends to communicate with foreign firms, for example, through foreign trade association to ensure non-discrimination. At the second stage, regulatory authorities are required to conduct widespread consultation through public hearings, notice of legislation or any other means. In practise, proposals are generally released to the public through a notice and comment procedures for a consultation period usually lasting 20 days, according to the standard guidelines for the methods of consultation used.

64. **Hungary** -- The Act on legislation regulates the public's rights to participate in the rule making process. In general terms, regulatory authorities send the text and specify a deadline for receiving comments. In some cases, a justification analysis is attached to the legal draft. No general criteria exist to determine how consulted persons are selected and there is no requirement for publishing written comments or for providing and publishing the ministry's answers. Foreign parties have the same opportunities as domestic constituencies to participate.

65. **Czech Republic** - There is a standardised procedure on prior consultation with the public based on the Governmental Rules of Procedures, Governmental Legislative Rules and on the Rules of Procedures for both Chambers of Parliament. All involved and interested parties have free access to draft regulations and may express their views and present comments (preferred in writing or in electronic form) from the very beginning of the procedures. Regulatory authorities must take account of all comments. The Governmental plan of legislative and non-legislative works (approved half yearly) is publicly accessible (e.g., on the Internet). Information on draft regulations can be acquired on the Government's web pages or in certain cases on the web pages of the authorities drafting the regulations. All parties (both corporations and individuals) including foreign entities, can also acquire information on how their comments have been handled. Session schedules of the Cabinet and both Chambers of Parliament (including the texts of bills) are available on their websites.

IV. **Cross Country Analysis**

**Principles for prior consultation**

66. While prior consultation takes diverse forms depending on the different stages of the process of developing regulations, several observations can be made. Firstly, overall the country case studies indicate a trend towards prior consultation. Secondly, three important elements important for prior consultation practices can be identified: the extent to which they incorporate transparency, non-discrimination and accountability.

- Transparency means that the consultation procedures themselves should be open and accessible.
- Non-discrimination ensures that prior consultation procedures treat domestic and foreign parties equally in a non-discretionary and impartial manner.
Accountability mandates that regulatory authorities explain the factual and logical basis for their decisions by giving due consideration to comments received, although they retain ultimate discretion in determining to what extent to consider and respond to a particular comment.

67. Transparency can encompass a range of issues including: how the opportunity to comment on a regulation is publicised (e.g., publication in government gazettes or making a text available on the Internet); how consultations are conducted (limited or open participation); and whether relevant materials, such as a report of any consultations or any submissions received in the course of consultations, are made publicly available. Some of these issues also relate to the efficiency of consultations.

68. Non-discrimination and discretion are different concepts, but they are not unrelated. While not all discretion will necessarily result in discrimination against foreign suppliers, regulatory authorities with wide discretion to select who is included in consultation processes have more scope to discriminate. The less discretion in the choice of participants in prior consultation processes, the less scope for any discrimination there may be. However, it is also important to differentiate between discrimination and the legitimate decision of regulatory authorities to limit consultations on the basis of objective criteria, for example, to those who may be strongly affected by a measure.

69. Accountability can include consideration of a number of issues, for example: whether regulatory authorities are obliged to respond to comments received, or simply to make available the reasons for their decisions; whether, where regulations are deemed not to be subject to prior consultation procedures or material from consultations is not disclosed, regulatory authorities are obliged to provide reasons for this decision; and whether the decision not to conduct prior consultation in a particular instance is subject to review.

Prior-consultation in two stages: addressing transparency and non-discrimination

70. When regulatory authorities introduce and modify measures, they first need to analyse the problems, gain a clear idea of the regulatory environment and explore possible solutions with experts and with their constituents. In earlier stages, consultations tend to be limited to a relatively narrow range of interests; regulatory authorities may then build policies through progressive dialogues with strongly affected parties. In some cases, they also set up forums for consultation, such as advisory councils or bodies consisting of selected interests. In other cases, they draft a policy paper, sometimes as a report of these forums, and apply notice and comment procedures for those reports to share their views with outside parties.

71. Regulatory authorities could make these preliminary prior consultation processes more transparent and non-discriminatory by publishing reports of the substance of the consultations or collecting views of both domestic parties and foreign parties. While the initial phase of prior consultation may be limited to selected invitees, participants for those consultations could be selected on the basis of objective criteria, open to both foreign and domestic parties to meet (e.g., those likely to be significantly affected by the proposed regulation, major players on the sector).

72. While evidence in the country cases shows that these prior consultations tend to be non-discriminatory toward foreign interests, it might be difficult for regulatory authorities to eliminate all discretionary aspects arising in the preparation process. However, as we see already in some of the reviewed countries, regulatory authorities could notify draft measures for public comments in a later stage to ensure that all interested parties are informed and given equal opportunities to make comments. This practice would provide an effective and credible safeguard against the possible abuse of selected
participation in earlier stages of consultation and ensure transparency and non-discrimination in prior consultation.

Content of prior consultation

73. The content of prior consultation also varies between different stages of the process of developing a regulation and also among countries. In earlier stages of developing a regulation, regulatory authorities can consult with interested parties to gain a better understanding of the existing situation and possible solutions to address any problems. Regulatory authorities may also hold further consultations on the basis of more detailed draft regulatory measures shortly before publication and entry into force. In a few countries, draft texts are pre-notified with statements of regulatory impact analysis, which describe the objectives, rationale, alternatives and benefits/costs of regulatory measures.

Legislative vs. executive branch/sub-national measures

74. While it is usual for the cabinet to propose bills in many parliamentary systems, regulatory policy initiatives may also be initiated from the legislative branch, based on political platforms or election commitments. The source of initiatives would depend on a country’s political regime, for example, the extent to which the legislative branch drafts bills, how it delegates decisions to the executive branch for subordinate measures and also how closely the legislative branch monitors subordinate measures. If the legislative branch does take its own initiatives and has its own preparatory processes, it presumably has its own procedures to consult with interested parties, and perhaps also for opening discussion to domestic constituents as well as foreign parties.

75. The country experiences also indicate that measures of local governments or self-governing entities are often considered not to be subject to prior consultation requirements.

Exceptions

76. The country experiences also show that there are common elements of exceptions to prior consultation. Exceptions are provided in the following cases when prior consultation is perceived as impracticable, unnecessary, or contrary to the public interest:

- Measures to cope with urgent problems of safety, health and environment arising or threatening to arise;
- Measures dealing with military and foreign affairs, which are required in the interests of national security or which merely meet an obligation under an international agreement;
- Measures of a minor nature which do not substantially alter existing regulations.

Other categories of exceptions are found in some countries, but regulatory authorities are in most cases required to explain why they are exempted from the prior consultation requirements.

V. Enhancement of the GATS disciplines on transparency

77. The analysis above on the WTO agreements suggests three possible approaches for strengthening transparency requirements, that is, the “Domestic procedure approach,” the “Enquiry point approach” and the “Notification approach”. This section assesses the possibility of incorporating these approaches in
GATS by taking into account the common elements and issues found in country practises on prior consultation.  

78. These three approaches offer different benefits and involve different costs. The "Domestic procedure approach", which could take the form of either mandatory or "best endeavours" commitments, can build upon existing domestic consultation practices, both benefiting from existing practices and contributing to their improvement. While a "Notification approach already exists in the TBT/SPS Agreement, it would entail significant administrative burdens for WTO members if included in the GATS. The "Enquiry point approach" is likely (although not guaranteed) to be less onerous, but its scope is more limited. It could function as a useful complement to other approaches, in particular to the "Domestic procedure approach". All approaches would need to address the issue of where to set the limits on prior consultation, in terms of the types of regulations subject to consultation (legislative versus subordinate measures); the level of government involved; and any possible general exceptions.

79. An important issue is the appropriateness of any standards for prior consultation given countries' varying capacities to implement them. Transparency and prior consultation can be greatly facilitated by Internet access and the lack of widespread access to computers and the Internet in developing countries may pose particular problems in implementing transparency requirements. However, given the domestic benefits in terms of better regulation to be gained from prior consultation, creative solutions, including building upon any existing consultation mechanisms in developing countries, could be found.

80. Reflecting these differing capacities to implement, as well as countries' differing regulatory systems and preferences, it may also be more useful for any new disciplines on prior consultation to set out general principles and objectives for the conduct of procedural requirements, rather than being overly-specific.

**Transparency and non-discrimination**

81. As the cross country analysis in Section IV indicates, the “Domestic procedure approach” should be implemented in line with the key principles of transparency and non-discrimination. However, the cross country analysis also identifies different types of prior consultation at two different stages of preparation process. The question arises whether it would be realistic or feasible for regulators to be transparent and non-discriminatory throughout the process of developing a regulation, especially at the first stage, where they tend to consult selectively with relatively narrow range of strongly affected interests. It is relatively more conceivable for regulatory authorities to ensure transparency and non-discrimination in the notice and comment procedure for the draft texts of prospective regulation, which would usually occur later in the process of developing a regulation.

82. It would also be necessary to ensure that regulatory authorities explain the factual and logical basis for their decisions by giving due consideration to comments received. Most of the practices reviewed also indicate that regulatory authorities should react to comments received in a timely manner and make the result of consultation publicly available. Some countries studied also require regulatory authorities to make publicly available the reasons for any decision not to undertake prior consultation for a particular regulation.

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16. While GATS transparency provisions are found in both Articles III and VI, it should be noted that discussion of possible prior consultation disciplines in the GATS has to date been undertaken in the context of Article VI.4, which deals with a narrower range of measures than Article III (see paragraph 30).
Exceptions

83. The TBT/SPS Agreements give special consideration to emergency measures and similar treatment could be considered in the case of possible GATS prior consultation requirements. Exceptions relating to measures dealing with military and foreign affairs and measures of a minor or mechanical nature could be also considered. It would also be important to continue the current practice in all relevant WTO disciplines related to prior notification and/or opportunity for comment (TBT, SPS Agreements and the Accountancy Disciplines) of focusing on measures which may significantly affect trade. As we see in the Australian case, these exceptions are expected to decrease the number of notice and comment procedures.

Legislative provisions vs. subordinate measures

84. The TBT and SPS Agreements cover technical regulations which would normally be implemented by subordinate measures. In the GATS, "measure" is defined very broadly and includes laws, regulations, rules, procedures, decisions and administrative actions. WTO members have voiced differing views regarding the precise scope of any new disciplines under Article VI.4 ("Domestic Regulation"). It is also not clear whether the measures in Article VI.4 relating to qualification requirements and procedures, technical standards and licensing requirements would generally take the form of subordinate, rather than legislative measures. While some WTO members have called for legislative measures to be excluded from any possible disciplines on prior consultation, it is not clear whether many important regulatory interventions, especially those which pursued social objectives such as universal service obligations, would be enacted via subordinate, rather than legislative, measures. Further, some WTO members have argued that their legislative branches have their own procedures for prior consultation on legislative measures, which may not permit foreign participation.

85. While it seems logical both in terms of manageability and political acceptability to limit the scope of measures which might be subject to prior consultation, for example, by excluding legislative measures, it may be difficult to define the scope of any exclusion. Given differences amongst members' legal and administrative systems, there is the risk that the burden of consultation may fall more heavily on some members than others, or that some regulatory interventions may be arbitrarily excluded from the requirement to consult depending upon how the measure was enacted.

Sub-national measures

86. Both the TBT/SPS Agreements treat the technical regulations of local government differently. The case studies in Section III also indicate that a number of OECD countries do not consider sub-national regulation to be subject to prior consultation. However, under the GATS, "measures taken by members" explicitly includes those taken by regional or local governments and authorities. Some WTO members

17. See Article 2.10 of the TBT Agreement and Article 6 of Annex B of the SPS Agreement for emergency cases.
18. While both the SPS and TBT Agreements refer to regulations which may have a significant affect on trade of other Members, the Accountancy Disciplines refer to "measures which significantly affect trade in accountancy services".
19. See the Australian case in the section III. While measures not having impact on business could be different from those not affecting significantly trade, we expect measures not having impact on business would probably not affect significantly trade in services.
20. See Article 3 of the TBT Agreement and Article 13 of the SPS Agreement.
have expressed concern in the WTO Working Party on Domestic Regulation that prior consultation obligations at sub-national levels would be unnecessarily burdensome. Additionally, some WTO members may face constitutional or other institutional constraints in dealing with sub-national measures. In this context, measures of local or sub-national authorities could be excluded from the types of measures subject to prior consultation.

**Regulatory objectives and rationale**

87. Making the objectives or rationales for regulations available in the context of wider public consultation could help to distinguish cases where measures may be unnecessarily trade restrictive or overly protectionist in intent and contribute to the avoidance of unnecessarily trade restrictive measures in relation to stated objectives. However, it should be noted that only a brief description of regulatory objectives is found in the TBT/SPS notifications, for example, health, safety, environment, etc. While the agreed format for notifications by those committees includes an item for regulatory objectives and rationale, it does not provide for much explanation of the rationale or regulatory objectives of measures. The Accountancy Disciplines take an “Enquiry point approach” and require a Member to inform another Member, upon request, of the rationale behind domestic regulatory measures in the accountancy sector, in relation to legitimate objectives. While the Accountancy Disciplines have not yet been implemented, this approach could be more appropriate than “Notification approach” in terms of gathering more detailed information about the rationale for a measure than is currently offered in the implementation of the TBT and SPS Agreements. The rationale and objectives for any regulation could also be included in any domestic procedures for prior consultation under the "Domestic procedure approach". Alternatively, an "Enquiry point approach" could be a useful complement to a "Domestic procedures approach". In any event, the issue of whether information provided on the rationale for a measure could subsequently be used in the context of WTO dispute settlement procedures might require reflection.

**Timing**

88. WTO notification procedures to enhance transparency among Members generally do not explicitly specify an exact stage (such as 6-8 weeks prior to enactment of a measure) at which Members should conduct notifications to the WTO Secretariat. Timing requirements tend not to be numerical, but based on what is necessary to achieve the objective of the provisions. For example, the TBT/SPS notification requirements state that notifications shall take place at an early appropriate stage, when amendments can still be introduced and comments taken into account. Consequently Members have some flexibility as long as there are still opportunities to give due consideration to comments received, although disagreements over when amendments can still be introduced and comments taken into account are sometime seen among Members in the context of the TBT/SPS Agreements. Further, enquiry points are to be available to respond to requests for information on request at any time, and no particular timing for their availability is considered necessary in WTO Agreements.

89. The above studies on prior consultation reveal that proposals for regulatory measures evolve in a progressive way within the executive branch as they move from basic policy directions to the draft texts of measures. One possibility would be to require that prior consultation take place sometime between the draft and the published final measures, when regulatory authorities usually conduct public notice and comment procedure to finalise regulatory measures. However, the timing of prior consultation may vary between services sectors and regulatory systems and it may thus be difficult to specify particular time periods. Another option would be to follow the more general prescription laid down in the TBT and SPS Agreements, based on meeting the fundamental objective of allowing sufficient time for views to be received and taken into account and any possible problems rectified before finalisation of the regulation. Under this model, it is left to national authorities to determine the appropriate timing for prior consultation.
in any given context, provided that they fulfil the objectives of enabling sufficient time for comments to be considered and taken into account.

**Administrative burdens/Developing countries**

90. Concerns have been expressed that additional disciplines on domestic regulation could simply result in another layer of bureaucracy with little real benefit. A number of countries have also highlighted what they see as being the potentially significant administrative costs that would be entailed for regulatory authorities in conducting prior consultation. These costs are more serious for developing countries with less administrative capacity and consideration should be given to how to minimise administrative burdens and maximise the benefits of good regulatory practices, including for facilitating trade.

91. The "Notification approach" is potentially a large burden for developing countries, given the scope and scale of regulations affecting trade in services. As noted previously, the lack of international standards in trade in services removes one of the useful means of limiting the number of regulations to be notified under the TBT and SPS Agreements (which do not require prior consultation procedures for regulations based on international standards). However, notification to the WTO also offers a centralised way of keeping track of important new regulations from trading partners which may have a significant impact on trade. Few developing countries have the administrative resources at the national level to track such regulations.

92. The "Domestic procedure approach", whether implemented on a mandatory or "best endeavours" basis, seems to be less burdensome than the "Notification Approach". Furthermore, the experience of reviewed countries recently adopting such domestic procedures suggests that they do not entail significant administrative burdens if it is limited to the domestic process and once the system (e.g. via Internet sites) is set up for consultation and relevant documents are available in digital form. But this assumption would probably not hold for most developing countries and some flexibility would probably be needed in the negotiation on any possible new disciplines. In this regard, it is expected that possible exceptions would significantly decrease the number of notice and comment procedures and help reduce administrative burdens. Whether a notification or domestic procedures approach is taken, particular consideration would need to be given in the case of developing countries to the pros and cons of limitations on the scope of prior consultation obligations.

93. The "Domestic procedure approach" also has the advantage of being able to draw upon any existing consultation procedures in developing countries. For example, the Telecom Regulatory Authority of India Act and the Electricity Regulatory Commissions Act both state that the Authority has to ensure transparency while exercising it powers and discharging its functions. It has adopted a procedure of consultations, under which it prepares consultation papers on the issues under consideration, seeks comments from the general public and experts in the area. Further Secretariat work could attempt to gather information on any other such procedures in selected non-OECD countries if members were interested.

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